NSWLRC reviews partial defences to murder

The New South Wales Law Reform Commission is reviewing the partial defences to murder: diminished responsibility, provocation and infanticide. Fiona Manning, *from NSWLRC, reports.*

These defences are known as partial defences because, if successful, they operate to reduce a conviction for murder to one for manslaughter. They do not result in an outright acquittal.

In August 1993 the Commission released its discussion paper examining the present state of the law, including an historical account of the context in which these partial defences developed and comparative perspectives. The paper suggested competing options for reform to promote community discussion.

Central to the review is a reconsideration of the present distinction between murder and manslaughter. The discussion paper questions the continuing relevance of this dichotomy.

Until relatively recently, there was a mandatory death penalty for murder. Under the earliest law of unlawful homicide a person who killed another could only avoid capital punishment if they were successful in claiming the benefit of clergy. In effect, this amounted to being able to recite a particular psalm. However, in a series of statutes, commencing at the end of the 15th century, the benefit of clergy was denied to certain felonies. One such category was homicide committed with 'malice aforethought'. This was the genesis of the murder/manslaughter distinction.

The benefit of clergy has long since been abolished but two categories of unlawful homicide, murder and manslaughter, continue to exist. The penalty for manslaughter is, and historically has always been, discretionary (the current maximum penalty is 25 years). Since the removal of the mandatory death penalty for murder in 1955 and as a consequence of subsequent legislative reforms, a judge now has considerable discretion in sentencing for murder in New South Wales.

Now that there is no differentiation in terms of penalty between murder and manslaughter the historical 'justification' for maintaining the distinction has disappeared. On the other hand, several cogent reasons have been advanced for retaining the dichotomy. As a threshold issue the Commission is seeking submissions on the desirability of replacing the current murder/manslaughter distinction with one overall category of unlawful homicide. If this reform were to be implemented, matters which would currently be argued in support of one or other of the partial defences would instead become relevant in respect of sentence.

The largest proportion of the discussion paper is devoted to an examination of each of the partial defences: the policy underlying their introduction, the elements of the defence, comparative provisions in other jurisdictions, and arguments in favour and against reformulating the defences.

Diminished responsibility

The impetus for this reference came from comments by the Chief Justice of New South Wales, the Hon Justice Gleeson in *R v Chayna* on the need for reform of the substantice elements of the defence of diminished responsibility. In this case, conflicting views of seven psychiatrists giving evidence highlighted the difficulties of applying to a given case the legal principles of diminished responsibility.

If the defence of diminished responsibility is to be retained, the discussion paper proposes a number of possible reforms in the areas of onus, procedure and sentencing as well as to the substantive elements of the defence. Some of the issues raised include

- whether the onus of proof should be altered
- whether issues of diminished responsibility should be determined in a forum other than a trial

- whether experts should be prevented from offering conclusions on the ultimate issue before the court
- whether further sentencing options for diminished responsibility offenders should be considered.

Provocation

Many of the problems with the defence of provocation are referable to the lack of clear rationale for the defence. Provocation is said to be 'a concession to human frailty'.

Empirical studies demonstrate that provocation is often an issue in cases in which men kill men during arguments and in which men kill women out of jealousy. It may be necessary to reassess to what extent the community should recognise a reduced level of culpability for what might be considered male patterns of aggression.

The discussion paper looks at the role of 'battered woman syndrome' in the law of provocation, a subject which has received considerable publicity following the recent decision of Justice Newman in the NSW Supreme Court, imposing a four year good behaviour bond on a woman who pleaded guilty, on the basis of provocation, to the manslaughter of her husband. The judge found that the wife fell within the 'battered woman syndrome'.

The other major issue in relation to the defence of provocation considered in the discussion paper s whether any reform is necessary to the objective test. In particular, the discussion paper considers whether factors such as ethnicity, gender and disabilities should go to establishing the level of control of the ordinary person, or whether the objective test should be abandoned altogether in favour of a purely subjective test of whether the accused in fact lost self control.

Infanticide

The final chapter in the discussion paper considers infanticide. This is the least controversial of the partial defences, essentially because infanticide cases are reasonably uncommon. Nevertheless, the discussion paper identifies a number of possible areas which could be clarified or amended.