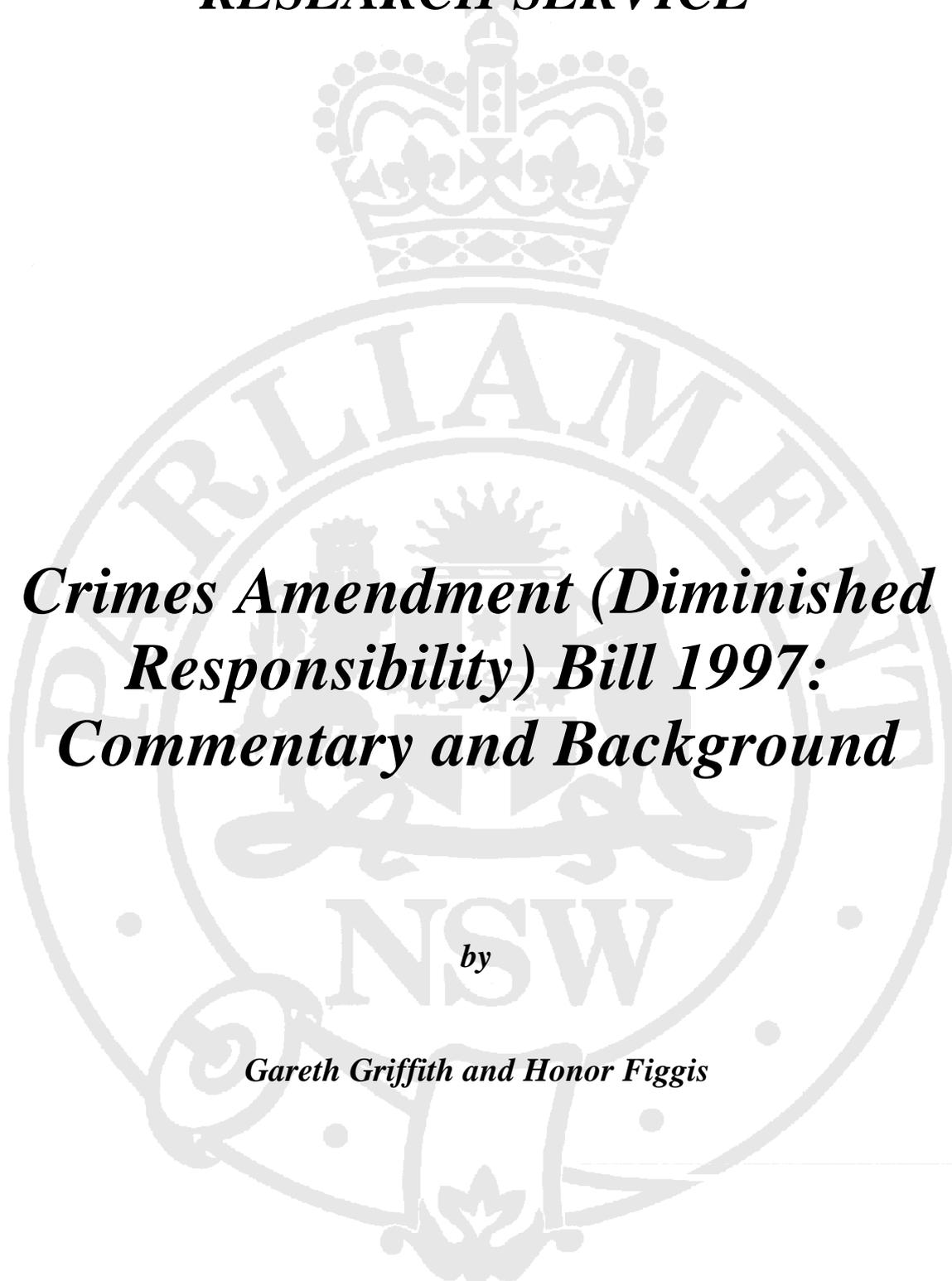


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***Crimes Amendment (Diminished
Responsibility) Bill 1997:
Commentary and Background***

by

Gareth Griffith and Honor Figgis

Briefing Paper No 19/97

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EXECUTIVE SUMMARY

The purpose of this paper is to present a commentary on the Crimes Amendment (Diminished Responsibility) Bill 1997 (henceforth, the Diminished Responsibility Bill).

Background issues: In terms of the background to the Bill, some of the paper's main findings are as follows:

- the Bill would repeal existing section 23A of the *Crimes Act 1900* and the defence of diminished responsibility. In its place the Bill proposes: a new defence of substantial impairment by abnormality of mind; and a procedural requirement that an accused person must disclose before the trial starts that he or she intends to rely on the defence;
- to a substantial extent the Bill is based on the report of the NSW Law Reform Commission on *Partial Defences to Murder: Diminished Responsibility*;
- the partial defence of diminished responsibility was introduced in NSW in 1974, at a time when there was still a mandatory life sentence for murder. The defence served the purpose of avoiding a murder conviction by permitting a lesser punishment where the accused was mentally impaired but not insane (page 5);
- under the defence of insanity or mental illness, the person's responsibility for his or her actions is nil, which in NSW results in that person's detention in prison or hospital as a forensic patient. Under the defence of diminished responsibility, on the other hand, a degree of mental responsibility remains, thus serving only to reduce culpability from murder to manslaughter (page 7);
- under section 32 of the *Criminal Procedure Act 1986* an accused person standing trial for an indictable offence may elect to have the charge of murder tried by judge alone. In *Chayna* (1993) 66 A Crim R 178 Gleeson CJ referred to 'a tendency for the legal representatives of accused persons who wish to raise a case of diminished responsibility to prefer a trial without a jury'. In 1995 the DPP issued guidelines for Crown Prosecutors as to the granting of consent to an accused to be tried by judge alone. Statistical figures for the post-1993 period are not available (pages 10-11);
- the Bill has been introduced at a time when it is felt in some quarters that the judiciary is failing to reflect the standards and values of the community in its sentencing decisions. Responding to this, a key feature of the Bill is that it 'places increased emphasis on the moral assessment by the jury as to whether the evidence warrants the reduction from murder to manslaughter';

The defence of substantial impairment by abnormality of mind: The main differences between the current defence of diminished responsibility and the new defence are as

follows:

- The concept of ‘mental responsibility’ is removed. The new defence requires the accused to show that his or her capacity to understand events, to judge whether his or her actions were right or wrong or to control himself or herself, was substantially impaired by an abnormality of mind.
- The current defence refers to an abnormality of mind that arises from a condition of arrested or retarded development of mind or any inherent causes or that is induced by disease or injury. The new defence instead requires the accused to prove that his or her abnormality of mind arises from an underlying condition. In the way that term is defined this will require the accused to prove that the abnormality of mind arose from ‘a pre-existing mental or physiological condition, other than a condition of a transitory kind’.
- The new defence is satisfied only if the impairment suffered by the defendant was so substantial as to warrant liability for murder being reduced to manslaughter.

Defence disclosure: Further, in order to improve prosecution preparation and trial efficiency, the Diminished Responsibility Bill will require:

- A person accused of murder to notify the prosecution before the trial that he or she intends to raise a defence of substantial impairment, as well as to provide the prosecution with particulars of the evidence to be given by witnesses in support of the defence.
- The main issue here is the extent to which these disclosure requirements would infringe the principle that accused person has a right to silence and is generally entitled to reserve his or defence until the prosecution has presented its case.
- Some questions raised by the proposed defence disclosure provisions include: whether there is in fact a need for legislation requiring pre-trial disclosure of evidence of substantial impairment; in what circumstances will the trial judge exercise the discretion to admit evidence of substantial impairment even though notice has not been given; whether excluding evidence of substantial impairment because the defence has not disclosed it before trial is an appropriate penalty for the failure to disclose; whether the accused’s right to silence should be further compromised by allowing the court to order a psychiatric or medical assessment of the accused; and at what point in time before the trial should the defence particulars be notified to the prosecution.

1. INTRODUCTION

The Crimes Amendment (Diminished Responsibility) Bill 1997 (henceforth, the Diminished Responsibility Bill) was introduced on 25 June 1997 by the Attorney General, Hon JW Shaw MLC. It is based on the report of the NSW Law Reform Commission on *Partial Defences to Murder: Diminished Responsibility*. As the Attorney General said in the Second Reading Speech, the Bill would repeal existing section 23A of the *Crimes Act 1900* and the defence of diminished responsibility. In its place the Bill proposes:

- a new defence of substantial impairment by abnormality of mind; and
- a procedural requirement that the accused person must disclose before the trial starts that he or she intends to rely on the defence.

