

# IT'S TIME TO ABOLISH DIMINISHED RESPONSIBILITY, THE COACH AND HORSES' DEFENCE THROUGH CRIMINAL RESPONSIBILITY FOR MURDER

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## Abstract

Diminished responsibility is a partial defence to murder which, if proven, reduces criminal liability for unlawful homicide from murder to manslaughter. This paper contends that given the vagueness, uncertainty and practical difficulties associated with the defence of diminished responsibility, it should be abolished completely in Australia as the very breadth of the defence, allows a coach and horses to be driven through criminal responsibility for murder. It will be contended that the availability of the defence of diminished responsibility is not appropriate even in jurisdictions such as Queensland and the Northern Territory which retain a mandatory life sentence for murder. Furthermore, it will be argued that attempts to reformulate the defence of diminished responsibility are akin to seeking to glue back together a shattered vessel.

## I INTRODUCTION

This paper is divided into three parts. The first part, the introduction, commences with an examination of the origins of the partial defence of diminished responsibility in Scotland and England, with attention being given to the English legislation as it was largely 'imported' into several Australian jurisdictions. The second part examines the history of the defence in the four Australian jurisdictions that have allowed the partial defence and the extent to which they now differ from the 'parent' English legislation. Whilst there are important differences between the four Australian jurisdictions, such as definitional differences and the role of expert evidence on the ultimate issue of whether responsibility was substantially diminished to warrant the reduction of murder to

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manslaughter, the elements of the defence are essentially the same and therefore the problems are similar. The third part considers sentencing, which, given the defence originated in an era of mandatory life imprisonment for murder, will focus on the two Australian jurisdictions of Queensland ('Qld') and the Northern Territory ('NT') which both permit the partial defence of diminished responsibility and retain mandatory life imprisonment for murder. The 'sister' defence of mental impairment or the often 'associated' defence of provocation is not within the scope of this article and as such has not been specifically addressed. However, some of the key linkages will be considered, such as Victoria's decision to abolish provocation and resist the introduction of diminished responsibility because of fears that defendants who utilise the partial defence of provocation would instead seek to utilise the partial defence of diminished responsibility.

As to mental impairment, the successor to the old insanity defence, it will be noted that the 'sister' defences of mental impairment and diminished responsibility both rely on the so called three capacities,<sup>1</sup> with the defence having to prove on the balance of probabilities a total incapacity against one of the three capacities for mental impairment, and a substantial incapacity against one of the three capacities for diminished responsibility. The main point here is that, unlike the old insanity defence where the defendant pleading insanity faced a lifetime at Her Majesty's pleasure in an asylum for the criminally insane, today a successful defence of mental impairment will lead to an accused person being liable to supervision or being released unconditionally.<sup>2</sup> It is argued in this paper that the partial defence of diminished responsibility should also be seen in the context of a far less draconian sentencing regime than in the past.

Diminished responsibility originated in Scotland as a plea in mitigation in the mid 19<sup>th</sup> century, in response to the 'purely cognitive elements of the M'Naghten insanity defence and to provide an alternative to the death penalty in murder cases'.<sup>3</sup> The Scottish courts developed the defence for persons otherwise liable for murder 'who did not satisfy the restrictive

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1 See for example *Criminal Code 1983* (NT) s 43C(1) Defence of Mental Impairment where the three capacities are listed: (a) he or she did not know the nature and quality of the conduct; (b) he or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or (c) he or she was not able to control his or her actions.

2 See for example *Criminal Code 1983* (NT) s 43I.

3 *HM Advocate v Dingwall* (1867) 5 Irvine 466; Victorian Law Reform Commission ('VLRC'), *Defences to Homicide*, Final Report (2004) [5.94], quoting Lawrie Reznek *Evil or Ill?: Justifying the Insanity Defence* (1<sup>st</sup> ed, London: Routledge, 1997), 22-24.

test for the insanity defence [now mental impairment] but whose mental state was nevertheless impaired'.<sup>4</sup>

Diminished responsibility became a statutory defence in England when it was introduced under s 2(1) of the *Homicide Act 1957* (England) as follows:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he 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 his acts and omissions in doing or being a party to the killing.<sup>5</sup>

As Simester and Sullivan observe 'the *raison d'être* of section 2 is to avoid the fixed penalty for murder and to afford the sentencing judge the complete discretion that a verdict of manslaughter allows'.<sup>6</sup>

The Law Commission of England and Wales has in 2004<sup>7</sup> commented on the formulation of section 2:

The wording of section 2 has been heavily criticised by judges, psychiatrists, and academic lawyers. Buxton LJ has described it as "disastrous" and "beyond redemption". The late Professor Griew said of it: "the wording is altogether a disgrace". Some consider the idea of a "substantial impairment of mental responsibility" to be nonsensical. Either one was responsible for killing someone, or one was not. "Responsibility" cannot be either enhanced or diminished. It is capacity or culpability that can be enhanced or diminished, and that is doubtless how the "impairment of responsibility" wording is understood.<sup>7</sup>

It proposed the retention of the defence of diminished responsibility, in the context of recommending that there be first and second degree murder classifications, and that the definition in section 2 be replaced (as set out below) by a more modernised version that can take account of evolving diagnostic practice:

- (a) A person who would otherwise be guilty of "first degree murder" is not guilty of "first degree murder" if, at the time of the act or omission causing death, that person's capacity to
  - (i) understand events; or
  - (ii) judge whether his or her actions were right or wrong; or
  - (iii) control himself or herself, was substantially impaired by an abnormality of mental functioning arising from an underlying condition, developmental immaturity, or both; and

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4 New South Wales Law Reform Commission ('NSWLRC'), *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997) [3.2].

5 *Homicide Act 1957* (England) s 2(1).

6 A P Simester and G R Sullivan, *Criminal Law Theory and Doctrine*, (1<sup>st</sup> ed, Oregon: Hart, 2000) 578.

7 Law Commission of England and Wales, *A New Homicide Act for England and Wales*, Consultation Paper No 177 (2004) 6.36.

- (b) The abnormality, the developmental immaturity, or the combination of both, was a significant cause of the defendant's conduct in carrying out or taking part in the killing.
- (c) "Underlying condition" means a pre-existing mental or physiological condition.<sup>8</sup>

It recommended that a successful plea of diminished responsibility should reduce 'first degree murder' to 'second degree murder' but should not be a partial defence to 'second degree murder'. The Commission believed that 'diminished responsibility should continue to operate as a partial defence in cases where the sentence for murder is a mandatory sentence of life imprisonment'. It summarised the rationale in favour of the defence of diminished responsibility as follows:

The main rationale which underlies the body of opinion favouring retention of diminished responsibility, even if the mandatory life sentence were to be abolished, can be summed up in the phrase "fair and just labelling". Consultees frequently expressed the view that it is unjust to label as murderers those not fully responsible for their actions.<sup>9</sup>

Apart from the need to ensure fair and just labelling, a number of other arguments were mentioned in individual responses of consultees, including the following:

- the out-dated nature of the insanity defence as contained in the M'Naghten Rules. The narrowness of the Rules, in the sense of their preoccupation with cognitive understanding, is seen as reinforcing the need for a partial defence of diminished responsibility. In addition, the stigma which attaches to being labelled "insane" makes defendants reluctant to plead insanity;
- the need to enable jurors to convict a defendant of a homicide offence in cases where, if the only conviction open to them was for murder, they might otherwise (perversely) acquit altogether;

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8 Law Commission of England and Wales, above n 7, 6.2; Following the shocking killing (seven stab wounds) of a complete stranger (Richard Whelan) on a North London bus by Anthony Joseph where the prosecution accepted a plea of diminished responsibility and subsequently the Whelan family described diminished responsibility as the 'defence for the indefensible with so much evidence showing that Anthony Joseph was an angry and vindictive man'. (See <<http://www.news.bbc.co.uk/1/hi/uk/7143252.stm>> at 2 November 2008), the Solicitor-General, Vera Bird, has foreshadowed that the British Government will accept the Law Commission's recommendations to change the laws in respect of diminished responsibility. <<http://www.guardian.co.uk/commentisfree/2008/aug/05/ukcrime.law>> at 2 November 2008.

9 Law Commission of England and Wales, above n 7, 6.20; The Commission was also influenced by research that the defence does not operate in England and Wales in a gender discriminatory fashion, and that in the 126 cases between 1997 and 2001 in which the defence was successfully pleaded 62 (49.2 per cent) resulted in the defendant being made the subject of a hospital order without limit on time. Law Commission of England and Wales, above n 7, 6.15 and 6.8.

- the importance of ensuring that the issue, which goes to the culpability of the defendant, is determined by a jury and not by the judge as part of the sentencing process;
- the need to ensure public confidence in sentencing. Sentences passed by judges following a finding by a jury that the defendant is guilty of manslaughter by reason of diminished responsibility are more likely to find public acceptance than sentences passed following a conviction for murder;
- the need in a disputed case for a jury, rather than a judge, to determine between experts whether responsibility is diminished;
- the fact that diminished responsibility is presently often the only defence to murder available to abused women “driven to kill”;
- the fact that the defence may enable a merciful but just disposition of certain types of case where all parties consider it meets the justice of the case.<sup>10</sup>

These arguments will be considered and critiqued in the course of this paper. The Law Commission itself noted that the defence only comes into play if the jury is satisfied beyond reasonable doubt that the defendant committed the act (the conduct element) and had the *mens rea* for murder and is arguably anomalous because it owes its existence solely to the respective mandatory sentencing regimes, which have always existed for murder.<sup>11</sup>

The defence of diminished responsibility is only available in four Australian jurisdictions: New South Wales (‘NSW’), Qld, the Australian Capital Territory (‘ACT’), and the NT.<sup>12</sup> In this context, it is significant that the other Australian jurisdictions are ‘functioning perfectly well without the defence’.<sup>13</sup>

Qld became the first Australian jurisdiction to introduce the defence of diminished responsibility in 1961.<sup>14</sup> Section 304A(1) of the *Criminal Code 1899* (Qld) (set out below) uses similar language to s 2(1) of the *Homicide Act 1957* (England) in one respect but departs from the section in another:

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10 Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 290, Cm 6301 (2004), 5.18 and 5.22.

11 Law Commission of England and Wales, above n 10, 5.19.

12 See *Crimes Act 1900* (NSW) s 23A; *Criminal Code 1899* (Qld) s 304A; *Crimes Act 1900* (ACT) s 14; *Criminal Code 1983* (NT) s 159.

