

## Chapter 3

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# Manslaughter and Other Homicide Offences

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# Manslaughter

As explained in Chapter 2, there are three general homicide offences in Western Australia: wilful murder, murder and manslaughter. The Commission has recommended that the offence of wilful murder be repealed and accordingly, under the Commission's recommendations, only murder and manslaughter will remain.<sup>1</sup> In general terms, murder is defined by the Commission as an unlawful killing with an intention to kill or an intention to cause an injury of such a nature as to endanger or be likely to endanger life. It will also constitute murder if the accused caused the death of another person by an act of such a nature as to be likely to endanger life in the prosecution of an unlawful purpose.<sup>2</sup>

Section 280 of the Code provides that an unlawful killing that does not amount to wilful murder or murder is manslaughter.<sup>3</sup> Similarly, manslaughter is broadly defined in most Australian jurisdictions as an unlawful killing that does not constitute murder.<sup>4</sup> For this reason the offence of manslaughter has been described as a 'residual' category of homicide.<sup>5</sup> As explained in Chapter 2 the distinction between murder and manslaughter developed as a means of avoiding the death penalty for homicides where the offender was considered less morally culpable because of the absence of 'malice aforethought'.<sup>6</sup> Although the death penalty is no longer available in Western Australia, murder and manslaughter continue to be distinguished by the provision of different penalties. A mandatory penalty of

life imprisonment applies to wilful murder and murder but the penalty for manslaughter is a maximum of 20 years' imprisonment.<sup>7</sup>

## MANSLAUGHTER UNDER THE CRIMINAL CODE (WA)

The elements of manslaughter are that:

- the accused caused the death of the victim;<sup>8</sup>
- the accused did not intend to kill or intend to cause grievous bodily harm to any person (or that the circumstances were such that the offence does not constitute wilful murder or murder); and
- the killing is not authorised, justified or excused by law.<sup>9</sup>

There are two broad categories of manslaughter under the Code: intentional and unintentional. Intentional manslaughter involves unlawful killings where the mental element of wilful murder or murder is present, but the offence is reduced to manslaughter on the basis of a partial defence. This category is comparable to voluntary manslaughter at common law.<sup>10</sup> In Western Australia the only way in which an intentional killing can be reduced to manslaughter is on the basis of the partial defence of provocation.<sup>11</sup> Partial defences available in other Australian

1. Underlying the Commission's recommendation to abolish the distinction between wilful murder and murder is the conclusion that the difference in culpability between a person who kills with an intention to kill and a person who kills with an intention to cause an injury of such a nature as to be likely to endanger life is not significant enough to justify a conviction for a different offence with a different penalty structure, see Chapter 2, 'The Distinction Between Wilful Murder and Murder'. However, the Commission is of the view that the differences between the elements of murder and manslaughter are sufficient to justify a conviction for a different offence with different consequences. The effect of the Commission's recommended structure for homicide offences in Western Australia is that, on the whole, the most culpable killings will be classified as murder and less culpable killings will be classified as manslaughter. This reflects the Commission's guiding principle that intentional killings should be distinguished from unintentional killings. The Commission also notes that all Australian jurisdictions maintain the distinction between murder and manslaughter and many law reform bodies have concluded that the distinction between the two offences should remain. See eg, Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [118], [120]; Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [2.37]; New South Wales Law Reform Commission (NSWLRC), *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [2.25].
2. See Chapter 2, Recommendation 7.
3. Section 268 of the Code provides that a killing is unlawful if it is not authorised, justified or excused by law.
4. See *Crimes Act 1900* (ACT) s 15(1); *Crimes Act 1900* (NSW) s 18(1)(b); *Criminal Code 1899* (Qld) s 303; *Criminal Code* (Tas) s 159(1). In South Australia and Victoria manslaughter is defined by the common law. In the Northern Territory manslaughter is defined in s 160 of the *Criminal Code 1983* (NT) as reckless or negligent conduct causing death.
5. NSWLRC, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No. 31 (1993) [2.9].
6. See Chapter 2, 'History'.
7. *Criminal Code 1913* (WA) s 287. In its Issues Paper, the Commission did not invite submissions about the elements of the offence of manslaughter. The Commission invited submissions as to whether the penalty for manslaughter should be reconsidered if the distinction between wilful murder and murder was abolished, and homicides that currently fall within the definition of murder would then fall within the definition of manslaughter: see LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 12. The Commission has concluded that an intention to cause a permanent but non life-threatening injury to health will no longer be sufficient to establish the mental element of murder. Therefore, some unlawful killings that are currently classified as murder may fall within the scope of manslaughter. The Commission does not consider that the maximum penalty for manslaughter should be increased as a consequence of this recommendation because it was made on the basis that an unlawful killing with an intention to cause a permanent injury to health was significantly less culpable than a killing with an intention to cause an injury likely to endanger life: see Chapter 2, 'The Mental Element of Murder: An intention to grievous bodily harm'.
8. *Criminal Code* (WA) s 270. For further discussion of causation, see Chapter 1, 'Causation'.
9. *Criminal Code* (WA) s 268. See also *Ward* [1972] WAR 36, 43.
10. For further discussion of voluntary manslaughter at common law, see NSWLRC, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No. 31 (1993) [2.9]; Finlay MD, *Review of the Law of Manslaughter in New South Wales* (2003) 11.
11. The Commission notes that an intentional killing may also constitute a lesser offence than wilful murder or murder if the circumstances fall within the definition of the offence of infanticide. The Commission has recommended that the offence of infanticide be repealed: see Chapter 3, 'Infanticide'.

jurisdictions include provocation, diminished responsibility and excessive self-defence.<sup>12</sup> The Commission has recommended that the partial defence of provocation should be abolished<sup>13</sup> and that the partial defence of diminished responsibility should not be introduced in Western Australia.<sup>14</sup> However, the Commission has not sought to eliminate all partial defences: a strong case has been made for the introduction of excessive self-defence in Western Australia. Therefore, under the Commission's recommended scheme for homicide the only way that an accused could be convicted of manslaughter in circumstances where an intention to kill or an intention to cause an injury likely to endanger life exists, is where the accused was originally acting lawfully in self-defence but the response of the accused (the killing) was unreasonable.<sup>15</sup>

The second category—unintentional manslaughter—applies to unlawful killings where the accused did not form the required intention for wilful murder or murder. This category is similar, but not identical, to the category of involuntary manslaughter at common law.<sup>16</sup> Under the Commission's

recommendations this category will apply where the accused caused death but did not intend to kill and did not intend to cause an injury likely to endanger life.<sup>17</sup> Unintentional manslaughter can be divided into two further categories.<sup>18</sup> The first category applies where death is caused by a deliberate (voluntary) act.<sup>19</sup> The second category, also known as manslaughter by criminal negligence, applies where death is caused by negligent conduct.

### Manslaughter by deliberate act

In the majority of cases under this category the death-causing act will be a deliberate act of violence or a deliberate application of force; however, there may be cases where death is caused by a non-violent act<sup>20</sup> or even a lawful act.<sup>21</sup> It has been recently stated that the requirement of unlawfulness for the offence of manslaughter is not extended beyond the requirement for an 'unlawful killing'.<sup>22</sup> In other words, it is not necessary to prove that the death-causing act was unlawful in addition to the requirement to prove that the killing was not authorised, justified or excused by law.<sup>23</sup>

12. In some jurisdictions there is also a partial defence in relation to suicide pacts. In South Australia and Victoria an accused may be convicted of manslaughter instead of murder if he or she has killed another person in pursuance of a suicide pact (that is, where there was an agreement between the deceased and the survivor that both would die): see *Criminal Law Consolidation Act 1935* (SA) s 13A(3) and *Crimes Act 1958* (Vic) s 6B. See also *Homicide Act 1957* (UK) referred to in Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [7.42]. In the Introduction to this Report the Commission recommended that the Attorney General of Western Australia establish an inquiry into how the law in Western Australia should respond to euthanasia, mercy killings, suicide pacts and any other related matter: see Introduction, Recommendation 1.
13. See Chapter 4, 'The Partial Defence of Provocation'.
14. See Chapter 5, 'Diminished Responsibility'.
15. See Chapter 4, 'Excessive Self-Defence'. In the introduction to this Report the Commission explained that one of its guiding principles is that intentional killings should be distinguished from unintentional killings. The partial defence of excessive self-defence is an appropriate exception to this general principle because the presence of a *lawful purpose* reduces culpability to such a significant extent that a conviction for murder is inappropriate. Similarly, felony-murder is an unintentional killing but it is elevated to murder because causing death by an act likely to endanger life for an *unlawful purpose* significantly increases the culpability of the accused: see Introduction, 'Guiding Principles for Reform'.
16. In relation to involuntary manslaughter at common law, see *Lavender* [2005] HCA 37, [2] (Gleeson CJ, McHugh, Gummow and Hayne JJ); NSWLRC, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No. 31 (1993) [2.10]; Finlay MD, *Review of the Law of Manslaughter in New South Wales* (2003) 35. Involuntary manslaughter at common law is divided into two categories: unlawful and dangerous act manslaughter, and manslaughter by criminal negligence: see *Wilson* (1992) 174 CLR 313, 332 (Mason CJ, Toohey, Gaudron and McHugh JJ). Previously there was a third category of involuntary manslaughter at common law known as battery manslaughter. In *Wilson*, Mason CJ, Toohey, Gaudron and McHugh JJ stated that manslaughter by the 'intentional infliction of some harm' (battery manslaughter) is no longer an appropriate category of manslaughter at common law: at 332–23. It was noted that death caused by a serious assault (which would previously have fallen under the category of battery manslaughter) would, in any event, be covered by manslaughter by an unlawful and dangerous act. See also *Clayton* [2006] HCA 58 [91] (Kirby J).
17. Felony-murder is the only exception to this general rule: Chapter 2, 'Felony-murder'.
18. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.12].
19. If the act was an unwillful act then the accused will not be criminally responsible for causing the death: see Chapter 4, 'Unwillful Conduct and Accident'.
20. For example, in *Stott & Van Embden* [2001] QCA 313, it was alleged that the death-causing act was either the supply of a fatal dose of heroin to the deceased or the injection of a fatal dose of heroin into the deceased's arm. The two accused were convicted of manslaughter under the Queensland Code and therefore the jury were not satisfied beyond reasonable doubt that the accused had an intention to kill or cause grievous bodily harm. McPherson JA observed that if the accused had supplied the dose of heroin to the deceased, criminal responsibility could not be determined by reference to s 289 of the Queensland Code (criminal negligence) because the accused were no longer in charge or in control of a dangerous thing: at [22]. Therefore, the supply of heroin does not fit within the category of criminal negligence under the Code and it is also not an act of intentional violence.
21. The Commission notes that in most cases where death is caused by a lawful act, the provisions of the Code dealing with criminal negligence will apply. However, there are possible examples where the death-causing act is lawful but the criminal negligence provisions are not applicable. For example, death caused during a sporting contest or death caused during a consensual sexual activity. In *Houghton* [2004] WASCA 20, [39] Murray J observed that the 'causing of serious injury on the sporting field may constitute unlawfully doing bodily harm ... While one may consent, by participation in a sporting contest, to the application of force by other players, so that such application of force will not constitute an assault as defined by the Code, s 222, non-consent is not an element of the offence of doing grievous bodily harm and it will not be rendered lawful by consent to an activity which causes it'. The same observation could apply to causing death on the sporting field.
22. *Roberts* [2007] WASCA 48, [118] (Roberts-Smith JA).
23. In *Houghton* [2004] WASCA 20 the Court of Criminal Appeal considered the meaning of the word 'unlawfully' in s 297 of the Code, which provides for the offence of unlawfully doing grievous bodily harm. The word 'unlawfully' is not defined for the purposes of s 297. In contrast, the word 'unlawfully' is defined by s 268 of the Code in the context of an unlawful killing. The majority of the court distinguished the offences of unlawfully doing grievous bodily

In cases where death has been caused by a deliberate act the defence of accident is commonly raised.<sup>24</sup> Section 23 of the Code provides that, subject to the express provisions of the Code 'relating to negligent acts and omissions', a person is not criminally responsible 'for an event which occurs by accident'. An event (such as death) occurs by accident if it was not intended or foreseen by the accused and was not reasonably foreseeable by an ordinary person.<sup>25</sup> Therefore, criminal responsibility for this category of manslaughter is ultimately determined objectively because the accused will be held criminally responsible if the prosecution can prove beyond reasonable doubt that death was *reasonably* foreseeable in all of the circumstances.

As a consequence of the Code defence of accident, there is a significant difference between manslaughter under the Code and manslaughter at common law.<sup>26</sup> The common law category of manslaughter by an unlawful and dangerous act requires the death-causing act to be both unlawful and dangerous.<sup>27</sup> The element of dangerousness is tested objectively. It must be proved that the act, 'from the standpoint of a reasonable person', carried with it 'an appreciable risk of serious injury'.<sup>28</sup> Under the Code there is no requirement that the act must be unlawful or dangerous. Therefore, from one point of view the offence of manslaughter is broader under the Code than at common law. On the other hand, at common law it is only

necessary for the prosecution to prove that the relevant act carried with it an appreciable risk of *serious injury*. It is not necessary for the prosecution to prove that there was an appreciable risk of *death*. Under the Code an accused will be excused from criminal responsibility for causing death if the prosecution cannot prove that *death* was reasonably foreseeable. From this perspective the offence of manslaughter at common law is broader because it may cover some killings that would be regarded as accidental under the Code.<sup>29</sup>

The difference between the common law and the Code can be illustrated by the situation where a person has applied force to another, causing him or her to fall and death results directly from the injury caused by the fall. In such a case it would appear easier to sustain a conviction for manslaughter at common law. Under the Code it is necessary for the prosecution to prove that death was reasonably foreseeable but at common law an appreciable risk of serious injury will suffice. If, for example, the accused punched the deceased in the head it may be foreseeable that a serious injury such as a broken jaw would result. Whether the defence of accident excuses an accused from criminal responsibility for manslaughter in these types of cases will depend upon the factual circumstances (such as the degree and nature of the force used) and an assessment by the jury as to whether death was reasonably foreseeable in those circumstances.<sup>30</sup>

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harm and unlawful killing on that basis. In other words, because 'unlawfully' is not defined for the purposes of s 297, it should be interpreted according to its ordinary meaning; that is, 'contrary to law and not excused'. It was observed that if the legislature had intended the word 'unlawfully' in s 297 to mean not authorised, justified or excused by law then the legislature would have said so, just as it did for the purposes of an unlawful killing: see [99] & [121] (Steytler and Wheeler JJ). Murray J held that the word 'unlawfully' under s 297 has the same meaning as the term 'unlawful' in the context of an unlawful killing: at [49].

24. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.12].
25. See Chapter 4, 'Unwilled Conduct and Accident'.
26. Recently, in *Roberts* [2007] WASCA 48 it was argued that the common law concept of manslaughter by an unlawful and dangerous act was included within the definition of manslaughter under the Western Australian Code. The Court of Criminal Appeal rejected this argument: see [118] (Roberts-Smith JA; Wheeler JA and McLure JA concurring).
27. The Commission notes that unlawful and dangerous act manslaughter is not the same as felony-murder under the Code. The difference is that felony-murder requires a further unlawful purpose in addition to the 'dangerous' death-causing act. For example, killing a person by kicking them in the head would constitute manslaughter at common law but killing a person by kicking them in the head during a robbery would constitute felony-murder under the Code.
28. *Wilson* (1992) 174 CLR 313, 335 (Mason CJ, Toohey, Gaudron and McHugh JJ). At common law in England the category of manslaughter by an unlawful and dangerous act is even broader than in Australia because it is only necessary to prove that the unlawful act 'carried with it a risk of causing some, perhaps slight, injury to another person': see Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary manslaughter*, Report No. 237 (1996) [1.4]. The Law Commission (England and Wales) observed that if an accused slapped another person in the face and that person lost their balance, fell over hitting the ground and died as a result of head injuries, the accused would be guilty of manslaughter by an unlawful act: at [2.7]. Similarly, the category of unlawful and dangerous act manslaughter in Ireland is broader than in Australia because it is only necessary to show that there was a risk of bodily harm: see Law Reform Commission of Ireland, *Involuntary Manslaughter*, Consultation Paper No. 44 (2007) [4].
29. However, in *Wilson* (1992) 174 CLR 313, 332 (Mason CJ, Toohey, Gaudron and McHugh JJ) it was observed that the position at common law is not necessarily different to the position under the Code. The High Court noted that an accused may rely on the defence of accident under the Code but at common law it may be possible for an accused to argue that the unlawful and dangerous act did not cause the death. In relation to the relevance of foreseeability when determining causation at common law, see Chapter 1, 'Foreseeability and accident'.
30. While the defence under s 23 of the Code has been successfully relied upon in these types of cases in both Western Australia and Queensland (see eg, *Hooper* [2000] WASCA 394; *Taiters* (1996) 87 A Crim R 507), the Commission notes that at common law it is not inevitable that a conviction for manslaughter would follow. In *Baugh* [1999] NSWCCA 131, [12] (Spigelman CJ referring to the comments of the trial judge) the accused punched the deceased once causing the deceased to fall onto the concrete. The accused was charged with manslaughter but convicted of assault occasioning bodily harm. The trial judge observed that the verdict of the jury was a 'generous, indeed benevolent view of the evidence' but was nonetheless open. In *Dobaczewski* [2000] NSWSC 344 the accused and the deceased were fighting and following a punch by the accused, the deceased fell down and hit his head on the road. The accused was originally charged with manslaughter but the prosecution accepted a plea of guilty to assault occasioning bodily harm. See also Chapter 4, 'Unwilled Conduct and Accident'.

The Model Criminal Code Officers Committee (MCCOC) observed that the category of unlawful and dangerous act manslaughter has been criticised as operating harshly because it may apply where death was accidental.<sup>31</sup> The MCCOC concluded that the category of manslaughter by an unlawful and dangerous act should be abolished.<sup>32</sup> Similarly, when commenting on manslaughter by an unlawful and dangerous act, the Law Commission (England and Wales) observed that:

[I]t is wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which would not even have been foreseeable by a reasonable person observing his conduct.<sup>33</sup>

Despite the difference between the Code and the common law in this context, the Commission has concluded that the current test for the defence of accident provides the appropriate minimum requirement for this category of manslaughter. The requirement that death was objectively reasonably foreseeable ensures that there is a degree of correspondence between the blameworthy conduct of the accused and the resulting harm.<sup>34</sup> If death was not reasonably foreseeable the accused could still be held criminally liable for any harm caused that was reasonably foreseeable. This will only be possible if there are appropriate alternative offences available to the jury.<sup>35</sup>

### Alternative offences

In certain circumstances an accused may be convicted of an alternative offence if he or she is acquitted of the offence charged.<sup>36</sup> Currently, the statutory alternative offences for manslaughter are killing an unborn child,<sup>37</sup> concealing the birth of a child,<sup>38</sup> and dangerous driving causing death.<sup>39</sup>

In cases where death follows the deliberate application of force there are a number of possible non-statutory alternative offences that may be applicable if the jury are not satisfied beyond reasonable doubt that death was reasonably foreseeable. For example, on the basis of the Commission's recommendations, if the accused had an intention to cause a permanent injury to health he or she could be convicted of intentionally doing grievous bodily harm under s 294 of the Code.<sup>40</sup> The penalty for this offence is the same as the penalty for manslaughter; that is, a maximum of 20 years' imprisonment. Similarly, if the accused had intended to harm the deceased the accused could be convicted of causing bodily harm with an intention to harm under s 304(2) of the Code. Again the maximum penalty is 20 years' imprisonment.<sup>41</sup> Further, if the accused deliberately applied force without any intention to harm but directly caused bodily harm he or she could be convicted of assault occasioning bodily harm.<sup>42</sup>

In Chapter 2 the Commission recommended that the mental element of murder should no longer be established by proof of an intention to cause grievous bodily harm. Bearing in mind that the definition of grievous bodily harm under the Code contains two different forms of harm, the Commission has concluded that only an intention to cause an injury of such a nature as to endanger or be likely to endanger life should be sufficient to establish the mental element of murder.<sup>43</sup> What this means is that an accused who causes the death of another with an intention to cause a permanent but non life-threatening injury will not be guilty of murder. Such an accused may also not be guilty of manslaughter because it may be arguable that death was not reasonably foreseeable.

31. Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 145. See also Law Reform Commission of Ireland, *Involuntary Manslaughter*, Consultation Paper No. 44 (2007) [2.160].

32. MCCOC, *ibid* 147.

33. Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary manslaughter*, Report No. 237 (1996) [3.6].

34. The Commission explained in Chapter 2 that, although precise correspondence between the mental element of murder and the resulting harm of death was not essential, it was important to ensure close proximity between the mental element and the harm done: see Chapter 2, 'The Mental Element of Murder: Intention to do grievous bodily harm'.

35. In Chapter 1 the Commission discusses a Western Australian case where a number of accused were acquitted of manslaughter but there was no alternative offences available to the jury: see Chapter 1, 'Causation: Issues raised by submissions'.

36. The only way that an accused can be convicted of an alternative offence is if there is a statutory alternative offence or if the accused has been separately charged with an appropriate alternative offence: see *Criminal Code* (WA) ss 10A & 10B.

37. *Criminal Code* (WA) s 290.

38. *Criminal Code* (WA) s 291.

39. *Road Traffic Act 1974* (WA) s 59.

40. Under the Commission's recommendations, such an intention will not constitute the mental element for murder; however, an intention to cause an injury of such a nature as to cause or be likely to cause a permanent injury to health will still constitute an intention to cause grievous bodily harm.

41. The fact that the offences of manslaughter, intentionally doing grievous bodily harm, and causing bodily harm with an intention to harm all have the same maximum penalty indicates that they are regarded by Parliament as equally serious. In broad terms, the seriousness of an offence is determined by reference to the degree of fault of the accused and the seriousness of the harm caused. Manslaughter involves the most serious harm but the degree of fault or blameworthiness of the accused may be significantly less than in the case of intentionally doing grievous bodily harm or causing bodily harm with an intention to harm. An accused may be convicted of manslaughter even though there was no intention to cause any harm or injury at all.

42. The maximum penalty for assault occasioning bodily harm is five years' imprisonment. If the offence is committed in circumstances of aggravation the maximum penalty is seven years' imprisonment: see *Criminal Code* (WA) s 317.

43. See discussion Chapter 2, 'The Mental Element of Murder: Intention to do grievous bodily harm'.

As a consequence of this recommendation the Commission is of the view that it would be appropriate to list the offence under s 294 of the Code (doing grievous bodily harm with an intention to do grievous bodily harm) as a statutory alternative offence for manslaughter. Therefore, in every case where an accused is charged with murder or manslaughter it will be open to the jury (if they are not satisfied beyond reasonable doubt that the accused is guilty of murder or manslaughter) to convict the accused of intentionally doing grievous bodily harm. In addition, s 294 lists a number of its own statutory alternative offences, including doing grievous bodily harm and assault occasioning bodily harm. If for any reason the available statutory alternative offences are not relevant to the circumstances of the case, it is essential that the prosecution ensure that any other relevant alternative offences are charged separately on the indictment.<sup>44</sup>

## Recommendation 8

### Alternative offences to manslaughter

That s 280 of the *Criminal Code* (WA) be amended to insert s 294 of the *Criminal Code* (WA) as an additional alternative offence to manslaughter.<sup>45</sup>

## Manslaughter by criminal negligence

Under the Code and at common law an accused may be convicted of manslaughter on the basis of criminal

negligence. Manslaughter by criminal negligence may arise as a result of either a negligent act or a negligent omission. Generally, there is no criminal liability for failing to act.<sup>46</sup> However, both the Code and the common law recognise 'a series of specific duties to act based on special relationships or understandings between the parties or upon responsibility for a dangerous situation'.<sup>47</sup>

Sections 262 to 267 of the Code provide for two different types of duties. The first category (found in ss 262–263) imposes a duty where there is a special relationship between two people so that one person owes a duty to provide the necessities of life to the other. The second category (found in ss 265, 266 & 267) provides for particular duties in relation to dangerous conduct. In order to provide a basis for criminal liability there must be a duty to act and a breach of that duty – the 'duty is to do whatever would be reasonable to prevent harm from occurring'.<sup>48</sup> The effect of failure to perform the duty is that the accused is held to have caused any consequences resulting to the life or health of another person by reason of the failure to comply with the duty.

In *Callaghan*,<sup>49</sup> the High Court considered s 266 of the Code which defines the duty of persons in charge of dangerous objects. The court held that the degree of negligence required under s 266 is the same as the degree of negligence required for manslaughter at common law.<sup>50</sup> The common law test for manslaughter by criminal negligence, as pronounced in *Nydam*,<sup>51</sup> is that there must have been

44. The Commission notes that in the recent case of *Becker* (District Court of Western Australia, 11 September 2007) the accused was acquitted of manslaughter. It was alleged that the accused had punched the deceased and as a result the deceased died from head injuries sustained from the fall: Pedler R, 'Law Let Down My Dead Son: Mum', *The West Australian*, 12 September 2007, 7. The accused in this case was not charged with any alternative offence, such as assault occasioning bodily harm. The Commission is of the view that in these types of cases it is essential that alternative offences are available to the jury so that an accused can be held criminally responsible for the harm that was reasonably foreseeable in the circumstances.
45. The Commission has recommended that an offence of dangerous navigation causing death should be enacted under the *Marine Act 1982* (WA): see Chapter 3, 'Dangerous Driving Causing Death: Dangerous navigation causing death'. It has also been recommended that once enacted this offence should be listed as a statutory alternative offence to manslaughter: see below, Recommendation 18.
46. Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary manslaughter*, Report No. 237 (1996) [2.23]. In *Coney* (1882) 8 QBD 534, 557–58 it was stated that it 'is no criminal offence to stand by, a mere passive spectator of a crime, even of murder': see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [3.11]. It has been observed that the law has resisted attaching criminal responsibility for failing to act: see Blokland J, 'Dangerous Acts: A critical appraisal of section 154 of the Northern Territory Criminal Code' (1995) 19 *Criminal Law Journal* 64, 79. See also MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 151.
47. Colvin, Linden & McKechnie, *ibid* [3.11] & [3.13].
48. *Ibid* [3.11].
49. (1952) 87 CLR 115.
50. In *Bateman* (1927) 19 Cr App R 8, 11–12 as cited in Macfarlane I, '*R v Pacino*: Extending the limits of criminal negligence?' [1998] *Murdoch University Electronic Law Journal* 9 [3] it was stated that in order to establish criminal negligence at common law there must be negligence that 'went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'. This test was approved in *Young* [1969] Qd R 417, 444 (Lucas J; Hoare J concurring). See also *Scarth* [1945] St R Qd 45–46 (Macrossan SPJ), 56 (Stanley AJ); *Evgeniou* [1964] 37 ALJR 508, 509 (McTiernan and Menzies JJ), 513 (Windeyer J); *Griffiths* (1994) 76 A Crim R 164, 166 (Brennan, Dawson and Gaudron JJ). In *Agnew* [2003] WASCA 188, [52] Murray J confirmed that the degree of negligence required under s 266 of the Code is 'gross' negligence, that is, a 'degree of recklessness involving serious moral guilt, something for which the jury thinks it to be appropriate that the accused ought to be punished as for the commission of a criminal offence'. In *Roberts* [2007] WASCA 48, [104] Roberts-Smith J stated that *Callaghan* 'stands as authority in Western Australia for the proposition that the common law standard of "criminal negligence" is applicable to negligence under the *WA Code*'. See also [236] (McLure JA).
51. [1977] VR 430.

such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.<sup>52</sup>

Thus, manslaughter by criminal negligence requires an objective assessment of what a reasonable person would have done in the circumstances. In some cases an accused may have been aware of the risk of harm but failed to comply with the relevant duty to act; whereas in other cases an accused may be held criminally responsible on the basis of a failure to appreciate the risk in the circumstances.<sup>53</sup> But a mere failure to do what a reasonable person would have done in the same circumstances is not sufficient. There must have been 'a serious departure from the standard of care that a reasonable member of the community would observe in the same circumstances'<sup>54</sup> or in other words, a 'serious degree of negligence'.<sup>55</sup>

The objective test for criminal negligence has been criticised because a person might be held criminally responsible even if he or she was incapable of meeting the applicable standard of care. The Law Reform Commission of Victoria recommended that it should be a defence to manslaughter if the accused was 'unable to meet reasonable standards because of physical or mental deficiency'.<sup>56</sup> In *Lavender*,<sup>57</sup> Kirby J noted the theoretical argument that the objective standard for criminal negligence may hold a person criminally responsible even where that person was unable to meet that standard because of physical or mental incapacities. Nonetheless, Kirby J maintained that the objective standard was appropriate, emphasising that the high degree of negligence required under the criminal law means that criminal responsibility for negligence will only be imposed where there is 'very serious wrongdoing'.<sup>58</sup>

The Commission notes that if an accused was incapable of meeting the standards of a reasonable person (due to youth or mental impairment) the defences of immature age and insanity may relieve an accused from criminal responsibility for causing death by criminal negligence. Under s 29 of the Code, a child aged over 10 years but under 14 years is not criminally responsible for an act or omission unless it is proved beyond reasonable doubt that he or she had the capacity to know that the act or the omission ought not have been done. The defence of insanity under s 27 of the Code applies where the accused, by reason of mental impairment, did not have the capacity to understand what he or she was doing, the capacity to control his or her actions, or the capacity to know that he or she ought not to do the act or make the omission.<sup>59</sup> Further, factors such as intellectual disability or mental impairment falling short of insanity may constitute strong mitigation in sentencing for cases of manslaughter by criminal negligence.<sup>60</sup>

### Duties where there is a special relationship

Sections 262 and 263 of the Code set out the duty to provide the necessities of life in particular circumstances. Section 262 provides that:

It is the duty of every person having charge of another who is unable by reason of age, sickness, mental impairment, detention, or any other cause, to withdraw himself from such charge, and who is unable to provide himself with the necessities of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessities of life; and he is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

52. Ibid 445. This test was approved of in *Wilson* (1992) 174 CLR 313, 332–33 (Mason CJ, Toohey, Gaudron and McHugh JJ).