For the Opposition, the Hon JP Hannaford MLC, is reported to have criticised the proposals for ‘not going far enough’. The Opposition, it is said, would abolish the use of diminished responsibility altogether, with Mr Hannaford explaining that ‘the state of mind of a killer should only be considered by a court in sentencing and should not affect the determination of whether a murder has been committed’. The same report noted the contrasting views of the president of the NSW Law Society, Patrick Fair, who argued that no change was required to the present partial defence of diminished responsibility under section 23A of the *Crimes Act*.¹ Both Mr Hannaford and Mr Fair agreed that the Government should have waited till the NSWLRC’s report was made available before introducing the Bill. Of the report itself, Mr Hannaford said that it was ‘written by lawyers for lawyers. It has no regard for the community’s expectations’.²

This paper looks briefly at the background to the proposed reforms, which includes a section commenting on the present operation of the defence of diminished responsibility in NSW. The Bill itself is then considered, followed by a note on the arguments for and against the defence of diminished responsibility. The proposals relating to the pre-trial disclosure of the new defence of substantial impairment by abnormality of mind are discussed separately at the end of the paper.

It can be noted at the outset that, of the Australian jurisdictions with a discretionary sentence for murder, it seems that only NSW and the ACT provide for a defence of diminished responsibility. Thus, there is no defence of diminished responsibility and no mandatory sentence for murder in Victoria, South Australia and Tasmania.³

¹ ‘State-of-mind defence pleas to be harder’, *The Sydney Morning Herald*, 26 June 1997.

² Hon JP Hannaford MLC, *Media Release*, ‘Diminished responsibility: Government dupes electorate’, 15 July 1997.

³ NSWLRC, Report 82 - *Partial Defences to Murder: Diminished Responsibility*, May 1997, p 31. (Henceforth, NSWLRC Report).

The present section 23A of the *Crimes Act 1900* is set out at Appendix A; the text of the Diminished Responsibility Bill is set out at Appendix B.

2. **BACKGROUND TO THE PROPOSED REFORMS**

The proposed reforms are set against a background of considerable controversy. The NSWLRC inquiry dates back to 1993, with its publication in August that year of a discussion paper on the partial defences to murder of provocation, diminished responsibility and infanticide. The immediate background to that reference were the comments of Chief Justice Gleeson in *R v Chayna*,⁴ suggesting that section 23A was ‘ripe for reconsideration’⁵. In that case the differing expert opinions of seven psychiatrists highlighted the difficulties for the jury in the application of the defence of diminished responsibility.

Likewise, the immediate background to the NSWLRC’s report was the controversy surrounding the sentencing, in March 1997, of Graham Cassel for the killing of Michael McPake at a La Perouse beach in April 1995, a case in which the Crown accepted a plea of manslaughter on the ground of diminished responsibility after reports from three psychiatrists and a psychologist all expressed the view that the accused was suffering from a major depressive illness at the time of the killing. Cassel was sentenced to penal servitude for eight years and an additional term of three years. According the NSWLRC report this means that Cassel will be eligible for release on parole in five years, at the expiry of his minimum term. The report continued, ‘It was submitted [by Cabinet Office] that this case demonstrates that the defence of diminished responsibility is a “loophole” in the law that permits killers to receive shorter sentences due to manslaughter convictions’.⁶

Responding to the case, the Leader of the Opposition, Hon Peter Collins MP, is reported to have said that a Coalition Government would ‘change the law to ensure that people did not “escape proper sentences” for serious crimes’. In the same report, the Premier is said to have told the victim’s family that changes to the defence of diminished responsibility would be considered, ‘but stopped short of supporting its abolition’. At a later press conference the Attorney General commented that abolition was ‘one option’, stating in addition ‘It may be preferable to refine or define that particular defence but I would not rule out the abolition of the defence’. These remarks were made, in turn, after the victim’s sister had expressed disappointment at the Government’s apparent reluctance to abolish the defence.⁷

⁴ (1993) 66 A Crim R 178.

⁵ Ibid at 191. Gleeson CJ explained that he did not intend to suggest that he had ‘any concluded opinion on the matter’.

⁶ NSWLRC Report, p 34. The report noted that release, at the expiry of the minimum term, ‘is by no means automatic’.

⁷ ‘Defence of diminished responsibility to remain’, *The Sydney Morning Herald*, 4 April 1997.

More generally, the Diminished Responsibility Bill has been introduced at a time when almost every facet of the criminal justice system is under intense scrutiny, much of it critical in nature. A longstanding feature of this debate, both in NSW and in other jurisdictions, relates to the perceived 'leniency' of some judges, which leads to the argument that the judiciary is failing to reflect the standards and values of the community in its sentencing decisions.⁸ The NSWLRC noted such public criticism of the courts, which it considered to be 'often ill-informed and intemperate'. Nonetheless, in light of this trend the Commission thought it prudent to involve the community (as represented by juries) in the process of assessing whether the degree of culpability for an unlawful killing should result in a verdict of guilty of murder or manslaughter. For the Commission, therefore, 'The administration of criminal justice must be the responsibility of both the judges and the community through participation in trials as jurors deciding on questions of primary culpability'.⁹ It is with these considerations in mind that the Diminished Responsibility Bill proposes to 'emphasise the role of the jury' in the defence of 'substantial impairment by abnormality of mind'.¹⁰

Yet, in recent weeks the jury system itself, as the representative of community standards, has come under the spotlight of critical scrutiny. Attention has focussed on two separate NSW murder cases,¹¹ one involving Said Morgan a former police officer who admitted shooting his victim six times at close range with his police revolver in May 1995, the other concerning Dean Waters, a former boxer who admitted killing his stepmother's lover in 1988. That the circumstances in the two cases were very different is clear: Morgan had killed a man accused of molesting his young relatives and was acquitted on what has been described as 'a novel approach to the well-known rule that a person is entitled not only to defend himself or herself but to protect others';¹² Waters, on the other hand, was found to have killed as a result of the domineering influence of his father and was acquitted on the basis of what can be described as an extended interpretation of the defence of duress.¹³

⁸ For example - 'Call for juries to decide sentences', *The Sunday Telegraph*, 4 May 1997.

⁹ NSWLRC Report, p 30.

¹⁰ *NSWPD*, 25/6/97, p 11064.

¹¹ A third case, involving the acquittal on the ground of self defence of Belinda Lowe, who killed a man who she believed was threatening to harm her unborn child, was also discussed in the media in relation to this controversy. However, as Zdenkowski has said, 'the Lowe case is really explicable in terms of the conventional application of the rules relating to self defence' and 'is likely to have largely escaped significant public attention but for its controversial predecessors' - 'Final verdict is - don't judge the jury', *The Sydney Morning Herald*, 8 August 1997.

¹² G Zdenkowski, 'Final verdict is - don't judge the jury', *The Sydney Morning Herald*, 8 August 1997.

¹³ 'Courts on trial after spate of acquittals', *The Sydney Morning Herald*, 9 August 1997. Associate Professor Mark Findlay is quoted as saying that the Waters verdict was the most problematic because it seemed to take 'the defence of duress well beyond previous limits'.

Reaction to these two cases has varied, as has the interpretation of their significance for the administration of criminal justice. For some the Morgan case was part of the community backlash against 'soft sentencing' to which, as suggested above, the debate as to whether the defence of diminished responsibility should be abolished belongs.¹⁴ For others, notably the Council of Civil Liberties, the same case 'set a dangerous precedent' and shows that the jury system 'can go wrong'.¹⁵ This view was echoed in an editorial comment in the *Australian*, which went on to welcome the innovation that permits the defence to 'elect to be heard before a judge alone rather than a jury if the judge and the prosecution agree'.¹⁶ On the other hand, Professor David Brown is reported to have said, with respect to both the Morgan and Waters cases, that 'it is not the jury which is setting the precedent, but the judge who instructs the jury in a certain way'.¹⁷ Associate Professor George Zdenkowski also counselled caution in drawing conclusions about the jury system on the basis of these cases, in part because most of the participants in the debate 'are not privy to the detailed evidence and judicial directions which are essential ingredients of the decision'.¹⁸

It may be, as the NSW Director of Public Prosecutions, Nicholas Cowdery QC, has said, the cases are merely 'a coincidence in timing'¹⁹ and that the arguments on behalf of the jury system, as the means by which ordinary members of the community bring their values and experience to bear on the administration of criminal justice, remain as powerful and pertinent as ever. This is not the place to engage in that complex and multi-faceted debate in any detail. Again, the important point to make is that the Diminished Responsibility Bill places the jury at centre-stage, with the Attorney General

¹⁴ 'Force considers return of killer', *The Daily Telegraph*, 5 August 1997 - citing the views of John Tingle MLC and 'senior government sources'. Associate Professor Mark Findlay is also quoted as saying that the Morgan and Waters cases suggest that 'Juries don't have confidence that judges will sentence properly' - 'The forgiven', *The Sydney Morning Herald*, 9 August 1997.

¹⁵ 'Force considers return of killer', *The Daily Telegraph*, 5 August 1997 - citing Ken Buckley, Secretary of the NSW Council for Civil Liberties.

¹⁶ 'Pause for thought when killers walk', *The Australian*, 5 August 1997. Note that under section 32 of the *Criminal Procedure Act* (NSW) an accused person standing trial for an indictable offence may elect to have the matter tried by judge alone. The details are discussed later in this paper.

¹⁷ R Guillatt and B Drury, 'The jury and the law', *The Sydney Morning Herald*, 5 August 1997.