13 Model Criminal Law Officers Committee (‘MCLOC’), *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (1998) 123; The defence is not recognised in either Canada or New Zealand.

14 Interestingly, given the strong similarities between the Qld and Western Australian Criminal Codes, Western Australia (‘WA’) has never introduced the partial defence to murder of diminished responsibility.

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.<sup>15</sup>

Academic writers have noted the reference to 'abnormality of mind' was incorporated into the above s 304A(1) but not the reference to substantial impairment of 'mental responsibility'.

The English formulation confers a wide discretion on juries to allow the defence where they think fit. The Queensland formulation seeks to tighten the conditions for the defence by specifying the three capacities which are also relevant for the insanity defence.<sup>16</sup>

NSW followed Qld's lead in 1974 but the legislation was more closely modelled on the English legislative formulation.<sup>17</sup> Following the New South Wales Law Reform Commission's ('NSWLRC') report,<sup>18</sup> s 23A of the *Crimes Act 1900* (NSW) was amended in 1997. This has widened the distinction with Qld. The salient sub-sections of the current s 23A are reproduced below:

S 23A Substantial impairment by abnormality of mind

(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 ['underlying condition' is defined in ss (8) as meaning a pre-existing mental or physiological condition, other than a condition of a transitory kind], and
- (b) the impairment was so substantial [a qualitative assessment of the defendant's culpability rather than a quantitative assessment of degrees of impairment] as to warrant liability for murder being reduced to manslaughter.

(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*. (emphasis added)

The NT was the third Australian jurisdiction to introduce the defence of diminished responsibility in 1983 with the passing of the *Criminal*

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15 *Criminal Code 1899* (Qld) s 304A(1).

16 E Colvin, S Linden and L Bunney, *Criminal Law in Queensland and Western Australia*, (2<sup>nd</sup> ed, Sydney: Butterworths, 1998) 350.

17 NSWLRC, above n 4, [3.2].

18 NSWLRC, above n 4, [3.43].

*Code 1983* (NT).<sup>19</sup> The language of the now repealed s 37 was drafted in similar terms to s 304A(1) of the *Criminal Code 1899* (Qld). However, in 2006 the NT began a process that is still continuing of adopting the *Criminal Code 1995* (Cth).<sup>20</sup> Notwithstanding the absence of the defence of diminished responsibility in the *Criminal Code 1995* (Cth), the NT Government elected to include such a defence in s 159 of the *Criminal Code 1983* (NT).<sup>21</sup> For present purposes it is sufficient to note that the 'revised defence is based on the recommendations of the [NSWLRC]'.<sup>22</sup> However, there is seemingly one important difference between the NSW and NT legislation, which relates to the admissibility of expert evidence and goes to the ultimate issue (the extent of the defendant's impairment). Compare s 23A(2) above with s 159(2) below:

Expert and other evidence *may be admissible* to enable or assist the tribunal of fact to determine the extent of the defendant's impairment at the time of the conduct causing death. (emphasis added)

The NT Attorney-General explained the purpose of s 159(2) as follows:

The provision makes it clear that the jury has a specific role once the evidence has established the existence of the defence in determining whether, by community standards, the impairment is of such an extent that the defendant should not be convicted of murder, but should be convicted of manslaughter.<sup>23</sup>

This important point relating to the ultimate issue and the role played by expert evidence will be developed later in the paper.<sup>24</sup> Even though the architecture of the two sections is very similar, there is a complete divergence on the admissibility of expert evidence notwithstanding both Attorneys-General stress the jury's role by community standards (arguably undermined in the NT by expert domination which NSW seeks to reduce) as to whether murder should be reduced to manslaughter. It goes to one of the problems of the defence *per se* and it is intended to draw out the theme of this paper that the partial defence is beset not only with problems of vagueness, uncertainty but also practical difficulties.

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19 *Criminal Code 1983* (NT) s 37.

20 *Criminal Code 1995* (Cth).

21 See *Criminal Reform Amendment Act (No 2) 2006* (NT).

22 See Dr Toyne, Justice and Attorney-General, NT, Second Reading Speech introducing *Criminal Reform Amendment Act (No 2) 2006* (NT).

23 Dr Toyne, above n 22.

24 In NSW, the emphasis is upon the jury making a qualitative assessment of criminal responsibility rather than a quantitative assessment of degrees of impairment, and is the reason that expert opinion evidence on the ultimate issue is inadmissible: s 23A(2). See J Clough and C Mulhern, *Criminal Law* (1<sup>st</sup> ed, Sydney: Lexisnexis, 2004) 386; *R v Majdalawi* (2000) 113 A Crim R 241. In *Majdalawi* it was held that the extent to which expert evidence can be relied on depends on whether the factual assumptions upon which it has been based are otherwise made out.

The last jurisdiction to introduce the defence of diminished responsibility was the ACT in 1990.<sup>25</sup> Effectively, the ACT followed s 2(1) of the *Homicide Act 1957* (England) with the use of ‘substantially impaired his or her mental responsibility’.<sup>26</sup>

As Bronitt and McSherry point out, despite the differences in the wording of the defence in these four Australian jurisdictions, diminished responsibility consists of three elements:

- the accused must have been suffering from an abnormality of mind;
- the abnormality of mind must have arisen from a specified cause; and
- the abnormality must have substantially impaired the accused’s capacity to understand his or her actions or to know that he or she ought not to do the act or to control his or her actions.<sup>27</sup>

The three elements above will now be considered in turn, focusing on the case law and law reform recommendations that have developed in these four jurisdictions starting with Qld which has the longest history of the defence and whose s 304A *Criminal Code 1899* (Qld) has remained unchanged for all practical purposes since 1961.<sup>28</sup> In drawing together the four Australian jurisdictions that allow the partial defence of diminished responsibility, the NT and NSW are very similar whilst Qld and the ACT could be categorised together as following the English legislation more closely.

## II AUSTRALIAN CASE LAW AND LAW REFORM RECOMMENDATIONS ON DIMINISHED RESPONSIBILITY

### A *Queensland*

The primary objective for the insertion of the defence of diminished responsibility into the *Criminal Code 1899* (Qld) was characterised by the then Attorney-General as:

[N]ot to let a person off with a lighter sentence but at least to do something to get away from this problem ... where a person, as the result of the decision of the jury on the evidence in terms of our present law, may be found not guilty by reason of being of unsound mind when, according to a commonsense appraisal

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25 *Crimes Act 1900* (ACT) s 14.

26 *Crimes Act 1900* (ACT) s 14(1).

27 S Bronitt and B McSherry, *Principles of Criminal Law*, (2<sup>nd</sup> ed, Sydney: Lawbook Co, 2005) 284. In the ACT the requirement under the *Crimes Act 1900* (ACT) s 14 is that the abnormality of mind substantially impaired his or her mental responsibility.

28 See *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [99] (Fryberg J).



of the matter, it may well be that a verdict of guilty at least of some offence would be more appropriate.<sup>29</sup>

The provision was attacked at the time and continues to remain controversial.<sup>30</sup> As Fryberg J noted in *McDermott v The Director of Mental Health* '[i]t became (perhaps not surprisingly) a popular defence, and has remained so ever since'.<sup>31</sup>

A useful guide as to the judicial application of s 304A in the *Criminal Code 1899* (Qld) in instructing the jury can be found in the Qld Supreme and District Court Benchbook ('Qld Benchbook').<sup>32</sup> The Qld Benchbook instructs the jury that if the prosecution has satisfied them beyond reasonable doubt on the elements of murder, then it falls to the defendant to show that his/her responsibility is diminished on the balance of probabilities. The first element of the defence is that at the time the defendant suffered from abnormality of mind. The Qld Benchbook states the following:

Abnormality of mind ... means a state of mind so different from that of ordinary human beings that a reasonable man would describe it as abnormal. It appears to us to be wide enough to cover the mind's activities in all aspects, not only the perception of physical acts and matters, and the ability to form a rationale judgment as to whether an act is right or wrong, but also the ability to exercise

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29 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 March 1961, 599 (The Honourable Alan Whiteside Munroe).

30 The Member for Townsville South said during the parliamentary debate on the introduction of s 304A: 'The Minister for Justice is deliberately writing into the Criminal Code a special clause for perverts, drunks, and the mentally subnormal, whether that sub-normality was brought on by themselves or not. I say that it is an incitement to juries to look for the easy way out'. *Queensland Parliamentary Debates*, 16 March 1961, p 2806; 'The potential for abuse of the defence has concerned judges (and legislators) since that time when legislation recognising diminished responsibility was first introduced'. *R v Whitworth* [1989] 1 Qd R 437, 445 (Thomas J).

31 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [99] (Fryberg J); In the first 27 months of operation of the English section, the defence was raised in 73 charges of murder; Baroness Wootton, 'Diminished Responsibility: A Layman's View', (1960) 76 *Law Quarterly Review* 224; A study which examined the patterns of homicide in NSW between 1968 and 1981 found that 16 per cent of the offenders in the study were known to have some kind of mental disorder at the time of, or at some time prior to the offence. See A Wallace, *Homicide: The Social Reality*, Bureau of Crime Statistics and Research, Attorney General's Department, New South Wales, 1986. The Australian Institute of Criminology's National Homicide Monitoring Program recorded homicide incidents between 1 July 1989 until 30 June 1998. During the nine year period, approximately 4.4 per cent (147) of homicide offenders were recorded as suffering from a mental disorder at the time of the homicide incident. Both studies quoted in J Mouzos, *Mental Disorder and Homicide in Australia*, Australian Institute of Criminology, Trends and Issues No 133, November 1999, 3.4.