53. Subjective foresight of consequences is often referred to as recklessness. The Commission concluded that recklessness should not be a separate mental element of murder: see Chapter 2, 'Intention and Recklessness'. Nevertheless, in certain circumstances an accused who was aware of the risk of death will be convicted of murder because an intention to cause an injury likely to endanger life (mental element of murder) or an act likely to endanger life in the prosecution of an unlawful purpose (felony-murder) would often involve subjective recklessness. The Commission also explained in Chapter 2 that the failure to appreciate the risk of death may be just as culpable as subjective awareness of the risk of death. In the context of manslaughter, because there is full discretion in sentencing, any variations in the degree of culpability associated with criminal negligence can be taken into account during sentencing.

54. *BBD* [2006] QCA 441, [16] (Mackenzie J).

55. Murray MJ, *The Criminal Code: A general review* (1983) 167.

56. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [256] & [270]. See also Law Reform Commission of Ireland, *Involuntary Manslaughter*, Consultation Paper No. 44 (2007) [5.140]. Similarly, Colvin et al observed that it 'may be thought unfair to measure an accused against an objective test that was particularly difficult for the accused to meet for reasons such as youth or mental impairment': see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials*, (Sydney: LexisNexis Butterworths, 2005) [4.23].

57. [2005] HCA 37.

58. Ibid [128]. The importance of maintaining a minimum objective standard was emphasised by the majority of the Canadian Supreme Court in *Creighton* [1993] 3 SCR 3, 61–62 (L'Heureux-Dubé, Gonthier, Cory, and McLachlin JJ, La Forest J concurring). The majority did not favour the approach of taking into account personal characteristics such as inexperience or lack of education. It was explained that the standard of care required should not vary on the basis of the personal characteristics of the accused but may vary depending upon the nature of the activity. For example, a high standard of care is required when undertaking brain surgery. The majority also noted that mental impairment leading to incapacity would deny criminal responsibility.

59. Mental impairment is defined in s 1 of the Code as 'intellectual disability, mental illness, brain damage or senility. For further discussion of s 27 of the Code see Chapter 5, 'Insanity – Mental Impairment'.

60. See eg, *Milini* [2001] QCA 424, [2] (McPherson JA; Chesterman and Douglas JJ concurring); *George* [2004] NSWCCA 247, [34] & [43].

Section 263 provides that:

It is the duty of every person who, as head of a family, has the charge of a child under the age of 16 years, being a member of his household, to provide the necessaries of life for such child, and he is held to have caused any consequences which result to the life or health of the child by reason of any omission to perform that duty whether the child is helpless or not.

'Necessaries of life' is not defined in the Code,<sup>61</sup> but it has been observed that it includes the provision of food, clothing, shelter and medical aid.<sup>62</sup> Failure to perform the duties in ss 262 and 263 will constitute an omission and an accused will be held criminally responsible for any consequences that are caused by the omission to the life or health of another person.<sup>63</sup>

In 1996, the Queensland Criminal Code Advisory Working Group recommended that the Queensland equivalent to s 263 should be amended to remove the phrase 'head of a family' and replaced with the phrase 'any parent or adult in charge of a child under 16'.<sup>64</sup> The Commission agrees that it is no longer appropriate to refer to the 'head' of a family. The duty to provide necessaries of life should apply to any parent of a child or any other person who has the charge of a child in their household.

### Recommendation 9

#### Duty of parents and other carers to provide necessaries of life to a child under the age of 16 years

That s 263 of the *Criminal Code* (WA) be amended to delete the phrase 'head of the family'.

The Queensland Criminal Code Advisory Working Group also recommended that, in addition to the duty to provide the necessaries of life, there should be a duty to take 'reasonable precautions' to 'avoid danger to the child's life, health or safety' and to take 'reasonable action' to 'rescue the child from any such danger'.<sup>65</sup> The Working Group noted that a similar recommendation was made in 1992 by the Queensland Criminal Code Review Committee to the Attorney General.<sup>66</sup> This earlier committee referred to the Victorian case of *Russell*,<sup>67</sup> and observed that the duty provisions under the Queensland Code should be expanded in order to 'provide the basis for liability' in such a case.<sup>68</sup>

In *Russell* the accused was charged with murder. The prosecution alleged that the accused drowned his wife and two children. An alternative theory considered during the trial was that the accused's wife had drowned the two children and committed suicide. McArthur J stated that the accused, as father of the two children, had a duty to care for the safety of his children and negligent failure to perform that duty would constitute manslaughter.<sup>69</sup> He also noted that 'a man is not bound to take steps which in the circumstances no reasonable man would take in an attempt to save the life of his child'.<sup>70</sup> McArthur J held that the accused's failure to do anything at all amounted to gross negligence and that the accused could have taken steps 'without risk or serious trouble to himself'.<sup>71</sup>

The Queensland Code was amended in 1997 to make it clear that a person who has the care of a child is under a duty to protect that child from harm. Section 286 of the Queensland Code now provides that:

61. Section 146 of the *Criminal Code* (Tas) defines necessaries of life as including in certain circumstances medical and surgical aid.
62. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [3.13]. See also *Macdonald & Macdonald* [1904] St Qd R 151, 177 (Chubb J) as cited in Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 89; *Nielsen* [2001] QCA 185 [33] (Ambrose J; Williams JA and Davies JA concurring); *Young* [1969] Qd R 417; *O'Brien* [2003] NSWCCA 121. In *O'Brien* the deceased was the 14-month-old child of the accused and the accused was convicted of manslaughter on the basis of criminal negligence for failing to provide her child with essential medical treatment.
63. Under the present structure of homicide offences, if by failing to provide the necessaries of life an accused intended to kill the deceased the accused would be held criminally responsible for wilful murder. If the accused intended to cause grievous bodily harm then he or she would be convicted of murder. If the failure to provide necessaries of life was criminally negligent then the accused will be convicted of manslaughter.
64. Queensland Criminal Code Advisory Working Group to the Attorney General, *Report* (1996) 46–47.
65. *Ibid.*
66. See Queensland Criminal Code Review Committee to the Attorney General, *Final Report* (1992) 192.
67. [1933] VLR 59.
68. Queensland Criminal Code Review Committee to the Attorney General, *Final Report* (1992) 192.
69. [1933] VLR 59, 80.
70. *Ibid.*
71. *Ibid* 80–81. Cussen ACJ and Mann J did not consider it was necessary to deal with the question of a breach of parental duty. They held that the accused could be held criminally responsible for the murder of his children because on the basis of his conduct (being present and failing to intervene) he encouraged the intentional killing of his children and therefore was a party to that crime: see 67 (Cussen ACJ), 76 (Mann J).

- (1) It is the duty of every person who has care of a child<sup>72</sup> under 16 years to —
- (a) provide the necessaries of life for the child; and
  - (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
  - (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;

and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.<sup>73</sup>

The Model Criminal Code includes a similar duty provision; that is, it is the duty of any person who has 'assumed responsibility for the welfare' of a child to 'avoid or prevent danger to the life, safety or health of the child'.<sup>74</sup> Likewise the Northern Territory Code provides that a person in charge of a child under the age of 16 years is under a duty 'to use reasonable care and take reasonable precautions to avoid or prevent danger to the life, safety or health of the child ... and to take all reasonable action to rescue such child or other person from such danger'.<sup>75</sup>

The Commission is of the view that there is an arguable case for extending the duty of parents and others in charge of children beyond the duty to provide necessaries of life. In particular, a person who *unreasonably* fails to rescue his or her child from danger should be held criminally responsible for any resulting harm to the child. However, there may be unintended consequences if such an extended duty provision is strictly applied. Parents and carers may be unable in particular circumstances to protect their children from harm. For example, a mother who is the victim of serious and long-standing domestic violence may be compelled to remain in a violent relationship out of genuine fear. Nevertheless, remaining in that relationship may place her child at risk of harm. Further, extended duty provisions may have significant implications for government departments working in the area of child protection. Accordingly, because of the social and practical issues, the Commission has concluded that further research and consultation with relevant agencies and individuals is necessary to determine whether the legal duty of parents and carers under the Code should be extended.

### Recommendation 10

#### Review of the duty of persons in charge of children under the age of 16 years

That the Department of the Attorney General and the Department of Child Protection jointly conduct a review of s 263 of the *Criminal Code* (WA) to determine whether:

- (a) The duty of every person who is in charge of a child under the age of 16 years in his or her household should be extended to include a duty to protect or rescue the child from harm and to take reasonable precautions to avoid danger to the health, safety or life of the child.
- (b) The duty under s 263 should be extended to those who are temporarily in charge of a child under the age of 16 years in circumstances where the child is not a member of their household.

### Duties arising from dangerous conduct

There are three provisions under the Code that impose duties in relation to dangerous conduct. The scope of these duties is limited: there is no general duty under the Code to use reasonable care or take reasonable precautions when engaged in any dangerous conduct. Section 265 establishes a duty to have reasonable skill and use reasonable care when carrying out surgical or medical treatment or any other dangerous act but the duty only applies if the person has *undertaken* to perform the relevant act. It provides:

It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

72. A person who has care of a child is defined in s 286(2) of the Queensland Code to include 'a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child'.

73. Section 286 was amended by s 45 of the *Criminal Law Amendment Act 1997* (Qld). The amended provision was considered in *BBD* [2006] QCA 441. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 156.

74. *Criminal Code* (NT) s 149. This duty is in addition to the duty to provide necessaries of life. Section 149 also creates a similar duty for a person who is in charge of another person 'who is unable to withdraw himself from such charge by reason of age, sickness, unsoundness of mind, detention or other cause' to prevent danger and to rescue the person from danger.

Section 266 of the Code is the duty provision most commonly relied on in manslaughter cases<sup>76</sup> (and for this reason will be considered in greater detail below). It deals with the duty of persons in charge of dangerous things and provides:

It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

Section 267 of the Code covers the duty to perform an act where the failure to perform the act would be dangerous. This duty also only arises if the person has *undertaken* to perform the act. The section provides that:

When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is his duty to do that act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

For example, a person may undertake to collect essential prescription medication for an elderly neighbour. If the person fails to deliver the medication and the neighbour dies as a consequence, he or she may be held criminally responsible for manslaughter on the basis of a breach of the duty under s 267. Of course, a jury would have to decide that the failure to deliver the medication in the particular circumstances amounted to gross negligence.

Therefore, if a person is in charge of a dangerous thing or has undertaken to do something, a duty to use reasonable care may arise. However, dangerous conduct that falls outside the precise terms of the three relevant Code provisions is not subject to the rules in relation to criminal negligence. This apparent gap in the Code is considered below.

### Duty of persons in charge of dangerous objects

There are three requirements to establish criminal responsibility for manslaughter on the basis of negligence under s 266 of the Code:

1. **There must have been a duty of care owed by the accused to the deceased:** An accused will only owe a duty of care (that is, a duty to use reasonable care and take reasonable precautions) if he or she is in charge or in control of a dangerous object.
2. **The accused must have breached the duty to use reasonable care and take reasonable precautions to avoid danger to the life, safety or health of another person:** As discussed above, in order to have breached the duty of care, there must have been a 'gross departure from the standard of care' required in the circumstances.<sup>77</sup>
3. **The failure to use reasonable care or take reasonable precautions must have caused the death:** It is necessary for the prosecution to prove that the death was caused by the accused's failure to perform the relevant duty.<sup>78</sup>

### Duty of care

In order for a duty to arise under s 266 of the Code the accused must have been in control of or in charge of

anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered.

It is not essential that the accused was in physical possession of the relevant object. For example, an owner of a motor vehicle may be in charge of the vehicle even though another person is driving.<sup>79</sup>

There is conflicting opinion whether the duty arises only in relation to an object that is inherently dangerous or whether the duty also applies in circumstances where the object is not usually dangerous but becomes dangerous when used in a particular way. It has been observed that there is little case authority on this question.<sup>80</sup> In *Dabelstein*,<sup>81</sup> the accused was convicted of manslaughter after inserting a sharpened pencil into his partner's vagina. This act caused a laceration which haemorrhaged, killing the deceased. The Queensland Court of Criminal Appeal considered the accused's liability for manslaughter under

76. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.17].

77. Macfarlane I, 'R v Pacino: Extending the limits of criminal negligence?' [1998] *Murdoch University Electronic Law Journal* 9 [34].

78. *Hodgetts & Jackson* [1990] 1 Qd R 456, 464 (Thomas J).

79. *Thomas* [2002] QCA 23, [26] (Williams JA; Davies JA and Douglas J concurring).

80. O'Regan RS, 'Dangerous Things and Criminal Liability under the Griffith Code' (1995) 19 *Criminal Law Journal* 128, 129; Macfarlane I, 'R v Pacino: Extending the limits of criminal negligence?' [1998] *Murdoch University Electronic Law Journal* 9 [24].

81. (1966) Qd R 411.

the Queensland equivalent to s 266 of the Code. Wanstall J held that:

The section is not, in my view, concerned only with the objective nature of the thing in question—with its designed characteristics or functions—but also with the practical consequences of its being used or managed carelessly. A knitting needle is an inherently harmless object by design, but a harmful one when thrust into someone's body, and so is a sharpened pencil, and when so used neither is indistinguishable from a dagger.<sup>82</sup>

However, Hanger J took the opposite view. He stated that the section only deals with objects that are 'innately dangerous' and does not cover objects that are 'normally harmless' but 'become harmful in particular circumstances'.<sup>83</sup>

O'Regan has observed that in subsequent cases the narrow view of Hanger J has generally been preferred.<sup>84</sup> However, he argued that the wider view expressed by Wanstall J is the appropriate interpretation because the narrow view 'leaves a gap in the Code scheme of criminal responsibility for some forms of highly culpable negligence'.<sup>85</sup> He stated that:

The vice which the criminal law should strike at is criminal negligence exposing others to danger and the culpability of a person who brings about that situation may be much the same whatever the means used to create it.<sup>86</sup>

The case law in Western Australia supports the broader interpretation of s 266 and therefore the scope of the provision does not appear to be limited to only those objects that are inherently dangerous.<sup>87</sup> The Commission agrees with this interpretation.

It is not entirely clear whether s 266 applies to a person's own body part (such as a fist or foot).<sup>88</sup> In *Houghton*,<sup>89</sup> the accused, who was aware that he was HIV positive, engaged in consensual sexual relations with the complainant without informing her of his condition. He was charged with unlawfully doing grievous bodily harm. On the basis that the accused was in control of bodily fluid containing HIV the majority of the Western Australian Court of Criminal Appeal said that it was 'strongly arguable' that the accused had breached the duty imposed by s 266 of the Code.<sup>90</sup>

Irrespective of whether s 266 applies to part of a person's body it has been observed that the provision does not apply to 'cases involving direct personal violence by blows to the body'.<sup>91</sup> Similarly, s 266 is not relevant to cases where death or injury results from the deliberate infliction of harm with a weapon. Thus, where death is caused by a weapon (such as a gun or knife) it is necessary to consider whether the weapon was used deliberately or negligently. In *Hodgetts & Jackson*,<sup>92</sup> Thomas J observed that it is necessary to consider

82. Ibid 430. The Commission notes that Stable J agreed with the decision of Wanstall J, that the appeal against conviction should be dismissed, but he did not express an opinion about the scope of s 289 of the Queensland Code.
83. Ibid 416. In *Young* [1969] Qd R 417, 443 (Hoare J concurring), Lucas J suggested that the section should be given as wide an interpretation as possible.
84. O'Regan RS, 'Dangerous Things and Criminal Liability under the Griffith Code' (1995) 19 *Criminal Law Journal* 128, 129–30. O'Regan noted that the wider view was impliedly accepted in *Hodgetts & Jackson* [1990] 1 Qd R 456. On the other hand, Macfarlane has argued that this case did not need to consider the issue and therefore is not authority for the broad interpretation: see Macfarlane I, 'R v Pacino: Extending the limits of criminal negligence?' [1998] *Murdoch University Electronic Law Journal* 9 [31]. Macfarlane also stated that the 'weight of authority establishes that the "thing" has to be inherently dangerous before s 266 of the Code comes into operation': at [33].
85. O'Regan, *ibid* 131.
86. Ibid. In contrast, Macfarlane has argued that the narrow interpretation is correct because if the broad interpretation is adopted then 'everything comes within the definition of "dangerous things" and the words "of such a nature" may as well be deleted from this section': Macfarlane I, 'R v Pacino: Extending the limits of criminal negligence?' [1998] *Murdoch University Electronic Law Journal* 9 [67].
87. See for example, *Pacino* (1998) 105 A Crim R 309 where s 266 was held to apply to dogs and *Mason* [2005] WASCA 125 where s 266 was held to apply to a rock.
88. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.18]. In *Court* [2003] WASCA 308, [41] there was some suggestion that s 266 of the Code may have been relevant to a case where the accused was charged with the murder of his son. It was alleged that the accused had killed his son as a result of excessive shaking ('shaken baby syndrome'). The prosecution's case was that the accused had intended to cause grievous bodily harm or, alternatively, that the accused was criminally negligent under s 266. The accused was acquitted after a trial by judge alone. The trial judge found that the death was caused by blows delivered to the back of the deceased in an attempt to resuscitate the deceased. Miller and McKechnie JJ observed that because the trial judge found death was caused by blows to the back (instead of being violently shaken) it was not necessary to consider the 'extent to which (if at all) it brought into play the provisions of s 266' of the Code: at [41].
89. [2004] WASCA 20.
90. Ibid [126] (Steytler and Wheeler JJ). Murray J disagreed, stating that the virus was not a 'thing' within the meaning of s 266 of the Code. In *Reid* [2006] QCA 202, [19] McPherson JA stated that he preferred Murray J's approach and stated that 'I respectfully consider that to speak of a man's own seminal fluid as something requiring "use or management" by him involves a rather strained interpretation of those words and of the section as a whole. Section 289 has hitherto been regarded as applying to "dangerous things" as objects external to the human body, such as knives and guns. If it is instead to be construed in the broad manner suggested, it will also extend to human saliva and blood (which are also capable of transmitting serious diseases) as well as to human teeth, hands and feet, which are notoriously capable of being used to do grievous bodily harm'.
91. *Hodgetts & Jackson* [1990] 1 Qd R 456, 462 (Thomas J). The Commission notes that it has been argued that s 266 of the Code should apply to a person's body part such as a fist and could also be relied upon in cases involving direct personal violence: see Edelman J, 'Preventing Intentional "Accidents": Manslaughter, criminal negligence and section 23 of the Criminal Codes' (1998) 22 *Criminal Law Journal* 71, 73 & 76.
92. [1990] 1 Qd R 456.

whether the essential case is that it *was the absence of care or precaution in its use or management that did the damage*. In a broad way, one would ask whether the case is essentially based on negligence or upon direct violence.<sup>93</sup>

In *Mackenzie*,<sup>94</sup> the accused pleaded guilty to the manslaughter of her husband. The basis of the plea was that the accused had been criminally negligent because she took her husband's gun and pointed it in his direction believing that the gun was unloaded. The gun discharged because the accused tripped over while she had her finger on the trigger.<sup>95</sup> In *Streatfield*,<sup>96</sup> the accused was 'playing' with a gun and pointed the gun at his wife. Believing that the gun was unloaded, the accused pulled the trigger killing his wife. The accused was convicted of manslaughter by criminal negligence because he failed to ensure that the gun was unloaded before pointing it at his wife and pulling the trigger.<sup>97</sup> In both these cases the killing was caused by the negligent use of a firearm rather than by the deliberate firing of a loaded weapon.

The Commission agrees that s 266 of the Code is not applicable to cases involving deliberate violence. As discussed further below, in order to establish liability for manslaughter on the basis of a breach of the duty imposed by s 266, it is necessary to prove that the failure to use reasonable care or take reasonable precautions caused the death. It is not appropriate to categorise, for example, the use of a knife to deliberately stab another person or the use of a gun to deliberately shoot another person as negligent conduct.

### **Breach of duty**

Once it is established that an accused owed a duty of care because he or she was in charge or in control of a dangerous object at the relevant time, it is necessary to consider whether the accused failed to meet the standard

of care required in the circumstances. Whether the accused breached the duty of care is determined objectively; that is, by reference to what a reasonable person would have done in the circumstances. To constitute a breach of duty, there must have been a gross departure from the standard of care required.

The test for manslaughter by criminal negligence at common law expressly requires that the conduct of the accused involved a high risk of death or grievous bodily harm. However, the duty under s 266 of the Code is not only relevant to cases of manslaughter. It may also be relevant to other charges such as unlawfully doing grievous bodily harm or causing bodily harm. Section 266 refers to the duty to use reasonable care and take reasonable precautions to avoid danger to the life, safety or health of any person. One possible interpretation is that in order to constitute manslaughter under the Code it will be sufficient if there is a risk of danger to life, health or safety.<sup>98</sup> Another, perhaps more logical, interpretation is that where the charge is manslaughter the prosecution would be required to prove that there was a risk to the life of another person.<sup>99</sup> Likewise if the charge was unlawfully doing grievous bodily harm, the prosecution should be required to prove that there was a risk of causing grievous bodily harm in the circumstances.<sup>100</sup>

It is not entirely clear from the case law what level of harm and what degree of risk must be present under the Code in order for a conviction for manslaughter by criminal negligence to be sustained. Because the general common law test for criminal negligence has been held to apply under the Code, it is arguable that there must also be a *high risk of death or grievous bodily harm*. In *Clark*,<sup>101</sup> however, the majority of the Queensland Court of Appeal held that in relation to the Queensland equivalent of s 266 the degree of risk may vary depending on the

93. *Ibid* (emphasis added).

94. [2000] QCA 324.

95. *Ibid* [11] (McMurdo P).

96. (1991) 53 A Crim R 320.

97. *Ibid* 321.

98. Edelman J, 'Preventing Intentional "Accidents": Manslaughter, criminal negligence and section 23 of the Criminal Codes' (1998) 22 *Criminal Law Journal* 71, 77–78. In *Omodei* [2006] WASC 210, [11] & [12] the accused was charged with doing bodily harm on the basis of criminal negligence. Johnson J affirmed that the general test for criminal negligence is 'recklessness involving grave moral guilt and as being of such degree as to warrant the sanction of the criminal law'. It was also stated that '[s]ubsequent attempts to reformulate the test have included reference to the *high risk* of endangering the life, safety and health of another'.

99. In *Mason* [2005] WASC 125, [18] the accused had thrown a large rock towards the road, striking a car being driven by the deceased and causing the deceased to collide with a pole. The deceased died from head injuries and the accused was convicted of manslaughter. One basis for the conviction was that the accused had breached the duty under s 266 of the Code. The court stated that the 'danger to *human life* involved in throwing this large rock onto a road, or towards a road, where vehicles may be, would appear to be obvious, and it would also appear to be obvious that the [accused] did not use any precautions to avoid that danger' (emphasis added).

100. In *BBD* [2006] QCA 441, [3] Jerrard JA stated that to prove criminal negligence (in relation to a charge of doing bodily harm) it is necessary to show that the accused 'disregarded such an *obvious risk of injury* ... that she breached a duty of care to a degree amounting to a crime and deserving of punishment' (emphasis added).

101. [2007] QCA 168.

circumstances. When discussing the duty to use reasonable care and take reasonable precautions to avoid danger to life, safety and health, Keane JA stated that:

In some cases, the danger will be extreme and obvious; in such cases, deliberate and active diligence will be required to discharge the duty of reasonable care imposed by the section. In other cases, the danger may be relatively slight or remote; in such cases, it may be that only conscious disregard of the danger will amount to a failure to exercise reasonable care worthy of punishment as a crime.<sup>102</sup>

In *Hodgetts & Jackson*,<sup>103</sup> Thomas J observed that the relevant section in the Queensland Code ‘imposes no duty to guard against dangers that are not reasonably foreseeable’.<sup>104</sup> He stated that if death was not reasonably foreseeable it is ‘impossible to see how a jury could convict a person on the basis of criminal negligence’.<sup>105</sup> Nevertheless, at the same time he held that the accused could not be convicted of manslaughter under s 269 unless ‘at least some serious harm’ was reasonably foreseeable.<sup>106</sup> Similarly, Ambrose J stated that it was necessary, among other things, for the prosecution to prove that it was reasonably foreseeable that death or serious harm might occur.<sup>107</sup>

It has been suggested that in order to establish manslaughter by criminal negligence it should be necessary to prove there was a high risk of death. The Law Reform Commission of Ireland recently examined the law in relation to criminal negligence manslaughter. Submissions were sought as to whether a high risk of death or, alternatively, a high risk of death or serious injury should be required in order to establish manslaughter by criminal negligence.<sup>108</sup> In relation to the apparent reluctance of juries in that jurisdiction to convict an accused of manslaughter on the basis of criminal negligence, it was observed that:

It could well be that jurors ... think that the stigma of a manslaughter conviction should not apply in cases where there is no deliberate violence or intention to injure, unless the risk to which the accused fails to advert or his or her failure to meet an expected standard involves a risk of death rather than substantial personal injury.<sup>109</sup>

Similarly, the Law Commission (England and Wales) recommended that gross negligence manslaughter should require proof of ‘gross negligence as to the risk of *causing death* (not merely as to causing serious injury)’.<sup>110</sup> The need for correspondence between the harm caused by negligent conduct and the risk involved in that conduct was adopted by the MCCOC. The effect of the relevant Model Criminal Code provisions is that an accused could not be convicted of the offence of dangerous conduct causing death (which replaced the offence of manslaughter by criminal negligence) unless the accused’s conduct involved a ‘high risk’ of causing death.<sup>111</sup>

The Commission has concluded that manslaughter by criminal negligence should only apply where the conduct of the accused involved a risk of death. However, the Commission does not consider that it is necessary to stipulate that the risk of death must be high. In some cases, especially those involving dangerous weapons, the risk of death will be obvious. The question in such circumstances will be whether the failure of the accused to use reasonable care or take reasonable precautions was so serious as to constitute a crime. However, there may be cases where the risk of death is not so high but, nevertheless, the accused was aware of the risk of death and showed complete disregard for human life. Accordingly, the Commission has concluded that the Code should be amended to make it clear that where the charge is one of manslaughter an accused can only be held criminally responsible for causing death by a negligent act or omission if the negligent act or omission involved a risk of death.<sup>112</sup>

102. Ibid [23] (Lyons J concurring).

103. [1990] 1 Qd R 456.