¹⁸ 'Final verdict is - don't judge the jury', *The Sydney Morning Herald*, 8 August 1997. One juror in the Waters case is reported to have said that the jury would have convicted Waters of manslaughter if it had known that the option was available. Responding to this, the solicitor for Waters, Mr Conditis, is said to have stated that 'a manslaughter conviction was a course never open to the jury under strict instructions given by Justice Hulme before deliberations began' - 'Juror's claims anger Waters', *The Sun Herald*, 17 August 1997. A second juror is said to have later expressed the same view - 'Boxer's slaying acquittal troubles jurors', *The Newcastle Herald*, 19 August 1997.

¹⁹ 'The forgiven', *The Sydney Morning Herald*, 9 August 1997.

stating in the Second Reading Speech, as part of his response to the public concerns raised by the Cassel case:

What I can say is that the new defence places increased emphasis on the role of the jury as the appropriate body to assess guilt or innocence when the defence is raised. The new defence also places increased emphasis on the moral assessment by the jury as to whether the evidence warrants the reduction from murder to manslaughter.²⁰

The following day *The Daily Telegraph* had translated this to mean ‘Killers face tougher time from juries’. In the same report the Attorney General is said to have discussed the Cassel case in the context of the proposed reforms, stating ‘I have no doubt that with these new tests this new concept would have made a substantial difference in cases of this kind’.²¹

3. **SECTION 23A OF THE NSW CRIMES ACT 1900 - HISTORY AND PRESENT LEGAL OPERATION**

History and background: The partial defence of diminished responsibility was introduced in NSW in 1974, at a time when there was still a mandatory life sentence for murder. Indeed, the Criminal Law Committee which proposed the introduction of the defence in NSW said that its recommendation was influenced mainly by the continuation of the mandatory life sentence for murder and the inflexibility of the *M’Naghten Rules*.²² The reform was based on section 2 of the English *Homicide Act 1957* which, in turn, was a reflection of legal developments in Scotland in the 19th century. In all these jurisdictions the diminished responsibility defence served the purpose of avoiding a murder conviction by permitting a lesser punishment where the accused was mentally impaired but not insane (as defined under the restrictive *M’Naghten Rules*).²³

Insanity is a complete defence, applicable to all crimes. Whereas diminished responsibility operates only to reduce murder to manslaughter.²⁴ Note that in NSW a verdict of not guilty by reason of insanity results in an order for indefinite detention. In fact the common law test of insanity applies in NSW under the defence of mental

²⁰ NSWPD, 25/6/97, p 11064.

²¹ *The Daily Telegraph*, 26 June 1997.

²² *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure*, Parliamentary Paper No 54, 1973, p 6. Cited in H Donnelly and S Cumines, *From murder to manslaughter: partial defence in NSW - 1990-1993*, Judicial Commission of NSW, December 1994, p 2.

²³ The test requires the accused to prove that he or she was suffering from such a defect of reason, from disease of the mind, as not to know the nature and quality of his or her act, or as not to know that what he or she was doing was wrong.

²⁴ D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws*, Second Edition, Federation Press 1996, Vol 2 at p 589.

illness.²⁵ A further point to make is that the scope of diminished responsibility is much wider than the defence of mental illness.²⁶ It is said that a colloquial name for the defence of diminished responsibility in Scotland was ‘partial insanity’,²⁷ which suggests both the breadth of its scope and the conceptual difficulties it entails.

At present the defence of diminished responsibility is available in three other Australian jurisdictions, namely, Queensland,²⁸ the ACT²⁹ and the Northern Territory.³⁰

Section 23A of the NSW Crimes Act 1900: The defence of diminished responsibility is defined under this section as follows:

Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such *abnormality of mind* (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as *substantially impaired his mental responsibility* for the acts or omissions, he shall not be convicted of murder (emphasis added).

As the NSWLRC explained, ‘It is a precondition to the application of the defence that the prosecution has proven, beyond reasonable doubt, that the accused is otherwise liable for murder’. If that is proven, there are then three elements which must be satisfied in order to establish the defence of diminished responsibility: (1) that at the time of the killing, the accused was suffering from an abnormality of mind; (2) that the abnormality of mind arose from one of the causes listed in parentheses in the section, that is, from a condition of arrested or retarded development of mind, or from any inherent cause, or induced by disease or injury; and (3) that the abnormality of mind substantially impaired the accused’s mental responsibility for the killing.³¹

The remaining sub-sections of section 23A state that: the accused bears the onus of proof

²⁵ Sections 38 and 39, *Mental Health (Criminal Procedure) Act 1990* (NSW). For the operation of these sections see - NSWLRC Report, p 26.

²⁶ According to the NSWLRC report (at 26): ‘The defence of mental illness applies only to those mental conditions which can be shown to affect the accused’s cognitive process to such an extent as to render that person incapable of knowing that that act was wrong. In contrast, diminished responsibility requires a substantial impairment caused by an abnormality of mind. This may cover, for example, uncontrollable urges and extreme emotional states, as well as cognitive disorders falling outside the defence of mental illness’.

²⁷ *Chayna* (1993) 66 A Crim R 178 at 189.

²⁸ *Criminal Code* (Qld), section 304A.

²⁹ *Crimes Act 1900* (ACT), section 14.

³⁰ *Criminal Code* (NT), section 37.

³¹ NSWLRC Report, p 25.

(on the balance of probabilities);³² once the defence is established the accused is liable to be convicted of manslaughter; a finding of diminished responsibility does not affect the liability of any co-accused for the death at issue; and evidence may be offered by the Crown tending to disprove the defence.

The interpretation of section 23A by the courts: The question, then, is what is meant by ‘diminished responsibility’. Conceptually it is a difficult term to explain and apply, largely because, unlike the defence of insanity (or mental illness), it does not imply a complete lack of understanding, judgment or control on the part of the accused. Instead, diminished responsibility is more a question of degree - of a ***substantial impairment*** - of a person’s moral and/or critical faculties. Under the defence of insanity or mental illness, the person’s responsibility for his or her actions is nil, which in NSW results in that person’s detention in prison or hospital as a forensic patient. Under the defence of diminished responsibility, on the other hand, a degree of mental responsibility remains, thus serving only to reduce culpability from murder to manslaughter. As Waller and Williams comment: ‘The very idea of being partially but not wholly responsible for one’s actions raises profound philosophical difficulties’.³³ But, then, is it the capacity of the defendant that is at issue here, or a moral assessment of his or her culpability, or both?

Whatever the underlying conceptual difficulties may be, the courts have been required to interpret section 23A. For this purpose, the defence of diminished responsibility has turned upon the phrase ‘***abnormality of mind***’ which has been defined to mean:

a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong but the ability to exercise willpower to control physical acts in accordance with that rational judgment.³⁴

A number of conditions have been held to amount to an abnormality of mind, including psychosis, organic brain disorder, schizophrenia, epilepsy, hypoglycaemia, depression (reactive and endogenous), post-traumatic stress syndrome, chronic anxiety and

³² *Tumanako* (1992) 64 A Crim R 149 at 159 (per Badgery-Parker J); *R v Trotter* (1993) 35 NSWLR 428 at 430 (per Hunt CJ at CL).

³³ L Waller and CR Williams, *Criminal Law: Text and Cases*, Eighth Edition, Butterworths 1997, p 682.

³⁴ *R v Byrne* [1960] 2 QB 396 at 402-403 (per Lord Parker). This formulation has been followed in NSW, for example - *Chayna* (1993) 66 A Crim R 178 at 190 (per Gleeson CJ).

personality disorders.³⁵ Those with intellectual disabilities can also be covered by the defence and, more controversially, it may be raised where the accused claims to have suffered from an anti-social personality disorder, or from premenstrual tension.³⁶ In its 1993 discussion paper the NSWLRC commented that ‘In general terms, “abnormality of mind” is problematic because it is neither a medical nor a legal concept...It has been submitted to the Commission that juries have particular trouble making sense of this requirement’.³⁷ In its 1997 Report the NSWLRC agreed that it was an ambiguous term ‘and that its meaning may be unclear to expert witnesses’.³⁸ The Commission recommended replacing the term ‘abnormality of mind’ with the expression ‘abnormality of mental functioning arising from an underlying condition’.³⁹

The NSWLRC was also of the view that the second element of the defence (the requirement that the accused must show that the abnormality of mind arose from one of the three causes listed in section 23A) ‘adds unnecessary complexity to the defence’. It was said, for example, that the courts have developed complicated criteria to distinguish between the three causes, but that ‘It is questionable whether any of these distinctions are logical or readily understood by juries’.

Also adding to the complexity and confusion, in the opinion of the NSWLRC, is the fact that the second element has been interpreted in a restrictive way, so that an abnormality of mind must refer to a condition arising from the three listed causes. An interesting aspect of that restrictive construction is that it has operated in NSW to ‘exclude from the ambit of the defence [of diminished responsibility] those persons who kill while *intoxicated or who act as a result of mere outbursts of rage or jealousy*’.⁴⁰ It was said in *R v Purdy* that ‘Disabling passions of an ephemeral kind are not to count’.⁴¹ At present, the defence of diminished responsibility can be established where the accused was intoxicated but only where he or she also suffers from a pre-existing condition, so that it must be shown that the abnormality of mind exists even where the accused is sober.⁴² On the other hand, where an actual abnormality of mind does exist, it may be ‘temporary in nature’, so long that is as it is proved to be present at the time of the act

³⁵ NSWLRC, *Discussion Paper 31 - Provocation, Diminished Responsibility and Infanticide*, August 1993, p 83. (Henceforth, NSWLRC Discussion Paper).