32 Department of Justice and Attorney-General, *Supreme and District Court Benchbook* (Queensland: The Department 2008) s 88.1.

will-power to control physical acts in accordance with that rational judgment.<sup>33</sup>

The Qld Benchbook states further:

It is not enough, however, to show only that the defendant lacked self-control because of anger, or was motivated by poor judgment or distress. In considering whether abnormality of mind has been shown, you should take account of the great variety there is among ordinary people, not only in their emotional responses, but in their ability to exercise self-restraint and to make rational decisions about whether an act is right or wrong.<sup>34</sup>

The first extract from the Qld Benchbook above reflects an uneasy amalgam of English law and statutory interpretation of s 304A by the Qld judiciary. The phrase in the first sentence referring to a state of mind so different a reasonable person would describe it as abnormal is taken from the oft quoted words of Lord Parker CJ in *R v Byrne*.<sup>35</sup> The second and third sentences continue with the same passage from His Lordship's judgment which both reflect a broad approach to abnormality of mind and was accepted by the Privy Council in *Rose v The Queen*.<sup>36</sup> By contrast, the second extract from the Qld Benchbook above reflects the narrower approach to what is an abnormality of mind as set out by Hanger J in *R v Rolph*:

I do not believe that such a description [a reference to the broad approach in *Byrne*] would be an adequate direction to a Queensland jury. I would think it necessary to remind juries that normal people in the community vary greatly in intelligence, and disposition; in their capacity to reason, in the depth and intensity of their emotions; in their excitability, and their capacity to exercise self-restraint, etc, etc, the matters calling for mention varying with the facts of the particular case; and that until the particular quality said to amount to abnormality of mind goes definitely beyond the limits marked out by the varied types of people met day to day, no abnormality exists.<sup>37</sup>

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33 Department of Justice and Attorney-General (Qld), above n 32, s 88.2: *Rose v The Queen* [1961] AC 496, 507.

34 Department of Justice and Attorney-General (Qld), above n 32, s 88.2; *R v Rolph* [1962] Qd R 262, 288.

35 [1960] 2 QB 396, 403; The breadth of the defence has attracted criticism. Suzanne Dell in her review of the operation of the defence in England noted that the majority of diminished responsibility offenders were diagnosed with psychosis, personality disorders and depression covering a wide range of conditions, including cases where Dell considered the accused would 'hardly have attracted a label had it not been for the defence'. S. Dell, *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* (1<sup>st</sup> ed, Oxford: Oxford University Press, 1984) 33, quoted in Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [5.99].

36 [1961] AC 496, 507; Bronitt and McSherry, above n 27, 288 ask the question in relation to the ability to exercise will-power if it is 'akin to asking whether the accused's physical acts were voluntary as the traditional approach to automatism has it, or is it something different?'

37 [1962] Qd R 262, 288.

Such a narrow approach has been buttressed in the seminal case of *R v Whitworth* where Thomas J famously opined that abnormality of mind does not include such normal emotions as anger, jealousy, bad temper, or attitudes or prejudices arising from upbringing.<sup>38</sup> Effectively, both Hanger J and Thomas J were taking the expression used by Lord Parker in *R v Byrne* of a state of mind so different 'that a reasonable person would describe it as abnormal'<sup>39</sup> and casting it as something extreme and far beyond the range of people met in ordinary life. The difficulty is in fixing some standard or test for a jury to reduce criminal responsibility from murder to manslaughter.

However, there are now doubts as to the applicability of the narrow approach following the 2007 case of *McDermott v The Director of Mental Health*<sup>40</sup> where the majority appeared to follow Lord Parker CJ in *R v Byrne*.<sup>41</sup> Fryberg J in dissent, supported the narrow approach where his Honour described it as providing 'a qualitative element with which to describe the concept of abnormality of mind'.<sup>42</sup> The second extract above from the Qld Benchbook is an affirmation that ultimately what constitutes an abnormality of mind is a matter for the jury to determine although the jury cannot be perverse in the face of uncontradicted medical evidence. This was encapsulated by Thomas J in *R v Whitworth*, 'that juries and judges alike look for a test that gives the defence to the harassed and the incapable, and denies it to the wicked and the callous. In the end it must be for the jury to draw the line from case to case'.<sup>43</sup>

The extent to which it is realistic to leave such a decision to the jury in the face of widely differing medical opinions as to the mental condition of the defendant is a central issue in this paper and will be further explored in a later section. This is particularly pertinent given the wide range of conditions that have been held to fall within the ambit of abnormality of mind.<sup>44</sup> Furthermore, as Clough and Mulhern point out 'abnormality of

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38 [1989] 1 Qd R 437, 447; However, abnormality of mind may be transitory provided the inherent cause has a degree of permanence; See *R v Tumanako* (1992) 64 A Crim R 149, 162 (Badgery-Parker J).

39 [1960] 2 QB 396, 403.

40 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [20] (Williams JA), [51] (Jerrard JA).

41 [1960] 2 QB 396, 403.

42 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [103].

43 [1989] 1 Qd R 437, 447.

44 These range from severe depression (*R v Chayna* (1993) 66 A Crim R 178); post-traumatic stress disorders (*R v Nielsen* [1990] 2 Qld R 578); to personality disorders (*R v Whitworth* [1989] 1 Qd R 437). As to the latter, in *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [121], Fryberg J noted The Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Edition, Text Revision of the American Psychiatric Association listed 11 distinct personality disorders.

mind' is a far broader concept than a 'disease of the mind' in the defence of mental impairment.<sup>45</sup>

The second element of the defence of diminished responsibility is that the abnormality of mind must arise from a specified cause or prescribed factor.<sup>46</sup> The Qld Benchbook takes the following approach, that 'the second step is to consider if the abnormality of mind arose from [1] a condition of arrested or retarded development of mind or [2] from an inherent cause or [3] was induced by disease or injury'.<sup>47</sup> Thus, the abnormality of mind must arise from one of the three general factors listed above, and which are in turn taken from s 304A *Criminal Code 1899* (Qld). The first factor, a condition of arrested or retarded development of mind, 'is designed to take into account intellectual disabilities or organic brain damage'<sup>48</sup> and 'is similar to the concept of 'natural mental infirmity' under s 27 *Criminal Code 1899* (Qld)'.<sup>49</sup> The second factor, an inherent cause, has been interpreted as meaning something that is 'natural to the person's mind and originating from within it',<sup>50</sup> and 'inherent' imports a degree of permanency.<sup>51</sup> Is there not then an anomaly, as Bronitt and McSherry suggest, because of the requirement that the inherent cause be permanent but the abnormality of mind need only be temporary?<sup>52</sup> Thus, a defendant who suffered from depression and was consequently less tolerant of stress would be covered under this section even if the trigger was external stressful factors, whereas a defendant of normal disposition driven by stress to act abnormally would not fall within the defence.<sup>53</sup> The third and final factor, induced by disease or injury, has been interpreted broadly to include all forms of physical deterioration such as epilepsy,<sup>54</sup> delirium from fever,<sup>55</sup> and psychiatric disorders. The word 'disease' 'extends to include a condition of the body ... in which its functions are disturbed

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45 J Clough and C Mulhern, *Criminal Law* (1<sup>st</sup> ed, Sydney: Lexisnexis, 2004) 383 'Although a disease of the mind will normally be sufficient for diminished responsibility, the defence is not limited to such situations. Any state of mind that is so different from that of ordinary people such that a reasonable person would term it abnormal may constitute an 'abnormality of mind', whether or not it stems from a disease of the mind'.

46 *R v Miers* [1985] 2 Qd R 138.

47 Department of Justice and Attorney-General (Qld), above n 32, s 88.2.

48 Bronitt and McSherry, above n 27, 286.

49 Clough and Mulhern, above n 45, 384 quoting as authority *R v Rolph* [1962] Qd R 262; *Criminal Code 1899* (Qld) s 27 sets out the defence of insanity.

50 *R v Whitworth* [1989] 1 Qd R 437, 454 (Derrington J).

51 *R v McGarvie* (1986) 5 NSWLR 270, 272 (Street CJ).

52 Bronitt and McSherry, above n 27, 286 quoting as authority *R v McGarvie* (1986) 5 NSWLR 270.

53 Clough and Mulhern, above n 45, 385.

54 *R v Dick* [1966] Qd R 301.

55 *R v Whitworth* [1989] 1 Qd R 437, 450 (Derrington J).

or deranged' and the word 'injury' 'carries its ordinary English usage, physical damage'.<sup>56</sup>

The third element of the defence of diminished responsibility is that the abnormality must have substantially impaired the defendant's capacity to understand his or her actions or to know that he or she ought not to do the act or to control his or her actions. The Qld Benchbook addresses this element as follows:

The third step is to decide if the abnormality of mind substantially impaired the defendant's capacity in one of three ways. The word substantially does not mean totally. ['Totally' is necessary for insanity or mental impairment.] Neither does it mean a slight impairment. It is between these two extremes. Did the abnormality of mind substantially impair the defendant's mental capacity, in one or more of these three respects; in his capacity to understand what he was doing when he caused (X's) death, or in his capacity to control his actions when he caused (X's) death, or in his capacity to know that he ought not to do the act that caused (X's) death, that is the capacity to know that it was wrong to act as he did?<sup>57</sup>

The critical phrase for the third element of the defence of diminished responsibility is that of 'substantially impaired' against one of the three capacities, as opposed to 'incapable' of understanding or controlling his or her actions for the 'sister' defence of mental impairment.

The early English cases spoke of substantial impairment being a matter of degree,<sup>58</sup> and whether a condition is serious enough to constitute a substantial impairment of criminal responsibility is a question of fact for the jury applying its common sense to all the circumstances of the case.<sup>59</sup> In *R v Lloyd*,<sup>60</sup> 'substantial' was held to be less than total but more than trivial or minimal impairment. In Australia, this scale found favour with Hart J in *R v Bliss*.<sup>61</sup>

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56 *R v De Souza* (1997) 95 A Crim R 1, 23-24 (Powell JA); In *R v De Souza*, the appellant alleged that at the time of the killing he was suffering from the effects of self-administered anabolic steroids. The trial judge held that although the appellant was suffering from an abnormality of mind it did not give rise to a defence under s 23A of the *Crimes Act 1900* (NSW) as it did not arise from, and was not induced by, injury. The Court of Criminal Appeal, New South Wales, agreed and dismissed the appeal.

57 Department of Justice and Attorney-General (Qld), above n 32, s 88.3.

58 *R v Byrne* [1960] 2 QB 396, 404 (Lord Parker CJ) stated that the defendant was described by expert witnesses as a dangerous sexual psychopath, responsible for a number of killings of young women. Byrne knew what he was doing but successfully claimed the defence as his psychopathic state made it difficult for him to refrain from killing. However, Byrne did receive a life sentence because of the danger he represented to the public.

59 *R v Simcox* [1964] Crim R 402, 403.

60 [1967] 1 QB 175, 176.

61 [1967] Qd R 470,475.