104. Ibid 463. See also *Evgeniou* [1964] 37 ALJR 508, 511 (Taylor J).

105. [1990] 1 Qd R 456, 463. In *Omodei* [2006] WASCA 210, [134] Johnson J confirmed that the foreseeability of the relevant harm is relevant to whether or not criminal negligence is established. In *EMJ* [2001] WACC 7, 269 French J observed in relation to a charge of manslaughter based on s 266 of the Code that ‘it is difficult to imagine circumstances where it is possible to prove gross criminal negligence where the manner of death was not reasonably foreseeable’.

106. [1990] 1 Qd R 456, 463–64.

107. Ibid 477.

108. Law Reform Commission of Ireland, *Involuntary Manslaughter*, Consultation Paper No. 44 (2007) [5.126]. Currently in Ireland, manslaughter by criminal negligence is established where there is a high degree of risk of ‘substantial personal injury’.

109. Ibid [5.114].

110. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [3.58]. It was explained that this recommendation reflects the current law in England: see *Adomako* [1995] 1 AC 171.

111. See MCCOC, *General Principles of Criminal Responsibility*, Report (1992) cll 5.5 & 29; MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 160. The Model Criminal Code definition of negligence has been recently adopted by the Northern Territory: *Criminal Code* (NT) s 43AL.

112. For consistency the Commission has also made similar recommendations in relation to causing grievous bodily harm and bodily harm.

**Recommendation 11**

**Criminal negligence**

That a provision be inserted into Chapter XXVII of the *Criminal Code* (WA) to provide that:

- (1) Where it is alleged that a person has caused death, grievous bodily harm or bodily harm by the failure to perform a duty in this chapter, it must be proved that the conduct of the person objectively involved a risk of at least the alleged harm.
- (2) Satisfaction of the requirement in (1) alone is not sufficient to establish criminal responsibility for the alleged harm.

***Negligent act or negligent omission must have caused the death***

In order to establish criminal liability for manslaughter on the basis of criminal negligence, it is necessary to prove that the breach of duty (or failure to use reasonable care and take reasonable precautions) caused the death of the deceased. The effect of s 266 is that an accused will be held to have caused any consequences (such as death) ‘which result to the life or health of any person *by reason of* any omission to perform’ the duty. The requirement to show a causative link between the negligence and the resulting harm is demonstrated by the following case.

In *Thomas*,<sup>113</sup> the accused was the owner of a motor vehicle who had permitted a 16-year-old, unlicensed and inexperienced girl to drive. She lost control of the vehicle, crashed and died. Immediately before she lost control of the vehicle, a passenger had grabbed hold of the steering wheel. The prosecution’s case was that the accused was criminally negligent by allowing the girl to drive the vehicle and was therefore responsible for her death. The trial judge directed the jury that if they found that the accused was in charge of a dangerous object then the accused had a duty to use reasonable care to make sure no one was harmed. If someone was harmed the accused would be held to have caused the harm.<sup>114</sup> The Court of Appeal

held that the trial judge made an error when directing the jury. Williams JA stated that:

The jury were never instructed that before convicting they had to be satisfied beyond reasonable doubt that the conduct of the appellant constituting negligence contributed significantly to the death of the deceased. The expression ‘contributed significantly’ or its equivalent was not used in his summing-up. It is clear that the proven negligence need not be the sole cause of the death. But, of course, if a jury on the facts were satisfied that the sole cause of death was something independent of the accused’s negligence then a verdict of not-guilty would have to be returned even though theoretically the accused’s negligence was established.<sup>115</sup>

It was held that in the circumstances of this case it was open for the jury to find that the sole cause of death was the ‘negligence of the passenger in grabbing and pulling the steering wheel, something for which the appellant was not responsible’.<sup>116</sup> The court quashed the conviction and ordered a retrial.

**Criminal negligence and s 23 of the Criminal Code**

The defences of unwilling conduct and accident under s 23 of the Code are not relevant to cases involving criminal negligence because s 23 of the Code provides that:

Subject to the *express provisions of this Code relating to negligent acts and omissions*, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.<sup>117</sup>

It has been held that all of the duty provisions under the Queensland Code (that is, those provisions that are equivalent to the duty provisions in Chapter XXVII of the Western Australian Code) are express provisions ‘relating to negligent acts and omissions’.<sup>118</sup> Although some of the duty provisions may apply to both negligent conduct and deliberate conduct (such as the duty to provide necessities of life) it has been held that as long as the provision is capable of applying to negligent conduct it is a provision dealing with negligent acts and omissions.<sup>119</sup>

The reason that the defences of unwilling conduct and accident under s 23 of the Code are subject to the

113. [2002] QCA 23.

114. Ibid [14].

115. Ibid [21] (Williams JA; Davies JA and Douglas J concurring).

116. Ibid [22].

117. *Criminal Code* (WA) s 23 (emphasis added). In contrast, the defence of mistake of fact under s 24 of the Code is available for a charge involving criminal negligence: see *Pacino* (1998) 105 A Crim R 309, 319–20 (Kennedy J; Wallwork J and Steytler JJ concurring). See also *Omodei* [2006] WASCA 210, [145] & [149] (Johnson J) where it was observed that the defence of mistake of fact is available on a charge based upon criminal negligence and unlike the defence of accident under s 23 of the Code, s 24 is not qualified by being subject to the express provisions relating to negligent acts and omissions.

118. *Young* [1969] Qd R 417, 443 (Lucas J; Hoare J concurring).

119. Ibid 441.

provisions of the Code dealing with negligent conduct can be illustrated by the following examples.

### Examples

A is hunting with friends. He takes his loaded gun out of his vehicle but fails to check if the safety catch is on. While walking with B, A trips over and the gun discharges. B is hit by a bullet and dies. A did not deliberately pull the trigger or discharge the weapon. If A could rely on s 23 of the Code, he would be excused from criminal responsibility for killing B on the basis that the act that caused death occurred independently from the exercise of his will. However, the fact that the final death-causing act was unwilling, will not necessarily excuse A. A's conduct in taking a loaded gun, without any safety precautions, into an area where there were other people may be held to constitute a gross failure to exercise reasonable care and take reasonable precautions in the use of a firearm.

C is threatening D by waving a knife around. C does not intend to use the weapon to harm D. D suddenly lunges forward in an attempt to grab the knife from C and in doing so, impales himself on the knife. D later dies from the wound. C might argue that the death was not reasonably foreseeable. However, the failure of C to exercise reasonable care and take reasonable precautions in the use of the knife (by waving a knife around for the purpose of threatening another person) may be viewed by a jury as grossly negligent.<sup>120</sup>

It has been suggested that the principal reason for exempting negligent acts and omissions from the ambit of s 23 of the Code is to exclude pleas of involuntariness in the case of negligent conduct.<sup>121</sup> The Commission agrees

with this observation because s 266 of the Code is not concerned with the precise death-causing act but rather with the 'control or handling' of a dangerous object.<sup>122</sup> Although negligent acts and omissions are also excluded from the scope of the defence of accident, the Commission notes that in most cases if death was not reasonably foreseeable it is unlikely that criminal negligence would be established. But there may be situations (such as the second example above) where the manner in which death occurred was not reasonably foreseeable, but the conduct of the accused nevertheless involved a risk of death.

The fact that s 23 of the Code is subject to the express provisions of the Code relating to negligent acts and omissions does not mean that s 23 and manslaughter by criminal negligence cannot both be raised in the same case.<sup>123</sup> Therefore if the case is presented in such a way that there is more than one possible factual basis for establishing manslaughter, both s 23 and the provisions dealing with criminal negligence may be relevant.<sup>124</sup>

### The relationship between the two categories of unintentional manslaughter

The Commission has examined above the two categories of unintentional manslaughter under the Code. Because the defences of accident and unwilling conduct are not available if the case is based upon criminal negligence, at first glance it may appear that an accused who is charged with manslaughter by criminal negligence is disadvantaged. However, the test for criminal negligence is generally more difficult for the prosecution to prove than negating the defence of accident under s 23 of the Code.<sup>125</sup>

On the basis of the Commission's recommendations, criminal responsibility for manslaughter by a deliberate act will ultimately depend upon whether the *death* was reasonably foreseeable as a *possibility* in the circumstances. For manslaughter by criminal negligence it is necessary for

120. See for example Kirby J's comments in *Ugle* [2002] HCA 25, [54].

121. *Stott & Van Embden* [2001] QCA 313, [23] (McPherson JA; Muir J concurring).

122. See *Mackenzie* [2000] QCA 324, [54] (McPherson JA).

123. *Mouritz* [2006] WASCA 165, [51] (Pullin JA). See also *Griffiths* (1994) 76 A Crim R 164, 166–67 (Brennan, Dawson and Gaudron JJ).

124. White B, Garwood-Gowers A & Willmott L, 'Manslaughter under the Griffith Code: Rowing not so gently down two streams of law' (2005) 29 *Criminal Law Journal* 217. See *Stott & Van Embden* [2001] QCA 313 as an example where both categories of manslaughter were relevant because there were two possible ways of interpreting the evidence about how the deceased was killed.

125. See *Kidd* [2001] QCA 536, [1] (McMurdo P), [7] (MacKenzie J), [21] (McPherson JA); *Stott & Van Embden* [2001] QCA 313, [23] (McPherson JA; Muir J concurring); *Hodgetts & Jackson* [1990] 1 Qd R 456, 461 (Thomas J); White, Garwood-Gowers & Willmott, *ibid* 224. In contrast, it has been argued that it is easier for the prosecution to prove criminal negligence than negate the defence of accident because foreseeability of danger to health or safety may be enough to establish criminal negligence under s 266 of the Code: see Edelman J, 'Preventing Intentional "Accidents": Manslaughter, criminal negligence and section 23 of the Criminal Codes', (1998) 22 *Criminal Law Journal* 71, 77–78. Edelman argued that the requirement for foreseeability of death or serious harm as explained by Ambrose J in *Hodgetts & Jackson* [1990] 1 Qd R 456 is wrong because the language of s 266 speaks of 'health and safety'. However, the Commission agrees with the view that a jury would be unlikely to convict an accused of manslaughter on the basis of criminal negligence if death was not at least reasonably foreseeable in the circumstances.

the prosecution to prove a very high degree of negligence and that the conduct of the accused carried with it a risk of death. Thus, the objective foreseeability of death is relevant in both cases but in the case of criminal negligence a much higher test must be satisfied.

The Commission has concluded that different tests for criminal responsibility for manslaughter by criminal negligence and manslaughter by a deliberate act are appropriate, provided that the relevant conduct in each case can be distinguished in terms of moral culpability or blameworthiness. Criminal negligence generally applies to conduct that is otherwise lawful, such as medical or surgical procedures, the care of children, and lawful activities involving dangerous objects. Even where the underlying conduct may be unlawful, criminal negligence does not apply to the deliberate use of violence or the deliberate infliction of harm. By contrast manslaughter by a deliberate act generally involves deliberate violence or harm. But this is not always the case. Because the criminal negligence provisions under the Code do not cover all possible types of dangerous conduct there are instances where conduct that would ordinarily be described as negligent is nonetheless dealt with by reference to s 23 of the Code.

### Example

A and B are involved in a sexual relationship. With B's consent, A applies pressure to B's carotid artery to increase his sexual pleasure. B dies from strangulation. The application of force in these circumstances is lawful because it was done with consent.<sup>126</sup> Criminal responsibility will be determined by reference to s 23 (that is, whether death was reasonably foreseeable) because the conduct does not fall within any duty provisions under the Code.<sup>127</sup>

### Example

It is a hot day and C leaves her infant D alone in a motor vehicle while she goes shopping. D dies from heat exhaustion. It is an offence to leave a child in a motor vehicle in circumstances where the child's health is likely to suffer.<sup>128</sup> Although C's conduct in leaving the child is unlawful, the conduct does not involve the deliberate infliction of harm. Whether C is held criminally responsible for the manslaughter of D should be determined on the same basis as other criminally negligent conduct. However, it is unlikely that these circumstances would fit within the precise requirements of s 266 of the Code because C is not in control of a dangerous object.

In *Hodgetts & Jackson*,<sup>129</sup> Derrington J observed that the Queensland Code (and by extension the Western Australian Code):

[I]s not logically symmetrical. While s 289 has the effect of rendering a person liable in respect of criminal negligence relating to the control of dangerous things, there is no corresponding section relating to criminal negligence generally, particularly in respect of acts not involving dangerous things.<sup>130</sup>

It has been argued that one way of correcting the 'unsymmetrical nature of the Code' would be to include a more general criminal negligence provision so that all deaths caused by criminally negligent behaviour are determined on the same basis and deaths caused by non-negligent conduct are determined by reference to the defence of accident under s 23 of the Code.<sup>131</sup>

This problem is demonstrated by *Stott & Van Embden*.<sup>132</sup> In that case the deceased died from an overdose of heroin. There were two views of the facts that could support a conviction for manslaughter. The first was that the two

126. In *Dabelstein* [1966] Qd R 411, 422 Hanger J observed that whether the relevant act was done with consent and whether the act was lawful or unlawful was irrelevant for determining criminal responsibility for manslaughter.

127. In *Boughey* (1986) 161 CLR 10 the accused was charged with murder. It was alleged that the accused had caused the death of his wife by exerting pressure to her neck. The accused claimed that the act was done with the consent of the deceased for the purpose of sexual gratification. In order to prove murder under s 157 of the Tasmanian Code it was necessary for the prosecution to prove that death was caused by means of an unlawful act which the offender knew or ought to have known was likely to cause death. The jury were directed that if the application of force to the deceased's neck was done without the consent of the deceased then it would have been an unlawful act. Under the law in Western Australia a person can consent to the application of force: see *Criminal Code (WA)* s 222. Therefore, a consensual application of force may be lawful but if death results, the killing will be unlawful unless it is authorised, justified or excused by law.

128. *Children and Community Services Act 2004 (WA)* s 102.

129. [1990] 1 Qd R 456.

130. *Ibid* 470. See also *Evgeniou* [1964] 37 ALJR 508, 510 (McTiernan and Menzies JJ); *Stott & Van Embden* [2001] QCA 313, [23] (McPherson J; Muir J concurring).

131. White B, Garwood-Gowers A & Willmott L, 'Manslaughter Under the Griffith Code: Rowing not so gently down two streams of law' (2005) 29 *Criminal Law Journal* 217, 226.

132. [2001] QCA 313.

accused had supplied heroin to the deceased and the deceased injected himself with the drug. The second was that one of the accused (with the assistance of the other) had injected the drug into the deceased's arm. The latter scenario fell to be determined by the rules in relation to criminal negligence because the two accused were in charge of a dangerous thing. However, in order to be convicted of manslaughter on the first basis, criminal responsibility had to be determined by reference to s 23 of the Queensland Code. McPherson JA observed that it is 'plainly undesirable that there should be differing criteria of criminal responsibility for negligent conduct according to whether the case is or is not capable of being brought within the literal wording' of the relevant Code provision.<sup>133</sup> Although both factual scenarios involved a degree of unlawfulness because supplying heroin is against the law, the appropriate description of the conduct causing death in both instances is negligence. The conduct did not involve the deliberate infliction of harm.

The Commission agrees that there is a gap in the Code in relation to criminally negligent conduct. Accordingly, the Commission has concluded that it is necessary to extend the duty to exercise reasonable care and take reasonable precautions under s 266 of the Code. The Model Criminal Code contains a general duty provision (in addition to specific duties concerning children or where a special relationship exists). It is provided that an omission may constitute a physical element of an offence if the person failed to perform the following duty:

The duty to avoid or prevent danger to the life, safety or health of another person if the danger arises from an act of the person, from anything in the person's possession or control or from an undertaking of the person.<sup>134</sup>

The Commission is of the view that a similar provision should be enacted in the Code. The effect of this recommendation is to ensure that it is easier for the prosecution to prove criminal responsibility in cases where

death is caused by deliberate violence or deliberate harm than in cases where death is caused by negligence.<sup>135</sup>

### Recommendation 12

#### Duty in relation to dangerous conduct

That s 266 of the *Criminal Code* (WA) be replaced by the following provision:

#### 266. Duty of persons in relation to dangerous conduct

It is the duty of every person to use reasonable care and take reasonable precautions to avoid or prevent danger to the life, safety or health of another if the danger arises from an act of the person or from anything in the person's possession or control.

The Commission's recommendation to extend the duty in s 266 to cover all dangerous conduct means that the two categories of manslaughter under the Code will be distinguishable on the basis of the presence or otherwise of deliberate violence or the deliberate infliction of harm. All deaths caused by negligent conduct will require proof that there was a risk of death and a gross failure to exercise reasonable care in the circumstances. Deaths caused by deliberate violence or the deliberate infliction of harm will require proof that death was reasonably foreseeable.

## A SEPARATE OFFENCE FOR CAUSING DEATH BY NEGLIGENCE

Some law reform bodies have examined whether manslaughter by criminal negligence would be more appropriately categorised as a different offence.<sup>136</sup> The

133. Ibid [23].

134. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 156.

135. See Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.13] where it is explained that it is appropriate that criminal negligence requires satisfaction of a more difficult test in comparison to manslaughter caused by intentional violence.

136. See MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 155; Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary manslaughter*, Report No. 237 (1996) [5.17]–[5.34]. The Law Commission (England and Wales) recommended a new offence of 'killing by gross carelessness'; Law Reform Commission of Ireland, *Involuntary Manslaughter*, Consultation Paper No. 44 (2007) [5.127]–[5.137]. In its consultation paper the Law Reform Commission of Ireland sought submissions as to whether gross negligence manslaughter should be incorporated into a new category of negligent homicide. The Commission notes that in India criminal negligence is not sufficient to establish manslaughter and instead falls under a different and lesser offence: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India*, (Sydney: Federation Press, 1997) 16.

MCCOC recommended that manslaughter by criminal negligence should be classified as 'dangerous conduct causing death'.<sup>137</sup> This conclusion was reached on the basis that manslaughter should include killing with an intention to cause serious harm and recklessness as to causing serious harm.<sup>138</sup> Thus, in the absence of a separate offence of dangerous conduct causing death, manslaughter under the Model Criminal Code would have included deaths where the accused intended to cause serious harm or was reckless as to causing serious harm as well as criminal negligence. The MCCOC concluded that these categories could be significantly distinguished in terms of moral culpability.<sup>139</sup> Despite this conclusion it was nonetheless recommended that the maximum penalty for dangerous conduct causing death should be the same as the maximum penalty for manslaughter.<sup>140</sup>

The Commission does not consider that there is any need to exclude criminal negligence from the offence of manslaughter in Western Australia. The test for criminal negligence ensures that only extremely culpable negligence will suffice to establish criminal responsibility. Bearing this in mind the two categories of unintentional manslaughter are essentially comparable in terms of moral culpability. Any difference in culpability can be taken into account during sentencing because all sentencing dispositions are available for manslaughter.

It has recently been suggested that there should be an offence of 'dangerous conduct causing death' in addition to the offence of manslaughter.<sup>141</sup> A provision dealing with dangerous conduct previously existed in the Northern Territory. Section 154 of the Northern Territory Code provided, among other things, that a person who caused 'serious danger' to a person 'in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger' was guilty of an offence. If the

danger caused was death, the maximum penalty was 10 years' imprisonment.

This offence was repealed in December 2006.<sup>142</sup> Prior to its repeal, manslaughter under s 163 of the Northern Territory Code was defined as an unlawful killing that did not constitute murder. It was also provided under s 31(1) of the Northern Territory Code that a person is 'excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct'. Therefore, criminal responsibility for manslaughter in the Northern Territory was determined on a different basis than is currently the position in Western Australia. In the Northern Territory, an accused would be acquitted of manslaughter if the prosecution were unable to prove that he or she actually foresaw death but in Western Australia an acquittal will only result if the prosecution cannot prove that an ordinary person would not have foreseen death in the circumstances. In other words, it was more difficult to obtain a conviction for manslaughter in the Northern Territory. As a consequence, the offence of dangerous conduct causing death captured some cases that would already constitute manslaughter in Western Australia. Reforms were made to the law in the Northern Territory for precisely this reason. During parliamentary debates it was stated that offenders in the Northern Territory 'have not been held criminally responsible to the same degree as they would have been had they committed an identical act in another jurisdiction'.<sup>143</sup> The offence of manslaughter in the Northern Territory now provides that a person is guilty of manslaughter if he or she causes death and was negligent or reckless as to death<sup>144</sup> and s 31 of the Northern Territory Code is no longer applicable to determining criminal responsibility for manslaughter.<sup>145</sup> Accordingly, the Commission can see no merit in introducing such an offence in Western Australia.

137. MCCOC, *ibid* 155. The Commission emphasises that the MCCOC did not recommend a separate offence of dangerous driving causing death. Such conduct would fall within the scope of its proposed offence of dangerous conduct causing death. One reason given for the decision to introduce an offence of dangerous conduct causing death was that juries have been reluctant to convict negligent drivers of manslaughter. The Commission has concluded that the offence of dangerous driving causing death should remain in Western Australia: see Chapter 3, 'Dangerous Driving Causing Death'.

138. MCCOC, *ibid* 67–68.

139. *Ibid* 155.

140. *Ibid* 161. The maximum penalty recommended for both manslaughter and dangerous conduct causing death was 25 years' imprisonment.

141. In September 2007, following the case of *Becker* (District Court of Western Australia, 11 September 2007) it was reported that the Director of Public Prosecutions intended to examine the need for a separate offence of dangerous conduct causing death: Spencer B, 'Law Change Likely to Punish Fatal Violence', *The West Australian*, 13 September 2007, 7.

142. *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT).

143. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 June 2005 (Dr Toyne, Attorney General).

144. *Criminal Code* (NT) s 160.

145. *Criminal Code* (NT) s 43AA(1).

## Infanticide

Infanticide is the term used in law to describe the killing of an infant by its natural mother where the balance of her mind is disturbed as a consequence of childbirth. Only four Australian jurisdictions have a specific offence of infanticide: New South Wales, Victoria, Tasmania and Western Australia.<sup>1</sup> In each of these jurisdictions infanticide is both an offence and an alternative verdict to murder.<sup>2</sup> In jurisdictions without an offence of infanticide, a mother who kills her infant may be charged with murder, manslaughter or, where circumstances permit, concealment of birth. In some cases a decision may be taken not to prosecute an infanticidal mother. As discussed later in this section, this is a regular occurrence in cases of neonaticide (where an infant is killed within 24 hours of birth) where it may be difficult to prove that the child was born alive<sup>3</sup> or where other factors may make a conviction unlikely.<sup>4</sup>

### INFANTICIDE: A SOCIAL AND LEGISLATIVE HISTORY

The social and legal treatment of infant homicide has changed significantly over time. In pre-modern societies the lack of effective contraception and the high incidence of unwanted, disabled or ill children combined with conditions of poverty and disease meant that infant homicide was commonplace and socially accepted.<sup>5</sup> Indeed,

in many societies it was used as an overt means of population control.<sup>6</sup> In Europe, the increasing dominance of Christianity and the religious significance placed on human life from the moment of conception began slowly to change social attitudes toward infant homicide.<sup>7</sup> Eventually, infant homicide came to be treated as any other form of unlawful killing in the eyes of the law.<sup>8</sup> However, the social stigma of bearing an illegitimate child together with extreme physical and economic conditions meant that the practice of infant homicide remained widespread until relatively recently.<sup>9</sup>

The legal censure of infant homicide committed by mothers was formalised in a 1623 English statute which created a presumption that a woman who concealed the death of her child was guilty of the child's murder.<sup>10</sup> The Act applied only to concealment of deaths of illegitimate children. The strict wording of the statute meant that an unmarried mother would be found guilty of murder even if it could be medically proved that her child was stillborn or subsequently died of natural causes.<sup>11</sup> Avoiding a conviction required evidence from at least one witness that the child had not survived the birth.<sup>12</sup> It is perhaps trite to observe that most unmarried women of this era would seek to give birth to an illegitimate child in secret,<sup>13</sup> making it impossible to escape conviction (and consequently, the death penalty) should the child die.

1. *Crimes Act 1900* (NSW) s 22A; *Crimes Act 1958* (Vic) s 6; *Criminal Code* (Tas) s 165A; and *Criminal Code* (WA) s 281A. The offence also exists in a number of international jurisdictions including England, Canada and New Zealand.
2. There are small differences in the requirements of the offence of infanticide in different jurisdictions and these are discussed where relevant below.
3. As explained in Chapter 1, a charge of wilful murder, murder or manslaughter may only be made if the victim is a 'person capable of being killed' within the definition provided by the *Criminal Code* (WA) s 269.
4. Factors underlying a decision not to prosecute a woman for the killing of her infant child may include mercy; youth of the mother; difficulty of establishing the circumstances surrounding the death; insufficient evidence of a deliberate act or omission on the part of the mother; psychiatric evidence that may lead to an acquittal on the basis of mental impairment; and insufficient evidence of intent (where intent is required). For a detailed discussion, see below, 'The law of infanticide in practice'.
5. For a detailed history of the practice of child destruction, see Tooley M, *Abortion and Infanticide* (Oxford: Clarendon Press, 1983) 309–22. See also Williamson L, 'Infanticide: An anthropological analysis' in Kohl M (ed), *Infanticide and the Value of Life* (New York: Prometheus Books, 1978) 61; Osborne J, 'The Crime of Infanticide: Throwing out the baby with the bathwater' (1987) 6 *Canadian Journal of Family Law* 47, 49; and McSherry B, 'The Return of the Raging Hormones Theory: Premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) 15 *Sydney Law Review* 292, 300–303.
6. Michael Tooley lists a number of cultures where infanticide was a common means of population control including among some pre-settlement Indigenous populations in Australia, North America and the South Sea Islands and at various stages of history in China, India, Greece, Rome and in some African and Arab cultures: Tooley, *ibid* 315–17.
7. *Ibid* 318–19.
8. *Ibid*. Nigel Walker observes that in medieval Europe, infant homicide was 'treated as a particularly heinous form of murder and [the law] prescribed hideous deaths for the mother': Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 126.
9. New South Wales Law Reform Commission (NSWLRC), *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No. 31 (1993) 117. Michael Tooley argues that until at least the 20th century it 'was very common to destroy infants that were deformed or diseased or illegitimate or regarded as ill omens. But the practice was not restricted to such cases. In many societies, custom determined how many children a family should have and infanticide was enjoined as a means of achieving the desired family size': Tooley, *ibid* 315.
10. *An Act to Prevent the Destroying and Murthering of Bastard Children* 1623 21 Jac 1 c 27. According to Seabourne Davies this was 'a reversion of the ordinary common law presumption of dead-birth': Davies DS, 'Child-Killing in English Law' (1937) 1 *Modern Law Review* 203, 214. It should be noted that because of an anomaly in the 17th century English citation system this Act is often wrongly cited by commentators as 1624.
11. See Lansdowne R, 'Infanticide: Psychiatrists in the plea bargaining process' (1990) 16 *Monash University Law Review* 41, 43.
12. *Ibid*.
13. A point acknowledged by the wording of the Act itself which refers to the avoidance of shame in regard to the delivery of 'bastard children'. Wilczynski notes that unmarried mothers were often servant girls 'seduced or raped by her master or his associates': Wilczynski A, *Child Homicide* (London: Oxford University Press, 1997) 150. The consequences of pregnancy for servant girls was likely to be immediate dismissal with little chance of future employment: Osborne JA, 'The Crime of Infanticide: Throwing out the baby with the bathwater' (1987) 6 *Canadian Journal of Family Law* 47, 49–50.