³⁶ NSWLRC Report, p 27.

³⁷ NSWLRC Discussion Paper, p 83; NSWLRC Report, p 44. Reference was made to the oral submissions of M Tedeschi QC and Dr R Milton.

³⁸ NSWLRC Report, p 47.

³⁹ *Ibid*, p 54.

⁴⁰ *Ibid*, pp 47-49.

⁴¹ [1982] 2 NSWLR 964; *R v Tumanako* (1992) 64 A Crim R 149. In *R v Jones* (1986) 22 A Crim R 42 it was held that a temporary alcohol-induced state of irresponsibility is not to count.

⁴² NSWLRC Report, p 65.

causing death and so long as the other requirements of section 23A are satisfied.⁴³

The expression '*mental responsibility*' has been said to point 'to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise willpower to control his physical acts'.⁴⁴ This, too, has been said to be an ambiguous expression, conflating two distinct ideas: the capacity of the defendant (impaired or reduced capacity); and an assessment of culpability (reduced or diminished liability).⁴⁵ The NSWLRC thought the expression may be 'misleading in so far as it does not make it expressly clear that it is a question for the jury, not experts, to answer'.⁴⁶

The question for the jury is, in fact, one of degree, as to whether an abnormality of mind '*substantially impaired*' the mental responsibility of the accused. It is said in this regard that 'substantial' impairment does not necessarily mean total impairment, but the impairment must be more than trivial or minimal.⁴⁷ Presumably, this refers to the capacity of the accused, an issue in which the jury will be assisted by expert evidence. However, the NSWLRC explains that the courts in recent years have emphasised that the question of substantial impairment is essentially a moral judgment concerning, in the final analysis, the degree of the accused's culpability, with the jury approaching this 'in a common sense way and applying community standards'.⁴⁸ Consider, for example, the discussion by Hunt CJ in *R v Trotter* where it was said that the question as to whether the impairment of the accused's mental responsibility was sufficiently 'substantial' so as to reduce the crime from murder to manslaughter was 'not a matter within the expertise of the medical profession. That is a task for the tribunal of fact, which must approach that task in a broad commonsense way...It involves a value judgment by the jury representing the community (or by a judge where there is no jury), not a finding of medical fact'.⁴⁹

Thus, the question whether the impairment is substantial or not is a matter for the jury and not medical experts. Further, if it is primarily a moral judgment, then juries 'may legitimately differ from expert medical opinion'.⁵⁰ The relationship between the jury and expert evidence can be summed up in these terms: the question of whether the accused has demonstrated the existence of an abnormality of mind is a matter for expert

⁴³ *Tumanako* (1992) 64 A Crim R 149 at 161.

⁴⁴ *Byrneat* 493 (per Lord Parker); followed in NSW in for example - *Tumanako* (1992) 64 A Crim R 149 at 159 (per Badgery-Parker J); *Chayna* at 191.

⁴⁵ NSWLRC Discussion Paper, p 85.

⁴⁶ NSWLRC Report, p 51.

⁴⁷ *R v Trotter* (1993) 68 A Crim R 536.

⁴⁸ *Ibid*, p 50.

⁴⁹ *R v Trotter* (1993) 35 NSWLR 428 at 431.

⁵⁰ NSWLRC Report, p 50.

evidence; the question whether the resulting impairment is so substantial as to reduce liability from murder to manslaughter is for the jury to decide; at present the jury may reject the medical evidence but only, it seems, where there is other evidence which displaces or throws doubt on it, or where the medical evidence is not unanimous.⁵¹

Diminished responsibility in NSW - empirical data: In December 1994 the Judicial Commission published a paper outlining the use of partial defences to murder in NSW. The data for the study was obtained from an audit of all Supreme Court Registry files and DPP files for homicide offenders sentenced between January 1990 and September 1993. Among other things, the study found that:

- of the 256 offenders studied, 36 (or 14.1%) argued the defence of diminished responsibility;
- the acceptance rate was 61.1%, compared with 70% for the defence of provocation;
- those offenders (6 in total) relying on a combination of both defences had the highest acceptance rate of 83.3%;
- for male offenders, who vastly outnumbered females, the acceptance rates for diminished responsibility and provocation were almost equal (60.6% and 60.0% respectively);
- diminished responsibility is more likely to be accepted when the male offender is related to the victim than when he is not (66.7% and 55.6% respectively);
- in cases involving female offenders where the defence was accepted (5 cases) all were diagnosed as suffering from major or severe depression. The most commonly diagnosed condition for males was some form of schizophrenia (6 cases) followed by major or severe depression (4 cases);
- jury verdicts accounted for 19 of the 36 cases (ie, 53.8%) when the defence of diminished responsibility was relied upon. In the majority of these cases (57.9%) the defence was not accepted;
- there were 5 judge alone trials in the study and all involved the defence of diminished responsibility. They represented 13.9% of cases where the defence was argued. The defence was accepted in 3 of the 5 cases.⁵²

⁵¹ *R v Tumanako* (1992) 64 A Crim R 149.

⁵² H Donnelly and S Cumines, *From murder to manslaughter: partial defence in NSW - 1990-1993*, Judicial Commission of NSW, December 1994. The results of this study appear to have been used in a later publication in which it is said that 'In four of those five trials, the offender was convicted of manslaughter on the basis of diminished responsibility' - H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in NSW 1990-1993*, Judicial

Judge alone trials - the operation of section 32 of the Criminal Procedure Act 1986:

Under this provision an accused person standing trial for an indictable offence may elect to have the matter tried by a judge alone. The DPP must consent to an election for a trial by judge alone. As the NSWLRC noted in its discussion paper, in *Chayna*, Gleeson CJ pointed to the reluctance of juries to make a finding of manslaughter in cases which clearly appeared to them to be murder and thought that because of this:

in recent times in this State there has been a tendency for the legal representatives of accused persons who wish to raise a case of diminished responsibility to prefer a trial without a jury.⁵³

That view was confirmed by the 1994 Judicial Commission study which noted the 'recent trend of accused persons opting to be tried by a judge alone pursuant to s.32 of the *Criminal Procedure Act*'.⁵⁴

However, as explained by the NSWLRC, the above study related to a period before the publication in 1995 by the DPP of guidelines for Crown Prosecutors as to the granting of consent to an accused's election to be tried by the judge alone: 'These guidelines stipulate that there is no presumption in favour of consent, and that each case is to be decided on its merits'.⁵⁵ To this the NSWLRC report adds that the Office of the DPP 'has not collected figures for the number of homicide cases tried by judge alone since 1993'.⁵⁶ Thus, it is not known definitively whether the trend of accused persons opting to be tried by judge alone has continued since 1995.

In his submission to the NSWLRC, the DPP recommended that under the reformulated defence of diminished responsibility, 'juries should be given sole power to decide whether the defence is established'. That recommendation was not accepted by the Commission, which went on to say:

While...trials by judge alone should be exceptional in diminished

Commission of NSW 1995, p 67.

⁵³ (1993) 66 A Crim R 178 at 191. Gleeson CJ observed: 'Furthermore, experience shows a marked reluctance on the part of juries to make a finding which results in the application of the description of manslaughter to a crime which appears to them to be murder'. NSWLRC Discussion Paper, p 93.

⁵⁴ H Donnelly and S Cumines, *From murder to manslaughter: partial defence in NSW - 1990-1993*, Judicial Commission of NSW, December 1994, p 2.

⁵⁵ NSWLRC Report, p 40. It was noted that 'Guideline Six makes it clear that matters which involve a judgment on issues raising community values, such as provocation, should ordinarily be heard by a jury. On the other hand, Guideline Eight states that cases in which the main issues arise out of expert opinions, including medical experts' opinions, may be better suited to trial by judge alone'.

⁵⁶ *Ibid.*

responsibility cases, there are such cases where it would be appropriate for the DPP to consent to trial by judge alone, for example where pre-trial publicity might otherwise require a lengthy adjournment. In our view, the DPP's power to withhold consent to trials by judge alone, according to our recommended amendments to the DPP's Guidelines, would be sufficient assurance that juries would try the issue of diminished responsibility in all appropriate cases.⁵⁷

With respect to the DPP's Guidelines for consent to an accused's election for trial by judge alone, the Commission recommended that they should be 'reviewed to make it clear that the defence of diminished responsibility requires a judgment on issues raising community values, which issues should ordinarily be decided upon by a jury'.⁵⁸ Further to this recommendation, in the Second Reading Speech for the Diminished Responsibility Bill the Attorney General said he would be asking the DPP to make appropriate amendments to the Prosecution Guidelines.⁵⁹

4. THE CRIMES AMENDMENT (DIMINISHED RESPONSIBILITY) BILL 1997 - THE DEFENCE OF SUBSTANTIAL IMPAIRMENT BY ABNORMALITY OF MIND

Proposed section 23A(1) of the *Crimes Act 1900* provides:

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

Except for the retention of the term 'abnormality of mind', this proposal is substantively the same as the reformulation recommended by the NSWLRC. The major difference in drafting is that, with the division of the sub-section into parts (a) and (b), the Bill delineates more clearly between the factual issue under part (a), which is to be considered (usually) by reference to expert medical evidence, as against the ultimate moral issue under part (b) as to whether the impairment is so substantial as to reduce liability and culpability from murder to manslaughter.

