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**LAW REFORM COMMISSIONER
VICTORIA**

Report No. 12

**PROVOCATION AND DIMINISHED
RESPONSIBILITY AS DEFENCES
TO MURDER**

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**MELBOURNE
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**U.S. Department of Justice
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PREFACE

By letter dated the 13th March 1979 The Honourable the Attorney-General acting pursuant to section 8(b) of the Law Reform Act 1973 referred to the Law Reform Commissioner the following reference:—

“To investigate and report upon the necessity for reform of the law relating to provocation as a defence to a charge of murder.”

Following on the publication and wide distribution of Working Paper No. 6 on Provocation as a Defence to Murder a Workshop Meeting was held at the State College of Victoria at Coburg on 26th September 1979. This was attended by a number of lawyers (both barristers and solicitors), penologists, police, prison warders, psychiatrists, psychologists, and social workers. Papers were presented by Mr. Colin Lovett of the Victorian Bar, Mr. Ronald Conway, a well known Victorian psychologist, and Drs. Neville Parker and David Sime, two experienced forensic psychiatrists. In this Paper a strong plea was made for the introduction of diminished responsibility as a defence for persons charged with murder.

Consideration of the Paper and subsequent discussions upon it led to the view that there may well be a case for the introduction of such a defence which could probably exist in parallel with the defence of provocation.

After discussion with the Attorney-General it was decided that the question be investigated and, if it seemed feasible, that a Report on both Provocation and Diminished Responsibility be submitted.

Accordingly a considerable amount of research was undertaken principally by Ms Lesley Skillen and Working Paper No. 7 was prepared and given a similar wide distribution to that of Working Paper No. 6.

Publicity was given to both Working Papers, notably by the Melbourne “Age” but despite this publicity and the width of distribution only a few written submissions were made. However both the Law Reform Commissioner and Ms Skillen have had innumerable informal discussions with interested persons. In this connection the Commissioner canvassed the views of all Supreme Court judges and takes this opportunity to express gratitude for and appreciation of their co-operation. Unfortunately neither the Victorian Bar Council nor the Law Institute has been able to formulate views on Diminished Responsibility in time for this Report although individual opinions in favour of the introduction of this defence have been voiced.

I now submit this Report to the Attorney-General for consideration.

I wish to thank all those who gave their time and advice so willingly and should make particular mention of Mr. John Van Groningen who efficiently and carefully organised the Workshop Meeting referred to above, of Dr. Bartholomew and of Drs. Parker and Sime for their readiness at all times to resolve difficulties, of Dr. Blair Currie for his co-operation on our visit to Aradale Hospital and J Ward at Ararat, and of Mrs. J. Howlett, Mr. Mark Sibree, and Professor Louis Waller of the Law Reform Advisory Council. Finally I must express particular thanks to The Honourable T. W. Smith, Q.C., for his ever-constructive criticism, to my former Legal Assist-

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ants Ms Frania Sharp and Mr. John Dixon for their help with the work on Provocation, to Ms Lesley Skillen for the depth and enthusiasm of her research and my secretary Ms Elizabeth Russell who has come to be the mainstay of Reports emanating from this Office.

I should add that for convenience and to avoid unnecessary clumsiness the masculine gender has been used throughout this Report in referring to persons. It must be clearly stated at the outset that arguments with respect to Provocation and Diminished Responsibility may apply equally, if not indeed with greater force, with respect to women.

JOHN MINOGUE
LAW REFORM COMMISSIONER

160 Queen Street,
Melbourne.
15th January, 1982

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PROVOCATION AND DIMINISHED RESPONSIBILITY AS DEFENCES TO MURDER

PART 1 PROVOCATION

"In 1672 one John Manning was indicted in Surrey for murder for the killing of a man, and upon not guilty pleaded, the jury at the Assizes found that the said Manning found the person killed committing adultery with his wife, in the very act, and flung a joint-stool at him, and with the same killed him; and resolved by the whole court that this was but manslaughter; and Manning had his clergy at the bar and was burned in the hand.

The court directed the executioner to burn him gently, because *there could be no greater provocation than this.*"¹

So reported Sir Thomas Raymond, one of the early compilers of reports of cases decided in the courts.²

What is Provocation?

1.1 In ordinary speech its most common meaning could be said to be incitement to anger or irritation. But in law two matters of importance must immediately be noticed.

1.2 First, provocation may provide a defence to a charge of murder — but a defence of a special kind. If successful it does not lead to an acquittal on the charge but to a reduction from a conviction of murder to one of manslaughter. It is a defence which springs from an appreciation and understanding of the frailty of human nature and which, even in times not so long past, could mean the difference between a mandatory sentence of being hanged by the neck until death and a sentence tailored to suit the moral gravity of a particular homicide.

1.3 The second matter of importance is that in law provocation has a meaning based on anger but it is a word used to denote much more than ordinary anger. Throughout the cases it is seen to be something which incites immediate anger or "passion" as an older terminology has it, and which overcomes a person's power of self-control to such an extent as to overpower or swamp his reason. What that *something* can be has been the subject of different views through the centuries, and these views have in great measure depended on the sort of person whom the law has regarded as meriting extenuating consideration when provoked to kill. In 1672 the sight of a wife in the act of adultery was clearly such an incitement and in those days when quarrelling was much more kindly regarded than it is today, the umbrella of provocation could cover fatally running an opponent through with a sword in the course of the quarrel.

1.4 Sir Edward East, writing in 1803, expressed the law to be that provocation, to reduce the crime of murder to manslaughter, must be

"such a provocation as the law presumes might in human frailty heat the blood to a proportionate degree of resentment, and keep it boiling

¹ Emphasis added.

² See Stephen's *History of the Criminal Law*, Vol. 3, p. 63.

to the moment of the fact; so that the party may rather be considered as having acted under a temporary suspension of reason than from any deliberate malicious motive."³

1.5 More than 200 years after John Manning had his hand gently burned, Sir James Fitzjames Stephen, one of our greatest writers on the criminal law, from his study of earlier writings and the cases, listed in his Digest of the Criminal Law a number of acts which he considered to amount to provocation in law. Amongst these were:—

The sight of the act of adultery committed with a wife. This, he said, is provocation to the husband of the adulteress on the part of both the adulterer and the adulteress; although he seems not to have considered whether the wife was allowed to give similar reign to her sense of resentment.

Assault and battery of such a nature as to inflict actual bodily harm or great insult.

Two persons quarrelling and fighting upon equal terms whether with deadly weapons or otherwise whichever be right in the quarrel and whichever strikes the first blow.

However, he concluded that neither words nor gestures nor injuries to property nor breaches of contract amount to provocation except (perhaps) words expressing an intention to inflict actual bodily injury accompanied by some act which shows that such injury is intended. If there were provocation, he stated the law to be that homicide which would otherwise be murder is not murder but manslaughter, if the act by which death is caused is done in the heat of passion caused by provocation unless that provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm.

Nor does provocation extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received; and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender caused death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.

The "Reasonable" or "Ordinary" Person

1.6 In the atmosphere of law reform which was strong in England in the late 19th century, a Draft Criminal Code was prepared by Criminal Code Commissioners, all of whom were High Court judges (including Stephen). They recommended that provocation be defined as "any wrongful act or *insult* of such a nature as to be sufficient to deprive an ordinary person of the power of self-control if the offender acts upon it on the sudden and before there has been time for his passion to cool".