The harshness of the 1623 statute was ultimately its downfall; juries were sensitive to the social stigma that attached to illegitimate birth and the severe poverty experienced by unmarried mothers and regularly refused to convict.<sup>14</sup> The reality of high infant mortality rates from natural causes must also have played a part in juries' reluctance to convict on a capital charge where the cause of death of the child was unknown. The presumption of live birth established by the 1623 Act was 'vigorously [and publicly] challenged'<sup>15</sup> by the medical profession, giving increasing reason for juries and judges to accept counsel's arguments against the application of the law. In 1803 the statute was repealed and replaced by an Act which restored the presumption of a 'dead-birth'<sup>16</sup> (requiring evidence that the child had been born alive in order to convict for murder) and made concealment of birth an alternative verdict to murder with a maximum penalty of two years' imprisonment.<sup>17</sup>

The difficulty of proving that a deceased child was born alive, where the accused was often the only source of evidence regarding the circumstances surrounding the death, allowed juries to continue to exercise compassion for these mothers. Infanticidal women were routinely acquitted or otherwise convicted of the lesser alternative offence of concealment.<sup>18</sup> The 1866 *Report of the Capital Punishment Commission* documents the judiciary's frustration with the gulf between the law and public opinion in relation to infanticide and the mockery of the judicial process that resulted.

It is in vain that judges lay down the law and point out the strength of the evidence, as they are bound to do; juries

wholly disregard them and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish ... Juries will not convict while infanticide is punishable capitally.<sup>19</sup>

Attempts by law reformers during the late 18th and early 19th centuries to provide for a lesser offence or penalty for cases of infanticide were frustrated in the parliamentary process<sup>20</sup> and the practice of infanticide apparently continued unabated.<sup>21</sup> Eventually the English Parliament passed the *Infanticide Act 1922* (UK), which created a separate non-capital offence of infanticide, punishable as for manslaughter.

Although motivated by the social and economic factors that characteristically swayed jury verdicts, the 1922 Act did not adopt those concerns as the basis for treating infanticidal women more leniently than murderers when often all the elements of murder (and in particular an intention to kill) were present. Instead, the 1922 Act legitimised the lenient treatment of these women by adopting a biological rationale,<sup>22</sup> which required that the mother's 'balance of mind was disturbed' as a consequence of childbirth.<sup>23</sup> The Act was deliberately drafted to apply only to mothers who killed their 'newly born' children.<sup>24</sup> In 1938, following a Court of Appeal decision that a 35-day-old baby was not young enough to qualify as 'newly born',<sup>25</sup> the offence of infanticide was extended to apply to children less than 12 months of age. To justify this extension, the 1938 Act added 'lactation' as a further basis upon which the mother's balance of mind may have been disturbed. Although the biological rationale underlying infanticide and in particular the connection between lactation and mental

14. Osborne, *ibid* 52. See also the discussion of stigma and poverty associated with 'out-of-wedlock' births and how this affected convictions for neonaticide in 19th century America in Oberman M, 'Understanding Infanticide in Context: Mothers who kill 1870–1930 and today' (2002) 92 *Journal of Criminal Law and Criminology* 707, 722–28; and Australia in Summerling P, 'The Darker Side of Motherhood: Abortion and infanticide in South Australia 1870–1910' (1985) 13 *Journal of the Historical Society of South Australia* 111.
15. Jackson M, 'Infanticide: Historical perspectives' [1996] *New Law Journal* 416, 417.
16. Davies DS, 'Child-Killing in English Law' (1937) 1(3) *Modern Law Review* 203, 214.
17. *Lord Ellenborough's Act*, 42 Geo 3 c 58 (1803) ss 1–4. It should be noted that the alternative offence of concealment of birth was again limited to mothers of illegitimate children. According to Walker, if the child was legitimate 'it was less easy to find a rational motive for [the act of killing or concealment of death] and the defence of temporary insanity was more likely to be accepted': Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 127. The offence was later extended to all mothers by the *Offences Against the Person Act 1828* (UK).
18. Where the evidence left no other finding but guilt, the sentence of death was routinely commuted to life imprisonment in cases of infanticide. Seaborne Davies notes that between 1849 and 1864 there were 5,000 coroner's inquests per year on young children, yet only 39 women were convicted of murder and in each of these cases the death sentence was commuted to life: Davies DS, 'Child-Killing in English Law' (1937) 1(3) *The Modern Law Review* 203, 218.
19. Minutes of Evidence of Justice Keating before the Capital Punishment Commission (England), *Report of the Capital Punishment Commission* (1866) 625, as cited in Davies, *ibid* 219.
20. Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 129–30.
21. Davies DS, 'Child-Killing in English Law' (1937) 1(3) *Modern Law Review* 203, 223. Many commentators note the prevalence of baby-farming and 'burial clubs' during the 19th century and that the 1803 Act had been interpreted as allowing the commission of infanticide. See, for example, O'Donovan K, 'The Medicalisation of Infanticide' [1984] *Criminal Law Review* 259, 260.
22. O'Donovan argues that 'medical theory provided a convenient reason for changing the law': O'Donovan, *ibid* 261.
23. The Act's drafter, Lord Birkenhead, admitted that this phrase had no direct psychiatric reference but was deliberately chosen to allow *de novo* interpretation by the judiciary: Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 131.
24. *Ibid*.
25. *R v O'Donoghue* (1927) 20 Crim App R 132.

disorder have been widely discredited, the 1938 Act provides the basis for the offence of infanticide in Western Australia today.

## THE CURRENT LAW IN WESTERN AUSTRALIA

The offence of infanticide was introduced into the *Criminal Code* (WA) (the Code) in 1986.<sup>26</sup> Infanticide is established as an offence of unlawful killing in s 277 of the Code and defined in s 281A as follows:

- (1) When a woman or girl who unlawfully kills her child under circumstances which, but for this section, would constitute wilful murder or murder, does the act which causes death when the balance of her mind is disturbed because she is not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child, she is guilty of infanticide only.

Alternative offence: ss 283, 290 or 291.

- (2) In this section 'child' means a child under the age of 12 months.

The penalty for infanticide (or an attempt to commit infanticide)<sup>27</sup> in Western Australia is a maximum of seven years' imprisonment.<sup>28</sup>

### Elements of the offence

In order to satisfy the elements of the offence of infanticide in Western Australia the accused must have caused, whether directly or indirectly,<sup>29</sup> the death of her biological child under the age of 12 months.<sup>30</sup> The accused must have intended to kill or cause grievous bodily harm to the child<sup>31</sup> and, at the time of the killing, the balance of her

mind must have been disturbed either because she had not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child.

As with all offences under the Code, the onus is on the prosecution to prove all elements of the offence beyond reasonable doubt. From the above it can readily be seen that infanticide is a homicide offence like no other. Other homicide offences, such as wilful murder and murder, only require the prosecution to prove elements of conduct (the objective act or omission causing the death) and intention (the subjective intention to kill or cause grievous bodily harm).<sup>32</sup> For manslaughter, the conduct element is the only element that must be proven by the prosecution. In contrast, in order for the offence of infanticide to be made out, the prosecution must not only prove the elements of conduct and intention, but also of relationship between the victim and the accused and of a specific mental imbalance afflicting the accused at the time of the offence.<sup>33</sup> The latter is a unique feature: as Jennifer Bargaen has observed, 'no other offence is defined in such a way as to incorporate mental abnormality as an element'.<sup>34</sup>

## CRITICISMS OF THE OFFENCE

### Biological rationale

As set out above, the offence of infanticide in Western Australia requires that, at the time of the killing, the accused's mind was disturbed either because she had not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child. This reflects a broader and generally

26. *Criminal Law Amendment Act 1986* (WA) ss 7 & 8; assented to 10 December 1986. Western Australia was the last Australian jurisdiction to introduce a special offence of infanticide and did so on the recommendation of then Crown Counsel, Michael Murray: Murray MJ, *The Criminal Code: A general review* (1983) 180–81.

27. *Criminal Code* (WA) s 283. The Commission has learned of two cases of attempted infanticide in Western Australia. The first involved a 14-year-old Aboriginal girl who had concealed her 'wrong-skin' pregnancy from her family and had given birth unattended and outside. The birth was an extremely difficult and painful breech birth. In an attempt to quieten the crying child, the girl cut its throat with the same broken bottle she had used to sever the umbilical cord. She placed the baby in a plastic bag under some spinifex, but it was later found by family members and survived. The girl was given a two-year intensive youth supervision order with counselling and treatment conditions. The second case involved a mother in her late 20s who attempted to stop her infant breathing. The trial resulted in a hung jury and a *nolle prosequi* was subsequently entered.

28. *Criminal Code* (WA) s 287A. In New South Wales and Tasmania the penalty for infanticide is the same as for manslaughter, while in Victoria the penalty is five years' imprisonment. See *Crimes Act 1900* (NSW) s 22A; *Criminal Code Act 1924* (Tas) ss 165A, 389(3); *Crimes Act 1958* (Vic) s 6. It is noted that the Murray Review recommended that the penalty for infanticide in Western Australia should be a maximum of life imprisonment: Murray MJ, *The Criminal Code: A general review* (1983) 181. Parliamentary debates at the time of the introduction of the offence suggest that the maximum penalty of seven years' imprisonment was a compromise between a 10 year maximum suggested by the Law Society and a five year maximum suggested by the Criminal Lawyers' Association.

29. *Criminal Code* (WA) s 270. See also discussion of causation in Chapter 1, above.

30. Where a mother (or father) kills a child over the specified age, it is known as 'filicide'. These cases are treated under the law as normal homicides.

31. Only the Western Australian and Victorian provisions specify a mental element required to establish infanticide. Under s 281A the accused must possess the mental element required for either wilful murder or murder; that is, an intention to cause death or do grievous bodily harm.

32. For a full description of these elements in the specific context of wilful murder or murder in Western Australia see Chapter 2, above. In addition to proving these elements beyond reasonable doubt, the prosecution must also negate any defence that is open on the evidence.

33. It should be noted that no causal connection between the act of killing and the mental imbalance is required, merely a temporal connection.

34. Bargaen JJ, 'Infanticide' in *The Laws of Australia* (Melbourne: Law Book Company, 1992) 241, 248.

accepted criminal law principle which maintains that a person who commits a crime while suffering from a serious mental impairment should not always be held fully responsible for his or her actions.<sup>35</sup> However, unlike other mental impairment defences,<sup>36</sup> infanticide does not require a causal connection between the act of killing and the mental impairment. The accused can intentionally murder her baby while in complete control of her actions with the knowledge that what she is doing is wrong, and still take advantage of the significantly lesser penalty provided by infanticide, so long as there is evidence that the balance of her mind was disturbed by reason of childbirth or lactation at the time of the killing. This creates, as Walker argues, a virtual presumption that any mother who kills her child in its first year of life is not fully criminally responsible for her actions by reason of mental illness.<sup>37</sup> While the degree of mental imbalance required to satisfy the offence of infanticide is not specified, it is clear that a very slight disturbance of mind may qualify if it can be biologically linked to childbirth or lactation.<sup>38</sup>

There are three mental conditions with an alleged connection to childbirth: postpartum blues, postpartum depression and puerperal psychosis. It has been reported that between 25 and 85 per cent of mothers (depending on diagnostic standards) experience postpartum or baby 'blues' with symptoms ranging from irritability to anxiety.<sup>39</sup> This condition usually begins within a few days of giving

birth and may continue for up to two weeks. Between five and 20 per cent of mothers experience postpartum depression: a type of reactive depression characterised by fatigue, loss of appetite, guilt and suicidal thoughts.<sup>40</sup> This condition usually emerges within the first six months of giving birth. However, studies show that the incidence and quality of blues and depression are no more pronounced following childbirth than in the general population.<sup>41</sup> These conditions are usually associated with lack of sleep, adjustment to new circumstances and general stress.<sup>42</sup> While each of these factors may follow childbirth, they would rarely satisfy the legislative requirement that biologically links the disturbance of mind to 'the effect of giving birth to the child'.<sup>43</sup>

A very small percentage of mothers (less than a quarter of one per cent) experience puerperal psychosis,<sup>44</sup> usually within the first 30 days of giving birth.<sup>45</sup> Puerperal psychosis is the most severe postpartum psychiatric illness,<sup>46</sup> and is typically characterised by visual or auditory hallucinations, delusions, severe depression and thought disorder.<sup>47</sup> However, no official diagnosis of puerperal psychosis exists<sup>48</sup> because it lacks sufficient unique attributes to justify a diagnosis separate to that of other psychoses which display similar symptomatology.<sup>49</sup> According to Anne Buist—an Australian psychiatrist and professor involved in postpartum research—'despite considerable research interest in the aetiology of postpartum psychiatric disorders, studies have

35. See generally Chapter 5, below.

36. Such as the defence of insanity in Western Australia which requires that the accused's capacity to understand what he was doing, or to know the wrongfulness of his actions, or to control his actions, is fully impaired by a relevant mental illness. In some other jurisdictions, such as New South Wales and Queensland, the partial defence of diminished responsibility can reduce a charge of murder to manslaughter where the accused's capacity is substantially (rather than fully) impaired by mental illness or abnormality of mind. These defences are discussed in detail in Chapter 5, below.

37. Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 135.

38. Wilczynski has observed in relation to her English study that 'lawyers and psychiatrists not only take a very liberal approach to the degree of mental imbalance required for infanticide, but to all other aspects of the definition also': Wilczynski A, *Child Homicide* (London: Oxford University Press, 1997) 158. It should be noted that the very rare use of infanticide in Australian jurisdictions means that there 'has been very little occasion for the elements of the offence to be tested judicially': Bargen JJ, 'Infanticide' in *The Laws of Australia* (Melbourne: Law Book Company, 1992) 241, 245.

39. Baby blues is probably best described as a mild adjustment disorder: Manchester J, 'Beyond Accommodation: Reconstructing the insanity defense to provide an adequate remedy for postpartum psychotic women' (2003) 93 *Journal of Criminal Law and Criminology* 713, 719.

40. *Ibid* 719–20.

41. See discussion in Maier-Katkin D & Ogle R, 'A Rationale for Infanticide Laws' [1993] *Criminal Law Review* 903, 906.

42. McSherry B, 'The Return of the Raging Hormones Theory: Premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) 15 *Sydney Law Review* 292, 293.

43. Further, there is no evidence that these conditions affect cognition or volition; but, as noted above, the offence of infanticide does not require that the accused's cognition or volition be impaired: *ibid* 307–308.

44. Manchester J, 'Beyond Accommodation: Reconstructing the insanity defense to provide an adequate remedy for postpartum psychotic women' (2003) 93 *Journal of Criminal Law and Criminology* 713, 720.

45. Kendall RE, Chalmers JC & Platz C, 'Epidemiology of Puerperal Psychoses' (1987) 150 *British Journal of Psychiatry* 662.

46. Maier-Katkin D & Ogle R, 'A Rationale for Infanticide Laws' [1993] *Criminal Law Review* 903, 906.

47. Manchester J, 'Beyond Accommodation: Reconstructing the insanity defense to provide an adequate remedy for postpartum psychotic women' (2003) 93 *Journal of Criminal Law and Criminology* 713, 720.

48. Maier-Katkin D & Ogle R, 'A Rationale for Infanticide Laws' [1993] *Criminal Law Review* 903, 908; Law Commission, *A New Homicide Act for England and Wales*, Consultation Paper No. 177 (November 2005) [9.29].

49. In other words, it is the timing of the diagnosis (during the puerperium), rather than any specific symptom, which invites identification as 'puerperal psychosis'. The puerperium is the period immediately after birth and continuing for approximately six-weeks of the birth while the mother's internal organs return to their pre-pregnancy state: see Manchester J, 'Beyond Accommodation: Reconstructing the insanity defense to provide an adequate remedy for postpartum psychotic women' (2003) 93 *The Journal of Criminal Law and Criminology* 713, 722; Wilczynski A, *Child Homicide* (London: Oxford University Press, 1997) 156; McSherry B, 'The Return of the Raging Hormones Theory: Premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) 15 *Sydney Law Review* 292, 295.

failed to show a conclusive link with *any* biological factors.<sup>50</sup> It is now generally accepted that puerperal psychoses are no different from other psychoses, and that childbirth is simply a precipitating, rather than causal, factor.<sup>51</sup> Indeed, studies reveal that women who develop psychosis following childbirth often have some history of non-puerperal psychiatric illness.<sup>52</sup> While the link between childbirth and mental imbalance required by infanticide remains elusive, this suggests that psychosis diagnosed following childbirth would qualify as an 'underlying pathological infirmity of the mind'<sup>53</sup> and would therefore meet the criteria for mental illness under the laws relating to the defence of insanity.<sup>54</sup>

The artificial biological relationship between mental impairment and childbirth required by the offence of infanticide has been widely criticised, not only for distorting the reality of most infanticide cases, but also for encouraging medical experts to distort their diagnoses and testimony in order for the elements of the offence to be satisfied.<sup>55</sup> It is important to note that filicides (child killings committed by a parent) are most often motivated by factors unrelated to mental illness, including social and economic conditions, lifestyle concerns, unwanted pregnancy, marital stress, jealousy or spousal revenge.<sup>56</sup> This raises two questions posed in the Commission's Issues Paper: should the offence of infanticide include social, psychological and economic factors causing a mental

imbalance; and should it be extended to other carers, such as fathers or step-parents who kill their children or guardians in the same conditions?<sup>57</sup> These questions are closely related to the perception that infanticide is gender-biased. This criticism is discussed below.

## Gender-bias

As Judith Osborne has observed, 'universal application is a fundamental principle of criminal law' and laws which provide for 'differential treatment of individuals or groups in terms of criminal liability' should be subjected to close scrutiny.<sup>58</sup> There are some laws affecting criminal liability, such as mental incapacity by reason of youth or mental illness that bear up under such scrutiny, while others, such as infanticide, do not.

One of the Commission's guiding principles for this reference is that there should be no offences or defences that apply only to specific groups of people on the basis of gender or race.<sup>59</sup> Infanticide is clearly an offence that is gender-biased. Only a natural mother can rely upon the offence (or alternative verdict) of infanticide to reduce her criminal culpability for the intentional killing of her child. Despite data showing that at least half of all filicides are committed by men, a father cannot rely upon infanticide even where the act is 'similar in nature' to those where women have relied upon infanticide.<sup>60</sup> According to Ania Wilczynski, the

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50. Buist A, 'Understanding Postpartum Psychiatric Disorders' (1998) 39(8) *Current Therapeutics* 37, 38 (emphasis added). Bala Mahendra notes that 'the experience of clinicians is that there are usually factors other than biological which have an aetiological role in precipitating any psychological difficulties which follow birth': Mahendra B, 'Whither Infanticide?' [2006] *New Law Journal* 664, 664. See also Wilczynski, *ibid*; Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Final Report (2004) [6.37]; McSherry, *ibid*.
51. Report of the Committee on Mentally Abnormal Offenders, Cmnd. 6244 (1975) 245; O'Donovan K, 'The Medicalisation of Infanticide' [1984] *Criminal Law Review* 259, 262. Walker suggests that the psychological stress of childbirth may 'trigger hitherto latent tendencies to one or other of the common psychoses or neuroses'. Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 125.
52. VLRC, *Defences to Homicide*, Final Report (2004) [6.33]. According to Kendall, Chalmers and Platz, factors such as 'being unmarried, having a first baby, Caesarian section and perinatal death' also contribute to psychiatric issues in new mothers and those with a history of manic or depressive disorders are most at risk of psychiatric admission following childbirth. Kendall RE, Chalmers JC & Platz C, 'Epidemiology of Puerperal Psychoses' (1987) 150 *British Journal of Psychiatry* 662, 672.
53. Rather than being linked exclusively to childbirth which may discount puerperal psychosis as 'the reaction of a healthy mind to extraordinary stimuli' (that is, childbirth): *Criminal Code* (WA) s 1 'mental illness – definition'. It is worth noting here that postpartum depression, which is a reactive disorder, would probably not fall under the definition of mental illness and the defence of insanity, unless it was diagnosed in the accused as an endogenous disorder. See McSherry B, 'The Return of the Raging Hormones Theory: Premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) 15 *Sydney Law Review* 292, 294, 307.
54. See *Criminal Code* (WA) ss 1 & 27. See also Dean PJ, 'Child Homicide and Infanticide in New Zealand' (2004) 27 *International Journal of Law and Psychiatry* 339, 345.
55. Lansdowne R, 'Infanticide: Psychiatrists in the plea bargaining process' (1990) 16 *Monash University Law Review* 41, 54.
56. Dean, *ibid*. Wilczynski A, 'Why Do Parents Kill Their Children?' [1994] *Criminology Australia* 12, 13; Wilczynski A, 'Mad or Bad: Child-killers, gender and the courts' (1997) 37 *British Journal of Criminology* 419, 428–29; McSherry B, 'The Return of the Raging Hormones Theory: Premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) 15 *Sydney Law Review* 292, 303. A study of child killings in New South Wales showed that while violence against children could 'not be attributed to any single factor ... stress, and different ways of handling that stress, were of paramount importance in setting the scene for child homicide': Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 148.
57. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 4, Questions 5 and 6.
58. Osborne JA, 'The Crime of Infanticide: Throwing out the baby with the bathwater' (1987) 6 *Canadian Journal of Family Law* 47, 47.
59. See further Chapter 1, above. One submission specifically recommended that any reforms be expressed in gender-neutral terms: Women's Law Centre, Submission No. 49 (7 August 2006) 6.
60. This data was given in a study conducted in England covering the period 1982 to 1989: Wilczynski A & Morris A, 'Parents Who Kill Their Children' [1993] *Criminal Law Review* 31, 33. A similar distribution of data was found in a New South Wales study covering the period 1968–1981: Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 124.

bias in favour of women in relation to acts of filicide is 'apparent at all stages of the criminal justice process':<sup>61</sup> from the initial decision to prosecute,<sup>62</sup> through to the granting of bail,<sup>63</sup> rates of conviction, and dispositions upon conviction.<sup>64</sup>

In its Issues Paper, the Commission posed the question whether, in view of the widely criticised rationale linking childbirth and mental disturbance, the benefits of the offence of infanticide should be extended to other carers, such as fathers and step-parents.<sup>65</sup> This would resolve the biological and gender-bias underpinning the current formulation of the offence. Like the Victorian Law Reform Commission (VLRC) who examined this issue in 2004,<sup>66</sup> the Commission found that there was strong opposition to extending the offence in this way.<sup>67</sup> Many submissions to the current reference pointed to the unique nature of the mother-child relationship as a reason for limiting the offence to natural mothers.<sup>68</sup>

The Commission posed the further question whether, in light of the broader motivations for child killing and the lack of evidence of a biological link between childbirth and mental disturbance, the offence of infanticide should be extended to include social, psychological and economic factors as the basis for the mental disturbance. In its final report the VLRC recommended that 'the offence of infanticide should take these complexities into account' and that 'the nexus between the disturbance of mind

and the act of childbirth and lactation' should be removed from the legislative formulation.<sup>69</sup> However, submissions to the present reference again showed strong opposition to the extension of the offence, with only four submissions supporting a reduction in criminal responsibility based on mental disturbance motivated by factors other than childbirth.<sup>70</sup> The Law Society of Western Australia observed that if infanticide was 'broadened to include social, psychological and economic factors ... then it would seem unfair not to include the child's father or immediate carer'.<sup>71</sup> The Commission agrees with this observation, but notes that no other jurisdiction has extended the application of the offence of infanticide beyond the natural mother and, in view of submissions to this and other inquiries, such extension would be unlikely to receive public support.

### Arbitrariness of the age element

A further feature of infanticide is that the victim must be less than a specified age. The age limit for infanticide in different jurisdictions ranges from newborn babies in Malaysia<sup>72</sup> to children up to 10 years old in New Zealand.<sup>73</sup> In Western Australia the age specified in the legislation is 12 months.<sup>74</sup> The age limit is said to be arbitrary because a mother who otherwise satisfies the elements of infanticide, including a mother with a mental condition that is genuinely consequent upon childbirth, 'cannot claim its protection if the child she killed was one day too old'.<sup>75</sup>

61. Wilczynski A, 'Mad or Bad: Child-killers, gender and the courts' (1997) 37 *British Journal of Criminology* 419, 422. Wilczynski asserts that her findings are mirrored in other studies undertaken in England, Australia, Canada, America, Denmark and Sweden: at 424.
62. In the Wilczynski study 90 per cent of men were prosecuted, compared to 46.4 per cent of women. Further, psychiatric evidence was more readily available to women prior to the decision to prosecute: *ibid* 422. For further discussion on factors influencing the decision not to prosecute see below, 'The law of infanticide in practice'.
63. In the Wilczynski study 50 per cent of women were granted bail compared to none of the men: *ibid*.
64. In the Wilczynski study 87.5 per cent of filicidal women convicted at trial received psychiatric disposals such as hospital orders or non-custodial orders. In contrast 84.2 per cent of filicidal men received custodial orders. Where psychiatric issues were in play males were more likely to be given 'coercive' and indeterminate hospital custody orders: *ibid* 422–23.
65. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 4, Question 6.
66. VLRC, *Defences to Homicide*, Final Report (2004) [6.30].
67. Only three of 17 submissions on this matter thought that the extension of the offence to other carers was appropriate, while two submissions supported an alternative partial defence of diminished responsibility which could cover filicidal males.
68. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Festival of Light Australia, Submission No. 16 (12 June 2006) 2–3; Office for Women's Policy, Department for Community Development, Submission No. 44 (17 July 2006) 2; Aboriginal Legal Service of Western Australia, Submission No. 45 (21 July 2006) 2; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 5; Office of the Director of Public Prosecutions, Submission No. 51 (8 August 2006) 4.
69. VLRC, *Defences to Homicide*, Final Report (2004) [6.37] recommendation 48.
70. It should be noted that several submissions which supported retention of the current formulation nonetheless questioned the scientific link between the mental disturbance and childbirth. Two submissions which supported abolition of infanticide did so on the basis of introducing the partial defence of diminished responsibility, which could reduce criminal responsibility for filicide on the basis of a mental disturbance caused by factors other than childbirth.
71. The Law Society of Western Australia, Submission No. 37 (4 July 2006) 4. The Law Society was supportive of extending the offence of infanticide to include other carers and other factors.
72. *Penal Code* (Malaysia) s 309A.
73. *Crimes Act 1961* (NZ) s 178.
74. The age of 12 months is also specified in the New South Wales and Tasmanian infanticide provisions. Victoria increased the age limit for the application of infanticide to two years in 2004, following a recommendation of the Victorian Law Reform Commission: VLRC, *Defences to Homicide*, Final Report (2004) recommendation 49.
75. Maier-Katkin D & Ogle R, 'A Rationale for Infanticide Laws' [1993] *Criminal Law Review* 903, 913. Further, as Jennifer Barga has observed, '[i]t may be entirely fortuitous whether or not a mother, in a distraught condition, happened to kill her recently born baby or its older sibling': Barga JJ, 'Infanticide' in *The Laws of Australia* (Melbourne: Law Book Company, 1992) 241, 247.