Following the Explanatory Note to the Bill, the principal differences between the current

⁵⁷ Ibid, pp 41-42.

⁵⁸ Ibid, p 39.

⁵⁹ NSWPD, 25/6/97, p 11066.

defence of diminished responsibility and the new defence are as follows:

- The concept of “mental responsibility” is removed. The new defence requires the accused to show that his or her capacity to understand events, to judge whether his or her actions were right or wrong or to control himself or herself, was substantially impaired by an abnormality of mind.
- The current defence refers to an abnormality of mind that arises from a condition of arrested or retarded development of mind or any inherent causes or that is induced by disease or injury. The new defence instead requires the accused to prove that his or her abnormality of mind arises from an underlying condition. In the way that term is defined this will require the accused to prove that the abnormality of mind arose from ‘a pre-existing mental or physiological condition, other than a condition of a transitory kind’ (sub-section 23A(8)).
- The new defence is satisfied only if the impairment suffered by the defendant was so substantial as to warrant liability for murder being reduced to manslaughter.

Comparing the Bill again with the recommendations of NSWLRC, that expert evidence is irrelevant to the ultimate issue of culpability and liability is also clarified under the Bill by the inclusion of proposed sub-section 23A(2) which provides:

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

This is to be read in light of the fact that the ultimate issue rule, forbidding expert witnesses from expressing opinions on that aspect of the case which the jury must decide, was abolished under section 80 of the *Evidence Act 1995*. In fact, it is doubtful whether that rule applied to the defence of diminished responsibility in NSW, with the NSWLRC discussion paper noting in this regard that ‘Evidence of this nature is routinely given by psychiatrists at diminished responsibility trials...’.⁶⁰ In any event, expert opinion on the ultimate issue as to whether the impairment was so substantial as to warrant liability for murder being reduced to manslaughter would be made inadmissible by proposed sub-section 23A(2). Experts would only be able to give evidence about whether there was a substantial impairment under proposed section

⁶⁰ NSWLRC Discussion Paper, p 88. On this point, the Commission said in its discussion paper that some submissions had claimed that ‘it is sometimes desirable and even necessary for medical witnesses to give evidence on this question [of culpability]. For example, the jury may need to be told what effect a psychotic condition or other abnormality would have on the defendant’s conduct. This would involve addressing questions of responsibility. It has also been suggested that counsel will inevitably develop ways to ask expert witnesses the question by other means’. For a discussion of the issue see - I Freckleton and H Selby, *Expert Evidence*, The Law Book Co Ltd 1993, para 10.140. Diminished responsibility was said to be one of the exceptions to the ultimate issue rule.

23A(1)(a).⁶¹ This is consistent with the view of the NSWLRC that expert evidence should only be relevant and admissible in relation to:

(a) whether or not there was an abnormality of mental functioning arising from an underlying condition and the relationship of that abnormality to the accused's capacity to understand events, or to judge whether his or her actions are right or wrong, or to control himself or herself; and (b) assessing the effects of self-induced intoxication...⁶²

Further to this, under proposed sub-section 23A(3) the new defence makes it clear that the effects of any self-induced intoxication on the accused at the time of the acts or omissions causing death are to be disregarded by the jury.

In substance, proposed sub-sections 23A(4)-(7) are identical to the present sub-sections 23A(2)-(5).

5. **COMMENTARY, WITH AN OVERVIEW OF ARGUMENTS FOR AN D AGAINST THE DEFENCE OF DIMINISHED RESPONSIBILITY**

Three questions: At least three questions can be raised in the context of the present debate concerning the defence of diminished responsibility, namely: should the defence be abolished altogether?; if not, should the status quo be maintained?; and if the defence is to be retained but in a reformulated version, how appropriate are the proposed changes under the Diminished Responsibility Bill? The last question can be discussed first.

Comments on the Diminished Responsibility Bill: The new defence of substantial impairment by abnormality of mind was described in the Second Reading Speech as 'tighter' than the present defence of diminished responsibility. It is certainly the case that the definition of 'underlying condition' makes it clear that conditions of a transitory kind, such as road rage, would not qualify as abnormalities of mind under the proposed defence. But the extent to which this alters the law in any substantial sense remains to be seen. As noted, at present it would seem that where an actual abnormality of mind does exist, it may be 'temporary in nature', so long that is as it is proved to be present at the time of the act causing death and so long as the other requirements of section 23A are satisfied. Presumably, this would still apply under the proposed defence, for what is precluded here are 'transitory' or fleeting conditions, such as transient disturbances of the mind as road rage or perhaps a fit of extreme jealousy, and not 'temporary' (that is, non-permanent) conditions such as post-natal depression.⁶³ In other words, it may be the case that the proposal would effectively regularise what the courts have said in their interpretation of the present section 23A. Certainly, Michael Adams QC, a member of

⁶¹ NSWPD, 25/6/97, p 11065-11066.

⁶² NSWLRC Report, p 62.

⁶³ NSWPD, 25/6/97, p 11065; NSWLRC Report, p 56.

the NSWLRC, was adamant in a radio interview from 26 June 1997 that the outcome in the *Cassel* case, where it seems the accused was suffering from a pre-existing but non-permanent condition of major depression, would not (or should not) be any different under the proposed defence.⁶⁴

However, that case was tried by judge alone and, presumably, anything like its equivalent in future would have to be heard before a jury. In the same radio interview, Stephen Norrish QC, commented in this regard that the proposal may result in juries ignoring overwhelming expert opinion. The suggestion appears to be that the proposed reforms may generate arbitrary outcomes, based perhaps on subjective criteria bearing little if any relation to the apparently 'objective' medical evidence.

Stephen Norrish QC noted, too, that the defence of mental illness can still be tried by judge alone. Why, then, one might ask should we insist that an analogous defence, based on the concept of abnormality of mind, be heard before a jury in all but the most exceptional cases? Is it suggested that the defence of mental illness involves, ultimately, less of a moral judgment than the defence of substantial impairment by abnormality of mind? If so, on what grounds?

Much of the discussion concerning the present operation of section 23A focused on the complex and confusing elements in the defence of diminished responsibility. The proposed reform would seem to be a vast improvement in this regard, certainly where the requirement to prove that the abnormality of mind arose from one of the designated causes is concerned. That the proposed formulation has its own complexities was acknowledged by the NSWLRC, in particular with respect to the interpretation of the term 'capacity to control', a notion which creates special difficulties for psychiatrists and which may prove controversial if extended to apply to so-called 'psychopaths'.⁶⁵ Again, that would be a matter for the jury to decide.

Another issue is that the new defence would still use the philosophical term 'abnormality of mind', against the psychiatric expression 'abnormality of mental functioning' favoured by the NSWLRC, but whether that will make any appreciable difference, certainly in terms of the jury's understanding of the elements of the defence, is to be doubted.

The general point to make is that the proposed defence remains conceptually difficult. This is largely due to the philosophical problems involved in any notion of 'partial insanity'. The Second Reading Speech stated in this respect:

⁶⁴ 2BL Radio Interview, 26 June 1997. In *Cassel* (NSW Supreme Court, Bruce J, 14 March 1997, CLD 70065/95, unreported) Bruce J commented, 'It has been clearly established that at the time of the offences the prisoner was suffering from a major depressive episode with significant emotional factors'.

⁶⁵ NSWLRC Report, pp 56-57.

Some people are so mentally ill as not to be responsible at all. The law provides that if they are found not guilty by reason of mental illness they are to be detained in mental hospitals. Other people, while not completely mentally ill, have their mental functioning affected by some kind of underlying condition, and they can raise this new defence.⁶⁶

A purist might question this by debating the conceptual coherence of the idea of partial responsibility which is at its core - in the sense that the accused lacks some but not all capacity to understand, judge or control him or herself. It may even be contended that both the present and the proposed defences are 'beneficent' muddles, in which the abnormality at issue is in danger of dissolving into the equivalent of a mitigating circumstance.⁶⁷ On the other side, it can be said that while any version of the defence will have its difficulties, the moral distinction that it seeks to make, reflected as this is in the reduction of liability from murder to manslaughter, is something that a jury will understand in a common sense way in the light of the particular circumstances of any case. However, it may be that considerations of this sort take the discussion towards the underlying arguments for and against the defence of diminished responsibility.