1.7 The Draft Criminal Code never became law although its influence can be easily detected in the Criminal Codes of Queensland (1901), Western Australia (1902) and of Tasmania (1924). However the idea of imposing

³ *Pleas of the Crown*, Vol. 1, p. 238.

some external standard on the quality of one's anger before it could become a defence took hold; the "reasonable man" made his appearance in the common law in 1869⁴ but was not seen again in the cases until 1913.⁵ The provoked killing had to be tested against what a reasonable man would do in the particular circumstances of the case, so that when the defence of provocation was taken juries had to consider two questions.

1. Was the accused in fact so deprived of his self-control by the action of the victim that he acted as he did? (The subjective test.)
2. Was the provocation enough to make a reasonable man do as the defendant did? (The objective test.)

But the judges became the arbiters of the standards of the reasonable man and in each case made the preliminary decision whether the evidence could support the view that the provocation was sufficient to lead a reasonable person to do what the accused did. For example in the first half of this century they decided that an exceptionally irritable, excitable, or pugnacious person,⁶ an intoxicated person if he kills when a sober person would not have done so,⁷ and an adolescent who miserably conscious of his impotence reacted to taunts by a prostitute by killing her,⁸ did not possess the type of human frailty which could be allowed to the reasonable man. Nor, it was said, could mere words alone, except in the most unusual and extreme circumstances, provoke a reasonable man to kill. And so a confession of adultery was excluded from the defence.⁹

1.8 By 1954, the year in which five Law Lords whose ages ranged from 64 to 79, decided that the enraged adolescent could not pass the reasonable man test,¹⁰ it seemed that a person was only permitted to respond to a list of legally recognised provocations which had been drastically reduced to three items, namely the actual finding of his spouse in the act of adultery, a serious physical assault, and "mere" words in circumstances of the most extreme and exceptional character.

Legislative Change.

1.9 However, significant developments of the law have since taken place. In England the *Homicide Act* of 1957 removed from the trial judge the power to decide what was, and what was not reasonable and provided that where there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said, or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining that question the jury shall take into account everything both done and said according to the effect which in their opinion it would have on a reasonable man.¹¹

⁴ *Welsh* (1869) 11 Cox C.C. 336.

⁵ *Alexander* (1913) 9 Cr. App. R. 139; *Lesbini* [1914] 3 K.B. 1116.

⁶ *Lesbini* [1914] 3 K.B. 1116; *Mancini* [1942] A.C. 1.

⁷ *McCarthy* [1954] 2 Q.B. 105.

⁸ *Bedder* [1954] 2 All. E.R. 801.

⁹ *Holmes* [1946] A.C. 588.

¹⁰ *Bedder* [1954] 2 All. E.R. 801.

¹¹ Section 3.

1.10 In 1961 the New Zealand Parliament amended its *Crimes Act* to provide a new approach to provocation by enacting that anything done or said may be provocation if —

- (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
- (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.¹²

Shortly after this amendment the New Zealand Court of Appeal was confronted with the difficulty of explaining this extraordinary "ordinary" man — one who had the power of self-control of an ordinary person but otherwise having the characteristics of the offender.¹³ The judges of that Court said the section requires a fusion of two discordant notions, the objective and the subjective, and it took them several pages of judicial reasoning to attempt to describe the limitations of such a person. They thought that special difficulties arose when it became necessary to consider what purely mental peculiarities may be allowed as characteristics. They thought it not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded, and thought that to allow this to be said would deny any real operation to the reference made in the section to the ordinary man and it would moreover go far towards the admission of a defence of diminished responsibility without any statutory authority to sanction it.

The Common Law.

1.11 Neither in South Australia nor in Victoria has there been any statutory alteration to the common law as there has been in England, New Zealand and New South Wales.¹⁴ But in 1964 two judges of the High Court whose views were approved by the Privy Council made it clear that all the circumstances had to be taken into account including words spoken.¹⁵

1.12 A man named Parker killed his wife's paramour after a series of events which included incidents kindling his growing suspicion of the paramour's alienation of his wife's affections, a confrontation between the parties concerned, a scornful reference by the paramour to Parker's sexual inadequacies, a notification by the wife of her decision to leave Parker and their children, and her physical departure. Some time later and some distance away Parker in a car ran down both his wife and the paramour and whilst in a state of high emotional disturbance and lack of self-control he battered the man to death with an iron instrument. The Privy Council upheld the view of Sir Owen Dixon and Mr. Justice Windeyer in the High Court that all the circumstances had to be taken into account and consequently the whole of the events of the day before and the day of the fatality were relevant in considering whether the accused was acting under the cumulative and continuing stress of provocation at the time he fatally struck the deceased. In the result a conviction of manslaughter was substituted for one of murder.

¹² Section 169 (2).

¹³ *McGregor* [1962] N.Z.L.R. 1051.

¹⁴ In N.S.W. in 1883 section 370 of the *Criminal Law Amendment Act* was enacted. The section with minor changes now appears as section 23 of the *Crimes Act* of that State.

¹⁵ *Parker* [1964] A.C. 1369.

1.13 And in 1977 some judges of the High Court took the view that words alone could provide the provocative incident triggering conduct in respect of which the defence of provocation was claimed in a murder case. The Court was considering the appeal of one *Moffa*¹⁶ from a conviction of murder, he having killed his wife in circumstances which were claimed to have been legally provocative.

Moffa was an Italian husband aged 50. He killed his Australian wife who was 15 years his junior after a night of growing emotional tension consequent upon her informing him that she was leaving him and upon a number of insulting remarks during the course of his pleading with her to remain with himself and their 3 children. Amongst her statements was one that she had been unfaithful to him with every man in the street. Members of the Court pointed out that there was no unqualified rule of an absolute nature applicable in all cases that a confession of adultery can never afford ground for the conclusion that an ordinary man would thereby be led to lose his self-control to the point of forming an intent to murder or to do grievous bodily harm as had been postulated by the House of Lords in 1946.¹⁷

It was also said that there is no absolute rule against words founding a case of provocation although a claim by an accused of provocation by words rather than by conduct would require close scrutiny. Several members of the Court thought that the deceased's scornful references to Moffa's sexual inadequacy and to her conduct with other males in their street could be classed as grossly provocative language and so could be "violently provocative" which the House of Lords in 1946¹⁸ would allow to justify a verdict of manslaughter. In the result the Court thought that the defence of provocation should succeed.

1.14 South Australia has subsequently provided further examples of the breadth (or narrowness) of the ordinary man. *Ian Dutton*¹⁹ was a man of 36 who killed his 20-year-old wife. Ten months after marriage he injured his back, an injury which affected his general health and made sexual intercourse difficult. It ceased in July 1978. His wife left him more than once and on the last occasion a week before her death. He went to the house where she was living after spending the previous evening drinking and according to his version of events, she was abusive, taunted him with his inability to satisfy her sexually, and refused to return to him, her final taunt being "I can get paid for what you can't give me". He lost control of himself and shot her with a rifle which he had with him in his car. The trial judge failed to endow the hypothetical ordinary man model with any attributes or characteristics beyond those implied by the expression "ordinary man" itself. He did not give the ordinary man the appellant's own alleged want of ordinary physical and sexual powers which according to his statement, meant much to him.

However, the majority of the Court of Criminal Appeal were of opinion that the judge should have explained to the jury that the reasonable man referred to is a person having the power of self-control to be expected of the ordinary person of the sex and age of the accused but in other respects

¹⁶ (1977) 51 A.L.J.R. 403.

¹⁷ *Holmes* [1946] A.C. 588.

¹⁸ *Ibid.*

¹⁹ (1979) 21 S.A.S.R. 356.

sharing such of the accused's characteristics as they thought would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.