The VLRC considered this matter in its 2004 report on defences to homicide. It recommended that the age element of infanticide in that jurisdiction be increased to cover the killing of children under two years of age. The increase was justified on the basis that the majority of filicides committed by mothers occurred in the first two years after birth.<sup>76</sup> However, an increase in age limit of the child can only be genuinely justified if the legislative link between the mental disturbance and childbirth or lactation is removed or if some other factor underpinning the mental disturbance is added. In this regard the VLRC has followed the lead of New Zealand by declaring that the disturbance of the mind may result from 'any disorder consequent on childbirth'.<sup>77</sup> This would include adjustment disorders and depressive illnesses caused by social, economic or other environmental factors.

It is not unusual that women who attempt or commit suicide will kill not only their last-born child, but all their children.<sup>78</sup> In its Issues Paper the Commission asked whether infanticide should be able to be relied upon where the mother had killed older children at the same time as her infant child.<sup>79</sup> This would prevent the anomaly of a mother being charged with murder for the older children and infanticide for the child under 12 months where the deaths occurred as a result of a mental disorder apparently consequent on childbirth. The Commission received seven submissions that directly addressed this question, with only two that entertained the possibility of an extension of this nature. The Commission notes that while the VLRC recommended that infanticide be extended to other children killed at the same time as the last born child,<sup>80</sup> this recommendation met with considerable opposition and was ultimately not incorporated as part of the amendments adopted by Parliament.

## INFANTICIDE TODAY

Unlike their pre-20th century counterparts, contemporary women generally have various options—such as legal abortion—to deal with an unwanted pregnancy and many more contraceptive means of preventing pregnancy.<sup>81</sup> The social stigma attached to unmarried mothers is also less evident and governments in Australia recognise that single mothers will often require financial support. Further, new mothers are closely monitored by healthcare professionals who are alert to symptoms of post-natal depression and readily refer at-risk women for psychological counselling. There is no question that these developments have lowered the rate of maternal filicide motivated by social and economic concerns (and by post-natal depression which is often exacerbated by these factors). Nonetheless, infant homicides still occur and studies show that children are most vulnerable as victims of homicide before their first birthday.<sup>82</sup>

### Categories of infant homicide

A review of modern psychiatric and legal literature suggests that child homicides committed by natural mothers will generally fall into one of the following categories:<sup>83</sup>

- **Unintentional killing** – where the mother temporarily loses control, usually in response to a stimulus from the child, such as prolonged crying.<sup>84</sup> The killing is unintentional, impulsive and is often accompanied by extreme stress conditions including emotional, financial and physical stress, sleep-deprivation and reactive depression.<sup>85</sup>
- **Psychotic response killing** – where the mother is mentally ill and often suffering from auditory and visual

76. VLRC, *Defences to Homicide*, Final Report (2004) [6.39] recommendation 49. This recommendation has since been implemented by the Victorian Parliament.

77. *Crimes Act 1958* (Vic) s 6. It should be noted that the New Zealand provision also requires a judgment to be made whether in light of the mental imbalance the woman should be held fully responsible for the killing: *Crimes Act 1961* (NZ) s 178(1).

78. Alder C & Polk K, *Child Victims of Homicide* (Cambridge: Cambridge University Press, 2001) 47.

79. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 4, Question 8.

80. VLRC, *Defences to Homicide*, Final Report (2004) [6.41] recommendation 49.

81. In these circumstances, it has been argued that infanticide can no longer be seen as a 'rational solution to women's difficulties': Allen JA, *Sex and Secrets: Crimes Involving Australian Women since 1880* (Melbourne: Oxford University Press, 1990) 246.

82. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 124. Based on a study of homicides during the period 1968–1981 in New South Wales.

83. These categories are largely motive-based but also show specific features of child killings. For further discussion of various methods and means of classification see d'Orban PT, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560; Resnick PJ, 'Child Murder by Parents: A psychiatric review of filicide' (1969) 126 *American Journal of Psychiatry* 325; Wallace, *ibid* 129–30.

84. See, for example, *Cooper* [2001] NSWSC 769 where the accused smothered her seven-month-old child when it would not stop crying. She had suffered psychotic depression following the birth and pleaded guilty to infanticide. She was released on a four-year bond. See also *Azzopardi* [2004] VSC 509 where the accused, suffering severe post-natal depression, pushed her one-month-old baby under the water while bathing her claiming that she did not intend to hurt her, 'just to give her a little fright'. She pleaded guilty to infanticide and released on an 18-month community-based order with psychiatric treatment.

85. Resnick PJ, 'Child Murder by Parents: A psychiatric review of filicide' (1969) 126 *American Journal of Psychiatry* 325. This category is sometimes labelled 'battering mothers': d'Orban PT, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560, 561.

hallucinations or delusions. Most mothers in this category will have received some previous treatment (including institutional care) for their mental condition or otherwise have a history of mental illness.<sup>86</sup> Mothers in such cases will often also attempt or commit suicide.<sup>87</sup>

- **Spouse revenge killing** – where aggression or retaliation against a spouse is directed against the child. These cases often also show a history of psychiatric illness and domestic violence.<sup>88</sup>
- **Altruistic killing** – where the child is killed in an act of mercy, such as with a sickly or disabled child<sup>89</sup> or where the mother believes that she is saving the child from some terrible fate (such as sexual or violent abuse).<sup>90</sup> Mothers who kill in these circumstances may also be suffering from a significant mental illness and often attempt or commit suicide.<sup>91</sup>
- **Neglect killing** – where the mother kills an unwanted child by passive neglect. Neglect cases include those where a mother deprives a child of adequate health care or nutrition.<sup>92</sup>
- **Aggression killing** – where the mother subjects the child to a serious fatal assault. In aggression cases, the victim may have been subjected to previous non-fatal

violence, such as battering or shaking by the mother or another carer.<sup>93</sup> In most studies, battering cases make up the bulk of child killings committed by a parent (including by fathers).<sup>94</sup>

- **Neonaticide** – where the mother kills her child within 24 hours of birth.<sup>95</sup> Neonaticide is usually motivated by social shame, fear of family reaction or repercussions, financial or lifestyle concerns. In cases of neonaticide the mother is typically young, unmarried and in denial of the pregnancy and birth or otherwise seeks to conceal it.<sup>96</sup>

Many child homicides committed by natural mothers fall into the last category.<sup>97</sup> Alison Wallace argues that there is a 'general recognition amongst researchers that special circumstances surround neonaticide and that it should be distinguished from other types of child killing'.<sup>98</sup> Neonaticide (or the killing of newborns) is the type of child killing that the offence of infanticide was originally established to address.<sup>99</sup> In practice, however, neonaticide presents legal and forensic problems which make the prosecution of offenders very difficult. Some of these problems also extend to the killing of older infants. These issues are discussed below.

86. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 143. In the Wallace study in New South Wales, all women who killed their children in circumstances of childbirth depression had received treatment for the relevant mental condition.

87. d'Orban PT, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560, 561.

88. Ibid 562. Spousal revenge appears to be a more typical filicidal motivation of males. See Wilczynski A, 'Why do Parents Kill Their Children?' [1994] *Criminology Australia* 12, 13.

89. See, for example, *Wang* [2000] NSWSC 447 (where the child, aged 23 months, was severely disabled) and *R v Dawes* [2004] NSWCCA 363 (where the child, aged 10 years, was autistic). In each case the mother attempted suicide. Other factors including acute depressive illnesses contributed to the motivation of these filicidal mothers.

90. See, for example, *Richards* [2002] NSWSC 415 (where the mother suffered delusions that pederasts were assaulting her three children) and *Dawney* [1999] NSWSC 944 (where the mother harboured delusions that the father of the child was stalking her and would kill the child). Again, in each case, the mother attempted suicide.

91. In some cases, the mother's primary motive is to commit suicide for reasons not associated with the child and her unwillingness to leave her child behind is the reason for child killing. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 146. Alder C & Baker J, 'Maternal Filicide: More than one story to be told' (1997) 9(2) *Women and Criminal Justice* 15, 24–28. See, for example *Li* [2000] NSWSC 1088 where the accused, who was suffering from acute endogenous depression, intended to commit suicide and killed her young child because she did not want to leave the child motherless. The accused pleaded guilty to manslaughter on the basis of diminished responsibility and was released on a five year bond.

92. See, for example, *R v O'Brien* [2003] NSWCCA 121 where the child, aged 14 months, died as a result of malnutrition and failure to seek medical help. The mother was convicted of manslaughter by omission and was sentenced to five years' imprisonment.

93. Some commentators combine aggression cases with accidental or unintentional killings under the category 'battering'. However, the Commission sees sufficient difference between an accidental killing (usually the result of a one-off impulsive act) and battering cases (which usually feature a history of violence) to merit a separate category.

94. See eg Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 137; d'Orban PT, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560, 561. However, a recent English study which examined cases over the period 1990–2003 showed that the most prevalent method of child killing was suffocation (36.7%) followed by battering (14.3%): Mackay RD, 'Infanticide and Diminished Responsibility Manslaughters: An empirical study' in Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Final Report (November 2006) 192, 198.

95. Oberman M, 'Understanding Infanticide in Context: Mothers who kill 1870–1930 and today' (2002) 92 *Journal of Criminal Law and Criminology* 707, 709. For a detailed discussion of neonaticide in the Australian context, including a description of a number of cases in Victoria over the period 1985–1995: see Alder C & Polk K, *Child Victims of Homicide* (Cambridge: Cambridge University Press, 2001) ch 3.

96. Alder & Polk, *ibid*. See also Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 130–33; Alder C & Baker J, 'Maternal Filicide: More than one story to be told' (1997) 9(2) *Women & Criminal Justice* 15, 28–30.

97. Mackay's research reveals that neonates or newborns are the most frequent child victim: Mackay RD, 'The Consequences of Killing Very Young Children' [1993] *Criminal Law Review* 21, 22.

98. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 130.

99. The proximity of the act of childbirth and the killing of the child grounded the assumption that the mother was suffering from a mental disturbance caused by childbirth.

## The law of infanticide in practice

In Western Australia the offence of infanticide is rarely charged. According to the Office of the Director of Public Prosecutions (DPP) for Western Australia there has been only one conviction of infanticide in the past 10 years.<sup>100</sup> In that case the accused was charged with the wilful murder of her newborn baby, but pleaded guilty to the alternative offence of infanticide prior to trial.<sup>101</sup> A search of the Supreme Court and District Court databases showed no indictments for infanticide since its introduction in 1986.<sup>102</sup> Although the Commission was able to identify a few cases, that have come before the courts in Western Australia, of mothers having killed their children under the age of 12 months, these women were typically charged with murder or wilful murder.<sup>103</sup>

Studies in other jurisdictions have revealed similar results. In Victoria, there were no charges for infanticide between 1997 and 2001;<sup>104</sup> in New South Wales, there were only two convictions for infanticide for the period 1990 to 1996;<sup>105</sup> and in England and Wales, which has approximately 50 times the population of Western Australia, there were only two infanticide convictions in the year 2000.<sup>106</sup> It is not clear whether the women in these few cases were actually indicted for infanticide or whether they

pleaded guilty or were convicted of infanticide in the alternative.

This is not to say that infant homicide is rare.<sup>107</sup> Many cases of neonaticide never come to the attention of prosecuting authorities because the body remains undiscovered and, where a body is found, the offender may not be able to be located. A study in Victoria revealed that there were 11 homicides of infants aged less than 24 hours recorded between 1985 and 1995, but the identity of the child (and therefore of the offender) was unable to be found in five of these cases.<sup>108</sup> Despite infanticide being available in Victoria, in the six cases where the offender was known, none were charged with the offence. Indeed only one charge resulted from these six cases, and that was of concealment of birth.<sup>109</sup>

The results of this study suggest a degree of prosecutorial empathy for neonaticidal women; however, there are other important factors that impact upon a decision not to prosecute in cases of neonaticide.<sup>110</sup> These include:

- Lack of evidence of the circumstances surrounding the birth and death of the child. In most neonaticide cases the mother has concealed the pregnancy (whether consciously or otherwise) and gives birth alone.<sup>111</sup>

100. The Office of the Director of Public Prosecutions (DPP) database is expected to catch all cases since 1996.

101. *Smith* (INS 148 of 2001). The accused was a 20-year-old unmarried woman who was assessed by psychiatrists as having psychologically denied her pregnancy. She gave birth to the child at home alone, wrapped the baby in several layers of clothing and sheets and placed it in the cupboard. When later taken to hospital by her mother, she denied having given birth, even when confronted with the fact that the placenta and umbilical cord were still retained within her. The accused was immediately admitted to surgery to remove the retained placental material and address acute blood loss. In a police interview (recorded at the hospital only four hours after surgery) the accused said that she was unsure whether the baby was alive or not when she wrapped it up and left it in the cupboard. However, this interview was excluded by voir dire because of the effect of hospital-administered medication and general anaesthetic (which affected cognitive function) and the accused's psychological state. The accused was ultimately sentenced to a two-year conditional release order with recommendation for ongoing psychiatric treatment.

102. However, it is not known whether this database is complete, particularly for cases prior to 1993. Efforts have been made to locate information on relevant convictions or indictments through various other sources including through consultation with the Office of the Director of Public Prosecutions, members of the judiciary and the Criminal Lawyers' Association of Western Australia. No Western Australian indictments for infanticide have been discovered through any source.

103. For example *Garvey* (INS 9 of 2004). The accused was charged with the murder of her four-month-old baby by shaking. Although the possibility of a plea of guilty to infanticide was mooted at a pre-trial hearing, the DPP did not feel that the elements of the offence could be made out in this case. A plea of guilty to manslaughter was ultimately accepted and the accused was sentenced to five years' imprisonment, with a three year non-parole period. See Robert Cock, Director of Public Prosecutions, email (22 August 2006).

104. VLRC, *Defences to Homicide*, Options Paper (2003) [6.1].

105. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [3.7].

106. Law Commission (England and Wales), *A New Homicide Act for England and Wales*, Consultation Paper No. 177 (2005) [9.3]. England and Wales have both an offence and partial defence of infanticide.

107. For example, English data reveal that the homicide rate for children under one year is greater than any other age group and four times higher than the general population: Maier-Katkin D & Ogle R, 'A Rationale for Infanticide Laws' [1993] *Criminal Law Review* 903, 903. This is reflected also in a New South Wales study which shows that children under the age of one are most at risk of filicide. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 124.

108. Alder C & Polk K, *Child Victims of Homicide* (Cambridge: Cambridge University Press, 2001) 34.

109. *Ibid* 44. See also Mackay RD, 'The Consequences of Killing Very Young Children' [1993] *The Criminal Law Review* 21, 29 where it is noted that no prosecution is an 'important method of dealing with' neonaticide and infanticide cases.

110. Robyn Lansdowne notes, in relation to a study of infanticidal women in New South Wales over the period 1976–1980, that 'problems of proof in the prosecution case' resulted in no trial in four cases of neonaticide: Lansdowne R, 'Infanticide: Psychiatrists in the plea bargaining process' (1990) 16 *Monash University Law Review* 41, 49, fn 44. A further study using New South Wales data over the period 1968–1981 found that of 10 cases proceeded with, five were no-billed or discharged at committal and a further two were acquitted. Of the remaining three cases, two were convicted of concealment of birth only. Only one woman, who had killed six babies, was convicted of a homicide offence – manslaughter. See Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 133.

111. Mackay's research shows that lack of evidence or public interest in conviction was the reason for failure to pursue charges in relation to a number of neonaticides. Mackay RD, 'The Consequences of Killing Very Young Children' [1993] *Criminal Law Review* 21, 23, 26–7.

- Lack of evidence of the mother's intent to kill or harm the child (as required by the Western Australian and Victorian infanticide provisions).<sup>112</sup>
- Immature age of the offender. Under s 29 of the Code a person under the age of 14 years is not criminally responsible for an act or omission, unless the prosecution can prove that at the time of doing the act or making the omission she had capacity to know that she ought not to do the act or make the omission.<sup>113</sup>
- The difficulty of establishing whether the child was born alive and was therefore a person capable of being killed. The Victorian study described above reported that in some cases 'a long period had elapsed before the discovery of the body, and by that time the advanced decomposition made it impossible to find definitive evidence which would sustain a charge of criminal homicide'.<sup>114</sup>
- Whether factors outside the mother's control, such as the umbilical cord being wrapped around the child's neck during the birthing process, contributed to or caused the death of the child.<sup>115</sup> Studies show that many women in denial of their pregnancy give birth unexpectedly into a toilet because of a perceived need to either urinate or defecate. In many of these cases the cause of death is often a fractured skull, drowning or asphyxiation and not attributable to any deliberate act, or even omission, on the part of the mother.<sup>116</sup>
- The likelihood of jury empathy for the mother and whether it is in the public interest to proceed with a prosecution.
- The possibility of successfully arguing insanity, especially in cases of psychological denial of pregnancy which may indicate an underlying mental condition.<sup>117</sup>
- The possibility of successfully raising the defence of automatism.<sup>118</sup> Narratives of neonaticides demonstrate the possibility of a temporary dissociative state brought about by a severe psychological blow – that of giving birth to a child after having psychologically denied the pregnancy.<sup>119</sup> There is often no real attempt to hide the body of the child<sup>120</sup> and some women go back to their normal duties, including school or work, within hours of having given birth.<sup>121</sup>

For mothers who kill children aged between 24 hours and 12 months, many of the above factors do not apply and decisions to prosecute are more often made.<sup>122</sup> But despite a special offence being available to these women, the chances of being indicted on a charge of infanticide are nonetheless slim. This is largely due to the strict requirements of the offence. A submission to the New South Wales Law Reform Commission by that state's DPP noted that 'one reason why infanticide is not used as a substantive offence is because the prosecution would then be required to prove as part of its case that the accused suffered from a disturbance of the mind'.<sup>123</sup> Further, in all

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112. In the New South Wales study, Wallace reports that '[i]n few, if any, of the cases, did there appear to be any evidence of any deliberate action by the mother to kill her new baby': Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 133.
113. The youth of an offender above the age of 14 years can also in some circumstances impact upon a decision to prosecute: see Mackay RD, 'The Consequences of Killing Very Young Children' [1993] *The Criminal Law Review* 21, 26.
114. Alder C & Polk K, *Child Victims of Homicide* (Cambridge: Cambridge University Press, 2001) 43. In the only known Western Australian case of *Smith* (INS 148 of 2001), the cause of death of the baby was judged by two pathologists to be unascertainable; although, the young mother admitted during an interview (later rendered inadmissible) that she was unsure whether the baby was alive when she wrapped it in the cloth and put it in the cupboard. The accused pleaded guilty to infanticide in the alternative with the DPP case proceeding on the basis that the mother had failed to provide the necessities of life.
115. Among other possibilities is that the woman 'might have been so exhausted by the labour that she was unable to properly tend to the child': *ibid*.
116. See Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 133.
117. Dean PJ, 'Child Homicide and Infanticide in New Zealand' (2004) 27 *International Journal of Law and Psychiatry* 339, 345.
118. In Western Australia automatism is found under the *Criminal Code* (WA) s 23: see Chapter 4, 'Unwilled Conduct and Accident'. Automatism, which defence results in a complete acquittal, may also be relied upon by mothers who kill older children. It was successfully raised in *Wiseman* (Unreported, Supreme Court of Victoria, Norris AJ, 27 April 1972) which involved a mother who drowned her two young children. The jury accepted psychiatric evidence that a 'series of shattering emotional experiences had brought her mind to a dissociative state so that at the time of the drownings her actions were controlled by her unconscious ... mind': see Editorial (1972) 46 *Australian Law Journal* 412.
119. Wilczynski A, *Child Homicide* (London: Oxford University Press, 1997) 157. In some cases the psychological denial of pregnancy is so strong that medical professionals cannot diagnose a pregnancy by external examination. Christine Alder and Kenneth Polk tell of one case where a 15-year-old girl saw a doctor five days before the birth for fluid retention and another doctor three days before the birth for bruising to the abdomen and vaginal bleeding following a car crash. Neither doctor realised she was pregnant, despite examination of her abdominal region. Alder C & Polk K, *Child Victims of Homicide* (Cambridge: Cambridge University Press, 2001) 36–37. See also, Alder C & Baker J, 'Maternal Filicide: More than One Story to be Told' (1997) 9(2) *Women & Criminal Justice* 15, 29.
120. Typically babies are placed in containers or bags in the house, wrapped in towels and left in plain sight, placed in the wardrobe or left in the toilet. See Alder & Polk, *ibid*; Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 133.
121. Alder & Polk, *ibid*; Wallace, *ibid*.
122. The defences of insanity (s 27) and automatism (s 23) under the *Criminal Code* (WA) would be available in certain circumstances and these may impact on a decision to prosecute.
123. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [3.13]. Mackay notes, however, that in the United Kingdom the DPP takes the view that charging with infanticide only requires the prosecuting authority to concede the woman's disturbance of mind, rather than prove it. Mackay RD, 'The Consequences of Killing Very Young Children' [1993] *Criminal Law Review* 21, 29.

Australian jurisdictions with the offence of infanticide this disturbance of mind must be linked to the birth of the child<sup>124</sup> or, with the exception of Tasmania, the effect of lactation following childbirth.

In essence this means that the prosecution must prove the mitigating circumstances on behalf of the accused.<sup>125</sup> The existence of a relevant mental disturbance satisfying the elements of infanticide would be difficult to prove if the accused refused to submit to psychiatric examination; and if the accused could raise a reasonable doubt that such mental disturbance existed at the time she killed her child, she would be entitled to an acquittal. As a consequence,<sup>126</sup> most infanticidal women are charged with murder and infanticide becomes an alternative verdict or a means of plea-bargaining.<sup>127</sup> The Commission recognises the merit of an offence that can act procedurally to reduce a charge of murder through the plea-bargaining process; however, the Western Australian experience demonstrates that the DPP will still (properly) insist that all elements of the offence are made out before accepting a plea to infanticide.<sup>128</sup>

In other cases the exact cause of death of an infant may not be able to be established and the death may be attributed to Sudden Infant Death Syndrome (SIDS).<sup>129</sup> A

study in the United Kingdom over an 18-year period found that of 81 children judged by courts to have been killed by their parents, 42 were initially certified as having died from SIDS and 29 were given another 'natural' cause of death.<sup>130</sup> In several Australian cases these offences have only come to light after subsequent admissions by the mother, sometimes many years after the death of the child. These admissions, which generally reveal an intent to kill, are powerful evidence that allow the prosecuting authorities to proceed on a charge of wilful murder or murder in preference to infanticide. Because of the time that has passed between the offence and the confession, it is difficult for such women to establish a relevant mental imbalance at the time of the offence to support an alternative verdict of infanticide.<sup>131</sup> The Commission located two cases in Western Australia where a woman had admitted to killing her child or multiple children in these circumstances.<sup>132</sup>

## SHOULD INFANTICIDE BE RETAINED IN WESTERN AUSTRALIA?

The Commission received 17 submissions that specifically addressed the questions raised in the Issues Paper about the offence of infanticide. While acknowledging that a

124. As discussed above, the Victorian provisions are slightly broader so that the mental disturbance can be due to any disorder consequent upon the birth: *Crimes Act 1958* (Vic) s 6.
125. VLRC, *Mental Malfunction and Criminal Responsibility*, Report No. 34 (1990) [151]. It is worth noting that this is not an issue with other mental health defences where the accused bears the onus of proving the mental impairment to the relevant standard.
126. And in Western Australia and Victoria, the further requirement upon the prosecution to establish the accused's intent to kill or cause grievous bodily harm.
127. Dean PJ, 'Child Homicide and Infanticide in New Zealand' (2004) 27 *International Journal of Law and Psychiatry* 339, 342; Lansdowne R, 'Infanticide: Psychiatrists in the plea bargaining process' (1990) 16 *Monash University Law Review* 41.
128. The DPP appears only to have accepted one plea to an alternative of infanticide. In that case, *Smith* (INS 148 of 2001), the accused was a young unmarried woman who had psychologically denied her pregnancy and committed neonaticide. The evidence demonstrated intent (by admissions given in an interview while in hospital and under the influence of medication; this interview was subsequently rendered inadmissible by the court) and mental disturbance sufficiently connected to the circumstances of giving birth. In *Garvey* (INS 9 of 2004) the unmarried, 24-year-old accused was charged with the murder of her infant aged four months. At a pre-trial hearing the suggestion of a plea to infanticide was mooted, but after looking carefully at the evidence the DPP felt it was properly a case of manslaughter (it being accepted that there was no intent to kill or cause grievous bodily harm as required by infanticide and murder). The killing of the child (by shaking) also appeared to be consequent more upon the mother's inability to cope with the new baby and extreme financial and emotional stress than any mental imbalance caused by childbirth or lactation. A plea of guilty to manslaughter was ultimately accepted and the accused was sentenced to five years' imprisonment.
129. Roger Byard has noted that the 'initial failure to diagnose [SIDS deaths] as homicides would have interfered with police investigations' in infant deaths: Byard RW, 'Inaccurate Classification of Infant Deaths in Australia: A persistent and pervasive problem' (2001) 175 *Medical Journal of Australia* 5, 6.
130. Meadow R, 'Unnatural Sudden Infant Death' (1999) 80 *Archives of Disease in Childhood* 7, 7. There have also been cases that have gone the other way – where a woman has been charged and convicted of the death of her infant on the basis of faulty forensic evidence or careless expert testimony. See the Sally Clark case in the United Kingdom was one such case that sparked a review of all criminal and civil cot death cases in the preceding decade. See Johnson P, 'The Sally Clark Case: Another collision between science and the criminal law' (2004) 36 *Australian Journal of Forensic Sciences* 11, 31; Byard RW, 'Lessons to be Learnt from the Sally Clark Case' (2004) 36 *Australian Journal of Forensic Sciences* 3.
131. For the same reason, arguments of insanity also often fail in these cases.
132. See *Scotchmer* (INS 187 of 2001) where the accused admitted to suffocating two babies, aged two weeks and 13 months, two years apart. She confessed while serving time for setting fire to the cot of a third baby who survived. While two psychiatrists gave evidence of a stress disorder and dissociative episodes at the time of the offence, the jury did not accept the defence of insanity and found her guilty of two counts of wilful murder. Psychiatrists attested that although she did not currently have any treatable mental illness, she did require ongoing psychiatric monitoring, medication and counselling. The judge took the accused's psychiatric state into account in sentencing her to life with a minimum non-parole period of 16 years' imprisonment for each murder to be served concurrently. In *Dunne* (INS 76 of 2001) the intellectually impaired accused confessed to smothering her infant child aged 4½ months some 27 years previously. The child's death had previously been considered to have been caused by SIDS. The accused came to police attention following another smothering murder—this time of an adult—and an attempted murder of another adult by smothering. She was charged with two counts of wilful murder and one count of attempted murder. Ultimately the accused was found unfit to plead and was given an indeterminate custody order under the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA).

majority of submissions received on this question supported the retention of infanticide in some form,<sup>133</sup> the Commission has concluded that the offence of infanticide should be removed from the Western Australian Code. Undoubtedly the most compelling criticism of the offence of infanticide is that, despite calls from the judiciary to prosecute the offence in preference to murder where circumstances permit,<sup>134</sup> it is very rarely charged.<sup>135</sup> As noted earlier, although the offence has existed in Western Australia for over 20 years, there have been no known indictments for infanticide. The Commission has considered different ways of reformulating the offence to overcome the criticisms outlined above, but on balance believes that the offence of infanticide is fundamentally flawed and should be abolished.