For and against the defence of diminished responsibility: As noted, views have been expressed on the first two questions posed above, as to whether the defence of diminished responsibility should be abolished or left unaltered. For the Opposition, the Hon JP Hannaford MLC, is reported to have favoured abolition of the defence of diminished responsibility. In contrast, the president of the NSW Law Society, Patrick Fair, is said to have argued that no change was required to the present partial defence of diminished responsibility under section 23A of the *Crimes Act*.⁶⁸

Arguments against the defence of diminished responsibility: Against the defence or any reformulated version of it, it is argued that:

- In light of the fact that there is no longer a mandatory life sentence for murder in NSW, the defence is an unnecessary anachronism. Diminished responsibility was devised originally as a way of saving some individuals from a mandatory sentence of death or later, from a mandatory sentence of life imprisonment. With the abolition of the death penalty and of the mandatory life sentence, there is no longer any need for the defence in relation to murder. For example, in 1982, the Victorian Law Reform Commissioner recommended the adoption of the defence. However, in its 1990 report the Victorian Law Reform Commission stated 'The primary argument underlying this recommendation was that "the crime of murder should be reserved for deliberately vicious and calculated killings"'. The

⁶⁶ NSWPD, 25/6/97, p 11065.

⁶⁷ Law Reform Commission of Victoria, *Discussion Paper No 14 - Mental Malfunction and Criminal Responsibility*, August 1988, p 54. The Commission discussed various criticisms of the defence of diminished responsibility as this operates in England.

⁶⁸ 'State-of-mind defence pleas to be harder', *The Sydney Morning Herald*, 26 June 1997.

subsidiary argument was based on the fact that murder carried a mandatory term of life imprisonment. Since the life sentence for murder is no longer mandatory in Victoria, it is appropriate to reconsider the recommendation'.⁶⁹ In the event the Commission recommended against introducing the defence of diminished responsibility.

- Indeed, of the Australian jurisdictions with a discretionary sentence for murder, only NSW and the ACT provide for a defence of diminished responsibility. The NSWLRC observed in this regard: 'In those jurisdictions which allow for discretionary sentencing for murder, any evidence of mental impairment may simply be taken into account when sentencing an offender'.⁷⁰
- It is said that no coherent limits can be placed on mental abnormality and that, as a consequence, the defence of diminished responsibility introduces an unacceptable level of vagueness into criminal trials. In effect, the defence provides a pretext to introduce a wide variety of extenuating circumstances which are relevant not to guilt but to sentence.⁷¹
- Because mental malfunctions defences depend on such a large extent on what the defendant tells a psychiatrist or psychologist, they are too susceptible to fabrication. In extreme cases, where insanity is the issue, fabrication is much more difficult.⁷²
- Diminished responsibility - dependent as it must be on medical or other expert evidence - also opens the way to abdication of responsibility by the jury and too great a reliance on the opinions of expert witnesses.⁷³
- There are difficulties with the sentencing of offenders who are convicted of manslaughter based on a successful defence of diminished responsibility. The concept of diminished responsibility only has value if it is used to mitigate the severity of the punishment otherwise thought appropriate. However, to sentence a mentally abnormal dangerous recidivist offender to a period of detention less than the norm would lead to the paradox that the more dangerous and disordered the defendant, the shorter the sentence has to be. The principle of proportionality,

⁶⁹ Law Reform Commission of Victoria, *Report No 34 - Mental Malfunction and Criminal Responsibility*, October 1990, p 48-53. (Henceforth, Law Reform Commission of Victoria Report). The following account of the arguments against the defence of diminished responsibility is based to a significant extent on the Commission's Report.

⁷⁰ NSWLRC Report, pp 31-32.

⁷¹ Law Reform Commission of Victoria Report, p, 51.

⁷² *Ibid*, p 52.

⁷³ *Ibid*.

endorsed by the High Court in *Veen (No1)*⁷⁴ and *Veen (No2)*,⁷⁵ means that an offender with diminished responsibility must get a lower sentence than a more culpable offender, even though the former may be more dangerous, due to his or her reduced level of mental functioning.⁷⁶

- The fairest, most efficient, and most flexible method for dealing with people who have mental malfunctions short of a full mental impairment defence is through the sentencing mechanism.⁷⁷
- Different considerations apply to the partial defence of diminished responsibility, on one side, and provocation and the infanticide defence, on the other. The infanticide defence is said to be well-accepted and well-bounded. Its existence does not cause practical problems.⁷⁸ The defence of provocation, it could be argued, is less complex and problematic from the standpoint of the jury, for it is based more on considerations which are amenable to common sense analysis, in effect deciding where a concession is to be made to human frailty, as opposed to the technical considerations concerning ‘abnormality of mind’ which are encountered in the defence of diminished responsibility.
- It may be better to redefine and broaden the defences of mental illness and provocation rather than create a “back-door” excuse for people who do not fit into the narrow tests provided by these two defences.⁷⁹

Arguments for the defence of diminished responsibility: In 1975 the Butler Committee in England recommended that if the mandatory life sentence for murder was abolished,

⁷⁴ (1979) 143 CLR 458.

⁷⁵ (1987) 164 CLR 465. In *Veen (No 1)* the High Court allowed an appeal on the ground of severity of sentence following a conviction of manslaughter on the basis of diminished responsibility. A determinate sentence was fixed. The offender was later released on licence and then killed another person in a similar way to the first crime. In *Veen (No 2)* the majority affirmed the principle that, prima facie, a mental abnormality which exonerates an offender from liability to conviction for murder is regarded as a mitigating circumstance, affecting the appropriate level of punishment (at 476). However, that majority also held that, in fixing an appropriate sentence a sentencing judge is entitled to ‘attach great weight’ to the protection of society (at 477). In *Veen (No 2)* the majority tried to reconcile the problem of sentencing offenders suffering from a mental abnormality with the principle of proportionality in terms which, arguably, only restated the difficulty at issue (at 477).

⁷⁶ Law Reform Commission of Victoria Report, p 52.

⁷⁷ Ibid. That an offender suffers from a mental disorder or an intellectual disability may be taken into account as a mitigating factor when sentencing that offender. See NSWLRC Report, p 28 citing - *R v Smith* (1958) 75 WN (NSW) 198; *R v Masolatti* (1976) 14 SASR 124; *R v Skipper* (1992) 64 A Crim R 260.

⁷⁸ Law Reform Commission of Victoria Report, p 53.

⁷⁹ Cabinet Office Submission to the NSWLRC Report, p 36. The Report also cites - B Fisse, *Howard’s Criminal Law*, 5th Edition, The Law Book Co Ltd 1990, p 112.

the defence of diminished responsibility should be abolished as well.⁸⁰ However, this view was rejected by the Criminal Law Revision Committee five years later, which concluded that even if the mandatory life sentence for murder were abolished, diminished responsibility should remain.⁸¹ There were a number of arguments for this: (1) the judge should have the guidance of the jury about the defendant's culpability when deciding on an appropriate sentence; (2) juries might be reluctant to convict someone for murder, particularly in cases where the person has aroused their sympathy, giving the jury the choice of only murder or acquittal which might lead to unmerited acquittals; (3) the special stigma attached to murder; and (4) public acceptance of lenient sentences is greater where the jury returns a manslaughter verdict rather than a murder verdict.⁸²

In Australia the debate has been conducted along similar lines. Thus, the main arguments on behalf of the defence, most of which are found in the NSWLRC Report, are as follows:

- In part as a result of the stigma attached to a murder conviction, it is important that the distinction between murder and manslaughter be retained. The defence of diminished responsibility enables the differences in moral gravity between murder and manslaughter to be clearly drawn in appropriate cases.⁸³
- That the defence no longer serves its original purpose is acknowledged: 'However, that argument ignores the concern that the community is less likely to accept a reduced sentence for murder, rather than manslaughter, based on a finding of mental impairment, and also ignores the vital importance of the jury in deciding whether an offender's culpability is substantially reduced because of mental impairment'.⁸⁴
- Following on from this, The NSWLRC argued that those law reform bodies which have opposed the defence 'have not attached sufficient weight to the importance of a manslaughter conviction in gaining community acceptance of appropriate sentences in diminished responsibility cases, nor have they given proper consideration to the jury's role in deciding degrees of blameworthiness and in determining whether criminal liability is to be imposed'.⁸⁵ In fact the Law Reform Commission of Victoria did report the argument that questions of

⁸⁰ Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders*, Home Office 1975.

⁸¹ Criminal Law Revision Committee, *Report No 14 - Offences Against the Person*, HMSO 1980.

⁸² Cited in Law Reform Commission of Victoria Report, p 50.

⁸³ Law Reform Commission of Victoria Report, p 49.