As the Chief Justice said:

"A jury may well think that insulting expressions imputing want of physical strength and sexual prowess would have little effect upon a man of ordinary powers of self-control who recognized them as mere abusive words having no foundation in fact. It may think, however, that the effect could be very different on a man who is only too conscious of the truth of what is said, so that what would otherwise be empty abuse becomes the most hurtful type of taunt. A correct understanding of what the law means by 'the ordinary man' is therefore essential in order to be able to answer the question whether the objective requirement of the test of provocation has been satisfied."²⁰

Mr. Justice Cox, in referring to the case of *Moffa*²¹ expressed the view that if racial characteristics can be regarded as being part of the causation of a homicide (as it had been by some of the judges in that case) it is difficult to see any logical stopping point short of investing the ordinary man with all of the characteristics of the accused himself other than the two — temper and intoxication — that the law has consistently excluded upon what may be fairly recognized as policy grounds. So he expressed the law to be that the ordinary man, against whom the actions of the accused are to be judged, is one possessing all of the characteristics and idiosyncracies of the accused himself — age, sex, race, colour, physical defects, and so on, that would have affected his conduct in the circumstances in which the accused found himself — with the two foregoing exceptions. He seems to express doubt as to the possibility of maintaining these exceptions indefinitely in view of the narrowing of the gap between the accused and the ordinary man but says that any possible abrogation of them will not be a matter for the Court in Adelaide, meaning, of course, that it will either have to be the High Court or the Parliament which takes this step.

1.15 The latest (but undoubtedly not the last) word on this subject has also been pronounced by the Court of Criminal Appeal in South Australia in a tragic case which attracted wide public interest. In April last, *Mrs. A.*,²² a woman 47 years of age, with six children of ages ranging from 25 to 13 killed her husband by means of a number of axe blows to the head. She had had a most unhappy marriage, her husband being a violent man both to her and her children. Two of the daughters had left home some 5 years ago because of their father's conduct towards them which included sexual interference, and the two daughters who remained up until the time of the killing had been sexually interfered with by their father from about the age of 6 years and intercourse with them had taken place from about the age of 9 years. As one of the judges of the Court remarked, "His conduct towards his family was about as repulsive as it was possible to imagine".

²⁰ At 357.

²¹ (1977) 51 A.L.J.R. 403.

²² Unreported, 19th & 20th August, 1981.

The evidence showed that Mrs. A. had throughout been unaware of her husband's incestuous conduct until the morning before the night of his death. In the early hours of that morning she heard about and saw marks of a violent assault on her daughter. A little later in the morning she expressed an intention of killing her husband both to the daughter and to a neighbour. She acquired a rifle which unknown to her was unable to be fired, and some bullets. Later in the morning the daughter told her for the first time of the incestuous behaviour which had been going on for years without her knowledge (including a rape on the previous evening). She went to work in the afternoon and as she told the Court during that period she "kept thinking, 'He's got to go. . . I couldn't let things go on the way they were'." On her return home late at night her husband touched her caressingly and talked about their being one happy family. His touch she described as like something red-hot from which she flinched away. A short time later they retired to bed where she rejected his fondling and assertion of love for her. He fell asleep. She then sat on the side of the bed and she described the event that followed in these words:—

"I was thinking about all the nights when I worked and I worked nights and all the things I had done for him over the years, waited on him hand and foot and how he had violated the girls like that. I sat on the edge of the bed. I smoked one cigarette after another — I don't know if it was one or two or what. I just don't know what I was thinking about. I just thought about all them kids, them four kids and what they must have gone through and what a sucker I was. How stupid I had been. Why hadn't I seen things like that happening before? Then the next thing I got up and went outside and went to the shed and I got the axe. I thought if I had a bullet I was frightened it would ricochet and come back and hit me. I pulled the bedclothes back and said, 'You bastard. What you have done all these years'. I hit him and the blow glanced off the top of his head, I remember that. He tried to get up in the bed. I kept on hitting after that and he kept trying to get up. I got scared. I thought 'If he turns the axe on me these kids are at his mercy; they will never be free'. So I grabbed the pillow and he kept trying to lift himself up off the mattress. I pushed his head into the mattress. I kept saying, 'Damn you, you bastard, die'. His head hit the floor. I did feel his pulse and I couldn't feel it any more and I kept pushing his head."

Then she rang the police and informed them what she had done.

The trial judge would not allow provocation to be put to the jury and Mrs. A. was convicted of murder. The Court of Appeal allowed her appeal and ordered a new trial, two of the judges being of the view that provocation should have been put to the jury.

The Chief Justice restated the law with regard to provocation although venturing no explanation of the ordinary person which no doubt seemed to him unnecessary in this particular case. What the Chief Justice said applies equally to Victoria today as to South Australia, and it is as follows:

"The killing of one person by another with intention to kill or do serious bodily harm is murder. Such a killing may, however, be reduced to manslaughter if the killing results from a sudden and

temporary loss of self-control on the part of the killer which is brought about by acts or words of the deceased amounting in law to provocation. To amount in law to provocation the acts or words must satisfy the following tests:

- (1) They must be done or said by the deceased to or in the presence of the killer,
- (2) They must have caused in the killer a sudden and temporary loss of self-control rendering the killer so subject to passion as to make him for the moment not master of his mind,
- (3) They must be of such a character as might cause an ordinary person to lose his self-control to such an extent as to act as the killer has acted."

As the Chief Justice pointed out, there was a considerable body of evidence tending to indicate that Mrs. A had made up her mind many hours, perhaps as long as 30 or more, before the killing, that she would kill her husband. However if there was matter which fairly raised the issue of provocation it was for the jury to decide upon the facts. And he proceeded to set out the version of the facts most favourable to her because it was a version which the jury might accept as the correct one. He thought it desirable to make the following observations as to what does not constitute provocation in law.

"The loss of self-control which is essential is not to be confused with the emotions of hatred, resentment, fear or revenge. If the appellant, when in control of her mind and will, decided to kill the deceased because those emotions or any of them had been produced in her by the enormity of the deceased's past behaviour and threatened future behaviour or because she considered that that was the only way in which she or her children could be protected from the deceased's molestations in the future the crime would nevertheless be murder. The law of a well-ordered and civilized society cannot countenance deliberate killing, even to the extent of treating it as extenuated as a response to the conduct of another, however abhorrent that conduct might be. Nor can society countenance killing as a means of averting some apprehended harm in the future. . . . The law has always and must always set its face against killing by way of prevention of harm which is merely feared for the future. Other measures which are peaceful and lawful must be resorted to in order to deal with threats of future harm."

The majority judges reached the conclusion that at least on the version of the facts most favourable to Mrs. A that it was open to a reasonable jury to take the view that an ordinary person, possessing those characteristics of Mrs. A which rendered her susceptible, might suffer in consequence of her husband's words and actions on the fatal night a loss of self control to the extent of doing what she did. And the Chief Justice concluded:

"... the deceased's actions and words in the presence of the appellant on the fatal night might appear innocuous enough on the face of them. They must, however, be viewed against the background of brutality, sexual assault, intimidation and manipulation. When

stroking the appellant's arm and cuddling up to her in bed, and when telling her that they could be one happy family and that the girls would not be leaving, the deceased was not only aware of his own infamous conduct but must also have at least suspected that the appellant knew or strongly suspected that, in addition to the long history of cruelty, he had habitually engaged in sexual abuse of her daughters. The implication of the words was therefore that this horror would continue and that the girls would be prevented from leaving by forms of intimidation and manipulation which were only too familiar to the appellant. In this context it was, in my opinion, open to the jury to treat the words themselves and the caressing actions which accompanied them as highly provocative and quite capable of producing in an ordinary mother endowed with the natural instincts of love and protection of her daughters, such a loss of self-control as might lead to killing."