The Commission is persuaded in its conclusion by the seven guiding principles for reform set out in Chapter 1. In addition to principle seven which militates against gender-specific offences, the first three principles are relevant to the current offence. Under the Code, infanticide requires an intentional killing.<sup>136</sup> The Commission has determined that the only lawful purpose for an intentional killing is self-preservation or the protection of another person; that is, in circumstances of self-defence, duress or extraordinary emergency.<sup>137</sup> The only other circumstances in which the Commission considers the accused should not be held criminally responsible for an intentional killing are where the accused suffers a relevant mental impairment<sup>138</sup> or where the accused is legally too immature to understand the nature of his or her actions.<sup>139</sup> It should be noted that in relation to an act of infanticide, where the accused's 'balance of mind' has been disturbed by a mental illness,

whether temporary or permanent (including puerperal psychosis) and where the accused does not have the capacity to control or understand the nature of her actions, she will still qualify for the complete defence of insanity under the Code.<sup>140</sup> A large number of submissions justified the continued existence of infanticide solely on the basis of mental impairment affecting capacity or rational judgment.<sup>141</sup> The Commission agrees with Justice John McKechnie's view that 'there is no particular reason for retaining the offence of infanticide' where the defence of insanity is available to relieve people suffering a relevant mental impairment from criminal responsibility.<sup>142</sup>

As part of the Commission's research for this reference it conducted a review of cases of mothers killing children (including children over 12 months of age) where transcripts or reports were readily available. The review captured all Australian jurisdictions, including those where an offence of infanticide does not currently exist. The Commission found that in many of the cases there was sufficient psychiatric evidence for an accused to raise the defence of insanity, especially under the Code insanity formulation which features volitional as well as cognitive elements. Only two cases were found where insanity was argued and failed and where convictions of murder or wilful murder resulted. These two cases involved women who had killed multiple children over a period of time and who had concealed the murders.<sup>143</sup> Both women were sentenced to significant terms of imprisonment; however, in each case the judge took into account their mental state in determining an appropriate sentence.

Law reform bodies in New South Wales and England have argued that infanticide can be readily subsumed into the

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133. A number of submissions questioned the justification tying mental disturbance to childbirth, with the DPP and WA Police suggesting the need for a definition of mental imbalance infanticide. Seven submissions acknowledged the need for reformulation of the offence to overcome criticisms such as gender-bias and the arbitrariness of the age element; although there was no clear agreement on what reformulation of the offence was appropriate. Four submissions supported outright abolition of the offence and a further two supported its abolition on the basis of the introduction of a partial defence of diminished responsibility.
134. See *Hutty* [1953] VLR 338, a case of neonaticide, where Barry J impugned the Crown for charging murder when the facts clearly presented the offence of infanticide: at 339.
135. The Criminal Lawyers' Association of Western Australia submitted that it was 'not aware of any such case being prosecuted in recent times': Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006) 4.
136. Or at least a killing with the intent to cause grievous bodily harm.
137. For discussion of these defences, see below, Chapter 4.
138. Under s 27 of the *Criminal Code* (WA).
139. Under s 29 of the *Criminal Code* (WA).
140. For a full discussion of the defence of insanity and the Commission's recommendations for reform of the defence, see below, Chapter 5.
141. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Festival of Light Australia, Submission No. 16 (12 June 2006) 2-3; Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 2; Michael Bowden, Submission No. 39 (11 July 2006) 2; Office for Women's Policy, Department for Community Development, Submission No. 44 (17 July 2006) 2; Aboriginal Legal Service of Western Australia, Submission No. 45 (21 July 2006) 2; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 4; Office of the Director of Public Prosecutions, Submission No. 51 (8 August 2006) 4. The Commission notes that none of these submissions supported the extension of the offence to other carers, including the father of the child, and neither did they support extension of the factors that may motivate the mental disturbance. Therefore, these submissions may be assumed to have confined the relevant mental impairment to the effects of childbirth.
142. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 2. See also Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 2 who endorse the same view.
143. *Scotchmer* (Unreported, WASC, INS 187 of 2001, 22 January 2002, Hasluck J); *Folbigg* [2005] NSWCCA 23.

partial defence of diminished responsibility which acts to reduce murder to manslaughter on the basis of a 'substantial' mental impairment.<sup>144</sup> They argue that the offence (or partial defence) of infanticide is unnecessary because, in those jurisdictions, it arrives at the same result. This approach was supported by two submissions to the present reference.<sup>145</sup> However, as will become clear in Chapter 5, the Commission does not recommend the introduction of the partial defence of diminished responsibility in Western Australia.<sup>146</sup> To ensure that no injustice would result from this recommendation, the Commission reviewed a sample of New South Wales cases where a mother has relied on the defence of diminished responsibility to reduce a charge of murder to manslaughter for the killing of her child.<sup>147</sup> The Commission found that in four<sup>148</sup> of the six cases located, insanity was a viable defence on the psychiatric evidence available.<sup>149</sup> In the remaining two cases,<sup>150</sup> the accused suffered from personality disorders<sup>151</sup> coupled with depression and severe environmental stressors. This resulted in impaired capacity,<sup>152</sup>

but not a mental illness of the relevant type in law to successfully argue insanity.<sup>153</sup> All but one of the cases involved children over 12 months of age and would therefore not fall within the offence of infanticide.<sup>154</sup>

In a number of other cases reviewed by the Commission there was sufficient evidence pointing to lack of intent to reduce a charge of murder to manslaughter, which in turn would activate discretionary sentencing. A comparison of outcomes in cases in those jurisdictions without infanticide as against those with infanticide, found no significant difference in disposition. As a result of this review the Commission is confident that no injustice will result in the implementation of its recommendation to repeal the offence of infanticide in Western Australia, including in the absence of the introduction of a partial defence of diminished responsibility. The Commission notes that its recommendations in relation to infanticide and diminished responsibility align with those of the Model Criminal Code Officers Committee.<sup>155</sup>

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144. Committee of Mentally Abnormal Offenders (Butler Committee), *Report of the Committee of Mentally Abnormal Offenders* (United Kingdom, 1975) [19.27]; NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (October 1997) recommendation 3.
145. Alexis Fraser, Submission No. 30 (15 June 2006) 4; Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006) 4. See also Women Justices' Association of Western Australia, Submission No. 14 (7 June 2006) 4. However, paradoxically the Women Justices' Association said that the offence of infanticide should be retained 'in its present state' and incorporated within the partial defence of diminished responsibility. It must be noted that diminished responsibility only reduces an offence of murder to manslaughter which has a far higher maximum penalty than the current offence of infanticide.
146. This position aligns with the recommendations of the Model Criminal Code Officers Committee (MCCOC). See MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 131, 139.
147. The Commission conducted a search for such cases on publicly available databases (Supreme Court of New South Wales, Lawlink and AustLII). All six cases located by the Commission (which spanned the period 1999–2006) were guilty pleas accepted on the basis of diminished responsibility or substantial impairment, as it is now known. It is possible that not all relevant cases were available on the databases; however, when cross-checked against data provided by the Judicial Commission of New South Wales, no further relevant cases during this period were uncovered.
148. *RG* [2006] NSWSC 21; *Dawes* [2004] NSWCCA 363; *Li* [2000] NSWSC 1088; *Richards* [2002] NSWSC 415.
149. In three cases where insanity was a viable defence the accused received a bond, usually with conditions of psychiatric care. In one other there was an attempt to kill two older children as well as a 21-month-old infant. That accused was released on bond on the basis of time already served pre-trial. In the last case the judge noted that by pleading guilty the accused had abandoned her chance to rely on the defence of insanity where that was clearly open to her. She was released on parole on the basis of time served pre-trial and was ordered to submit to psychiatric treatment.
150. *Sette* [2000] NSWSC 648; *Dawney* [1999] NSWSC 944. A further case—*Wang* [2000] NSWSC 447—was excluded from the sample because it involved the killing of a child (aged 23 months), as well as the accused's husband. The accused intended to commit suicide and kill the severely disabled child but only intended to restrain the husband. A plea of guilty based on diminished responsibility was accepted in relation to the child and a plea of guilty to manslaughter by unlawful and dangerous act was accepted in relation to the husband. The accused suffered severe depression and had made several attempts to commit suicide; however, while her relevant capacities were substantially impaired at the time of the killing there was no suggestion of the impairment amounting to insanity. Since the killing the accused had suffered severe post-traumatic stress disorder with persistent vegetative features. The accused was sentenced to two years' imprisonment for causing the death of her child and six years' imprisonment for causing the death of her husband to run concurrently. A non-parole period of four years was set by the court.
151. A personality disorder usually points to a very difficult background or defective personality that makes a person more vulnerable to acts of violence, anti-social behaviour or lack of self-control. See *Hodges* (1985) 19 A Crim R 129, 130. Personality disorders do not usually amount to a mental illness or disease of the mind at law and therefore cannot usually support a plea of insanity. However, some jurisdictions, notably the Australian Capital Territory and the Commonwealth, have recently included 'severe personality disorder' in the definition of mental illness under their criminal codes following the example of the Model Criminal Code. It should be noted that other jurisdictions (such as South Australia and the Northern Territory) which have also used the Model Criminal Code formulation as the basis of the mental impairment defence have deliberately omitted personality disorders from relevant definitions. The Commission strongly believes that personality disorders should not excuse a person from criminal responsibility in Western Australia. For a discussion of this issue and the Commission's recommendations regarding the defence of mental impairment (insanity): see below, Chapter 5.
152. There is some debate about whether a personality disorder should be able to support a plea of diminished responsibility. Ultimately it will be a question of whether the jury believes that the disorder substantially impaired the person's capacity to control his or her behaviour. See VLRC, *Defences to Homicide*, Options Paper (2003) [5.139]–[5.140].
153. Further, Bernadette McSherry has cast doubt upon whether anything but the most acute postpartum depression would be considered enough to substantially incapacitate a woman as required for diminished responsibility: McSherry B, 'The Return of the Raging Hormones Theory: Premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) 15 *Sydney Law Review* 292, 312.
154. However, it should be kept in mind that in New South Wales, infanticide is sentenced the same as for manslaughter and therefore theoretically achieves the same result as diminished responsibility.
155. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 131, 139.

## CONCLUSION

Undoubtedly, public compassion for many infanticidal mothers, especially those who kill in circumstances of true mental disorder or within hours of giving birth, remains.<sup>156</sup> Society will still countenance mercy for women who kill their babies in these tragic circumstances and who must live with that loss for the rest of their lives. The Commission does not seek more punitive treatment of these women, but it does not believe that they should be able to rely on a specific offence or defence that claims a biological link between childbirth and mental impairment 'based on unproven or discredited concepts'.<sup>157</sup> In the Commission's opinion, there is sufficient room within its recommended sentencing and defences framework to appropriately show mercy.

As mentioned earlier, those women who kill their children while genuinely incapacitated by puerperal psychosis or another mental illness can raise the defence of insanity. The age of the child, the presence of intent or indeed the relationship between the accused and the child is irrelevant to this defence. The Commission's recommendations for reforming the defence of insanity (to be named 'mental impairment') and its recommended expanded disposition regime makes this an attractive defence for such offenders who will undoubtedly need ongoing psychiatric treatment to learn to cope with their actions and their loss. Under the proposed mental impairment disposition regime there is only a presumption of a custody order for homicide offences.<sup>158</sup> Since infanticide does not currently require a judge to make a compulsory custody order and the circumstances of

infanticide would usually be considered exceptional such as to displace the presumption, it is unlikely that a custody order would result.<sup>159</sup>

Those women who have killed their children intentionally and not as a result of a genuine psychiatric illness may face a charge of murder under the Commission's reforms and, if convicted, will be sentenced accordingly.<sup>160</sup> While the Commission's recommendations regarding discretionary sentencing set a presumptive period of life for murder, this sentence may be displaced if the circumstances of the offender or the offence would make such a sentence clearly unjust.<sup>161</sup> Authorities in all jurisdictions demonstrate that personal or general deterrence is rarely a factor in relation to sentencing for infanticide-type offences and that mental impairment falling short of insanity is an important mitigating factor in these cases. The history of infanticide shows that judges are adept at interpreting the public interest in punishing infanticidal women<sup>162</sup> and the Commission has faith that there is sufficient room in its recommendations to allow for a show of mercy where circumstances demand it.

### Recommendation 13

#### Repeal the offence of infanticide

That s 281A and s 287A of the *Criminal Code (WA)* be repealed and that consequential amendments be made to s 277 and s 283 and to any other relevant legislative provision to abolish the offence of infanticide in Western Australia.

156. This is evident in the number of submissions received by the Commission that, while recognising problems with the offence, supported retention of infanticide.

157. Dean PJ, 'Child Homicide and Infanticide in New Zealand' (2004) 27 *International Journal of Law and Psychiatry* 339, 346.

158. See further below, Chapter 5, 'Dispositions on Special Verdict of Not Guilty by Reason of Mental Impairment'.

159. More likely would be a type of release order, such as the 'Supervised Release Order' recommended by the Commission in Chapter 5, Recommendation 37.

160. It should be remembered that because of the strict requirements of the offence of infanticide, women in Western Australia who kill their infant children already face a charge of murder where a decision to prosecute is taken.

161. See Chapter 7, Recommendation 44.

162. It is well accepted that there is little public interest in serious punishment (as opposed to treatment) in most cases of infanticide and especially in respect of neonaticide.

## Dangerous Driving Causing Death

Legislation dealing specifically with road traffic matters was introduced in Western Australia in 1919<sup>1</sup> at a time when the use of motor vehicles on roads was becoming more widespread. However, it was not until 1945 that an offence of reckless or dangerous driving causing death was enacted under s 291A of the *Criminal Code (WA)* (the Code).<sup>2</sup> This was repealed when, in 1974, the *Road Traffic Act 1974 (WA)* was introduced to 'consolidate and amend the law relating to road traffic'. Section 59 of that Act sets out the offence of dangerous driving causing death – the only homicide offence in Western Australia that is not contained in the Code.

Generally, the offence of dangerous driving causing death may be committed when an accused is involved in a fatal car collision in which the accused was speeding, driving under the influence of alcohol or drugs, or otherwise driving dangerously. Statistics published by the Western Australia Police indicate that during the five-year period from 2001–2005 there were 776 fatal road crashes in Western Australia in which 884 people died.<sup>3</sup> During the same period, 70,430 drivers were found to have driven in excess of the legal alcohol limit and over 17 million speed limit violations were reported.<sup>4</sup>

Because of the large number of fatal road accidents each year and the large number of drivers who drive in excess of the speed limit or under the influence of alcohol, the offence of dangerous driving causing death potentially affects a significant number of Western Australians. Research conducted by the Crime Research Centre of Western Australia indicates that from 1994–2004 there were 314 reported offences of dangerous driving causing death.<sup>5</sup> Bearing in mind the scope of conduct covered by the offence of dangerous driving causing death, it may be expected that there would be more dangerous driving causing death offences than other homicide offences. However, during the same period there were 451 reported offences for wilful murder, murder and manslaughter.<sup>6</sup>

### THE OFFENCE OF DANGEROUS DRIVING CAUSING DEATH IN WESTERN AUSTRALIA

Although the offence under s 59 of the *Road Traffic Act* is generally referred to as 'dangerous driving causing death', it is important to note that the offence also applies in circumstances where a person suffers grievous bodily harm.<sup>7</sup> Section 59 of the *Road Traffic Act* provides that:

- (1) If a motor vehicle driven by a person (the 'driver') is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving the motor vehicle
- (a) while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or
  - (b) in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person,
- the driver commits a crime and is liable to the penalty in subsection (3).

Summary conviction penalty: imprisonment for 18 months or a fine of 160PU and in any event the court convicting the person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.

- (2) For the purposes of this section —
- ...
- (b) it is immaterial that the death or grievous bodily harm might have been avoided by proper precaution on the part of a person other than the person charged or might have been prevented by proper care or treatment;
  - (c) when an incident occasions grievous bodily harm to a person and that person receives surgical or medical treatment, and death results either from the harm or the treatment, the incident is deemed to have occasioned the death of that person, although the immediate cause of death was the surgical or medical treatment if the treatment was reasonably proper in the circumstances and was applied in good faith; and

1. *Traffic Act 1919 (WA)*.

2. Section 291A of *Criminal Code (WA)* was inserted by s 2 of the *Criminal Code Amendment Act 1945 (WA)*. Despite the description of the offence as 'reckless or dangerous driving', s 291A of the Code provided that a person committed the offence if he or she failed to use 'reasonable care and take reasonable precautions in the use and management' of a vehicle and thereby caused the death of another person. In *Callaghan* (1952) 87 CLR 115, 120–21, the High Court held that the degree of negligence required for s 291A was the same as the degree of negligence for the offence of manslaughter.

3. Western Australia Police, *Annual Report (June 2006)* 45–46, Statistical Appendix: Road safety information. A 'fatal road crash' is defined as a road crash where at least one person died within 30 days as a result of injuries sustained during the crash.

4. *Ibid.*

5. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) 13.

6. *Ibid.* The Commission notes that the data for 2004 is possibly slightly inaccurate because it is stated that there was only one reported offence of dangerous driving causing death and in this year some dangerous driving causing death offences were included under the category of manslaughter.

7. However, because of the Commission's focus on homicide in this Report, the offence of dangerous driving causing grievous bodily harm is not considered in detail.

- (d) the term 'grievous bodily harm' has the same meaning as is given thereto in *The Criminal Code*.
- (3) A person convicted on indictment of an offence against this section is liable —
- (a) if the offence is against subsection (1)(a), or the offence is against subsection (1)(b) and is committed in circumstances of aggravation, to a fine of any amount and to imprisonment for —
- (i) 20 years, if the person has caused the death of another person; or
- (ii) 14 years, if the person has caused grievous bodily harm to another person; or
- (b) in any other circumstances, to imprisonment for 4 years or a fine of 400PU,

and, in any event, the court convicting that person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.

- (4) On the summary trial of a person charged with an offence against this section the person may, instead of being convicted of that offence, be convicted of an offence against section 59A, 61 or 62.

Dangerous driving causing death is the only offence of homicide that can be dealt with summarily: that is, by a magistrate.<sup>8</sup> It will be dealt with summarily unless the accused or the prosecution have made an application to a magistrate for the charge to be dealt with in the District Court. A magistrate may decide that the charge should be dealt with in the District Court because, among other things, the 'circumstances in which the offence was allegedly committed are so serious that, if the accused were convicted of the offence, the court would not be able to adequately punish the accused'.<sup>9</sup>

When a charge of dangerous driving causing death is dealt with by a magistrate, s 59 provides that the accused may, instead of being convicted of dangerous driving causing death, be convicted of a number of alternative offences. The alternative offences are dangerous driving causing

bodily harm (s 59A), dangerous driving (s 61) or careless driving (s 62). The availability of alternative offences enables the court to convict the accused of an appropriate less serious or different offence. Reckless driving under s 60 of the *Road Traffic Act* is not an alternative offence to dangerous driving causing death or dangerous driving causing grievous bodily harm. In most cases where the accused had driven recklessly (that is, wilfully drove in a dangerous manner) the accused would be charged with manslaughter.<sup>10</sup>

### **Dangerous driving causing death: a distinct offence under the *Road Traffic Act***

There is potential overlap between the offence of dangerous driving causing death and other homicide offences. For example, if a motor vehicle is used deliberately as a weapon by driving it into another person, the more appropriate charge would be wilful murder or murder.<sup>11</sup> On the other hand, if an accused did not intend to kill or cause grievous bodily harm but the quality of the driving was grossly negligent or reckless the accused would be charged with manslaughter. In *White*,<sup>12</sup> for example, the accused's car collided with another vehicle, killing two of its occupants. The accused recorded a blood alcohol level of 0.072 and was driving between 10 and 20 kilometres per hour above the speed limit. He had been warned by a passenger in his vehicle that he was approaching a stop sign, but despite this warning the accused drove through the intersection at an increasing speed causing the collision.<sup>13</sup> He pleaded guilty to two counts of manslaughter. Similarly, in *Duff*,<sup>14</sup> the accused was convicted of one count of manslaughter and one count of grievous bodily harm after colliding with two pedestrians while driving his motorcycle. The accused had driven his motorcycle at speeds of approximately 140 kilometres per hour in a 60-kilometre speed zone and he had been driving under the influence of amphetamines.<sup>15</sup>

8. Section 5 of the Code provides that if the statutory provision creating an offence provides for a summary conviction penalty then the offence can be dealt with by a magistrate. Two examples of cases of dangerous driving causing death that were dealt with by a magistrate are *Krakouer v Durka* [2003] WASCA 141 and *Grills v Ng* [2000] WASCA 294.

9. *Criminal Code* (WA) s 5(3).

10. Both the Law Society of Western Australia and the Criminal Lawyers' Association observed in their submissions that the police commonly charge manslaughter where the nature of the driving is particularly serious. Law Society of Western Australia, Submission No. 37 (4 July 2006) 6; Criminal Lawyers' Association, Submission No. 40 (17 July 2006) 5. For a discussion of the differences between careless, dangerous and reckless driving, see below 'Categorisation of Driving Offences Under the Road Traffic Act'.

11. For example, in *Zervas* (1986) 4 MVR 279 the accused was charged with the wilful murder of his ex-defacto by deliberately crashing his vehicle into a pylon on a bridge when she was seated in the passenger seat. The jury acquitted the accused of wilful murder but convicted him of murder. The Commission received one submission stating that a 'vehicle should be regarded as a dangerous weapon like a gun, and the law formulated accordingly': Paul Ritter, Submission No. 4 (29 May 2006) 2. If a vehicle is used as a weapon with an intention to cause death or grievous bodily harm then the driver may be guilty of wilful murder or murder. A driver may be charged with manslaughter due to gross negligence in the same way that a person holding a gun could be charged with manslaughter if he or she did not exercise sufficient care while in charge of a dangerous thing under s 266 of the Code.

12. [2003] WASCA 197.

13. *Ibid* [2]–[4] (Templeman J).

14. [2006] WASCA 37.

15. *Ibid* [11]–[12] (Roberts-Smith J).

In its Issues Paper the Commission sought submissions as to whether dangerous driving causing death should be retained as a distinct offence under the *Road Traffic Act*.<sup>16</sup> If the offence of dangerous driving causing death was repealed, then cases that would usually have resulted in a charge of dangerous driving causing death would instead result in a charge of manslaughter. In his submission, Dr Thomas Crofts argued that the offence of dangerous driving causing death should be retained as a distinct offence on the basis that juries may be reluctant to convict an accused of manslaughter where death is caused by the manner of driving.<sup>17</sup> The Western Australia Police also noted that most adults (and jurors) in Western Australia are drivers and therefore it was suggested that the offence of dangerous driving causing death is viewed differently from general homicide offences.<sup>18</sup> These views reflect the underlying reason for the introduction of separate offences dealing with death caused by driving.

Prior to the introduction of the *Road Traffic Act*, a person who caused the death of another by culpable driving would have been charged with an offence under s 291A of the Code or with manslaughter. At the time the offence under s 291A of the Code was introduced it was observed that juries were reluctant to convict a culpable driver of manslaughter because the maximum penalty for manslaughter at the time was life imprisonment. The purpose of introducing the offence under s 291A was to provide an 'intermediate offence'; that is, an offence with a lower maximum penalty and an offence that did not require the same degree of proof of negligence as required for manslaughter.<sup>19</sup>

All Australian jurisdictions have a separate offence that covers death caused by some form of culpable driving.

However, unlike Western Australia, these offences are not contained in road traffic legislation but are set out in the general criminal statute of that jurisdiction.<sup>20</sup> It could be argued that all homicide offences should be contained in the same legislation; however, there are a number of arguments in favour of retaining the offence of dangerous driving causing death in the *Road Traffic Act*. The Law Society submitted that 'persons charged with this offence are invariably law abiding citizens who have become the subject of a police investigation solely due to their manner of driving'.<sup>21</sup> Accordingly, the Law Society argued that it is more appropriate to categorise the offending behaviour as a 'road traffic matter rather than a criminal offence' under the Code.<sup>22</sup> Similarly, the Criminal Lawyers Association stated that those who commit the offence of dangerous driving causing death are often people with 'no record or propensity for criminal behaviour and who are unlikely to reoffend'.<sup>23</sup> The Office of the Director of Public Prosecutions (DPP) submitted that there should be a distinct offence under the *Road Traffic Act* because dangerous driving causing death may result from 'momentary inattention' whereas manslaughter involves grossly negligent driving.<sup>24</sup> The Law Society and the Criminal Lawyers Association both stated that where 'the manner of driving is criminal in nature' the driver will usually be charged with manslaughter.<sup>25</sup>

The Department of Community Development submitted that dangerous driving causing death should be retained as a separate offence under the *Road Traffic Act* because it would enable a 'fairer assessment process' under the *Working with Children (Criminal Record Checking) Act 2004* (WA). A person is less likely to obtain an 'assessment notice' (which enables that person to work in 'child-related work' if he or she has been convicted of manslaughter as

16. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 5, Question 10.

17. Dr Thomas Crofts, Murdoch University, Submission No. 33 (16 June 2006) 6.

18. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 6.

19. *Hansard*, 1945, vol. 2, 1710, as cited in LRCWA, *Manslaughter or Dangerous Driving Causing Death*, Project No. 17 (1970) [5]. However, in *Callaghan* (1952) 87 CLR 115, 120–21 the High Court held that the degree of negligence required for s 291A and manslaughter was the same. The Commission noted in its report, that since 1945 (when s 291A was introduced) through to the end of 1969 there had been 214 indictments for manslaughter caused by a motor vehicle: at [7]. Although there were 118 convictions only three were for manslaughter; the other 115 convictions were for the alternative offence under s 291A. The offence of causing death by dangerous or reckless driving was introduced in the United Kingdom in the *Road Traffic Act 1956* for similar reasons: see Cunningham S, 'Reality of Vehicular Homicides: Convictions for murder, manslaughter and causing death by dangerous driving' [2001] *Criminal Law Review* 679, 683. However, the Law Reform Commission of Victoria observed that 'it can no longer be assumed juries will be reluctant to convict drivers of manslaughter, or even murder, where the facts support such a charge'. It referred to the results of a survey of about 600 Victorian voters which found that the 'community is willing to equate certain forms of unsafe driving causing death with manslaughter, especially where alcohol is involved': see Law Reform Commission of Victoria, *Death Caused by Dangerous Driving*, Report No. 45 (1992) [15] & [19].

20. See eg *Crimes Act 1900* (ACT) s 29; *Crimes Act 1900* (NSW) s 52A; *Criminal Code 1983* (NT) s 174F(1); *Criminal Code 1899* (Qld) s 328A; *Criminal Law Consolidation Act 1935* (SA) s 19A; *Criminal Code 1924* (Tas) s 167A; *Crimes Act 1958* (Vic) s 318.

21. Law Society of Western Australia, Submission No. 37 (4 July 2006) 5.

22. *Ibid.*

23. Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 5.

24. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 5.

25. Law Society of Western Australia, Submission No. 37 (4 July 2006) 5–6; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 5.

opposed to dangerous driving causing death.<sup>26</sup> The *Working with Children (Criminal Record Checking) Act 2004* prescribes manslaughter as a 'Class 2 Offence' for the purpose of the Act but does not prescribe dangerous driving causing death as such an offence.<sup>27</sup>

All submissions received by the Commission were of the view that the offence of dangerous driving causing death should be retained as a distinct offence under the *Road Traffic Act*.<sup>28</sup> The Commission agrees. Although there is some overlap between dangerous driving causing death and manslaughter, there are many situations where manslaughter would not be an appropriate charge. Further, the offence of manslaughter already covers a wide range of criminal conduct.<sup>29</sup> The Commission does not consider that there is any justification for categorising as manslaughter all cases where death is caused by dangerous driving.