With respect to these learned judges, if a person says a building or a task is substantially complete then common parlance interprets this as being a considerable amount, well over 50 per cent and nearly finished.<sup>62</sup> It is to be deprecated that a better common law definition has not emerged or that legislators have not sought to be more definitive with such a controversial defence on behalf of the community. One such possibility would be to require 'substantial impairment' to be adjacent to the totality requirement for the defence of mental impairment, given there must be something significant or salient about the defendant's mental state to warrant murder being reduced to manslaughter. However, it does illustrate one theme of this paper, namely, the vagueness of the defence when such a key phrase as 'substantial impairment' can be no better defined than lying somewhere between trivial (say 5 per cent) and total (100 per cent) impairment.

The notion of 'substantial impairment' raises a further issue, which relates to sentencing that will be discussed in later sections. Suffice at this stage to note that *a priori* there is a direct correlation between the extent of 'substantial impairment' and a person being a risk to the community. The worse or more substantial the abnormality of mind, the greater the risk to the community, and therefore the greater should be the sentence. Conversely, the less or more trivial the abnormality of mind, the less the risk to the community and therefore the closer the manslaughter offence is to murder.

It is the manner in which mentally disturbed defendants are treated and dealt with under the criminal justice system in Qld that is the focus of the next section, particularly the role of the Qld Mental Health Court.<sup>63</sup>

## I Mental Health Act 2000 (*Qld*)

The *Mental Health Act 2000* (Qld) primarily deals with involuntary assessment and treatment of people with a mental illness.<sup>64</sup> For present purposes, the key component of the Act under examination covers

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62 The Australian Concise Oxford Dictionary, (1<sup>st</sup> ed, Melbourne: Oxford University Press, 1987), 1063, lists under 'substantial': 'of real importance or value, of considerable amount, opposite of nominal'.

63 Whether a defendant who successfully raises the defence of diminished responsibility receives any psychiatric care will depend upon the sentencing and mental health provisions in the particular jurisdiction.

64 *Mental Health Act 2000* (Qld). Amendments passed under the *Health and Other Legislation Amendment Act 2007* on 28 May 2007 included a change to the purpose of the Act (s 4), and the way the purpose is to be achieved (s 5). These changes reinforce the need for consideration of community protection, and the needs and rights of the victim, in every decision relating to a forensic patient.

people with a mental illness charged with a criminal offence and the determination of their mental state and detention before and after a finding of diminished responsibility within the meaning of s 304A of the *Criminal Code 1899* (Qld).

Under the *Mental Health Act 2000* (Qld), a Mental Health Court was established.<sup>65</sup> The Qld Mental Health Court is constituted by a Supreme Court judge who is assisted by two experienced psychiatrists who advise the court on medical or psychiatric matters.<sup>66</sup> The powers of the Mental Health Court under the Act are to do 'all things necessary or convenient to be done for, or in relation to, exercising its jurisdiction'.<sup>67</sup> Under the Act, the Attorney-General can appeal against a decision of the Mental Health Court, which is heard by the Court of Appeal.<sup>68</sup>

An example of how the Qld legislation operates in relation to diminished responsibility can be found in the case of *McDermott v The Director of Mental Health; ex parte A-G (Qld)*.<sup>69</sup> In that case, the Attorney-General unsuccessfully sought to overturn the finding by the Mental Health Court that McDermott was suffering from diminished responsibility under s 304A of the *Criminal Code 1899* (Qld) when he killed his father in August 2003. McDermott was committed for trial in the Supreme Court on a charge of murder in August 2004 and in March 2005 his then solicitors referred his mental condition to the Qld Mental Health Court which gave judgment in May 2006. The Attorney-General's basic submission was 'that the finding [by the Qld Mental Health Court] of diminished responsibility was based on conclusions which were so much in contest and uncertain that the court could not have been satisfied, on the balance of probabilities, of the availability of the defence'.<sup>70</sup>

The majority of the Court of Appeal (Williams and Jerrard JJA) in separate judgments dismissed the appeal. Fryberg J dissented.

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65 *Mental Health Act 2000* (Qld) s 381(1).

66 *Mental Health Act 2000* (Qld) ss 382(1), (2).

67 *Mental Health Act 2000* (Qld) s 384(1). In 2007 the Queensland Mental Health Review Tribunal received 113 new matters as a result of Mental Health Court findings. See Queensland Mental Health Review Tribunal, Annual Report 2007, 14.

68 *Mental Health Act 2000* (Qld) s 334(b). The use of an alternative forum other than the courts to hear diminished responsibility cases, such as in Qld, was rejected by the NSWLRC who considered the defence ought primarily to be left to the jury within the trial process and saw no reason why an exception should be made to allow the defence to be heard by a specialist body. The Commission noted there was provision in NSW for an election for trial by judge alone. For the provision, see NSWLRC, above n 4, [3.84] and for trial by judge alone see later cases such as *R v Enderbury* [2002] NSWSC 535 and *R v Tatarinova* [2004] NSWSC 676.

69 [2007] QCA 51.

70 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [77] (Fryberg J).

The appeal demonstrates the difficulties judges sometimes face in determining the availability of the defence of diminished responsibility in the face of widely differing expert evidence as to the state of mind of the respondent at the time of the killing. Of the four psychiatrists who gave evidence, two diagnosed a schizoaffective disorder while a third favoured a mixed personality disorder of the narcissistic, paranoid type whilst in the grip of an outburst of rage, and a fourth diagnosed a regressed mental state and personality disorder with paranoid, narcissistic and antisocial traits.<sup>71</sup> The matter was further compounded with disagreements between the four psychiatrists when relating the particular diagnosis to substantial impairment of a relevant capacity. Additionally, the two psychiatrists assisting the court disagreed as to which of these opinions was the safest of the assessments.<sup>72</sup> The judge constituting the Mental Health Court found 'on the balance of probabilities, that the defendant's abnormal state of mind substantially impaired his capacity to know that the attacks on his father were wrong'.<sup>73</sup> The three Court of Appeal judges all agreed that at the time of the killing the respondent was in a state of abnormality of mind,<sup>74</sup> but disagreed as to whether there was a substantial impairment of a relevant capacity. Williams JA (with whom Jerrard JA agreed) was of the view that once a finding of abnormality of mind is made, it is open to the court to conclude which capacity was substantially impaired.<sup>75</sup>

The judgment of Fryberg J is a powerful dissent and, with respect, is to be preferred to those of the majority. His Honour had a different view of the evidence supporting the Qld Mental Health Court's finding on diminished responsibility to that of the majority on the Court of Appeal and he said:

I am unable to identify anything in them [witness statements], or in her Honour's other findings, which implies the existence of either an impairment to the respondent's capacity to know that he ought not do the act or a causal link between the state of abnormality of mind described above and any such impairment. Ordinary human experience provides no foundation for linking such an impairment to, or identifying it from, a sequence of disordered thinking such as is described by those witnesses.<sup>76</sup>

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71 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [127]-[131] (Fryberg J).

72 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [127]-[133] (Fryberg J).

73 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [134] (Fryberg J).

74 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [25] (Williams JA), [57] (Jerrard JA), [126] (Fryberg J).

75 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [29] (Williams JA), [68] and [71] (Jerrard JA).

76 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [136] and [141].



However, it is his Honour's statutory interpretation of substantial incapacity caused by a state of abnormality of mind under s 304A of the *Criminal Code 1899* (Qld) that provides the most telling criticism of the Qld Mental Health Court and the position of the majority in the Court of Appeal:

The Queensland requirement for the state of abnormality of mind substantially to impair a nominated capacity is much more precise and adapted to resolution by medical evidence than the English requirement that the offender be "suffering from such abnormality of mind ... as substantially impaired his mental responsibility for the acts or omissions". The latter is as much a normative as an empirical standard. ... Statements in other jurisdictions suggesting that a jury can resolve the question on the basis of non-medical evidence which conflicts with medical evidence should not ordinarily be taken in this State to mean that a tribunal of fact may be satisfied on the balance of probabilities of the existence of a substantial impairment to a relevant capacity and a causal relationship between that impairment and a state of abnormality of mind in the complete absence of medical evidence to support such a finding.<sup>77</sup>

Such an extensive analysis of *McDermott's* case has been undertaken to underscore one of the central themes of this article, namely, the considerable legal and practical difficulties sometimes associated with such a broad and uncertain defence as diminished responsibility in the face of widely differing expert evidence. The problem of conflicting expert evidence has been the subject of extensive academic and judicial consideration, and was reviewed by the High Court in the sad case of *Velevski v R*:<sup>78</sup>

The correct position is, in our opinion, that conflicting expert evidence will always call for careful evaluation. So too, because expert evidence by definition deals with generally unfamiliar and technical matters, it will always need careful, and usually more elaborate treatment by the trial judge in directing a jury about it. Juries are frequently called upon to resolve conflicts between experts. They have done so from the inception of jury trials. Expert evidence does not, as a matter of law, fall into two categories: difficult and sophisticated expert evidence giving rise to conflicts which a jury may not and should not be allowed to resolve; and simple and unsophisticated expert evidence which they can. Nor is it the law, that simply because there is a conflict in respect of difficult and sophisticated expert evidence, even with respect to an important, indeed critical matter, its resolution should for that reason alone be regarded by an appellate court as having been beyond the capacity of the jury to resolve.<sup>79</sup>

These remarks have a greater resonance in the narrower context of cases of diminished responsibility because not only do such cases more readily fall into the 'difficult and sophisticated' category of expert evidence, but also the overlap between the three elements of the defence is more

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77 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51; See for example *R v Tumanako* (1992) 64 A Crim R 149, 160.

78 [2002] HCA 4.

79 *Velevski v R* [2002] HCA 4 [181]-[182] (Gummow and Callinan JJ).

pervasive than other defences except mental impairment, and impacts on the exclusively jury question of whether the abnormality of mind was so substantial as to warrant the reduction of murder to manslaughter. The Court of Appeal in *McDermott* split 2:1 in dismissing the Attorney-General's appeal, yielding a further illustration of the complexities surrounding abnormality of mind which 'is an expression used in the statute and is not a reference to a specific medical diagnosis'.<sup>80</sup> The essence of the division in the Court of Appeal appears to stem from the majority favouring Lord Parker's broad definition of abnormality of mind in *R v Byrne* as opposed to a narrower interpretation of s 304A of the *Criminal Code 1899* (Qld) preferred by Fryberg J.<sup>81</sup>

The implication of such judicial divergence is significant. The majority appear to have restated the law as per *R v Byrne* which implies both a closer alignment with the 'parent' English legislation and a rejection of the narrower approach as to the definition of what is an abnormality of mind as set out by Hanger J in *R v Rolph*,<sup>82</sup> and Thomas J in *R v Whitworth*.<sup>83</sup> The effect of a broader interpretation of abnormality of mind will be to make it easier for defendants to meet the first limb of the partial defence of diminished responsibility.