So there the law stands.

The Problem of the Ordinary Man.

1.16 Nonetheless we are still left with this extraordinary "ordinary man". In the case of *Smith*²³ which set this enquiry afoot Sir Oliver Gillard expressed the view that legislative action was urgently needed to remove the semantic difficulties experienced by trial judges in directing juries on provocation, when they came to consider the ordinary man's reaction to the circumstances in which the accused found himself. Whether they should ponder upon what he "could" or "would" or "might" do was completely unclear. And it is immediately apparent that there are significant differences in meaning involved. But the clarification of this confusion on terms most favourable to the person accused would still leave the judge the initial arbiter of whether a reasonable jury could come to the conclusion on the evidence before them that an ordinary man might perform the extraordinary act of killing. Who is the ordinary man would be no nearer of solution.

1.17 Sir Garfield Barwick in *Moffa*²⁴ thought that the emotional disturbance consequent on Moffa's wife's disclosed attitude to him did not make him other than an ordinary man and in particular other than an ordinary man of his ethnic derivation.

1.18 In the recent English case of *Camplin*²⁵ in which the House of Lords had to consider the reaction of a 15 year old boy to a homosexual assault by an older man followed by taunting words, it was held that the "ordinary man" included an ordinary boy of that age. Lord Diplock, with whom two other of the Law Lords agreed, said that a jury should be directed as follows:

"The judge should state what the question is, using the very terms of [section 3 of the *Homicide Act 1957*]. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the

²³ Unreported 10th April, 1978 (Vic. Full Court).

²⁴ (1977) 51 A.L.J.R. 403; *supra*, para. 1.13.

²⁵ [1978] A.C. 705.

provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did."²⁶

The majority report of the Sub-Committee on Provocation of the Victorian Criminal Bar Association pertinently remarked of this case:

"Surely, once a fifteen year old youth, or indeed, a male or female of any age is raped or buggered, he or she ceases to be ordinary in any real sense at all? A jury must look at *that* person with all his susceptibilities and weaknesses. It is impossible to draw lines as was attempted in *McGregor*."

1.19 And, as the Irish Court of Criminal Appeal thought when in 1978 it formally stated the objective test not to be part of the law of Eire, Mr. Justice Murphy's views in *Moffa's* case are compelling.²⁷ Talking of the ordinary man the judge asked:

"Is he a complete stranger subjected to the provocative conduct, or a person in the same circumstances as the accused?"

And he went on:

"To be in the same circumstances, he should be taken to be in the same relationship with the deceased (in this case, a marital relationship) and must have experienced the relationship. In a case such as this, he should have lived the life of the accused, or it would be impractical to speak of what a reasonable or ordinary man would do in the circumstances. For example, it might have been an unbearable insult to a person of the accused's origin to be called a 'black bastard'. Once the full circumstances are taken into account, the objective test disappears because it adds nothing to the subjective test. For this reason, those who adhere to the objective test have rigidly excluded individual peculiarities of the accused (for example, low intelligence, impotence, pugnacity).

The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances".²⁸

1.20 In a submission advocating the abrogation of the objective test The Honourable T. W. Smith Q.C. after having pointed out the difficulty of fitting the peculiarities of the individual into some concept of orderliness went on to point out that the susceptibility to a particular form of provocation even where it is not peculiar to the individual may be peculiar to a small group or to a limited section of the community. For example to a Moslem member of the Turkish community in Victoria it might be an intolerable provocation for someone to make use of a copy of the Koran in

²⁶ At 718.

²⁷ See *People v MacEoin* (1978) 112 Ir. L.T. 53, 56.

²⁸ (1977) 51 A.L.J.R. 403, 412.

his presence in an obscene or degrading fashion. Or, again, a member of the Croatian community might be provoked beyond his powers of self-control if a fellow member denounced him as a communist who had fought with Tito against the Croats. Indeed he might as well fear that such a denunciation, if given credence, would endanger his life.

1.21 Perhaps it is as the late Sir John Barry, a judge of great experience in the criminal law said when he expressed the view that the objective test is unlikely to be applied by a jury who in his words

"are more likely to have regard to the limitations of the accused on trial than to the capacity for self-control of a mythical ordinary person."²⁹

1.22 Or as the Bar submission referred to above put it, 'the jury may impose their own standard in the wrong sense, i.e. What would *they* have done if *they* were the accused? After all, who is more ordinary or reasonable than *we*? Or perhaps (reverting to the situation in *Camplin's* case) a juror will compromise — What would I have done if I was buggered at fifteen?"

In short, the test cannot withstand critical examination.

1.23 The English Criminal Law Revision Committee after a nine-year consideration of Offences Against the Person (other than sexual offences) recently came to the conclusion in regard to provocation that the objective test ought to go.³⁰ It will be remembered (see para 1.9) that the preliminary determination by the judge had been abandoned in the *Homicide Act* of 1957. The principal recommendation of the Committee in relation to provocation was that the law should be reformulated and in place of the reasonable man test the test should be that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as sufficient ground for the loss of self-control leading the defendant to react against the victim with a murderous intent. In the Committee's view this formulation has some advantage over the present law in that it avoids reference to the entirely notional "reasonable man", directing the jury's attention instead to what they themselves consider reasonable which, they said, "has always been the real question". And they further recommended that the defendant should be judged with due regard to all the circumstances including any disability, physical or mental, from which he suffered.

The Committee proposed no change in the present rule whereby the defence applies only where the defendant's act is caused by the provocation and is committed suddenly upon the provocative event, not to cases where the defendant's violent reaction has been delayed, but they thought the jury should still be allowed to take into consideration previous provocations before the one which produced the fatal reaction.

1.24 I have come to the view that the objective test should go and I recommend its abrogation. In the result the jury should be directed to consider the simple legal, although no doubt oft-times extremely difficult, practical problem —

Was the accused person really provoked and did he or she genuinely lose the power of self-control, and as the result of that loss and of

²⁹ Jeffrey [1967] V.R. 467, 478.

³⁰ Fourteenth Report 1980 (Cmd. 7844) para. 81.

the provocation act as the accused person did, or was the conduct not the result of natural and sudden anger but of brutal and planned ferocity?

1.25 The onus should remain upon the prosecution to negative the existence of provocation and consequential conduct leading to death of the victim. Of course the lapse of time between the provoking incident and the killing and the mode of retaliation, are matters which may well in the circumstances be proper for consideration of the reality of the conduct being truly provoked and not premeditated. As has been pointed out, in many of the cases all the circumstances surrounding the killing including prior provocative acts and conduct should be considered.