### Elements of the offence

The elements of the offence of dangerous driving causing death, which must be proved by the prosecution, are:

- (1) that the accused was driving a motor vehicle;
- (2) that the motor vehicle was involved in an incident which caused the death of another person; and
- (3) that the accused was either
  - (a) driving under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle; or
  - (b) driving in a manner (which includes speeding) that was having regard to all the circumstances dangerous to the public or any person.<sup>30</sup>

An accused is deemed to be driving under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle if he or she was driving with a blood alcohol percentage of or exceeding 0.15 per cent.<sup>31</sup> The prosecution does not have to prove that the 'incident' was caused by the manner of the accused's driving.<sup>32</sup> This is a significant departure from general legal principles applicable to offences against the person (including homicide offences) because it is usually required that the prosecution must prove beyond a reasonable doubt that there is a causal connection between the conduct of the accused and the resulting harm. Under s 59B(6) of the *Road Traffic Act* the onus is *on the accused* to prove on the balance of probabilities that the death was 'not in any way attributable' to the fact that the accused was under the influence of alcohol or the manner of driving.

Prior to 2004,<sup>33</sup> the offence of dangerous driving causing death required that the prosecution prove beyond reasonable doubt that the accused caused the death of another (either directly or indirectly) by driving in a dangerous manner. The section previously stated that:

A person who causes the death of or grievous bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person, commits a crime.

The impetus for the 2004 amendments was the death of a young girl who was struck by a vehicle driven under the influence of alcohol. The driver was charged with driving without a licence and driving under the influence of alcohol, but was not charged with dangerous driving causing death. Parliamentary debates reveal that the latter charge was not laid because the police were of the view that it could

26. Department for Community Development, Submission No. 42 (17 July 2006) 6.

27. Under s 22 of the Act employers are prohibited from employing persons in 'child related employment' if they have a conviction for a Class 1 or Class 2 offence or a pending charge that is a Class 1 or Class 2 offence and an 'assessment notice has not been issued'. Section 12(4) of the Act provides that the CEO 'is to issue an assessment notice' where there is a 'non-conviction charge' (that is, a charge but no conviction recorded) for a Class 2 offence unless the CEO is 'satisfied that, that because of the particular circumstances of the case, a negative notice should be issued'. Where there is a conviction for a Class 2 offence the presumption under s 12(6) of the Act is for a negative notice to be issued 'unless the CEO is satisfied that, because of the exceptional circumstances of the case, an assessment notice should be issued.' Where a person has an offence that is not a Class 1 or Class 2 offence on his or her record the general presumption is in favour of an 'assessment notice being issued': see *Working with Children (Criminal Record Checking) Act 2004* (WA) s 12(5).

28. That is, all submissions received that addressed the relevant question: see Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2005) 3; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 3; Festival of Light Australia, Submission No. 16 (12 June 2006) 4; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 6; Department for Community Development, Submission No. 42 (7 July 2006) 6; Law Society of Western Australia, Submission No. 37 (4 July 2006) 5; Michael Bowden, Submission No. 39 (11 July 2006) 2; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 5; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 6.

29. See Chapter 3, 'Manslaughter'.

30. Apart from the obvious differences between the levels of harm suffered by the victim, the same elements must be proved by the prosecution for the offences of dangerous driving causing grievous bodily harm and dangerous driving causing bodily harm.

31. *Road Traffic Act 1974* (WA) s 59B(5).

32. However, the Commission notes that if the accused's vehicle is not actually involved in the 'incident' (for example, the driving of the accused caused two other vehicles to collide), the prosecution is still required to prove that the accused caused the incident: see *Road Traffic Act 1974* (WA) s 59B(2).

33. The current s 59 of the *Road Traffic Act* was amended by the *Road Traffic Amendment (Dangerous Driving) Act 2004* (WA).

not be proved on the available evidence.<sup>34</sup> The accused was fined \$1700 and suspended from driving for two years<sup>35</sup> – a penalty, it was suggested in Parliament, that did not reflect the ‘true seriousness’ of the accused’s conduct.<sup>36</sup> After obtaining expert evidence that a driver with a blood alcohol content of 0.165 per cent is ‘seriously impaired’ and would be unable to ‘recognise and respond in a timely manner’ to traffic emergencies, the case was revisited and a charge of dangerous driving causing death was laid.<sup>37</sup> The accused was acquitted by a District Court jury applying the *Road Traffic Act* as it existed prior to the amendments. The Commission is not aware of the nature of the evidence that was presented at the trial or the arguments raised by the defence, but the need for the prosecution to prove beyond reasonable doubt a causal connection between the manner of driving and the death may have had a bearing on the jury’s decision to acquit.<sup>38</sup>

### Causation

The purpose of the 2004 amendments was to ‘simplify the requirements for proof of causation’ for the offences of dangerous driving causing death, dangerous driving causing grievous bodily harm and dangerous driving causing bodily harm.<sup>39</sup> In September 2004, the Road Traffic Amendment (Dangerous Driving) Bill 2004 (the Bill) was referred to the Standing Committee on Legislation. The Standing Committee was advised that the previous law was ‘deficient because of the difficulty in establishing causation between the dangerous manner of a person’s driving and the resulting death’.<sup>40</sup> The Standing Committee observed that the Bill had two unusual features. First, that the Bill ‘removes the concept that criminal punishment is imposed because of a link between something that the accused has done and the harm that results’.<sup>41</sup> And second, that the concept of causation is ‘brought back in’ by

providing an opportunity for the accused to prove that the death (or other harm) was in no way attributable to their conduct.<sup>42</sup> It would appear to be particularly difficult for an accused to establish the defence. The Explanatory Memoranda to the Bill states that:

The use of the words ‘in any way attributable’, in the provision, means that if the death or harm was in part attributable to the influence of drugs or alcohol and partly attributable to some other factor, then the defence will not be made out.<sup>43</sup>

This departs from the ordinary concept of causation under the criminal law. For homicide offences under the Code, the prosecution must prove beyond reasonable doubt that the accused caused the death either directly or indirectly. The general rule is that if the conduct of the accused substantially contributed to the death then causation will be established.<sup>44</sup> In other words, it is not sufficient that the conduct of the accused was a *cause* of death. Rather, the conduct of the accused must be a *substantial or significant cause* of death. Section 59(2) previously stipulated that a person ‘causes the death of or grievous bodily harm to another person whether he does so directly or indirectly’. This provision was consistent with the definition of causation under s 270 of the Code.

The Commission notes that New South Wales similarly has an offence of dangerous driving causing death and this offence also does not require proof that the manner of driving or the accused’s intoxication caused the victim’s death.<sup>45</sup> Section 52A of the *Crimes Act 1900* (NSW) also provides that it is a defence if the accused proves that the death was ‘not in any way attributable’ to the manner of driving or the intoxication of the accused. However, in other Australian jurisdictions it is necessary for the prosecution to prove that the accused’s manner of driving caused the death of the victim.<sup>46</sup>

34. Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 4184 (Mr Jim McGinty, Attorney General). The Western Australia Police indicated that because there was no evidence to suggest that the accused was driving in dangerous driving manner, the evidence of intoxication would probably not be sufficient to prove the offence: see Standing Committee on Legislation, *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (October 2004) Appendix 2: Public statement from the Western Australia Police Service.

35. Standing Committee on Legislation, *ibid*.

36. Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 4184 (Mr Jim McGinty, Attorney General).

37. Standing Committee on Legislation, *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (October 2004) Appendix 2: Public statement from the Western Australia Police Service.

38. The transcript of proceedings is not publicly available.

39. Standing Committee on Legislation, *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (October 2004) i.

40. *Ibid* 4–5. The Standing Committee received advice from Mr George Tannin SC, State Counsel.

41. *Ibid* i.

42. *Ibid* ii.

43. Road Traffic Amendment (Dangerous Driving) Bill 2004 (WA), Explanatory Memoranda, 3.

44. See further discussion in Chapter 1, ‘Causation’.

45. During the Second Reading Speech to the Road Traffic Amendment (Dangerous Driving) Bill 2004 the Attorney General noted that the amendments would bring Western Australia in line with the law in New South Wales: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 4184 (Mr Jim McGinty, Attorney General).

46. Section 29 of the *Crimes Act 1900* (ACT) provides that it is an offence if a person by culpable driving causes the death of another person; s 328A of the *Criminal Code* (Qld) provides that a person who operates a vehicle dangerously and causes the death of another commits a crime; s 19A of the *Criminal Law Consolidation Act 1935* (SA) creates an offence if a person drives in a culpably negligent manner, recklessly or at a speed or in a manner dangerous

### Reversal of the onus of proof

At the time of the proposed amendments it was contended that s 59B(6) of the *Road Traffic Act* reverses the onus of proof and requires an accused to prove his or her innocence.<sup>47</sup> If the prosecution proves that the accused was under the influence of drugs or alcohol, or that the accused was driving in a manner dangerous to the public or to any person, then the onus shifts to the accused to prove that neither their consumption of drugs or alcohol nor their manner of driving caused the death.<sup>48</sup>

However, the Standing Committee concluded that s 59B(6)

is not strictly speaking a reversal of the onus of proof because the defence requires proof of something that is not an element of the offence.<sup>49</sup>

The Commission does not accept this argument.<sup>50</sup> Causation was previously an element of the offence of dangerous driving causing death which had to be proved by the prosecution. Now the accused bears the onus of proving that his or her conduct did not cause the victim's death. It is difficult to see how it can be argued that there has not been a reversal of the onus of proof.

### The purpose of the amendments

Generally, under the criminal law an accused is presumed to be innocent and the prosecution carries the onus (or burden) of proving that the accused is guilty to the required standard of proof, that is, beyond reasonable doubt. As discussed in Chapter 1, the prosecution is required to prove the elements of the offence and negate any defences raised by the accused. However, there are examples of statutory provisions that reverse the onus of proof by requiring that the accused bears the onus of proving a particular defence. For example, under s 27 of the Code an accused bears the onus of proving on the balance of probabilities that he or she was insane at the time of

committing an offence.<sup>51</sup> Section 428 of the Code creates an offence of possessing stolen or unlawfully obtained property. For this offence, once the prosecution has proved beyond reasonable doubt that the accused was in possession of the relevant property and that the property was reasonably suspected of having been stolen or unlawfully obtained, the accused bears the onus of proving that he or she had 'no reasonable grounds for suspecting that the thing was stolen or unlawfully obtained'. There are other examples where the onus is reversed, thus requiring the accused to prove his or her innocence.<sup>52</sup>

There may be sound policy reasons why the onus of proof is reversed in any particular situation. For example, in relation to insanity it would be impractical for the state to prove as an element of every offence that the accused was sane because the prosecution would have to present expert psychiatric evidence in every case.

The amendments to the offence of dangerous driving causing death were designed to operate as

a further beneficial and powerful deterrent against drink-driving. The Road Traffic Act will be amended to ensure that those who choose to drink alcohol or use other intoxicants and then drive bear the full responsibility for the entire consequences of their conduct.<sup>53</sup>

The Commission notes that this policy argument was only expressed in relation to driving while intoxicated; however, the onus of proof is reversed for any accused who is charged with the offence of dangerous driving causing death, irrespective of whether the accused was driving while intoxicated. If the accused was driving in a dangerous manner he or she will still be required to prove that the death was not caused by the dangerous driving. Given that the amendments were only recently enacted it is not possible to determine if the new laws have had any deterrent effect upon drink driving. However, the Commission considers that in order to have any deterrent

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to the public and by that driving the person causes the death of another; s 167A of the *Criminal Code* (Tas) provides that a person is guilty of an offence if he or she causes the death of another by driving at a speed or in a manner that is dangerous to the public; s 318 of the *Crimes Act 1958* (Vic) creates an offence if a person causes death by culpable driving; s 174F(1) of the *Criminal Code* (NT) provides that a person is guilty if he or she drives a motor vehicle dangerously and that conduct causes the death of any person.

47. See eg Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2004, 5005 (Ms K Hodson-Thomas).

48. Standing Committee on Legislation, *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (2004) 36.

49. *Ibid* ii.

50. The Commission notes that various submissions to the Standing Committee argued that the provisions of s 59B did constitute a reversal of the onus of proof: see *ibid* 36.

51. *Armanasco* (1951) 52 WALR 78, 81 (Dwyer CJ).

52. See, for example, s 11 of the *Misuse of Drugs Act 1981* (WA) which provides that a person is deemed to be in possession of a prohibited drug with an intent to sell or supply that drug if he or she is in possession of a specified quantity of that drug. The accused is then required to prove that he or she did not intend to sell or supply the drug. Section 49 of the *Prostitution Act 2000* (WA) provides that for the purposes of an offence under this Act an accused is deemed to know that a person was a child unless the accused can prove that he or she took all 'reasonable steps to find out the age of the person concerned' and 'believed on reasonable grounds, at the time of the offence' that the person was at least 18 years of age. See also Standing Committee on Legislation, *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (2004) Appendix 5.

53. Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 4184 (Mr Jim McGinty, Attorney General).

effect, drivers would need to be aware that under the law they could now be charged and convicted more easily of the offence of dangerous driving causing death than was previously the case.

The other apparent reason for the amendments was to overcome the difficulties experienced by the prosecution in proving a causal link between the manner of driving and the death. Although this reason was frequently mentioned in the Standing Committee report,<sup>54</sup> the Commission is not aware of any specific evidence explaining why the police or prosecution found it difficult to prove causation. On the other hand, there was discussion about the difficulty for the prosecution in proving that a person who was driving under the influence of alcohol was driving dangerously. In the Standing Committee report it was noted that evidence of an accused's intoxication will often reveal that the accused's driving was objectively dangerous.<sup>55</sup> However, evidence of intoxication alone will not necessarily be sufficient to establish that the driving was dangerous. It was noted that in some cases it is necessary to present other evidence such as evidence from medical experts about the 'impact of alcohol on human behaviour'.<sup>56</sup> The Commission notes that the deeming provision in s 59B(5) overcomes this problem. If the accused is driving with a blood alcohol content of or in excess of 0.15 per cent then the accused is deemed to be incapable of proper control of the vehicle.<sup>57</sup> This removes the need for the prosecution to present evidence to demonstrate that a significantly intoxicated driver was driving dangerously.

### The Commission's view

The Commission acknowledges that in many cases a driver who was driving while under the influence of alcohol to such an extent as to be incapable of proper control of the vehicle, or a driver who was speeding or otherwise driving in a dangerous manner, would usually be responsible for causing the collision in which his or her car was involved. However, this is not necessarily always the case. There may be some situations where a driver is involved in a collision which causes the death of another person, but that collision was not the fault of the driver irrespective of his or her level of intoxication or manner of driving. Consider, for example, the following scenarios.

### Examples

A drives through a red light at high speed while being pursued by police. B is driving in the opposite direction. B is in the correct lane and has a green light; however, he is driving at 30 kilometres per hour over the speed limit. A and B collide – B survives but A dies. If it was determined that driving at 30 kilometres per hour over the speed limit was dangerous in all of the circumstances then under the current law, despite the actions of A, B will be presumed to have committed the offence of dangerous driving causing death. B will be required to prove that the death was in no way attributable to the fact that he was speeding. In such a case this could require expert evidence about the braking distances at certain speeds. B would have to show on the balance of probabilities that, even if he was driving at the speed limit, there was no way that he could have avoided the crash.

C is driving with a blood alcohol level of over 0.15 per cent and stops at the traffic lights. D approaches the traffic lights at excessive speed and fails to brake in time, colliding with C's vehicle and killing a passenger in C's car. C is deemed to have committed the offence of dangerous driving causing death because he was involved in an incident which caused the death of another person. While C may be able to prove that the death was in no way attributable to the fact that he was intoxicated, it is not necessarily fair that he should be required to do so.

During an accident involving multiple vehicles and a series of rear-end collisions on a highway, one person dies. If E is one driver in the series of vehicles and has a blood alcohol reading over 0.15 per cent, then E is presumed to have committed the offence of dangerous driving causing death, even though he or she did not cause the collision.

In its Issues Paper, the Commission sought submissions in relation to whether or not the reversal of the onus of proof in s 59B(6) of the *Road Traffic Act* should be reconsidered.<sup>58</sup> The Law Society submitted that it is a

54. Standing Committee on Legislation, *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (October 2004).

55. *Ibid* 10.

56. *Ibid*.

57. *Ibid* 30. This deeming provision is similar to the deeming provision for the offence of driving under the influence of alcohol under s 63 of the *Road Traffic Act 1971 (WA)*.

58. Section 59B(6) was inserted into the *Road Traffic Act 1974 (WA)* by s 7 of the *Road Traffic Amendment (Dangerous Driving) Act 2004 (WA)* which came into operation on 1 January 2005.

fundamental principle of criminal justice that the onus of proof of a criminal charge lies with the state.<sup>59</sup> The Law Society argued that this fundamental principle applies to other homicide offences so there is no logical reason why the onus of proof has been reversed for this offence only.<sup>60</sup> Dr Thomas Crofts submitted that the burden of proof 'should be on the prosecution to establish all the elements of such a serious offence, including that the dangerous driving was the actual cause of death'.<sup>61</sup> Michael Bowden stated that the reversal of the onus of proof is against 'time honoured principles' and further argued that juries are capable of determining whether the fact that an accused was intoxicated had contributed to the accident. Mr Bowden also raised the point that if an accused person has to prove that he or she is not responsible for the death, the practical effect is that the accused may be forced to give evidence in violation of his or her 'right to silence'.<sup>62</sup>

Four submissions supported the current requirement under s 59B(6) of the *Road Traffic Act*.<sup>63</sup> Festival of Light Australia submitted that the reversed onus of proof should be retained because to drive while intoxicated is 'recklessly indifferent to human life'.<sup>64</sup> The DPP expressed the view that s 59B(6) of the *Road Traffic Act* does not operate unfairly to an accused.<sup>65</sup> The Western Australia Police supported the provision because of 'the commonly accepted grounds that a person who elects to drive after drinking should reasonably be expected to know that the likelihood of killing another person is greatly increased'.<sup>66</sup> While the Commission does not disagree with these observations, it does not follow that such drivers should be held accountable for harm caused by other factors. The Commission is concerned that the reversal of the onus of proof may operate unfairly to an accused and is not convinced that the amendments were required. In this regard the Commission notes that the deeming provision in relation to the level of blood alcohol content is arguably all that was needed to ensure that the prosecution did not have any difficulty in proving that a significantly intoxicated driver was driving dangerously. In the absence of an examination of how the law is operating in practice it is not possible for the Commission to determine if the

laws are appropriate. Therefore, and bearing in mind the serious nature of dangerous driving causing death and the fact that the maximum penalty is the same as for manslaughter, the Commission is of the view that the operation of the current provisions should be reviewed.

### Recommendation 14

#### Review of s 59 and s 59B of the *Road Traffic Act 1974 (WA)*

1. That an independent body conduct a review of all cases in Western Australia where a person has been charged under s 59 or s 59A of the *Road Traffic Act 1974 (WA)* since the law was amended in 2004.
2. That this review determine whether the removal of the requirement for the prosecution to prove a causal link between the dangerous driving and the death or injury has operated unfairly to any accused.
3. That this review consider whether and, if so why, the amendments have resulted in more convictions for the offences of dangerous driving causing death, dangerous driving causing grievous bodily harm and dangerous driving causing bodily harm.

## CATEGORISATION OF DRIVING OFFENCES UNDER THE ROAD TRAFFIC ACT

The Commission received a submission from lawyer Malcolm Hall questioning whether the offences of dangerous driving causing bodily harm, dangerous driving causing grievous bodily harm and dangerous driving causing death require amendment.<sup>67</sup> As Mr Hall observed, there are a series of offences under the *Road Traffic Act* that are based on the culpability of the accused's driving. In order from the least serious to the most serious, these offences are:

59. Law Society of Western Australia, Submission No. 37 (4 July 2006) 5.

60. Ibid.

61. Dr Thomas Crofts, Murdoch University, Submission No. 33 (16 June 2006) 6.

62. Mr Michael Bowden, Submission No. 38 (10 July 2006) 2. The principle is contained in the *Evidence Act 1906 (WA)* s 8.

63. Festival of Light Australia, Submission No. 16 (12 June 2006) 4; Angelhands, Submission No. 47 (3 August 2006) 2; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 4; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 5.

64. Festival of Light Australia, Submission No. 16 (12 June 2006) 4.

65. Office of the Director of Public Prosecutions, Submission No. 51 (16 August 2006) 5.

66. Western Australia Police, Submission No. 48 (31 July 2006) 6.

67. Mr Malcolm Hall, Submission No. 38 (10 July 2006) 1. Dangerous driving causing death and dangerous driving causing grievous bodily harm are contained in s 59 and dangerous driving causing bodily harm is contained in s 59A of the *Road Traffic Act 1974 (WA)*.

- careless driving;
- dangerous driving; and
- reckless driving.

In addition to these categories, there are two separate provisions under the *Road Traffic Act* dealing with the consequences of an accused's driving, that is, dangerous driving causing bodily harm and dangerous driving causing death or grievous bodily harm.<sup>68</sup> Mr Hall submitted that the current classification of driving offences causing harm is inconsistent with the general categories of driving offences because conduct which might usually be classified as 'careless' is charged as 'dangerous' (and effectively elevated to a higher level of culpability) solely on the basis of the consequences caused by the driving. Therefore, Mr Hall argued that the level of culpability required for the offence of dangerous driving causing death can fall anywhere across the continuum from careless to reckless driving. Mr Hall suggested that it may be more appropriate that there is an offence of culpable driving causing death or other harm instead of dangerous driving causing death or other harm.<sup>69</sup> Another possible option would be to distinguish driving offences causing harm on the basis of the nature of the driving. In order to assess the viability of these options it is useful to set out the elements of the offences of careless driving, dangerous driving and reckless driving.

### Careless Driving

The least serious driving offence is careless driving, which is committed if a person drives without due care and attention under s 62 of the *Road Traffic Act*. The maximum penalty for careless driving is a fine of \$600. The offence of careless driving is assessed objectively. In *Burke v Traill-Nash*,<sup>70</sup> the accused was convicted of careless driving after colliding with another vehicle on a freeway when the vehicle in front stopped suddenly. Because road works were being carried out on the freeway the speed limit had been reduced to 60 kilometres per hour. The accused appealed against the conviction. Pullin J upheld the conviction stating that a person driving with due care in these circumstances 'must drive assuming that a sudden stop may be necessary,

and his error of judgment was therefore a lack of care in the circumstances'.<sup>71</sup> It was also observed that the fact an accident occurred is not of itself evidence that the driver was driving without due care and attention.<sup>72</sup>

If the nature of driving involves momentary inattention the offence charged will usually be careless driving. However, momentary inattention may also lead to a charge of dangerous driving if in all the circumstances of the case the quality of driving was dangerous to the public or any person. The offences of careless driving and dangerous driving are therefore not mutually exclusive: careless driving may also constitute dangerous driving in particular circumstances.

In his submission Mr Hall noted that some drivers do not understand why they are charged with dangerous driving causing death when, in the absence of a car accident and resulting death, the driver would usually be charged only with careless driving.<sup>73</sup> In some circumstances when the nature of the driving would support a charge of either careless driving or dangerous driving the police may exercise their discretion to charge the lesser offence. The Commission believes that if the manner of driving was dangerous and it results in death, then it is entirely appropriate that the accused is charged with dangerous driving causing death regardless of whether he or she would be charged with dangerous driving if no death had occurred. From a practical point of view it will also often be easier to demonstrate that the nature of the driving was objectively dangerous if the driver failed to exercise care and attention and did in fact cause a car accident.

### Dangerous Driving

Section 61 of the *Road Traffic Act* provides that it is an offence to drive 'in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person'.<sup>74</sup> For a first offence against s 61 the maximum penalty is a fine of \$800. For any subsequent offence the maximum penalty is a fine of \$2,000 or nine months' imprisonment and disqualification from holding a drivers licence for not less than 12 months.

68. *Road Traffic Act 1974* (WA) s 59.

69. Mr Malcolm Hall, Submission No. 38 (10 July 2006) 1.

70. [2002] WASCA 152.

71. *Ibid* [14].

72. *Ibid* [5] where Pullin J referred to observations of the magistrate who presided over the trial. The magistrate referred to *Geneff v Townshend* [1970] WAR 20, 21 (Hale J) and *Lawrance v Johnson* (Unreported, Supreme Court of Western Australia, Library No. 1314, Wallace J, 14 March 1974) where it had been observed that the fact an accident has taken place does not mean that the accused is guilty of careless driving.

73. Mr Malcolm Hall, Submission No. 38 (10 July 2006) 1.

74. For the variations in wording in other Australian jurisdictions, see the equivalent offences in *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 7; *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 42(2); *Traffic Act 1987* (NT) s 30(1); *Road Traffic Act 1961* (SA) s 46(1); *Traffic Act 1925* (Tas) s 32(1); *Road Safety Act 1986* (Vic) s 64(1).

## ◀ Dangerous Driving Causing Death

In *Kaighin*,<sup>75</sup> the Full Court of the Supreme Court of Western Australia listed a number of propositions in relation to dangerous driving:

- Negligence is not an element of dangerous driving; negligent driving is not necessarily dangerous driving; thus failure to keep a proper look out on a road on which there is no other traffic and there are no persons in the vicinity is not dangerous driving.
- For driving to be 'dangerous' ... it must in reality, and not speculatively, be actually or potentially dangerous to the public or another person.
- A momentary lapse of attention may constitute dangerous driving.
- The test as to whether driving is dangerous is objective.<sup>76</sup>

In *Moore v Moore*,<sup>77</sup> the accused was convicted of dangerous driving. The accused had stopped at a stop sign and pulled out directly into the path of an oncoming vehicle travelling at about 80–90 kilometres per hour. The accused did not see an oncoming vehicle and the two vehicles collided. On appeal, McKechnie J upheld the conviction of the driver stating that:

On a clear day, at an open intersection, he drove his car directly into the path of an oncoming vehicle, causing a situation not of potential but of actual danger. The fact that he looked and did not apparently see the other vehicle does not lessen the conclusion that the manner of driving in entering [the road] at that time was objectively dangerous.<sup>78</sup>

Thus it can be seen that the driver's intention or subjective belief at the time is not relevant in assessing whether the driving was dangerous.

### Reckless Driving

A person who wilfully drives in a manner which is dangerous to the public or to any person is guilty of reckless driving under s 60 of the *Road Traffic Act*.<sup>79</sup> Sections 60(1a) and 60(1b) provide that generally a person who drives at a speed of 155 kilometres per hour or at a speed exceeding

the speed limit by more than 45 kilometres per hour is guilty of reckless driving. The legislation provides exceptions for police and emergency drivers in particular circumstances.

The difference between reckless driving and dangerous driving is the element of wilfulness. Therefore, the offence of reckless driving incorporates an objective test in relation to the quality of driving and a subjective test in relation to whether the accused drove in that manner wilfully.<sup>80</sup> Because of the additional element of wilfulness the offence is more serious. For a first offence of reckless driving, the maximum penalty is a fine of \$1,000 or nine months' imprisonment and a mandatory minimum disqualification period of six months. For a second offence the maximum penalty is a fine of \$1,200 or nine months' imprisonment and a mandatory minimum disqualification period of 12 months. For any subsequent offence the maximum penalty is a fine of \$2,400 or 12 months' imprisonment and the driver must be disqualified from driving for life.