## II *The Effect of Mental Impairment and the Mental Health System on Sentencing*

In *R v Neumann; ex parte A-G (Qld)*,<sup>84</sup> the Court of Appeal took the opportunity to review the principles for sentencing an offender found guilty of manslaughter on the grounds of diminished responsibility. The case is of special interest as there was a marked disagreement between members of the court as to the merits of relying on the mental health system. In effect, countervailing principles are in play as on the one hand 'low intelligence and diminished responsibility falling short of insanity will (if otherwise relevant) operate on sentencing as a mitigating factor',<sup>85</sup> whilst on the other hand mental abnormality may be an aggravating

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80 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [25] (Williams JA).

81 *McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [20] (Williams JA), [51] (Jerrard JA), [142] Fryberg J.

82 [1960] 2 QB 396; [1962] Qd R 262, 288.

83 [1989] 1 Qd R 437, 446-447.

84 [2005] QCA 362: In this case, an appeal by the Attorney-General against a 12 year sentence for the attempted murder of a two year old child with a bayonet was dismissed. The Court split 2:1, with the dissenting judge, Jerrard JA, favouring a sentence of life imprisonment.

85 *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362 [27] (Fryberg J); *R v Kiltie* (1974) 9 SASR 453 (Bray CJ), cited with approval in *R v Dunn* [1994] QCA 147.

factor in sentencing. The well known passage from Brennan J's judgment in *Channon v The Queen* illustrates the point:

An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe.<sup>86</sup>

In addition to the above countervailing sentencing principles, there is also the tension between the criminal justice system and the mental health system.<sup>87</sup> Judges take different views as to confidence in psychiatric rehabilitation and the risk posed to the community as demonstrated in the contrasting passages in *R v Neumann*.<sup>88</sup> Jerrard JA was in dissent and held this unflattering view of the mental health system in Qld as it pertained to Mr Neumann who was subsequently diagnosed as suffering from schizophrenia:

[T]here were cases in which the mental condition of a convicted person would render that person dangerous if at large, and in some cases sentences of life imprisonment might have to be imposed to ensure that society was protected. I have the view that this is such a case, because of the absence of any evidence about Mr Neumann's future mental health or how he could (ever) be returned safely to the general community.<sup>89</sup>

Fryberg J gave the leading judgment for the majority (McPherson JA agreeing) and his Honour held a far more optimistic view of the mental health system than his brother judge, Jerrard JA, as the following passage illustrates,

[i]n short, appropriate mechanisms exist under the Act to deal with any danger which the respondent might pose to the community when the time comes for his release. Schizophrenia can often be treated and controlled. It is worth noting that in May the Mental Health Court assessed him as suitable for treatment in the community under escort.<sup>90</sup>

Just one year after *R v Neumann* was decided, the case of *R v Beacham* came before the Court of Appeal,<sup>91</sup> and again the judges differed in their respective confidence in the mental health system. Mr Beacham appealed his sentence of 13 years imprisonment ordered by the Qld Mental Health Court. The majority (McMurdo P and Jerrard JA) allowed the appeal and substituted a term of 12 years imprisonment. Jerrard JA gave the leading

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86 *Channon v The Queen* (1978) 20 ALR 1, 4-5.

87 *R v Beacham* [2006] QCA 268 [3] (McMurdo P).

88 *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362.

89 *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362 [10]-[11].

90 *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362; *R v Beacham* [2006] QCA 268.

91 *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362; *R v Beacham* [2006] QCA 268.

judgment and gave this summation of the situation at the time of the applicant's future release: '[i]f at large in the community, and mentally ill, Mr Beacham can be made an involuntary patient in a mental health service. ... The danger for the community will come from his not taking medication prescribed for him, and his consumption of unprescribed drugs'.<sup>92</sup> Jones J dissented and gave the following appraisal of the present regime of mental health services and its ability to protect the community as his reason for finding no error in sentencing: '[t]he only protection provided by the present regime under the *Mental Health Act* at the end of the applicant's term of imprisonment, unless he is further detained, is limited to his being made an involuntary patient pursuant to Chapter 4 of the *Mental Health Act*'.<sup>93</sup>

The two cases above of *R v Neumann* and *R v Beacham* bear testimony to the difficulties and uncertainties that sometimes present themselves when courts have to make sentencing judgments many years in advance of the applicant's release with all the attendant unknowns as to the mental health regime then operating and the mental state of the applicant.<sup>94</sup> Sitting alongside the court balancing liability against mitigation is the vexed question of protecting the community from an offender who is mentally abnormal. The question being put is whether given the availability of the defence of mental impairment, the partial defence of diminished responsibility is both an unnecessary complication and an unnecessary risk to the community.

## B *New South Wales*

NSW was the second Australian jurisdiction after Qld to introduce the defence of diminished responsibility in 1974,<sup>95</sup> at a time when there was a mandatory life sentence for murder. Unlike Qld, the law relating to diminished responsibility has been changed in NSW,<sup>96</sup> following a NSWLRC report,<sup>97</sup> which in turn had its genesis in obiter observations made by the then Chief Justice of NSW in the case of *R v Chayna*.<sup>98</sup>

In *R v Chayna*,<sup>99</sup> the appellant was convicted of the murder of her two children and her sister-in-law. Seven psychiatrists gave evidence

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92 *R v Beacham* [2006] QCA 268 [37].

93 *R v Beacham* [2006] QCA 268 [54].

94 *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362; *R v Beacham* [2006] QCA 268 [54].

95 *Crimes Act 1900* (NSW) s 23A.

96 *Crimes Amendment (Diminished Responsibility) Act 1997* (NSW).

97 NSWLRC, above n 4.

98 (1993) 66 A Crim R 178.

99 (1993) 66 A Crim R 178.

expressing various opinions. Gleeson CJ gave the leading judgment and in obiter remarks under the heading 'Possible need for law reform'<sup>100</sup> his Honour expressed concern about s 23A and said,<sup>101</sup> '[t]he fact that, as the present case shows, there can be such conflicting expert opinion about the application to a given case of the legal principles of diminished responsibility is a matter of concern ... it appears to me that *the place in the criminal law of s 23A is a subject that is ripe for reconsideration*'.<sup>102</sup> (emphasis added) His Honour made these remarks in the context of observing that the mandatory life sentence for murder had changed since diminished responsibility was introduced in 1974, as well as a marked reluctance on the part of juries to find manslaughter when it appears to them to be murder with a consequent tendency for accused persons raising diminished responsibility to prefer trial without a jury.<sup>103</sup> It is one of the contentions of this paper that, with respect to the NSWLRC, the Commission missed an historic opportunity to press home the substance of his Honour's remarks which were apparently directed at the possibility of abolishing the defence.

The 1997 amendments to s 23A of the *Crimes Act 1900* (NSW) removed the concept of 'mental responsibility' and instead 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.<sup>104</sup> In this respect, NSW moved away from England's *Homicide Act* and closer to Qld's s 304A.<sup>105</sup> Interestingly, the NSWLRC agreed 'that the term "abnormality of mind" is imprecise and that its meaning may be unclear to expert witnesses'.<sup>106</sup> The Commission rejected an exhaustive list of conditions, which would give rise to the defence of diminished responsibility as the list would be

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100 Priestly JA and Studdert J agreed with Gleeson CJ.

101 *Crimes Act 1900* (NSW) s 23A.

102 *R v Chayna* (1993) 66 A Crim R 178, 191.

103 *R v Chayna* (1993) 66 A Crim R 178, 191; Under s 132 of the *Criminal Procedure Act 1986* (NSW) an accused person standing trial for an indictable offence can elect to have the charge of murder tried by judge alone. Under s 132(3) an election may be made only with the consent of the Director of Public Prosecutions ('DPP'). The DPP has issued guidelines for Crown Prosecutors as to the granting of consent to an accused to be tried by judge alone. The NSWLRC was of the view that it will seldom be appropriate for a trial to be heard by judge alone when the accused is pleading the defence of diminished responsibility and recommended that: 'The Director of Public Prosecutions' Guidelines for consent to an accused's election for trial by judge alone 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'. See NSWLRC, above n 4, recommendation 3, [3.27].

104 *Crimes Act 1900* (NSW) s 23A(1).

105 *Homicide Act 1957* (England); *Criminal Code 1899* (Qld).

106 NSWLRC, above n 4, [3.37].

difficult to formulate with any precision and would prevent consideration of the merits of individual cases.<sup>107</sup> In effect, the Commission put in the 'too hard' basket any attempt to limit the number of conditions falling within the scope of the defence preferring to stand behind the rubric of maintaining flexibility so as not to restrict psychiatric labels coming under the defence. This admission lends support to the contention that *inter alia* the defence should be abolished as being too broad.

However, the NSW legislation broke new ground when it departed from abnormality of mind arising from a *specific cause* in favour of abnormality of the mind arising from an *underlying condition*. This latter term is defined in s 23A(8) and requires the accused to prove on the balance of probabilities, that the abnormality of mind arose from 'a pre-existing mental or physiological condition, other than a condition of a transitory kind'.<sup>108</sup> The Commission was of the view 'that the restriction of the defence to conditions arising from the three listed causes appears quite arbitrary and may generate a high level of complexity and confusion in relation to the expert evidence which is led in diminished responsibility cases'.<sup>109</sup>

However, it is not immediately apparent how a reformulation that still requires the jury to decide whether murder should be reduced to manslaughter by considering how one of the three capacities was affected by reason of an underlying condition improves the clarity of the defence. The Commission explained the meaning of 'underlying condition' as:

intended to link the defence to a notion of a pre-existing impairment requiring proof by way of expert evidence, which impairment is of a more permanent nature than a simply temporary state of heightened emotions. This does not mean that the condition must be shown to be permanent. It simply requires that the condition be more than of an ephemeral or transitory nature.<sup>110</sup>

Arguably, all the Commission succeeded in doing was to add to the vagueness of the defence by linking a specified capacity to an underlying condition that in turn merely excludes heightened emotions such as 'road rage' which is scarcely 'substantial enough reason to reduce the offence to manslaughter'.<sup>111</sup>

The Commission set up its own test as to the effectiveness of its

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107 NSWLRC, above n 4, [3.37].