⁸⁴ NSWLRC Report, p 32

⁸⁵ Ibid.

responsibility should be reflected in the verdict of the jury as representatives of the community, stating 'It is not enough that these issues may be taken into account by the judge in relation to sentencing. The formal finding of diminished responsibility is important in that it signals the defendant's reduced responsibility to the community; it both constrains and explains the sentence imposed'.⁸⁶

- The loophole argument, that the defence wrongly allows people who kill to avoid murder convictions, is ill-founded. The NSWLRC stated: 'It is fundamental to our system of criminal justice that culpability for serious offences is measured according to the accused's mental state in committing the offence...People who kill while in a state of substantially impaired responsibility should not be treated as "murderers"'.⁸⁷
- While there is always a risk of fabrication, evidence that is fabricated can be properly tested, with the accused bearing the burden of proving that the defence has been established.⁸⁸
- As an 'intermediate defence' diminished responsibility provides flexibility to determine responsibility according to degrees of mental impairment, 'rather than according to a strict contrast between sanity and "insanity"'.⁸⁹ It has been said in this regard that the stark choice between guilty and not guilty on the ground of mental malfunction does not reflect the fact that mental malfunctions range along a continuum. There is a significant gap in responsibility between people who have serious impairments and those who do not. A defence of diminished responsibility - available as a partial defence to reduce murder to manslaughter and as a formal finding of 'guilty but with diminished responsibility' for all other offences - properly reflects the differences in responsibility.⁹⁰
- It is inconsistent to retain the defence of infanticide - a particular form of diminished responsibility - but not allow other similarly compelling mental disturbances to form the basis of a partial excuse.⁹¹

6. DEFENCE DISCLOSURE UNDER THE CRIMES AMENDMENT (DIMINISHED RESPONSIBILITY) BILL 1997

Proposed section 405A B: The Diminished Responsibility Bill proposes to insert a new section relating to murder trials, section 405AB, into the procedural provisions of the

⁸⁶ Law Reform Commission of Victoria Report, p 50.

⁸⁷ NSWLRC Report, pp 33 -34.

⁸⁸ Ibid, p 35.

⁸⁹ Ibid, p 36.

⁹⁰ Law Reform Commission of Victoria Report, p 49.

⁹¹ Ibid, p 51.

Crimes Act 1900 (NSW). The aim of the new section is to alert the prosecution before the trial that the accused intends to raise a defence of substantial impairment, and to provide the prosecution with particulars of witnesses' evidence in support of the defence.

The proposed section 405AB prevents an accused from presenting any evidence in support of a defence of substantial impairment if he or she has not notified the Director of Public Prosecutions of the intention to raise the defence, unless the Court gives the accused leave to present the evidence. In particular, without the leave of the Court the accused cannot call any witnesses to give evidence in support of a substantial impairment defence unless the accused has notified the DPP of the name and address of the witness and the particulars of the evidence that the witness will give. The purpose of disclosure is to give the prosecution notice of the intention to rely on the defence so that they are not caught by surprise at the trial.⁹² Disclosure allows the prosecution to consider the defence before the trial and, if appropriate, obtain advice from expert witnesses about the defence evidence.⁹³

The effect of the amendments is that defendants wishing to have a murder conviction reduced to manslaughter on the basis of substantial impairment will normally have to disclose before trial the defence and particulars of the evidence to be given by witnesses. A defendant claiming substantial impairment will generally call expert medical or psychiatric witnesses, as the defence will almost always depend on such expert evidence.

The proposed disclosure requirements will be an exception to the general rule that in criminal proceedings defendants are not obliged to give any information about their defence to the prosecution, and can reserve their defence until the prosecution has presented its case at trial. This right arises from the presumption of innocence, under which it is the responsibility of the prosecution to prove the case against the accused. The accused has the right to remain silent while the police investigate and the prosecution prepares its case.⁹⁴

In recent years, however, some jurisdictions have required defendants to disclose before trial whether they intend to adduce alibi or expert evidence. All Australian States require the defendant to notify the prosecution before trial if he or she intends to rely on an alibi.⁹⁵ In the United Kingdom, the defence may be required to notify the prosecution

⁹² Hon J Shaw MLC, Attorney General, *NSWPD 25/6/97* p11066.

⁹³ *Ibid.*

⁹⁴ See G Griffith, *The Right to Silence*, NSW Parliamentary Library Briefing Paper No 11/97.

⁹⁵ *Crimes Act 1900* (NSW) s 405A; *Crimes Act 1958* (Vic) s 399A; *Criminal Code* (Qld) s 590A; *Criminal Code* (WA) s 636A; *Criminal Code 1924* (Tas) s 368A; *Criminal Law Consolidation Act 1935* (SA) s 285C; *Criminal Code* (NT) s 331. In New South Wales, if an accused intends to lead evidence of tendency or coincidence or first-hand hearsay evidence, he or she must now generally give advance notice of that intention: *Evidence Act 1995* (NSW) ss 67, 97, 98.

before trial if it intends to present some types of expert evidence.⁹⁶ In Victoria, the Court may order the defence to file before trial a statement indicating the facts and issues contained in the prosecution case statement with which it takes issue, and to provide copies of the statements of any expert witnesses whom the defence intends to call at the trial.⁹⁷ The defence is not required to disclose the identity of any witness other than an expert witness.

These exceptions to the principle that the defence may reserve its evidence until the prosecution has presented its case have been justified on the basis of the special difficulties of countering alibi and expert evidence without notice.⁹⁸ It is argued that the defence should not be entitled to ‘ambush’ the prosecution with unforeseen evidence that requires extensive or expert investigation, because the extra work for the prosecution may lead to a delay or adjournment of the trial, and possibly result in an acquittal that would not have occurred if the prosecution had sufficient time to test the evidence effectively.⁹⁹

There has been some pressure for a general duty of defence disclosure not limited to the ‘special cases’ of alibi or expert evidence.¹⁰⁰ It is said that pre-trial notification of the nature of the defence and the supporting evidence would expedite criminal trials and relieve the prosecution of the burden of investigating and proving matters that the defence does not intend to dispute at the trial. The Attorney-General stated in the second reading speech for the Crimes Amendment (Diminished Responsibility) Bill that he has decided to refer the wider issue of disclosure to the New South Wales Law Reform Commission under the general heading of a review of the right to silence.¹⁰¹

Section 405AB may be regarded as falling within the category of the ‘special case’

⁹⁶ *Police and Criminal Evidence Act 1984* (UK) s 81.

⁹⁷ *Crimes (Criminal Trials) Act 1993* (Vic) ss 5, 11.

⁹⁸ Leng R, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-trial Disclosure’, [1995] *Criminal Law Review* 704. The New South Wales Law Reform Commission recommended in a 1987 report that any party proposing to call evidence of an expert, scientific or technical nature should disclose that intention to the court before trial and provide an outline of the evidence and the names of the witnesses who are to give it: NSW LRC, *Procedure from Charge to Trial: Specific Problems and Proposals*, DP 14/1, vol 1, 1987, ¶5.66.

⁹⁹ NSW LRC, *Procedure from Charge to Trial: Specific Problems and Proposals*, *ibid* ¶5.11.

¹⁰⁰ See Leng R, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-trial Disclosure’, [1995] *Criminal Law Review* 704; Nader J, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials*, 1993; New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals*, DP 14/1, vol 1, 1987; Aronson M, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992.

¹⁰¹ NSWPD 25/6/97 p 11066.

disclosure exceptions of alibi and expert evidence noted above. Although the disclosure requirements in the proposed s 405AB(2) are not expressly limited to the particulars of expert evidence, in practice a defence of substantial impairment will almost always rely on expert medical or psychiatric witnesses. The New South Wales Law Reform Commission did not discuss the question of a general duty of defence disclosure, but it indicated that in its view there are strong arguments for considering a substantial impairment defence to be a special case justifying pre-trial disclosure:

...we make no recommendations in this Report in relation to procedures for compulsory disclosure and assessment in diminished responsibility cases. However, we do note that there are special considerations in this type of case which support a legal requirement for the accused to give advance notice of an intention to plead diminished responsibility, to serve those medical reports intended to be relied on, and, perhaps, to submit to a psychiatric or psychological assessment. First, evidence of diminished responsibility is generally a matter which is wholly within the accused's knowledge. Secondly, the integral role of expert evidence in relation to the defence means that the prosecution encounters particular difficulties in rebutting diminished responsibility without adequate notice and provision to examine the accused. Thirdly, it may be argued that in such cases, the accused's right to silence and presumption of innocence are not infringed, since admission of having committed the act in question is implicit in reliance on the defence. Lastly, we consider that it is necessary to balance the interests of the accused with the interests of the general community in ensuring that adequate time is allowed for the accused's case to be properly tested by the prosecution. While we recognise that there is a risk of compromising an accused's right to silence by any form of compulsory disclosure and assessment, we consider that the special circumstances of pleading diminished responsibility justify such a requirement in relation to that defence.¹⁰²

Need for legislated pre-trial disclosure of a substantial impairment defence: It is not completely clear whether there is in fact a need for legislated pre-trial disclosure. Is there a real problem of ambush diminished responsibility defences? There does not appear to be any relevant empirical evidence relating to ambush defences for any Australian jurisdiction.¹⁰³ In 1987 the New South Wales Law Reform Commission commented that:

At present in NSW it is almost universal practice for the lawyer for the accused person to reveal to the prosecution the nature of any proposed defence based on psychiatric evidence, such as insanity or diminished responsibility.... If this is not done, and the prosecution is surprised by the defence calling a doctor or other

¹⁰² NSWLRC Report, pp 82-83.