In *Italiano v Jamieson*,<sup>81</sup> the accused appealed against a conviction for reckless driving. The accused allegedly drove his truck erratically, slowing down and then speeding up, but never exceeding the speed limit. The truck was seen by two witnesses to be 'drifting' across to the wrong side of the road on numerous occasions over several kilometres causing oncoming vehicles to take evasive action. The accused gave evidence that because his truck was carrying cattle and because of the wet conditions he believed he was driving safely in the circumstances.<sup>82</sup> After finding that the manner of driving was objectively dangerous, Miller J stated that:

In relation to the element of wilfulness, the question to be answered is whether the driver of the vehicle adverted to the consequence or to the quality of the driving as being inherently dangerous or dangerous to the public or to any person and in so adverting to that consequence, nonetheless recklessly proceeded indifferent to the consequences or the quality of the driving in question.<sup>83</sup>

It was concluded in this case that the conviction for reckless driving was appropriate because the only reasonable inference was that the accused must have understood

75. (1990) 11 MVR 119.

76. *Ibid* 123. The court noted that in *McCone v Reading* [1938] 1 All ER 157,158 it was stated that the standard of driving is 'impersonal and universal, fixed in relation to the safety of other users of the highway': *ibid* 121.

77. [2001] WASCA 126.

78. *Ibid* [28].

79. The concept of 'reckless driving' is included in other jurisdictions: see eg *Traffic Act* 1987 (NT) s 30(1); *Road Traffic Act* 1961 (SA) s 46(1); *Traffic Act* 1925 (Tas) s 32(1); *Road Safety Act* 1986 (Vic) s 64(1).

80. *Edmond v Taylor* (1998) 27 MVR 158, as cited in *Italiano v Jamieson* [2001] WASCA 434, [14] (Miller J).

81. *Ibid*.

82. *Ibid* [3]–[9].

83. *Ibid* [16], citing *Attree v Randell* (1993) 19 MVR 95, 100 (Murray J).

the consequence of his driving but still recklessly continued to drive in that manner.<sup>84</sup>

## Conclusion

While the Commission acknowledges that there is a degree of overlap between the offences of careless driving, dangerous driving and reckless driving, the Commission does not consider that it is necessary or appropriate to further classify driving offences that cause harm on the basis of these three separate categories. An offence of 'careless driving causing death' is unnecessary because in most cases if the accused was driving without care and attention and caused a fatal accident, then the driving would ordinarily be viewed as dangerous. The Commission does not consider that there is any basis for introducing an offence of reckless driving causing death (or other harm). Wilfully driving in a dangerous manner and causing death would often appropriately result in a charge of manslaughter. In other cases, the offence of dangerous driving causing death is sufficient to mark the seriousness of the driving conduct. Mr Hall's submission suggested that the *Road Traffic Act* could be amended to introduce offences of culpable driving causing death, culpable driving causing grievous bodily harm and culpable driving causing bodily harm. Although offences of culpable driving causing harm would shift the focus from the manner of driving to the harm caused, the Commission is of the view that this option would add unnecessary complexity to the law. The Commission considers that the current structure of driving offences and driving offences which cause harm are generally appropriate.

However, the Commission is of the view that there is an inconsistency in including dangerous driving causing death and dangerous driving causing grievous bodily harm in the same offence with a similar penalty structure. Although the maximum penalty for dangerous driving causing death committed in circumstances of aggravation is greater than dangerous driving causing grievous bodily harm committed in circumstances of aggravation, the penalty for both offences in the absence of aggravating circumstances is the same. Under the Code, homicide offences are generally treated more seriously than offences causing grievous bodily harm.<sup>85</sup> The Commission recommends that dangerous driving causing death and dangerous driving

causing grievous bodily harm should be separated into two distinct offences with different penalty provisions.

### Recommendation 15

#### Dangerous driving causing death and dangerous driving causing grievous bodily harm to be separated into two offences

1. That s 59 of the *Road Traffic Act 1974* (WA) be amended to remove the offence of dangerous driving causing grievous bodily harm.
2. That a new s 59AA be enacted in the *Road Traffic Act 1974* (WA) to create the offence of dangerous driving causing grievous bodily harm. The provisions of s 59AA should be in identical terms to s 59, other than in relation to the penalties provided for the offence.

## SENTENCING FOR DANGEROUS DRIVING CAUSING DEATH

### Dangerous driving causing death in circumstances of aggravation

Section s 59 of the *Road Traffic Act* provides that an accused will be liable to a greater maximum penalty in certain specified 'circumstances of aggravation', which are defined in s 59B as follows:

- (3) For the purposes of sections 59 and 59A a person commits an offence in 'circumstances of aggravation' if at the time of the alleged offence —
  - (a) the person was unlawfully driving the vehicle concerned without the consent of the owner or person in charge of the vehicle;
  - (b) the person was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 km/h, the speed limit (if any) applicable to that length of road; or
  - (c) the person was driving the vehicle concerned to escape pursuit by a member of the Police Force.
- (4) For the purposes of subsection 3(c) it does not matter whether the pursuit was still proceeding or had been suspended or termination, at the time of the alleged offence.<sup>86</sup>

84. Ibid [19].

85. An exception is the offence of intentionally causing grievous bodily harm. The maximum penalty for this offence is the same as the maximum penalty for manslaughter – 20 years' imprisonment. Even though causing grievous bodily harm is less serious than causing death the culpability in the case of intentionally causing grievous bodily harm is greater than the culpability in cases of manslaughter.

86. The Standing Committee on Legislation observed that there is no time period included in the legislation to determine if the driver was still escaping a police pursuit after the pursuit had been terminated. The Committee was advised by Mr George Tannin SC, State Counsel, that it was not considered necessary

## ◀ Dangerous Driving Causing Death

In summary, an accused will commit the offence in circumstances of aggravation if he or she was, at the time of the offence,

- driving a stolen vehicle;<sup>87</sup>
- driving more than 45 kilometres per hour over the speed limit; or
- driving to escape a police pursuit.<sup>88</sup>

There is a considerable difference between the maximum penalty for dangerous driving causing death committed in aggravating circumstances (20 years' imprisonment) and the penalty which applies in ordinary cases (four years' imprisonment).<sup>89</sup>

It has been observed that the seriousness of dangerous driving causing death is assessed by reference to the 'driving misconduct involved'.<sup>90</sup> In *Kay*,<sup>91</sup> Murray J concluded that:

[T]he fact that the vehicle is stolen is of no particular relevance to any matter of fact which may sensibly be taken to aggravate the nature of the offence and the criminality involved in its commission. Of itself, it says nothing about the quality of driving misconduct or the nature of the harm which that misconduct may cause.<sup>92</sup>

In the same case, Miller J questioned why the maximum penalty for dangerous driving causing death when the vehicle is stolen should be five times more than the maximum penalty for an ordinary case.<sup>93</sup> Further, Miller J stated that 'urgent attention is required by Parliament to correct the disparity between the two maxima'.<sup>94</sup>

The Commission received three submissions commenting on the definition of aggravating circumstances in s 59B of the *Road Traffic Act* – all from judges of the Supreme Court whose role it is to interpret these provisions on appeal. Justice McKechnie submitted that the circumstances of aggravation are 'illogical because they do not relate to the dangerousness of the driving'.<sup>95</sup> Justice Miller reiterated the concerns he expressed in *Kay* (discussed above). In her submission Justice Wheeler suggested that the inclusion of driving a stolen vehicle as an aggravating circumstance for the offence of dangerous driving causing death does not reflect the main concern of the community; that is, personal safety.<sup>96</sup>

The Commission agrees that whether an accused was driving a stolen vehicle (or a vehicle without the consent of the owner) is not of itself relevant to assessing the culpability of the accused or the seriousness of the offence of dangerous driving causing death. If the accused was driving a stolen vehicle he or she will be charged and, if convicted, sentenced for that offence separately.<sup>97</sup> The Commission notes that the substantially similar provision in the *Crimes Act 1900* (NSW) does not include in its list of aggravating circumstances that the vehicle was stolen.<sup>98</sup> On the other hand, the aggravating circumstances of excessive speeding and escape from a police pursuit do have a logical connection to the manner of driving. The Commission does not consider it necessary to expressly include aggravating circumstances in the legislative provision creating the offence, because a court is always required

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to stipulate a time period as it will be a question of fact in the circumstances of the case if the pursuit has been suspended or terminated: Standing Committee on Legislation *Report in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (October 2004) 20–21. The Commission notes that the issue is whether the driver was trying to escape from police and subsection (4) only clarifies that a driver may be endeavouring to escape even though the police have suspended or terminated the pursuit.

87. The increased penalty for dangerous driving causing death when the driver was driving a stolen vehicle was inserted into the *Road Traffic Act* by s 6 of the *Criminal Law Amendment Act 1992* (WA). The Commission notes that this circumstance of aggravation could apply to increase the maximum penalty for the offence where an accused was driving a vehicle belonging to his or her family but which was taken without permission.
88. The circumstances of aggravation driving at speed and driving to escape police pursuit were inserted into the *Road Traffic Act* by s 7 of the *Road Traffic Amendment (Dangerous Driving) Bill 2004* (WA).
89. If the accused is convicted of dangerous driving causing grievous bodily harm in circumstances of aggravation, then he or she will be liable to a maximum penalty of 14 years' imprisonment rather than a maximum of four years' imprisonment for the same offence committed without aggravating circumstances.
90. *Wood* (2002) 130 A Crim R 518, 529 (Murray J), as cited in *Kay* [2004] WASCA 222 [2] (Murray J). In *AM Smith* [1976] WAR 97,107–108 (Jackson CJ; Lavan and Wickham JJ concurring) referred to *Guilfoyle* [1973] 1 All ER 844, 844–45 noting that the Court of Appeal in England observed that the penalties for the similar offence in England distinguish between those cases involving 'momentary inattention or misjudgement' and those cases where the accused has 'shown a selfish disregard for the safety of other road users of his passengers, or with a degree of recklessness'. The Court of Appeal further stated that a 'sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs'. Jackson CJ indicated that he agreed with the observations that the second category is more serious than the first category. These categories have been subsequently approved in Western Australian cases: see eg *Kay* [2004] WASCA 222, [51] (Miller J).
91. *Kay* [2004] WASCA 222.
92. *Ibid* [7].
93. *Ibid* [41].
94. *Ibid*. Also see similar observations made by Wheeler J in *Parsons* [2000] WASCA 407, [21]–[22].
95. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 8.
96. Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 6.
97. An accused who was driving a stolen vehicle may also be charged with stealing a motor vehicle in circumstances of aggravation, namely that he or she was driving the vehicle recklessly or dangerously. If so, the maximum penalty is eight years' imprisonment instead of seven years' imprisonment for stealing the vehicle: see *Criminal Code* (WA) s 378.
98. In New South Wales the circumstances of aggravation are that the accused was driving with the prescribed percentage of alcohol in his or her blood; that the accused was driving at a speed that exceeded the relevant speed limit by more than 45 kilometres per hour; that the accused was driving the vehicle to escape a police pursuit; or that the accused's ability to drive was substantially impaired by the fact that the accused was driving under the influence of a drug: *Crimes Act 1900* (NSW) s 52A(7).

to take into account any aggravating factors when determining the appropriate sentence; nevertheless, these two factors are appropriately categorised as aggravating circumstances.

The Commission also notes that there is a discrepancy between the penalty structure for dangerous driving causing death in the Magistrates Court and for the same offence in the District Court. In the Magistrates Court the maximum penalty (18 months' imprisonment) applies irrespective of whether there are circumstances of aggravation. Thus, if an accused is convicted of dangerous driving causing death in circumstances of aggravation in a Magistrates Court he or she will not face a greater maximum penalty.<sup>99</sup> In contrast, there are particular offences under the Code which specify circumstances of aggravation and provide a greater maximum penalty in those circumstances regardless of whether the accused is dealt with summarily or on indictment.<sup>100</sup> The Commission is of the view that if it is considered appropriate to specify circumstances of aggravation for the offence of dangerous driving causing death, these circumstances should apply irrespective of the court in which the matter is heard. Accordingly, the Commission recommends that when heard in the Magistrates Court, a greater maximum penalty should apply if the offence is committed in circumstances of aggravation.<sup>101</sup>

### Recommendation 16

#### Amendment to the circumstances of aggravation under s 59B of the *Road Traffic Act 1974 (WA)*

That s 59B(3)(a) of the *Road Traffic Act 1974 (WA)* be repealed for the reason that driving a vehicle without the consent of the owner or the person in charge of the vehicle should not be classified as a circumstance of aggravation because it is not relevant to the manner of driving.

### The penalty for dangerous driving causing death

While there is no suggestion that the maximum penalty of 20 years' imprisonment for dangerous driving causing death committed in circumstances of aggravation is inadequate, it has been asserted that the general maximum of four years' imprisonment is too low. In *Kay*,<sup>102</sup> Miller J stated that:

The maximum penalty of 4 years for an 'ordinary case' of dangerous driving causing death or grievous bodily harm seems to be surprisingly low.<sup>103</sup>

In his submission Justice Miller repeated his concern that penalties for dangerous driving causing death are inadequate at both the Magistrates Court and District Court levels.<sup>104</sup> The Commission notes that the maximum penalty available for a subsequent offence of dangerous driving causing bodily harm in the Magistrates Court is also 18 months' imprisonment.<sup>105</sup> Even though the accused would already have been convicted of at least one prior offence of dangerous driving causing bodily harm, the seriousness of the offence of dangerous driving causing death would suggest that the maximum penalty even for a first offence should be greater than the maximum penalty for a subsequent offence of dangerous driving causing bodily harm.

Justice Wheeler noted in her submission that the maximum penalties available for similar offences in other jurisdictions are generally higher than in Western Australia.<sup>106</sup> For example, in New South Wales the maximum penalty for dangerous driving causing death is 10 years' imprisonment. For aggravated dangerous driving causing death the maximum penalty is 14 years' imprisonment.<sup>107</sup> In the Australian Capital Territory the maximum penalty for causing death by culpable driving is generally seven years' imprisonment and where the offence is committed in circumstances of aggravation the maximum penalty is nine

99. *Kay* [2004] WASCA 222, [8] (Murray J).

100. For example, see s 317 which provides that maximum penalty for assault occasioning bodily harm committed in aggravating circumstances is seven years' imprisonment (compared to five years' imprisonment without aggravating circumstances) and if the charge is dealt with in the Magistrates Court the maximum penalty if there are aggravating circumstances is three years' imprisonment and a fine of \$36,000 (compared to two years' imprisonment and a fine of \$24,000): see also *Criminal Code (WA)* s 301.

101. See below, Recommendation 17.

102. [2004] WASCA 222.

103. *Ibid* [40]. The Standing Committee noted the disparity between the penalty for an offence committed when the car is stolen and an offence when the car is not stolen and stated that the 'Attorney General indicated that amendments to increase the penalty for dangerous driving will be introduced': Standing Committee on Legislation, *Report on Legislation in Relation to the Road Traffic Amendment (Dangerous Driving) Bill 2004*, Report No. 23 (October 2004) 19.

104. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 8.

105. *Road Traffic Act 1974 (WA)* s 59A(3)(b).

106. Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 6.

107. *Crimes Act 1900 (NSW)* s 52A(1)–(2). The Commission notes that in New South Wales the maximum penalty for dangerous driving causing grievous bodily harm is less than for dangerous driving causing death. For dangerous driving causing grievous bodily harm the maximum penalty is seven years' imprisonment and for aggravated dangerous driving causing grievous bodily harm the maximum penalty is 11 years' imprisonment: see *Crimes Act 1900 (NSW)* s 52A(3)–(4).

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years' imprisonment.<sup>108</sup> In the Northern Territory the maximum penalty for dangerous driving causing death is 10 years' imprisonment.<sup>109</sup> In South Australia the maximum penalty for causing death or serious harm by culpable driving is 15 years' imprisonment; however, if the offence is aggravated or is a subsequent offence the maximum penalty is life imprisonment.<sup>110</sup> The maximum penalty for culpable driving causing death in Victoria is 20 years' imprisonment.<sup>111</sup>

In contrast, Justice McKechnie submitted that the 'maximum penalties for dangerous driving causing death are generally appropriate'.<sup>112</sup> Similarly, the Aboriginal Legal Service submitted that the current penalty for the offence of dangerous driving causing death is adequate.<sup>113</sup> In its submission the Law Society suggested that the maximum penalty for dangerous driving causing death should be reduced to 10 years' imprisonment because manslaughter currently has the same maximum penalty of 20 years.<sup>114</sup> The maximum penalty of 20 years' imprisonment is only available if the offence of dangerous driving causing death is committed in circumstances of aggravation. The Commission has recommended the repeal of the aggravating circumstance that the accused was driving a stolen motor vehicle. If death results from dangerous driving where the driving conduct involved speeding by more than 45 kilometres per hour or driving to avoid a police pursuit, the accused will often be charged with manslaughter. In these circumstances the jury will have to determine if the nature of the accused's driving was grossly negligent. If not, the accused may instead be convicted of dangerous driving causing death. It does not appear logical that both offences have the same maximum penalty. If the driving is

not considered to be grossly negligent then the accused should be subject to a lesser maximum penalty. However, the offence of dangerous driving causing death is still extremely serious and a maximum penalty of 10 years' imprisonment would be inadequate. Accordingly, the Commission has concluded that the maximum penalty for dangerous driving causing death in circumstances of aggravation should be 18 years' imprisonment.

The Commission is of the view that the maximum penalty of four years' imprisonment for all other offences of dangerous driving causing death, where the charge is dealt with on indictment in the District Court, is inadequate when compared to the maximum penalty for aggravated dangerous driving causing death. It is also significantly lower than the maximum penalty in most other Australian jurisdictions. The Commission is of the view that the maximum penalty for dangerous driving causing death without the existence of aggravating circumstances should be increased. Similarly, and in order to achieve consistency, where the offence is dealt with summarily by a magistrate the penalty should be greater when the offence is committed in circumstances of aggravation. The Commission therefore recommends that the offences of dangerous driving causing death and dangerous driving causing grievous bodily harm should be separated and that the maximum penalty for dangerous driving causing death should be more than the maximum penalty for dangerous driving causing grievous bodily harm. In order to ensure that the penalties are appropriate when compared to the offence of dangerous driving causing bodily harm, the Commission also recommends that maximum penalties for dangerous driving causing bodily harm should be reconsidered.<sup>115</sup>

108. *Crimes Act 1900* (ACT) s 29. The maximum penalty for culpable driving causing grievous bodily harm is four years' imprisonment and five years' imprisonment if committed in circumstances of aggravation.
109. *Criminal Code* (NT) s 174F (1). This provision was introduced in December 2006.
110. *Criminal Law Consolidation Act 1935* (SA) s 19A. In Queensland the offence of 'dangerous operation of a vehicle' where death or grievous bodily harm is caused has a maximum penalty of seven years' imprisonment. If the accused is significantly over the legal limit of blood alcohol the maximum penalty is increased to 14 years' imprisonment: see *Criminal Code* (Qld) s 328A. In Tasmania the maximum penalty for causing death or grievous bodily harm by dangerous driving is 21 years' imprisonment: see *Criminal Code* (Tas) ss 167A–B. Section 389(3) of the Tasmanian Code provides that the maximum penalty for any crime is 21 years' imprisonment or a fine unless the section creating the offence specifies a different penalty. For the offences of causing death or grievous bodily harm by dangerous driving there is no penalty set out in the section.
111. *Crimes Act 1958* (Vic) s 318. The offence of culpable driving causing death covers deliberate reckless driving, grossly negligent driving and driving under the influence of alcohol or drugs to such an extent as to be incapable of proper control of the vehicle. There is a separate offence for dangerous driving causing death or serious injury and the maximum penalty is five years' imprisonment.
112. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 8.
113. Aboriginal Legal Service, Submission No. 45 (July 2006) 3; as did the Office of the Director of Public Prosecutions, Submission No. 51 (16 August 2006) 22 on the basis that the penalty range is appropriate to 'reflect the varying circumstances in respect of which the homicide offences may be charged'.
114. Law Society of Western Australia, Submission No. 37 (4 July 2006) 15. Referring to s 59(3)(a) of the *Road Traffic Act 1974* (WA) the Law Society further submitted that an unlimited fine is inappropriate and the legislation should specify a maximum amount. However, the option of an unlimited fine is available to the District Court or Supreme Court when imposing a sentence for offences where the maximum penalty is described as a term of imprisonment only: see *Sentencing Act 1995* (WA) s 41(5). Accordingly, the Commission does not consider that there is any reason to specify an amount of the fine in these circumstances.
115. The current maximum summary penalty for a first offence of dangerous driving causing bodily harm under s 59A of the *Road Traffic Act 1974* (WA) is a fine of \$4,000 or nine months' imprisonment and a mandatory minimum disqualification period of 12 months. For a subsequent offence the maximum penalty is a fine of \$8,000 or 18 months' imprisonment and a mandatory minimum disqualification period of 18 months. If the offence is committed in circumstances of aggravation and is dealt with in the Magistrates Court the maximum penalty is also \$8,000 or 18 months' imprisonment. If the offence is aggravated and dealt with by the District Court, the maximum penalty is an unlimited fine and seven years' imprisonment and a mandatory minimum disqualification period of two years.

**Recommendation 17****Penalties for dangerous driving causing death, dangerous driving causing grievous bodily harm and dangerous driving causing bodily harm**

1. That the *Road Traffic Act 1974* (WA) be amended to provide that the maximum penalty for dangerous driving causing death is greater than the maximum penalty for dangerous driving causing grievous bodily harm and, in turn, the maximum penalty for dangerous driving causing grievous bodily harm is greater than the maximum penalty for dangerous driving causing bodily harm.
2. That the *Road Traffic Act 1974* (WA) be amended to provide for a greater summary conviction penalty for dangerous driving causing death and dangerous driving causing grievous bodily harm committed in circumstances of aggravation.

In order to illustrate how the amended penalties described in the above recommendation could be rendered appropriately in legislation, the Commission provides the following example penalty structure. The Commission believes that the suggested penalties identified below properly reflect the level of seriousness of each offence.

**Dangerous driving causing death**

- (1) That the maximum summary penalty for dangerous driving causing death should be two years' imprisonment or a fine of 240PU<sup>116</sup> and a minimum drivers licence disqualification of two years.
- (2) That the maximum summary penalty for dangerous driving causing death committed in circumstances of aggravation should be three years' imprisonment or a fine of 320PU and a minimum drivers licence disqualification of two years.
- (3) That the maximum penalty if the offence of dangerous driving causing death is dealt with on indictment should be 10 years' imprisonment or a fine of 400PU and a minimum drivers licence disqualification of two years.
- (4) That the maximum penalty if the offence of dangerous driving causing death is dealt with on indictment and the offence is committed in circumstances of aggravation should be 18 years' imprisonment and a fine of any amount and a minimum drivers licence disqualification of two years.

**Dangerous driving causing grievous bodily harm**

- (1) That the maximum summary penalty for dangerous driving causing grievous bodily harm should be 18 months' imprisonment or a fine of 160PU and a minimum drivers licence disqualification of two years.
- (2) That the maximum summary penalty for dangerous driving causing grievous bodily harm committed in circumstances of aggravation should be two years imprisonment or a fine of 320PU and a minimum drivers licence disqualification of two years.
- (3) That the maximum penalty if the offence of dangerous driving causing grievous bodily harm is dealt with on indictment should be seven years' imprisonment or a fine of 400PU and a minimum drivers licence disqualification of two years.
- (4) That the maximum penalty if the offence of dangerous driving causing grievous bodily harm is dealt with on indictment and the offence is committed in circumstances of aggravation should be 14 years' imprisonment and a fine of any amount and a minimum drivers licence disqualification of two years.

**Dangerous driving causing bodily harm**

- (1) That the maximum summary penalty for dangerous driving causing bodily harm should be nine months' imprisonment or a fine of 80PU and a minimum drivers licence disqualification of two years.
- (2) That the maximum summary penalty for dangerous driving causing bodily harm committed in circumstances of aggravation or for a subsequent offence of dangerous driving causing bodily harm should be 12 months' imprisonment or a fine of 160PU and a minimum drivers licence disqualification of two years.
- (3) That the maximum penalty if the offence of dangerous driving causing bodily harm is committed in circumstances of aggravation and is dealt with on indictment should be five years' imprisonment and a fine of any amount and a minimum drivers licence disqualification of two years.

116. One penalty unit equals \$50: see *Road Traffic Act 1974* (WA) s 5(1a).

### DANGEROUS NAVIGATION CAUSING DEATH

In its submission, the Criminal Lawyers Association suggested that the definition of 'driving' for the purpose of the offence of dangerous driving causing death should be expanded to include driving of other vehicles such as boats.<sup>117</sup> The Criminal Lawyers Association observed that if a driver of a boat drives dangerously and kills another person the only possible charge is manslaughter. While the Commission agrees that it would be useful to have alternative charges in these circumstances, it is not appropriate for other types of vehicles to be included in the *Road Traffic Act*.

The Commission notes that the *Marine Act 1982* (WA) provides for a series of offences relating to the navigation of vessels<sup>118</sup> including:

- navigating in a 'dangerous, negligent or reckless manner';<sup>119</sup> and
- navigating or attempting to navigate a vessel under the influence of drugs or alcohol to such an extent as to be incapable of proper control of the vehicle.<sup>120</sup>

As observed above, there is no equivalent offence to dangerous driving causing death under the *Marine Act*. Section 52B of the *Crimes Act 1900* (NSW) creates the offence of 'dangerous navigation occasioning death'. It is

modelled on the offence of dangerous driving occasioning death in s 52A of the same Act. In some Australian jurisdictions there is a general offence of dangerous driving or dangerous operation of a vehicle and the scope of these offences is wider than just the driving of a motor vehicle.<sup>121</sup> The Commission considers that it would be appropriate for an offence of dangerous navigation causing death to be enacted in Western Australia and such an offence should be specified as an alternative verdict for the offence of manslaughter. The Commission suggests that the offence of dangerous navigation causing death should follow the same structure of the offence of dangerous driving causing death.

#### Recommendation 18

##### Dangerous navigation causing death

1. That an offence of dangerous navigation causing death be enacted under the *Marine Act 1982* (WA) and that the offence be based upon the provisions of the offence of dangerous driving causing death under s 59 of the *Road Traffic Act 1974* (WA).<sup>122</sup>
2. That the offence of dangerous navigation causing death be specified as an alternative verdict for manslaughter under s 280 of the *Criminal Code* (WA).

117. Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 6.

118. 'Ship' or 'vessel' is defined by s 3 of the *Marine Act 1982* (WA) to 'mean any kind of vessel used or capable of being used in navigation by water, however propelled or moved, and includes: (a) a barge, lighter, floating restaurant, or other floating vessel; and (b) an air-cushion vehicle, or other similar craft, used primarily in navigation by water; but does not include pontoons or floating jetties used only for the purposes of walkways or storage or similar platforms situated adjacent to river banks or any other shore in circumstances in which they are not being towed or moored away from shore.'

119. *Marine Act 1982* (WA) s 59(1).

120. *Marine Act 1982* (WA) s 59(2). Sections 59(1) and 59(2) each carry a maximum fine of \$1000.

121. See eg *Criminal Code* (Qld) s 328A; *Criminal Law Consolidation Act 1935* (SA) s 19A. The Commission notes that although other vehicles are included in the offence description this is appropriate because the offence is not contained in specific road traffic legislation.

122. The Commission recommends above that there should be a review of the provisions of s 59 and s 59B of the *Road Traffic Act 1974* (WA), in particular the reversal of the onus of proof in s 59B. In light of this, the Commission suggests that it may be appropriate to wait until the review is completed before the offence of dangerous navigation causing death is enacted. In any event the offence of dangerous navigation causing death should correspond to the provisions of the offence of dangerous driving causing death at any given time.