"Mere" Words as Provocation

1.26 There is a further matter which it is suggested needs legislative attention. Whilst it seems that there is a general recognition that words as well as actions may be provocative³¹ it cannot be said to be entirely clear that words alone without more will suffice to found a defence of provocation. The Full Court of Victoria in the case of *Enright*³² in 1959 took the view that in a case where the provocation was primarily the repetition of the words "bastard" or "you rotten bastard", it was not open to the jury to take the view that any ordinary man could have been provoked by such slight means to lose his self-control so far as to batter the victim to death with a piece of wood. Enright was a man of no great intelligence who had led a roving life and had been variously a station hand, horsebreaker, and shearers' cook. He had had several falls from horses and also a heavy fall in which he injured the back of his head. After this fall he had suffered lapses of memory and had several short periods of treatment in mental hospitals. As a boy of 10 or 12 years he had learnt that he was illegitimate and had developed an obsessive aversion to the use of the term "bastard". He struck up an acquaintanceship with an elderly man named Robertson when they were both looking for work and told him something of his early history. A trivial argument began between the two men which went on for some time as they were walking along a road during which Robertson called Enright a rotten bastard upon which he remarked that that was a terrible thing to say but Robertson continued his abuse. Enright realised that the latter was using the objectionable word because he knew that he could hurt him by doing so and as he said, the word was racing through his mind all the time and he just went cold. Robertson kept repeating the appellation and eventually Enright lost his self-control and hit him repeatedly with a piece of wood thereby killing him. The members of the Court thought that although it was open to the jury to consider what Robertson did was not merely to abuse Enright but to try with malice and persistence to hurt and enrage him nevertheless these words were not sufficient to provide a defence. In the intervening 20 years since this case was decided there seems to have been a noticeable change of attitude in the courts and it is not hard to imagine a defence of provocation succeeding in the hypothetical case of the Croatian referred to in para. 1.20 above.

³¹ *Parker* [1964] A.C. 1369; *Moffa* (1977) 51 A.L.J.R. 403; *Dutton* (1979) 21 S.A.S.R. 356;
³² [1961] V.R. 663.

Nevertheless it seems desirable to put the matter beyond doubt and **it is recommended** (as has been enacted in both the English and New Zealand legislation) that it be enacted that provocation may be by things done or by things said or by both together.

Intoxication.

1.27 Yet another matter which needs consideration and one which has proved of considerable difficulty generally in the criminal law. How far can the fact that the person who kills after being provoked is intoxicated, affect his ability to plead provocation? It seems clear as the law stands that the jury can consider intoxication insofar as it affects the question of the accused's actual provocation — that is, are they able to say that his intoxication in fact was part of the cause of his being actually provoked to do what he did? However, as was said by Lord Denning in a case in 1963:³³

"Drunkenness may impair a man's power of self-control so that he may more readily give way to provocation than if he were sober . . . Nevertheless he is not allowed to set up his self-induced want of control as a defence. The acts of provocation are to be assessed not according to the effect on him personally, but according to the effect they would have on a reasonable man in his place."³⁴

In sober people the emotional impulse released by anger is under the control, to a certain extent, of the higher brain centres and it is these centres that are depressed by alcohol. Hence a drunken person may be provoked to an aggressive reaction by a stimulus that would cause only a slight irritation to a sober person.

If the objective test is to go it would seem that homicidal acts following on provocation to someone under the influence of alcohol (but not so far under the influence as to be incapable of forming an intention to kill) should be capable of raising the defence, unless upon policy grounds it is thought better to exclude such an actor from it. It seems however that no harm will be done if the defence is allowed because, bearing in mind that there can be no lesser verdict than manslaughter in the circumstances, the judge can impose as harsh³⁵ or moderate a penalty as seems called for in all the circumstances.

In any event where there is evidence of intoxication the jury would be aware that they will need to ask themselves whether the accused was genuinely provoked or whether he or she was by reason of the alcohol consumed really spoiling for trouble.

1.28 Accordingly **it is not recommended** that intoxication be capable of depriving an accused of the defence.

Lawful Acts as Provocation

1.29 Finally, if the foregoing recommendations are accepted a possible difficulty has to be met. It might be argued for example that a person who killed a member of the police force whilst he was making a forcible or even a non-forcible arrest was provoked to the point of losing his power

³³ *Attorney-General for Northern Ireland v. Gallagher* [1963] A.C. 349.
³⁴ At 380-381.

³⁵ See *infra*, para 2.63, where it is recommended that the penalty for manslaughter be increased to a maximum of life imprisonment.

of self-control and so could avail himself of the defence of provocation. Some judges hold the view that lawful acts can never be provocation.^{35a} To exclude all lawful acts no matter what the circumstances could be unreal and work injustice. On the other hand, police powers of apprehension and arrest contain sufficient safeguards within themselves against abuse and are so important for the stability of society that public policy would seem to demand their exclusion from any category of provocative conduct. Lawful arrest and imprisonment or conduct authorised by a lawful warrant or by any of the provisions relating to arrest now gathered together in the *Crimes Act* 1958 are seen as proper subjects for exclusion and it is recommended that provocation do not include them.

Recommendations.

1.30 In Working Paper No. 6 several options were set out as to the course of reform. In the light of submissions received and what has been said before in this Report it is recommended that

- (a) Legislation along the lines of Option A be adopted as follows:
 1. Any rule of law whereby provocation is insufficient to reduce murder to manslaughter unless it would or could have caused a reasonable person or an ordinary person or someone with some of the characteristics of such a person to lose the power of self-control and, in consequence, to act as the accused acted in causing the death, and any rule of law requiring proportionality of response to provocation, or limiting the time which may elapse between provocation and response, are hereby abrogated.
 2. Nothing in the preceding section shall limit in any way the matters which may be taken into account in determining any issue of fact.
- (b) It be further enacted:
 3. Provocation may be by things done or by things said or by both together, but does not include any lawful arrest or imprisonment or any conduct authorised by a lawful warrant or by any of the provisions of sections 457 to 463B inclusive of the *Crimes Act* 1958, unless the offender believed that what was so done was unlawful.

^{35a} e.g. Mr. Justice Zelling, the dissenting judge in the Adelaide case referred to herein. In the same case the Chief Justice and Mr. Justice Jacobs took the view that unlawfulness of the provocative conduct as a separate requirement to found the defence has become obsolete.

PART 2 DIMINISHED RESPONSIBILITY

Introduction.

2.1 Diminished responsibility is a defence available in some jurisdictions to a person charged with murder who has some form of mental disorder, transient or otherwise, but who is not insane in the legal sense. If it succeeds a verdict of manslaughter rather than of murder is returned. While proof of insanity completely absolves an offender from criminal responsibility for a crime, diminished responsibility, as the name implies, merely reduces it.

Of course a verdict of not guilty on the ground of insanity does not result in the person charged with murder being discharged into the community as a free man. It results rather in his being kept in strict custody until the Governor's pleasure be known. This will be dealt with more fully in paragraphs 2.27-2.33 below.

2.2 The term diminished responsibility may be called a short-hand expression although not a particularly apt one, for a defence which is at present perhaps best expressed in the Queensland Criminal Code. The defence was introduced into this Code in 1961. Section 304A provides:

"(1) 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 his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

2.3 The moral blameworthiness of the act of killing may be blunted in varying degrees. As the defence of diminished responsibility was originally developed, this diminution of moral blameworthiness called, in the view of the judges, for a reduction from the finality and harshness of the penalty for murder which at the time of its introduction both in Scotland and England, was hanging.

Origin in Scotland.

2.4 The defence originated in Scotland. The first reported case appears to have been in 1867 when Lord Deas of the High Court of Justice held that a weakened state of mind (caused in the case before him by delirium tremens) might well be an extenuating circumstance reducing murder to culpable homicide (our manslaughter).³⁶ He later justified this course by reference to the jury's undoubted right to return such a verdict on a charge of murder adding that the doctrine he had initiated

"was founded on a principle of natural justice, which recognised a distinction between what in other countries, equally enlightened as our own, was termed murder in the first and in the second degree,

³⁶ *Dingwall* (1867) 5 Irv. 466.

and which under our own humane system we could act upon better and more conveniently by the distinction between murder and culpable homicide."³⁷

England.