¹⁰³ See G Griffith, *The Right to Silence*, NSW Parliamentary Library Briefing Paper No 11/97p 35. A study in England indicated that the 'common perception that ambush defences pose a significant problem for the criminal justice system may be erroneous': R Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate*, Royal Commission on Criminal Justice, HMSO, 1993.

expert, the court will invariably grant the prosecution's application for an adjournment to call evidence in reply.¹⁰⁴

The Report of the Law Reform Commission on diminished responsibility stated that the Commission has become aware of problems which the prosecution may encounter in trials where the defence of diminished responsibility is pleaded, arising from the absence of any legal compulsion of the accused to disclose an intention to plead diminished responsibility. The Commission cited several submissions, including that of the New South Wales DPP, but did not provide any information as to the incidence or effect of ambush defences.¹⁰⁵

Discretion to admit evidence of substantial impairment: Proposed section 405AB gives the trial judge a wide discretion to admit evidence of substantial impairment even if the required notice has not been given. The judicial discretion is not limited by reference to 'special circumstances' or other guidelines. Proposed section 405AB(1) states that:

on a trial for murder, the defendant must not, *without the leave of the Court*, adduce evidence tending to prove a contention by the defendant that the defendant is not liable to be convicted of murder by virtue of s 23A, unless the defendant gives notice, as prescribed by the regulations, of his or her intention to raise that contention (italics added).

The alibi notice provisions in s 405A of the *Crimes Act* contain a similar formulation providing that the defendant may not without leave of the Court adduce evidence in support of an alibi unless the defendant has complied with the notice requirements. In 1987 the New South Wales Law Reform Commission observed that in fact trial judges rarely excluded alibi evidence even though notice had not been given:

Under the legislation requiring the disclosure of a defence of alibi, the sanction established to enforce disclosure is the right of the trial judge to disallow, in the exercise of his or her discretion, the alibi evidence sought be introduced by the accused person. In our view, and this is consistent with current practice, this is a sanction which should only be used rarely since it effectively prevents the accused person from presenting evidence in defence of the charge. We consider that the sanctions available to a court should remain a matter of discretion in order to meet the circumstances of the particular case. We also consider that the range of sanctions available to the trial judge, and specified in relevant legislation, should be extended to include greater use of the power to allow the prosecution to call a case in reply and the power to grant adjournments to the

¹⁰⁴ NSWLRC, *Procedure from Charge to Trial: Specific Problems and Proposals*, DP 14/1, vol 1, 1987, ¶5.4.

¹⁰⁵ NSWLRC Report, pp 79-81. The Commission noted that in England the Criminal Law Revision Committee rejected a proposal to require compulsory disclosure of an intention to plead diminished responsibility on the ground that it was unnecessary since, in practice, the prosecution was rarely ever taken by surprise: Criminal Law Revision Committee, *Offences Against the Person* Report 14, HMSO 1980.

prosecution if it is unfairly disadvantaged.¹⁰⁶

Sanction for failure to notify defence before trial: The above extract from the 1987 Law Reform Commission Report raises the question of the appropriate sanction for failure to disclose a substantial impairment defence. Finding a sanction for failure to disclose that does not overly infringe the rights of accused persons is not easy. It is arguable that evidence which tends to exculpate an accused person should never be excluded from the evidence in the trial.¹⁰⁷ Other possible sanctions less serious than exclusion of evidence include:¹⁰⁸

- allowing the judge or the prosecution to comment to the jury on the accused's failure to disclose the defence at an early stage,¹⁰⁹ and inviting the jury to draw adverse inferences from the non-disclosure;
- the Court ordering costs against an accused who does not comply with disclosure requirements;
- the Court taking an accused's failure to notify the defence into account in sentencing;
- a right for the prosecution to have the case adjourned, or to call evidence in rebuttal or to recall witnesses. These are currently procedures requiring the leave of the Court.¹¹⁰ Of course, these measures to some extent defeat one of the purposes of defence disclosure, to expedite trials.

Psychiatric or medical examination of the accused on behalf of the prosecution: A further observation is that the Diminished Responsibility Bill has not taken up a suggestion by the Law Reform Commission that there are arguments in favour of allowing the Court to order a psychiatric or medical examination of the accused. There is currently no provision in New South Wales to compel an accused person to submit to an assessment by the prosecution's psychiatrist or psychologist. It is argued that this may

¹⁰⁶ NSWLRC, *Procedure from Charge to Trial: Specific Problems and Proposals*, DP 14/1, vol 1, 1987, ¶5.59.

¹⁰⁷ *Ibid*, ¶5.36.

¹⁰⁸ See H Figgis, *Dealing with Court Delay in New South Wales*, NSW Parliamentary Library Briefing Paper No 31/96 pp 27-30.

¹⁰⁹ For example, *Crimes (Criminal Trials) Act 1993* (Vic) s 15.

¹¹⁰ Leave for the prosecution to re-open their case after the defence has presented its case is only granted in exceptional circumstances: *R v Chin* (1984) 157 CLR 671. The *Crimes (Criminal Trials) Act 1993* (Vic) provides that the court may allow the prosecutor after he or she has closed his or her case to call evidence in reply to evidence given by the prosecution which could not reasonably have been foreseen by the prosecutor having regard to the defence response filed before trial.

greatly impede the prosecution's ability to rebut a plea of diminished responsibility. If the prosecution's expert witnesses are not able to interview the accused, their evidence is necessarily limited; arguably the jury is then denied the opportunity to consider the plea based on adequate information from both sides.¹¹¹ The Commission deferred considering the question, stating that it should be discussed in the context of a review of right to silence; however, the Commission indicated that in its view there are special considerations in diminished responsibility cases which may support a legal requirement for the accused to submit to a psychiatric or psychological assessment.¹¹²

Time of notice of substantial impairment defence: the time when the defence must be notified to the prosecution is not specified in the Bill, and will be governed by regulations. Alibi notices must be provided within 10 days of the committal hearing under s 405A(7). The time for notifying the defence of diminished responsibility seems unlikely to be set so far ahead of trial. The Attorney General commented in the second reading speech on the Bill that the time for giving notice:

...will be determined by the purpose of disclosures, which is to give the prosecution notice of the intention to rely on the defence and not to catch them by surprise at the trial. The timing of disclosure must also take into consideration the realities of

restrictions on access to legal aid in the legal process. There is no legal aid available for murder committals. The accused person may not obtain legal aid until some time after the committal, and the expert reports will then have to be obtained and assessed before the accused person can be advised about whether to not to raise the defence.

In relation to the timing of the alibi notice (within 10 days of the committal), in 1987 the Law Reform Commission stated that:

In our view, this is unrealistic. Accused people who are not represented at their committal proceedings may take some time to engage the services of lawyer and some further time may elapse before the lawyer received complete instructions. Although this would certainly be a factor taken into account by a court in deciding whether to admit evidence of an alibi where the required notice has not been given within time, we consider it preferable that the time within which the notice must be given should be a nominated period prior to the date of the trial and that this date for giving notice should be specified by the prospective court of trial in each case, thus enabling the circumstances of the particular case to be taken into account and a more realistic time within which notice must be given to be fixed.¹¹³

¹¹¹ NSWLRC Report, pp 79-81.

¹¹² NSWLRC Report p 80.

¹¹³ NSWLRC, *Procedure from Charge to Trial: Specific Problems and Proposals*, DP 14/1, vol 1, 1987, ¶5.61.

7. *CONCLUSIONS*

The Diminished Responsibility Bill deals with an area of the criminal law which is as controversial as it is complex. In placing greater emphasis on the role of the jury, the Bill seeks to bolster the legitimacy of the criminal justice system by increasing community input into it, thereby deflecting the focus of public attention in these matters away from the judiciary. As noted, the new defence of substantial impairment by abnormality of mind was described in the Second Reading Speech as ‘tighter’ than the present defence of diminished responsibility. The key question for some is whether a partial defence of this sort is needed at all where there is no longer a mandatory life sentence for murder. It has been said in this regard that, with the exception of the ACT, no other Australian jurisdiction with a discretionary sentence for murder provides for the defence of diminished responsibility. On the other side, one argument on behalf of the defence relates to the special stigma attached to a murder conviction and the role played by the defence of diminished responsibility in enabling the differences in moral gravity between murder and manslaughter to be clearly drawn in appropriate cases.

The disclosure provisions under the Bill can be seen as a part of a general trend to adjust the balance between the rights of accused persons and the public interest in speedy trials and a well-armed prosecution. The key issue at stake here is the extent to which, in order to improve prosecution preparation and trial efficiency, the proposal infringes the principle of an accused person’s right to silence. There is also some question whether the disclosure reforms proposed will in practice have a substantial effect on the conduct of murder trials involving a defendant with diminished responsibility.

APPENDIX A

Section 23A Crimes Act 1900 (NSW)

Diminished responsibility

23A.

- (1) Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.
- (2) It shall be upon the person accused to prove that he is by virtue of subsection (1) not liable to be convicted of murder.
- (3) A person who but for subsection (1) would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
- (4) The fact that a person is by virtue of subsection (1) not liable to be convicted of murder in respect of a death charged shall not affect the question whether any other person is liable to be convicted of murder in respect of that death.
- (5) Where, on the trial of a person for murder, the person contends:
 - (a) that he is entitled to be acquitted on the ground that he was mentally ill at the time of the acts or omissions causing the death charged; or
 - (b) that he is by virtue of subsection (1) not liable to be convicted of murder,evidence may be offered by the Crown tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

APPENDIX B

Crimes Amendment (Diminished Responsibility) Bill 1997