108 *Crimes Act 1900* (NSW) ss 23A(4), (8).

109 NSWLRC, above n 4, [3.40].

110 NSWLRC, above n 4, [3.51].

111 England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) [93].

reformulated defence of diminished responsibility by applying it to the facts in *Chayna's* case:

If this case were retried under the Commission's formulation of diminished responsibility, there would be less scope for such strongly conflicting evidence, since the formulation does not require the expert witness to form a conclusion or diagnosis about the aetiology [assignment of a cause] of the accused's condition. Expert evidence would be focused on the presence of an abnormality of mental functioning, [the NSW Parliament chose to retain the term 'abnormality of mind'] on whether that abnormality arose from an underlying condition, and the effect of that abnormality, if any, on the accused's capacity to understand events, or to judge whether his or her actions were right or wrong, or to control his or her actions. While there would still be potential for conflict in expert evidence as to the existence of an abnormality of mental functioning arising from an underlying condition and as to whether and to what extent the relevant capacities were impaired, that conflict should be reduced. Expert opinions about the ultimate diagnosis of the accused's condition, such as whether that condition happened to amount to schizophrenia or depression or a dissociative state, would not be directly relevant to the issues for the jury to determine.<sup>112</sup>

Contained within the above paragraph is the significant admission that there would still be potential for conflict in expert evidence in the first two of the three elements of the defence notwithstanding the first and third elements are matters for the jury.<sup>113</sup> Furthermore, it has proved difficult to fulfil the expectation that the third element, involving the critical jury question of whether the impairment was so substantial as to warrant murder being reduced to manslaughter, can be practically compartmentalised from expert evidence on the first two elements. It is also contended with respect that judicial comments regarding juries being able to sift out what is 'substantial' from a mass of conflicting medical evidence is unrealistic.<sup>114</sup> Certainly, nothing has changed as regards the impression that psychiatrists can be obtained to express any desired view and that 'avoiding a murder charge may therefore be seen as a matter of merely shopping for the appropriate medical expert(s)'.<sup>115</sup>

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112 *R v Chayna* (1993) 66 A Crim R 178; NSWLRC, above n 4, [3.65].

113 See Badgery-Parker J in *R v Tumanako* (1992) 64 A Crim R 149,160: 'Because the existence of the *first* and the *third* elements are matters for *determination by the jury* being matters of degree not capable of scientific measurement, and the jury is entitled to approach them in a broad commonsense way and not necessarily in accordance with the medical evidence, on neither issue is the jury, bound to accept the medical evidence if there is other material before it which in the judgment of the jury, conflicts with it and outweighs it'. (emphasis added)

114 See for example Hunt CJ at CL, in *R v Trotter* (1993) 68 A Crim R 536, 537-538: 'The doctors are obviously qualified to say whether the extent of the particular impairment to the accused's perceptions, judgment and self-control is slight, moderate or extensive, or somewhere in between, but whether that impairment to the accused's mental responsibility for his actions may 'properly' be called substantial (in the sense of being such as to warrant the reduction of the crime from murder to manslaughter) is *not* a matter within the expertise of the medical profession'.

115 See MCLOC, above n 13, 123. As A P Simester and G R Sullivan, *Criminal Law Theory*

It is contended here that the Model Criminal Law Officers Committee ('MCLOC') correctly identified the critical issue when it stated that,

[t]he practical problems with the partial defence of diminished responsibility will not be remedied by further changes to the test. This is because the concept of this partial defence is fundamentally confused. ... Diminished responsibility is inherently vague. All three elements of the defence are immersed in uncertainty.<sup>116</sup>

Some six years after the publication of the MCLOC Discussion Paper, the Victorian Law Reform Commission ('VLRC') reviewed the merits of introducing the defence of diminished responsibility into Victoria.<sup>117</sup> The VLRC concluded in similar terms to the MCLOC as follows:

The current formulations of diminished responsibility are not satisfactory and it would be too difficult to reformulate the defence in a way that would adequately resolve the current problems. Not only is the current formulation vague and therefore open to manipulation,<sup>118</sup> the defence of diminished responsibility mixes two separate concepts that do not sit easily together. These include the notion of the 'mind' which may be the subject of expert psychiatric opinion, and 'responsibility' which is essentially an ethical notion which psychiatrists have no expertise in.<sup>119</sup>

The NSWLRC had attempted to meet this latter issue by placing increased emphasis on the moral assessment by the jury as to whether the evidence warranted the reduction from murder to manslaughter:

Our reformulation of the definition of diminished responsibility omits the term

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*and Doctrine*, (1<sup>st</sup> ed, Oregon: Hart, 2000) 581 point out: 'Not infrequently, faced with the prospect of such testimony [medical witnesses prepared to testify that the defendant fell within the terms of section 2 *Homicide Act 1957* (England)], the prosecution will indicate that it is prepared to accept a plea of not guilty to murder but guilty of manslaughter on the ground of diminished responsibility'. The learned authors support their observation by noting: 'For the period 1986-8, in only 9.2 per cent of cases where a plea of diminished responsibility was offered by the defence did the prosecution refuse the plea: House of Lords, *Report of the Select Committee on Murder and Life Imprisonment, Vol II - Oral Evidence, Part I* (1988-9) 115'.

116 MCLOC, above n 13, 123.

117 Victorian Law Reform Commission ('VLRC'), *Defences to Homicide*, Final Report (2004).

118 The VLRC was concerned that if the defence of diminished responsibility was introduced into Victoria it would become the new mental impairment defence because of the perceived stigma of a not guilty verdict by reason of mental impairment and the 25 year nominal term. A further issue was that people who really should have pleaded mental impairment would have been assured hospital care but with diminished responsibility may not receive the same system of care. See VLRC, above n 117, [5.114]. Similarly, the VLRC was also concerned that if the defence of provocation were to be abolished (as subsequently occurred), diminished responsibility could be used as a replacement defence and therefore it would be illogical to create a new defence which might have many of the same defects to take its place. See VLRC, above n 117, [5.131].

119 See VLRC, above n 117, [5.132].



'substantial impairment of mental responsibility'<sup>120</sup> and focuses instead on the question of whether there was a sufficiently substantial effect on the accused to warrant reducing the charge to manslaughter.<sup>121</sup> This makes it clear that the ultimate issue for the jury is not a medical question but one of culpability and liability. Expert evidence is irrelevant to that ultimate issue.<sup>122</sup>

The NSWLRC reinforced its view by stressing s 80 of the *Evidence Act 1995* (NSW) abolishes the ultimate issue rule in NSW.<sup>123</sup> In this context, the MCLOC noted that:

Questions directed to eliciting whether the defendant's conduct conforms to the legal standard are objectionable. Nevertheless, such questions are routinely put to medical experts in these cases. There is even suggestion that the evidential rule does not apply in this context. However the fact remains that the rules need to be bent somewhat to facilitate the operation of the partial defence.<sup>124</sup>

As if to underscore the MCLOC's above observation, the NT, whilst adopting the general approach of s 23A of the *Crimes Act 1900* (NSW),<sup>125</sup> specifically departed from that section as regards the ultimate issue of the impairment being so substantial as to warrant murder being reduced to manslaughter. Section 159(2) of the *Criminal Code 1983* (NT) specifically allows expert evidence to be admitted to determine the extent of the defendant's impairment.<sup>126</sup> Such inconsistency between jurisdictions on admissible evidence on the key element of the defence is both undesirable and indicative of the problems surrounding the defence.

The practical difficulties in directing juries on diminished responsibility are obvious, particularly where there is conflicting evidence from psychiatrists. For the defence to succeed, the defendant is required to show that he or she is neither fully sane nor completely insane (now mental impairment).<sup>127</sup> This involves jurors taking complicated and

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120 Adopted by the NSW Parliament in the amended s 23A of the *Crimes Act 1900* (NSW).

121 See *Crimes Act 1900* (NSW) s 23A(1)(b) which provides that the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

122 See NSWLRC, above n 4, [3.63].

123 See NSWLRC, above n 4, [3.62]; This is reflected in s 23A(2) of the *Crimes Act 1900* (NSW) which provides: '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'.

124 See MCLOC, above n 13, 126-127; See *Tonkin v Montgomery* (1975) Qd. R 1.

125 See *Criminal Reform Amendment Act (No 2) 2006* (NT) which established a revised defence of diminished responsibility under s 159 of the *Criminal Code 1983* (NT).

126 See *Criminal Code 1983* (NT) s 159(2) which provides that 'Expert and other evidence may be admissible to enable or assist the tribunal of fact to determine the extent of the defendant's impairment at the time of the conduct causing death'.

127 See VLRC, above n 117, [5.118], where Dr Jeremy Horder in his submission referred the VLRC to research in the United Kingdom to support the argument that diminished responsibility operates in 'if anything an even more gender-biased way

often contradictory psychiatric evidence and translating it into legal significance.<sup>128</sup>

What then is a jury to make of the Qld Benchbook's direction that 'you will be guided by the medical evidence about these matters, but you will reach your own conclusions in the light of all the evidence'?<sup>129</sup> One can only agree with the MCLOC's conclusion on direction to juries that 'the problem still remains and arguably will persist indefinitely due to the nebulous nature of the doctrine'.<sup>130</sup>

### *C Northern Territory*

As discussed in the Introduction, the NT has chosen to adopt a variation of the NSW legislation for the partial defence of diminished responsibility.<sup>131</sup> The major difference is that the NT section allows expert and other evidence to be admissible to assist the jury determine the extent of the defendant's impairment, whereas the equivalent NSW section specifically excludes such expert evidence as to whether the impairment was so substantial as to warrant murder being reduced to manslaughter.<sup>132</sup> This difference was considered earlier when discussing the NSW position.

The other major distinction to be drawn between NSW and the NT is the sentencing regime. NSW has abolished a mandatory life term for murder whereas the NT has not.<sup>133</sup> Whether the retention of a mandatory life term for murder considerably strengthens the case for the retention of the defence of diminished responsibility will be reviewed in the later section on sentencing. Only two of the four Australian jurisdictions that allow the partial defence of diminished responsibility also retain mandatory life sentences for murder, namely, the NT and Qld.<sup>134</sup>

The case of *R v Yunupingu* is illustrative of the issues raised in this

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than provocation, favouring men who have (typically) killed their spouses'.