2.5 In England the initial impetus for such a defence arose out of the long-standing pressure for the abolition of capital punishment. The government of the day succeeded in 1957 in having enacted legislation which introduced a defence of diminished responsibility. This was the English *Homicide Act* of that year and the same Act to which reference has already been made for its alteration of the law relative to provocation and which also provided for the types of murder which should attract the death penalty.

The relevant sections are as follows:

"2. (1) 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. . . .

(3) A person who but for this section would be liable whether as principal or as accessory to be convicted for murder shall be liable instead to be convicted of manslaughter."

2.6 The description of the abnormality of mind set out in the section was taken from the *Mental Deficiency Act* of 1913 but the importation of the concept of mental responsibility had no precedent. In 1960 Lord Parker (the then Lord Chief Justice of England) in the leading case of *Byrne*³⁸ construed the constituent elements of the section thus:—

"'Abnormality of mind' . . . means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgement. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts."³⁹

The existence of an abnormality of mind is a question for the jury, on which medical evidence is important but not decisive; the jury is quite entitled to disagree with even unanimous medical evidence if in their opinion other evidence, including the accused's acts or statements and his demeanour, conflicts with and outweighs it.

³⁷ *Ferguson* (1881) 4 Coup. 552, 558.

³⁸ [1960] 2 Q.B. 396.

³⁹ At 403.

As to substantial impairment this is a question of degree which English law says should be approached by the jury in a broad, commonsense way, since such matters as a person's ability to resist his impulses are incapable of scientific proof.

2.7 The authority of Lord Parker's view on the construction of the section has not subsequently been questioned and has been adopted by the Privy Council.⁴⁰ The defence thus embraces just about all types of pathological mental abnormality both incurable and transitory.

New South Wales.

2.8 In 1974 New South Wales adopted diminished responsibility by enacting section 23A of the *Crimes Act* which substantially reproduced the English formula.

Diminished Responsibility and Insanity.

2.9 In Victoria as in England and most other common law jurisdictions a person whom the tribunal decides because of disease of his mind did not know the nature and quality of his act or know that it was wrong, bears no criminal responsibility. This statement of the law is known as the *McNaghten Rule*. If his mental condition is such the law says he is insane. Short of insanity there is no defence involving mental abnormality which can affect criminal responsibility. This was the position in England before the *Homicide Act* 1957.

2.10 Since the introduction of section 2 of that Act there has been a significant drop in the number of persons acquitted on the ground of insanity. Whereas in 1954, 1955 and 1956 the numbers so acquitted were 22, 24 and 18 respectively the numbers in 1976, 1977, and 1978 have been 2, 1, and 1. It can be with some confidence asserted that the defence of insanity is now very rarely raised. On the other hand there has been a steady increase in the number of persons convicted of manslaughter on the basis of diminished responsibility, e.g. 36 in 1961, 66 in 1970, 79 in 1978. In Appendix A a detailed tabulation for the years 1957 to 1979 sets out the numbers so convicted and the range of sentences imposed.

2.11 The classification "diminished responsibility" now harbours a divergent group of offenders. Some types of offenders call for special mention amongst the mentally disturbed comprised in the Table. These are:—

(a) The Psychopaths.

2.12 Psychopathy is a term which psychiatrists have adopted to describe a mental disorder characterised by inability to conform to basic social requirements. In the words of Sir David Henderson, a witness before the Gowers Royal Commission on Capital Punishment (1953) and an expert on psychopathy, the individuals who constitute this group

"are social mis-fits in every sense of the term, persons who have never been able to adapt themselves satisfactorily to their fellow-man, and appear to be entirely lacking in altruistic feeling". . . .

Irrespective of all the efforts which are made to assist them, often from their earliest days, they remain at an immature, individualistic,

⁴⁰ *Rose* [1961] 1 All E.R. 859.

egocentric level. On this account they fail to appreciate reality, they are fickle, changeable, lack persistence of effort and are unable to profit by experience or punishment. They are dangerous when frustrated. They are devoid of affection, are cold, heartless, callous, cynical and show a lack of judgement and forethought which is almost beyond belief . . .

Such persons are driven by what may be called their collective unconscious to deeds of violence which are as uncontrollable as a tidal wave."⁴¹

Not surprisingly, some have seen "psychopathy" as amounting to no more than "immorality"⁴², and while its classification as a psychiatric disorder is generally recognised⁴³ it has remained a highly contentious subject. However the English courts have not excluded it from the "abnormality of mind" specified in the *Homicide Act*; indeed the accused in *Byrne*⁴⁴ who strangled and then sexually mutilated a young girl was described as a sexual psychopath who could not control his violent perverted desires. The concept of psychopathic disorder has become an acknowledged and important part of the English criminal justice system.⁴⁵

(b) Intoxication.

2.13 The question of the relationship between intoxication and criminal responsibility has proved one of the most difficult in the law. The Court of Criminal Appeal has rejected the proposition that intoxication could amount to an "abnormality of mind" within section 2⁴⁶ of the *Homicide Act* 1957; it has also refused to accept that substantial impairment of responsibility may result from self-induced intoxication, combined with an existing abnormality of mind which is not by itself sufficient for a defence under the section.⁴⁷ However in 1975 the Court accepted the view that there may be cases where an accused person "proves such a craving for drink or drugs as to produce in itself an abnormality of mind."⁴⁸

(c) Mercy Killing.

2.14 Diminished responsibility has been invoked in a number of cases as a defence to mercy killing.⁴⁹ Home Office research indicates that between 1957 and 1968 there were 23 such cases.⁵⁰ The cases follow a pattern of people killing their severely retarded children or terminally ill parents; a state of "reactive depression" (an abnormal state of despair) is usually diag-

⁴¹ Report of the Royal Commission on Capital Punishment (Cmd. 8932), para 398.

⁴² e.g. Wootton, "Diminished Responsibility: A Layman's View" (1960) 76 L.Q.R. 224.

⁴³ The Mental Health Act 1959 (U.K.) recognises "psychopathic disorder" as "a persistent disorder or disability of mind . . . which results in abnormally aggressive or seriously irresponsible conduct . . ."

⁴⁴ [1960] 2 Q.B. 396.

⁴⁵ See e.g. A. Ashworth & J. Shapland, "Psychopaths in the Criminal Process" [1980] Crim. L.R. 628.

⁴⁶ *Di Duca* (1959) 43 Cr. App. R. 167.

⁴⁷ *Fenton* (1975) 61 Cr. App. R. 261.

⁴⁸ *Ibid.*

⁴⁹ e.g. *Marples*, Nottingham Evening News June 12, 1958; *Moodie*, The Times Jan. 14, 1959; [1959] Crim. L.R. 373; *Johnson*, The Times July 2, 1960; *Gray* (1965) 129 Justice of the Peace & Local Government Review 819; *Price*, The Times Dec. 22, 1971.

⁵⁰ E. Gibson & S. Klein, *Murder 1957-1968*, A Home Office Statistical Division Report on Murder in England & Wales, Table 42.

nosed and there being no medical evidence called in rebuttal by the Crown and a sympathetic reaction from the jury, a verdict of manslaughter is returned and a sentence of probation or a short term of imprisonment is imposed.

(d) Provocation.

2.15 The defence of diminished responsibility has served to compensate for what many regard as a deficiency in the existing English law relating to killings which although provoked do not satisfy the stringent criteria necessary for a successful defence of provocation. Where the provocative incidents have been occurring over a period of time and the accused finally reaches his breaking point there may be no final provocative act which can be isolated as the direct cause of the accused's lack of self-control. Furthermore, if there is a considerable time lapse between the last demonstrable act of provocation and the killing the defence is unlikely to succeed. In such circumstances however it is often possible to diagnose a state of reactive depression or hysterical dissociation (an imperfect adaptation to stress and conflict) or similar mental disturbance.⁵¹

In these situations it is not uncommon for both provocation and diminished responsibility to be taken as defences.