128 See MCLOC, above n 13, 127.

129 Department of Justice and Attorney-General (Qld), above n 32, s 88.3.

130 See MCLOC, above n 13, 123.

131 See the *Criminal Code 1983* (NT) s 159 which was introduced under the *Criminal Reform Amendment Act (No 2) 2006* (NT).

132 Compare *Criminal Code 1983* (NT) s 159(2) with *Crimes Act 1900* (NSW) s 23A(2).

133 While the *Crimes Act 1900* (NSW) s 19A(1) states a person who commits the crime of murder is liable to imprisonment for life, this is qualified by s 19A(3) which states that nothing in this section affects the operation of s 21(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (which authorises the passing of a lesser sentence than imprisonment for life). Section 21(1) in turn states 'If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence for a specified term'.

134 See *Criminal Code 1983* (NT) s 157(1) and *Criminal Code 1899* (Qld) s 305A(1).

paper.<sup>135</sup> In this case, a guilty plea of manslaughter on the grounds of diminished responsibility was accepted by the Crown 'on account of permanent brain damage caused by his regular chronic indulgence in petrol-sniffing and being under the influence of petrol at the time of the killing'.<sup>136</sup>

Angel A/CJ then summed up on sentencing the prisoner as follows:

Mr Lawrence [counsel for the prisoner] submitted that any sentence I pass should be suspended, having particular regard to the fact that this man has been in gaol since his arrest in June 2000. I agree with that submission. I do not consider the prisoner poses a continuing danger to others, particularly given his strong family support.<sup>137</sup>

With respect to his Honour, the decision to suspend a sentence after 18 months in custody for a deliberate killing involving three stab wounds from behind is difficult to understand. There is a suggestion in the judgment that his Honour may have accepted that the prisoner feared for his life but this is heavily qualified.<sup>138</sup> There is also a suggestion that his Honour may have seen the case in the context of the broader social problems associated with petrol sniffing in Aboriginal communities.<sup>139</sup> However, to go further and state that in his Honour's opinion the prisoner does not pose a continuing danger is not consistent with the unchallenged medical evidence.<sup>140</sup>

It is clear that his Honour placed considerable significance on the prisoner

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135 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002).

136 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002) [2].

137 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002) [29].

138 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002) [19]–[20]: 'At some stage, the deceased, who had a stick in his hand, pointed at the prisoner and said: "You and I are both dead", then drew the stick across his throat. This terrified the prisoner. He thought he was to become the victim of a joint killing. He was spooked and illogically feared for his life. He immediately got up, immediately went home, armed himself with the knives, returned to the group of sniffers and immediately, and without more, proceeded to kill the deceased'.

139 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002) [28]: 'The present case is yet another tragedy consequent upon petrol sniffing. The waste will continue without intervention measures at every level. It is not just an Aboriginal problem, it is a problem for the government and the whole community to sort out'.

140 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002) [18]: 'The combination of the prisoner's permanent brain damage and the intoxicating effects of having sniffed petrol, produced a severe impairment of his capacity to think and induced him to attach wrong significance to what he saw or heard and to draw illogical conclusions'.

being a first offender, remorseful for what he had done and enjoyed strong family support. But one is left to wonder on the juxtaposition of this with the protection of the other members of the community.<sup>141</sup>

This paper has sought to demonstrate that in cases such as *R v Yunupingu*,<sup>142</sup> the width of the defence of diminished responsibility and the practical difficulties in sentencing an offender who may be at once less criminally responsible and more dangerous to the public, indicate that the most appropriate course is to abolish the defence completely.

#### D *Australian Capital Territory*

In the Introduction it was observed that the ACT was the last jurisdiction in Australia to introduce the defence of diminished responsibility in 1990, and essentially followed s 2(1) of the *Homicide Act 1957* (England) with the use of the words ‘substantially impaired his or her mental responsibility’.<sup>143</sup>

The best known case for diminished responsibility in the ACT is *R v Singh*.<sup>144</sup> In this case, the accused drugged her boyfriend, Joe Cinque, by means of Rohypnol tablets and then injected him with heroin. Mr Cinque died as a result. The accused elected to be tried by a judge alone, which was a predictable decision given the circumstances of Mr Cinque’s death and the fact that the accused also chose not to give evidence. The trial judge, Crispin J, was satisfied beyond reasonable doubt ‘that at the time the accused injected heroin into the body of Mr Cinque she intended to cause his death’.<sup>145</sup> Crispin J then directed his attention to the three elements of the defence of diminished responsibility. His Honour found on the first element that the accused was suffering from an abnormality of mind at the time of Mr Cinque’s death. On the second element his Honour decided that any of the diagnostic categories identified fell within the category of aetiologies stipulated in s 14 of the *Crimes Act 1900* (ACT); and on the third element his Honour concluded that the

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141 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002) [18] and [28]: ‘According to Doctor McLaren, the prisoner demonstrates a significant level of brain damage, his poor cognitive performance not being a matter of cultural or educational factors. ... Petrol sniffing is a blight on the communities of both the Top End and the desert. Every effort must be made to reduce its incidence. It ravages the young. It ravages sniffers’ families. It ravages their communities. It ravages the community at large’.

142 Transcript of proceedings, *R v Daniel Batutjula Yunupingu* (Supreme Court of Northern Territory, Angel J, 24 January 2002).

143 *Crimes Act 1900* (ACT) s 14(1); Qld, NSW and the NT avoid the problems of the much criticised term ‘mental responsibility’ by replacing it with three capacities. See Bronitt, and McSherry, above n 27, 288-89.

144 [1999] ACTSC 32.

145 *R v Singh* [1999] ACTSC 32 [117].

accused's mental responsibility for the act was substantially impaired and therefore the defence was made out.<sup>146</sup> His Honour sentenced the prisoner to 10 years imprisonment for manslaughter fixing a period of four years before being eligible for parole.<sup>147</sup>

An analysis of Crispin J's judgment reveals that the two most significant propositions his Honour accepted were the weight to be placed on an assessment that despite all the premeditation in planning Mr Cinque's death 'she had no real appreciation of the implications or consequences of her behaviour'.<sup>148</sup> His Honour added that 'there is clear evidence that she attempted to save him'<sup>149</sup> which appears to be inconsistent with other evidence that Ms Singh watched Mr Cinque die over a two day period, delayed ringing for an ambulance, and when she phoned for an ambulance she gave a false name and address. As to the first proposition, Crispin J observed that it is 'clear that she [the accused] had seen a number of medical practitioners including psychiatrists who were not called to give evidence. I am prepared to infer that they would not have assisted her case'.<sup>150</sup> The implication of this remark is that a number of experts did accept the accused had an appreciation of her actions. Furthermore, the various psychiatric assessments of the accused were heavily affected by a lack of access to the accused.<sup>151</sup>

This observation by his Honour lends support to the view that not only is 'doctor shopping' an issue but so is access to the accused and the subsequent weight to be given to individual medical testimony. Ultimately, his Honour was led to a 'pick and choose' process where for example his Honour stated 'Dr Byrne's diagnosis of a depressive illness was emphatically confirmed by Professor Mullen whose evidence on this issue I preferred to that of Dr Diamond and Professor Hayes [experts for the Crown who were denied access to the accused]'.<sup>152</sup> However, his Honour selected a passage from Dr Diamond's report where he accepted the view that 'whilst her capacity to think logically might not

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146 *R v Singh* [1999] ACTSC 32 [169].

147 *R v Singh* [1999] ACTSC 32 [66]; The case caused widespread disquiet which was captured in Helen Garner's book entitled '*Joe Cinque's Consolation*'. The book's title was intended to focus attention on the victim and his family whereas all the attention at the trial had of course been on the accused. Helen Garner, *Joe Cinque's Consolation*, (2<sup>nd</sup> ed, Sydney: Pan Macmillan, 2004).

148 *R v Singh* [1999] ACTSC 32 [163].

149 *R v Singh* [1999] ACTSC 32 [167].

150 *R v Singh* [1999] ACTSC 32 [160].

151 *R v Singh* [1999] ACTSC 32 [129]. '[T]he experts called on behalf of the Crown, Professor Hayes and Dr Diamond, did not have the opportunity of interviewing the accused. I think that they were placed at something of a disadvantage by being denied the opportunity to form any impression of the accused based upon their own observations'.

152 *R v Singh* [1999] ACTSC 32 [161].

have been impaired so that she would have been able to understand in an abstract or intellectual sense that as a result of her actions Mr Cinque would die, she had no real appreciation of the implications or consequences of her behaviour'.<sup>153</sup> However, it is contended that a better view of the significance of this statement is that any abnormality the accused was suffering from did not substantially impair her mental responsibility for her act.

As to Crispin J's second proposition that, if the evidence that the accused attempted to save Mr Cinque is based on her apparently giving him mouth-to-mouth resuscitation then two observations follow.<sup>154</sup> First, his Honour did 'not accept Professor Hayes' hypothesis that in contacting Ms Cammack she may have been simply trying to make it look as though she had made an attempt to save him'.<sup>155</sup> Second, the reported conversation between the accused and Ms Cammack is consistent with the attempt being perfunctory.<sup>156</sup>

The case is a tragic testimony to the truth of Gleeson CJ's earlier cited observations in *R v Chayna* of a marked reluctance on the part of juries to find manslaughter when it appears to them to be murder with a consequent tendency for accused persons raising diminished responsibility to prefer trial without a jury.<sup>157</sup> The outcome in *R v Singh* could well have varied depending on the jurisdiction involved.<sup>158</sup> The outcome may have proved to be the same in Qld if the case had come before the Mental Health Court although the judge would have been assisted by two experienced psychiatrists. However, in NSW the case would likely have come before a jury with the real possibility of a murder conviction. If consistency is a criterion in the test of maintaining confidence in the judicial system, then cases like *R v Singh* place pressure on such confidence.<sup>159</sup>

### III SENTENCING

Those jurisdictions in Australia that have no partial defence of diminished

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153 *R v Singh* [1999] ACTSC 32 [163].

154 *R v Singh* [1999] ACTSC 32 [60]: 'The ambulance officer gave her instructions about mouth to mouth resuscitation and it *appears* that she commenced to follow those instructions'. (emphasis added)

155 *R v Singh* [1999] ACTSC 32 [166].

156 *R v Singh* [1999] ACTSC 32 [58].

157 *R v Chayna* (1993) 66 A Crim R 178, 191.

158 *R v Singh* [1999] ACTSC 32; Of course, absent the defence of mental impairment, the events in *R v Singh* in an Australian jurisdiction that does not permit the partial defence of diminished responsibility would have led to a murder conviction.

159 *R v Singh* [1999] ACTSC 32.

responsibility have broadly adopted the position that diminished responsibility is adequately considered during sentencing.<sup>160</sup> For example, the VLRC, in recommending against the partial excuse of diminished responsibility being introduced in Victoria, considered that a mental disorder short of mental impairment, which may have a mitigating effect, should be taken into account in sentencing.<sup>161</sup>

The MCLOC was of the same view finding that the need for the defence is questionable where sentencing flexibility exists. The MCLOC also argued that a further reason to oppose the introduction of diminished responsibility was the tragic experience in *Veen v The Queen (No 1)*<sup>162</sup> and *Veen v The Queen (No 2)*.<sup>163</sup> In the first case, the evidence supported the prosecution's argument that the defendant was likely to kill again and therefore this should offset any reduction in sentence by reason of diminished responsibility. The High Court disagreed and held that proportionality in sentencing outweighed any consideration of public protection. The defendant did kill again in the same circumstances upon release from prison, but in the second case, life imprisonment was ordered, as the defendant's propensity to kill under specified circumstances was no longer uncertain but well established.<sup>164</sup> MCLOC pointed out that:

The *Veen* cases illustrate the danger underlying the diminished responsibility doctrine.<sup>165</sup> Lenient penalties may not be desirable for all defendants suffering from abnormalities of the mind falling short of insanity. The paradoxical situation arises whereby a defendant successfully raising diminished responsibility is to receive a shorter sentence than a defendant who fails in that regard, even though the former may be significantly more dangerous than the latter.<sup>166</sup>

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160 Sentencing for murder is regularly under review in Australian jurisdictions as exemplified by the very recent changes (August 2008) in Western Australia ('WA'), a jurisdiction with no partial defence of diminished responsibility. Following the abolition of the distinction between wilful murder and murder (and the abolition of the partial defence of provocation), the minimum non-parole period for murder in WA has increased from seven to ten years and for the first time there will be no maximum limit on the non-parole period: See <<http://www.mediastatements.wa.gov.au/Pages/Results.aspx?ItemID=129895>> at 17 August 2008.

161 See VLRC, above n 117, [5.129]. 'Flexibility in relation to sentence lengths and dealing with mentally ill offenders makes the introduction of diminished responsibility unnecessary and undesirable. While diminished responsibility results in a manslaughter outcome and therefore a reduced prison sentence, the Victorian Sentencing Act provides flexibility in sentencing and also gives courts scope to order hospital dispositions where necessary'.

162 (1979) 143 CLR 458.

163 (1987) 164 CLR 465.

164 See MCLOC, above n 13, 129.

165 *Veen v The Queen (No 1)* (1979) 143 CLR 458; *Veen v The Queen (No 2)* (1987) 164 CLR 465; See further R Fox, 'The Killings of Bobby Veen: The High Court on Proportion in Sentencing', (1988) 12 *Criminal Law Journal* 339.

166 See MCLOC, above n 13, 129; For example, in *R v Leanne Walsh* [1998] NTSC 28, Mildren, Thomas and Priestly JJ were of the view 'it would seem that the greater the

However, this paper goes further than either the MCLOC or the VLRC in advocating that even in the two jurisdictions that have a mandatory sentence for murder combined with the partial defence of diminished responsibility, namely Qld and the NT,<sup>167</sup> the defence should be repealed.

### A *Queensland*

The reasons for this position are slightly different for each of the two jurisdictions. In Qld, under s 305(1) of the *Criminal Code 1899* (Qld) the punishment for murder is imprisonment for life. Under s 181(3) of the *Corrective Services Act 2006* (Qld) the prisoner is eligible for parole after serving 15 years.<sup>168</sup> Earlier in this paper, the case of *R v Beacham* was reviewed in the context of the Qld mental health system.<sup>169</sup> The Qld Court of Appeal in that case reduced the 13 year sentence imposed by the Qld Mental Health Court to one of 12 years. It is contended, that given serious cases of manslaughter on the grounds of diminished responsibility are yielding sentences at the upper end of the imprisonment scale, then notwithstanding the requirement to apply for parole under s 181(3) of the *Corrective Services Act 2006* (Qld) after 15 years, there is little reason on this ground alone to oppose the abolition of the defence. Indeed, given the uncertainty surrounding the future state of mental health services, the better view may be to sentence under murder and then calculate the sentence under a procedure similar in form to that followed in NSW under the *Crimes (Sentencing Procedure) Act*.<sup>170</sup>

Section 54A(1) of the NSW Act provides for standard non-parole periods for different offences.<sup>171</sup> The standard non-parole period is represented as 'an offence in the middle of the range of objective seriousness for offences'.<sup>172</sup> Thus, the court's discretion when sentencing is guided by the determination of where the offence lies in the spectrum of objective seriousness'.<sup>173</sup> In reasoning whether a non-parole period should be shorter or longer than the standard non-parole

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impairment the less the culpability to be taken into account in deciding appropriate punishment'.

167 See *Criminal Code 1899* (Qld) s 305; *Criminal Code 1983* (NT) s 157.

168 The *Corrective Services Act 2006* (Qld) s 181(3) states: 'If the Criminal Code, section 305(2) does not apply, the prisoner's parole eligibility date is the day after the day on which the prisoner has served 15 years'.

169 *R v Beacham* [2006] QCA 268.

170 *Crimes (Sentencing Procedure) Act 1999* (NSW).

171 *Crimes (Sentencing Procedure) Act 1999* (NSW). For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

172 Section 54A(2), *Crimes (Sentencing Procedure) Act 1999* (NSW).

173 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5817 (The Honourable Bob Debus, Attorney-General).



period, the court is further directed<sup>174</sup> to refer *only* to reasons provided for in s 21A.<sup>175</sup>

## B Northern Territory

The situation in the NT is governed by s 157(1) of the *Criminal Code 1983* (NT) which mandates imprisonment for life for the crime of murder. Under s 53A(6) of the *Sentencing Act 1995* (NT), '[t]he sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are *exceptional circumstances* that justify fixing a shorter non-parole period'.<sup>176</sup> (emphasis added)

The requirement under s 53A(7) *Sentencing Act 1995* (NT), which covers the definition of exceptional circumstances, that *inter alia* the offender is unlikely to reoffend, affords a strong measure of protection to the public. However, the terms of s 53A(7) of the *Sentencing Act 1995* (NT) which also require the victim's conduct and condition to have substantially mitigated the conduct of the offender, make it unlikely that a person convicted of murder with diminished responsibility in mitigation would serve less than the mandatory 20 years before being eligible for parole.

In these circumstances, the better view for the NT may be rather than retain the defence of diminished responsibility solely because of the mandatory life sentence for murder, to amend s 53A(7) of the *Sentencing Act 1995* (NT) to specifically allow greater consideration of diminished responsibility in mitigation by including language similar to s 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that the offender was not fully aware of the consequences of his or her actions because of any disability.

The selection of a standard non-parole period for murder is a political one. However, the very recent decision of the Western Australian government, in a jurisdiction that does not allow the partial defence of diminished responsibility, to set a minimum non-parole period for murder of ten years, provides a benchmark, and

<sup>174</sup> Section 54B(2) and (3), *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>175</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out a comprehensive list of aggravating and mitigating factors which for present purposes include *inter alia* under mitigating factors s 21A(3)(g) *the offender is unlikely to reoffend* and s 21A(3)(j) *the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability*. (emphasis added)

<sup>176</sup> *Sentencing Act 1995* (NT) s 53A(7) defines 'exceptional circumstances' as the offender otherwise being of good character and unlikely to reoffend, and the victim's conduct and condition substantially mitigate the conduct of the offender.

is consistent with the NSW standard non-parole period of ten years for murder in a jurisdiction that does allow the partial defence of diminished responsibility.<sup>177</sup> As against the current sentencing regimes for murder in Qld (15 years before being eligible for parole) and the NT (20 years), the countervailing circumstances of aggravation under a NSW sentencing model may yield a similar non-parole sentencing result to the present regimes for cases at the upper level of the seriousness spectrum.

#### IV CONCLUSION

This paper has sought to demonstrate that the partial defence of diminished responsibility is flawed because it is too broad and vague in its formulation which in turn leaves the defence open to manipulation. The term 'abnormality of mind' has developed to include a wide range of conditions and not being a psychiatric term has led to the development of its meaning depending upon individual cases where the defence has been raised.

The practical problems of instructing juries in the face of widely differing medical opinions, of leaving the ultimate issue solely to the jury, and the marked reluctance of juries to reduce murder to manslaughter where the circumstances appear to them to be murder, will not be remedied by any further changes to the test.

It is contended that a person who unlawfully kills and seeks to mitigate his or her crime on the basis of diminished responsibility should either have to meet the higher standard of total impairment against one of the three capacities sufficient for the defence of mental impairment, or be convicted of murder and be exposed to the sentencing regime of the particular jurisdiction.

The existence of a mandatory life sentence for murder is no impediment *per se* to the total abolition of the defence of diminished responsibility in Qld and the NT, either on the prudent grounds of a conservative approach to protecting the public from offenders whose 'abnormality of mind' was 'substantial' or by amending the sentencing regime to permit greater consideration of such offenders under a regime of standard non-parole sentencing. In this context, both jurisdictions allow the defence of

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<sup>177</sup> Arguably this ten year standard non-parole period for murder is also consistent with greater weight being attached to the protection of the community given a successful defence of diminished responsibility requires the offender's mental capacity to have been substantially diminished. See for example s 3A Purposes of Sentencing; *Crimes (Sentencing Procedure) Act 1999* (NSW) under which s 3A(c) reads: 'to protect the community from the offender'.

provocation (*Criminal Code 1983* (NT) s 158 and *Criminal Code 1899* (Qld) s 304), which is commonly pleaded in the alternative to diminished responsibility and if successful, reduces murder to manslaughter.

It is time to abolish the partial defence of diminished responsibility in Qld, NSW, the NT and the ACT as the defence drives a coach and horses through criminal responsibility for murder. There exists an alternative defence of mental impairment, and given the unknowns surrounding mentally ill offenders whose criminal responsibility has been 'substantially' diminished, greater weight should be attached to protecting the community from the offender.