Hospital Orders.

2.16 In England in 1959 a new *Mental Health Act* was enacted to make fresh provision with respect to the treatment and care of mentally disordered persons.

This included Part V which dealt with admission of patients concerned in criminal proceedings and transfer of patients under sentence to the care of the mental health authorities. Section 60 of the Act set out the powers of courts to order hospital admission or guardianship. As guardianship relates to special English conditions in relation to the powers of local authorities and institutions managed or supervised by them, it will not be further dealt with in this Report. With regard to hospital admission the section enacted that:

"60—(1) Where a person is convicted before a court of assize or quarter sessions of an offence other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the following conditions are satisfied, that is to say —

(a) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of section sixty-two of this Act), —

(i) that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; and

(ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment, or the reception of the patient into guardianship under this Act; and

⁵¹ See e.g. *McPherson*, The Times, June 18, 1963; *Slape* [1965] Crim. L.R. 320; *Fulker* [1972] Crim. L.R. 579.

- (b) the court is of opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section,

the court may by order authorise his admission to and detention in such hospital as may be specified in the order . . ."

The section further states that an order shall not be made unless arrangements have been made for the offender to be admitted to a specific hospital (subsection (3)). An order made under the section in addition must specify the form of mental disorder from which the offender is suffering upon which both medical practitioners must agree (subsection (5)).

2.17 Once a section 60 order is made, the criminal justice system relinquishes its control over the offender and he becomes for most purposes a compulsorily admitted patient under the *Mental Health Act*, and can be released by the mental health authorities.⁵²

Since a hospital order may therefore be a "soft option" for some offenders or may be insufficient to protect the public from dangerous offenders who might be prematurely released, section 65 was enacted to enable higher courts to direct that the offender should not be released without the consent of the Home Secretary. This section empowers the court to make a restriction order where "it is necessary for the protection of the public so to do", and "having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large . . . either without limit of time or during such period as may be specified in the order".

2.18 The Home Secretary also has power to order that a prisoner found to be suffering from a mental disorder be transferred to a hospital.⁵³

Sentencing.

2.19 Since 1960⁵⁴ considerable experience has been gained in the handling of prisoners convicted of manslaughter on the ground of diminished responsibility. The courts have in general taken the view that where an offender satisfies the statutory conditions for a hospital order such an order will be made even though the offence would normally attract a substantial sentence of imprisonment on the ground of general deterrence.⁵⁵ There has been some divergence of opinion with regard to punishment versus treatment which is not surprising in an area where courts are dealing with persons whose moral culpability is often difficult to assess. Perhaps the most difficult of such persons are the psychopaths. In 1972 a widely based Committee under the Chairmanship of Lord Butler was set up to consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted and his disposal, and also to consider any changes necessary relating to the provision of appropriate treatment in

⁵² See section 63 (3).

⁵³ Section 72.

⁵⁴ The *Mental Health Act* 1959 did not come into operation until November 1960.

⁵⁵ D. A. Thomas, *Principles of Sentencing*, 2nd edition, (1979) p. 296.

prison, hospital or the community for offenders suffering from mental disorder or abnormality. This Committee which delivered its Report in late 1975⁵⁶ came to the conclusion that prison was probably the most suitable environment for dangerous psychopaths and thought that hospital orders should only be made for such persons in special circumstances.

2.20 English legislation allows the Home Secretary to release on licence and recall at any time a person serving a life sentence.⁵⁷ Sentences for life imprisonment for manslaughter on the ground of diminished responsibility are not infrequently imposed, the justification for these having been recently restated by the Court of Appeal (Criminal Division) in *Maun*.⁵⁸

"Where the accused has some mental deficiency and it is impossible to foresee exactly how that deficiency will continue and develop . . . it is right and proper for the Court to keep a hold, as it were, over the accused by sentencing him for life and then leaving the question of his release to be determined when his condition improves, and as it improves."

The same Court has characterised a life sentence as being more favourable to an offender than a fixed term of imprisonment.

"Very often a sentence of imprisonment for life is imposed in mercy; it may well be that a man is suffering from some mental element which will clear up very quickly, and in those circumstances with a sentence of life imprisonment it can be reviewed at any time."⁵⁹

The Victorian Scene.

2.21 Any consideration of reform of the substantive criminal law cannot be divorced from the question of sentencing and sentencing options. This is particularly so in the case of homicide where the mental condition of the offender can have such an important bearing both on his criminal responsibility and therefore his guilt and on the problem of his disposition and treatment.

2.22 This Report will recommend reform by providing for a defence of diminished responsibility to a charge of murder.

Charges of Murder

2.23 Before setting out the reasons for such recommendation it is thought helpful to shortly consider the medical procedures in operation when a person is charged with murder and what practicable courses are open to the court when it is faced with the problem of sentencing.

2.24 Before a person charged with murder is brought to trial a psychiatric examination is made and both his fitness to plead to the charge and his mental condition at the time of the homicide are the prime objects of interest at this stage. If he is considered fit to plead and there is material to support a defence of insanity (i.e. a condition of mind which comes within the confines of the McNaghten Rules and that condition existed at the time of the

⁵⁶ *Report of the Committee on Mentally Abnormal Offenders* (Cmd. 6244).

⁵⁷ *Criminal Justice Act* 1967, sec. 61.

⁵⁸ (1978) 71 Cr. App. R. 100, 102.

⁵⁹ *Costelloe* (1970) 54 Cr. App. R. 172, 174.

homicide) the defence is faced with the problem of whether or not to plead insanity, the onus of proving which rests upon the accused. Because of the consequences of success in this defence a decision whether or not to plead it can be of deep and painful concern to both the accused and his advisers but further consideration of this aspect of a criminal defence is not germane to this paper.

2.25 However the result of the trial is germane in two respects. If the defence of insanity is not taken and a verdict of guilty is returned, then the court has no option but to sentence the accused to imprisonment for the term of his natural life. This sentence was substituted for that of death by hanging early in 1975 and so far no policy seems to have emerged with respect to the actual length of imprisonment which must be served or whether and when the prisoner can come under the consideration of the Parole Board with a view to ultimate release.

2.26 At the present time there are 70 prisoners undergoing a sentence of this type. It has been estimated by Dr. Bartholomew, a consultant psychiatrist at Pentridge, that the mental condition of approximately 50 per cent of these prisoners was at the time of the offence such that evidence of their diminished responsibility could have been produced had that defence been available and consequently in their cases a verdict of manslaughter would have been possible. Dr. Bartholomew is an extremely experienced psychiatrist who has conducted psychiatric examinations of over 850 prisoners convicted of murder.

Not Guilty but Insane

2.27 If the defence of insanity is successful the verdict of not guilty on the ground of insanity, although it pronounces the person charged to be free of criminal responsibility, leaves the trial judge no option but to order the prisoner acquitted on that ground to be kept in strict custody in such place and in such manner as to the court seems fit until the Governor's pleasure is known. Effect is given to the direction initially by confinement in Pentridge Prison. The Governor then may by order direct that he be kept in safe custody during the Governor's pleasure in the place designated in the order or in such other place as a person or authority designated in the order may from time to time determine.⁶⁰

2.28 The Governor's practice is to direct that the person be kept in strict custody at Her Majesty's Prison at Pentridge or such other place as the Director-General of Community Welfare Services may from time to time determine. On reception into Pentridge the "prisoner" is again examined psychiatrically and a decision made. Consideration is given to whether the person is mentally ill or intellectually defective within the meaning of those terms as defined in the *Mental Health Act 1959*. The former is defined as meaning

"to be suffering from a psychiatric or other illness which substantially impairs mental health" and the latter as "to be suffering from an arrested or incomplete development of mind".⁶¹

⁶⁰ *Crimes Act 1958*, section 420.

⁶¹ Section 3.

This will be seen as covering a much wider field than the McNaghten Rules. If the person appears to be mentally and/or intellectually defective then section 52 of the *Mental Health Act* may be brought into operation. This section reads as follows:—

"52. (1) If any person while lawfully imprisoned or detained in any gaol or other place of confinement appears to be mentally ill or intellectually defective it shall be lawful for the Minister for Social Welfare* upon receipt of certificates in the prescribed form from two medical practitioners to direct by duplicate order under his hand that such person shall be removed as a security patient to some State institution as the Minister for Social Welfare* thinks proper and appoints.

(2) Every person so removed whether before or after the commencement of this Act as a security patient shall be detained in some State institution until it is certified either by the authorized medical officer alone or by the superintendent of such institution and some other medical practitioner that such person no longer need be treated in an institution, whereupon the Minister for Social Welfare* shall if such person remains subject to be continued in custody issue his order in duplicate to the superintendent of such institution directing that such person be discharged from the institution and removed to the gaol or other place whence he had been taken or to some other gaol or place of confinement to be dealt with according to law or if such person does not remain subject to be continued in custody the Minister for Social Welfare* shall direct that he be discharged and he shall be discharged accordingly."

2.29 If the Minister for Community Welfare Services directs removal as a security patient to a State institution the person certified passes out of the control of the prison authorities and into that of the mental health authorities. By way of illustration, in August 1980 7 of the 40 held during the Governor's pleasure under section 420 of the *Crimes Act* were in mental hospitals — 4 in J Ward at the Aradale Hospital at Ararat, 2 in Mont Park, and 1 at the Bundoora Repatriation Hospital. J Ward, which is the old Ararat Gaol is the most secure of these hospitals but has an effective capacity of only 30 patients.

2.30 Those who are not certified under section 52 but are mentally disturbed are initially held in G Division at Pentridge. It has been described as a decrepit building but staff care is expert and humane and facilities are to some extent improving. However there is only scant provision of education and industrial therapy. Individual and group psychotherapy is undertaken to a limited degree by the two staff therapists. There is also a full-time psychiatrist, whose time is, however, taken up mostly by administration and court appearances, and a consultant psychiatrist employed on a part-time basis.

2.31 When the psychiatric state of the "patients" (to use a euphemistic term) has been assessed, a decision is made as to where they shall best be accommodated within the prison system. This depends of course in large part on the availability of accommodation, some remaining in G Division at Pentridge; others are transferred to country prisons; others may be sent to less secure prison institutions.

* Now the Minister for Community Welfare Services.

There are cases where after the killing has taken place the mental condition of the person who has killed quickly returns to normal, and little if any psychiatric treatment is necessary.

2.32 Of the 33 section 420 cases who were not certified under section 52 in August 1980 10 were in G Division and the remainder were spread throughout the prison system, most of them having prospects of rehabilitation progressing through the country prisons to open camps and then to release supervised by parole officers. Country prisons, however, have no psychiatric staff and must rely on visits from the psychiatrists at Pentridge. If symptoms recur and treatment is required the "patient" must in most cases be returned to Pentridge. It needs repeating that none of these "patients" can be regarded as criminals or as responsible for their action in killing.

2.33 In the case of persons detained during the Governor's pleasure under section 420 the Adult Parole Board is required once in every year and also whenever so required by the Minister, to furnish to him a report and recommendation with respect to every person who has been ordered pursuant to the provisions of the section to be kept in strict custody. The Adult Parole Board is a body consisting of a judge of the Supreme Court who is its Chairman, the Director-General of Community Welfare Services, a full-time member appointed by the Governor-in-Council, and three other persons, including one woman, appointed by the Governor-in-Council. However it is for the Minister to decide if and when a person detained shall be released.

Guilty of Manslaughter — Diminished Responsibility

2.34 The relevance of the foregoing is that as matters stand at present persons found guilty of manslaughter on the ground of diminished responsibility if committed to prison, would be subject to much the same treatment and conditions as those detained during the Governor's pleasure except for the fact that the maximum penalty for manslaughter is 15 years.⁶² Section 52 where applicable would be brought into use and otherwise those needing psychiatric care would follow the same pattern.

When a prisoner is received into the prison his location within the prison system is considered by a Classification Committee which has the assistance of Dr. Bartholomew.

The prisoner's incarceration may thus range from J Ward at Aradale to the Prison Farm at Morwell.

2.35 Unlike the compulsory sentence for murder, in the case of manslaughter the court has a greatly increased number of options as to what sentence it may pass, and it is to these options to which attention will now be directed. The maximum sentence of imprisonment for manslaughter is for 15 years but there is no minimum sentence prescribed, so that the court may impose a fine or indeed discharge without penalty if there be a case suitable for that generous treatment. The latter could be the rare (although always possible) result after a verdict of manslaughter on the ground of diminished responsibility following upon a trial for murder.

⁶² *Crimes Act*, section 5.

2.36 Should such a verdict become possible the relationship between the crime and the punishment can be complex and difficult. Diminished responsibility can follow from mental illness, psychopathic disorder, subnormality of varying degrees, from disease or injury or it may be from some other inherent cause. What is to be the sentence for one who may be regarded as being of diminished responsibility? Is it to be one of punishment or as an alternative, treatment designed to cure his abnormality, or partly one and partly the other? What does the present system allow and what can be achieved within it? Apart from such treatment as is available either under section 52 of the *Mental Health Act* 1959 or within the prison system the following options would seem to be open. Some comments will be made where necessary as to how far they are appropriate.

***Alcoholics and Drug-dependent Persons Act* 1968.**

2.37 Section 13 of this Act provides that where the offender habitually uses intoxicating liquor or drugs of addiction to excess and drunkenness or drug addiction contributed to the commission of the offence, the court may impose a suspended term of imprisonment on condition that the offender attend a treatment centre, whether as an in-patient or out-patient, for a period of between six months or two years. Under section 14 a person who is dependent on alcohol or drugs may be committed to a detention centre for a period of between six months and three years in lieu of a sentence of imprisonment. However, no such detention centres have yet been proclaimed, and it has been held in the case of *Robinson*⁶³ that until such time as they are, the provisions of section 13 should not be invoked to enable an offender to avoid punishment where this is otherwise appropriate in the public interest.

Section 51, *Mental Health Act* 1959.

2.38 Section 51 (1) of the *Mental Health Act* 1959 reads as follows:

51. (1) Where a person is convicted of any criminal offence by a court of competent jurisdiction the court on being satisfied by the production of a certificate of a medical practitioner or by such other evidence as the court may require that such person is mentally ill or intellectually defective may in lieu of passing sentence order such person to be admitted into an appropriate State institution to be named in the order and the person shall forthwith be conveyed to and upon the production of the order and certificate shall be admitted into and detained in such institution accordingly.

The disadvantages of this section is the absence of any accompanying power to specify the length of the offender's detention or otherwise place restrictions on his release⁶⁴; under section 51 (2) the offender becomes a recommended or approved patient and his discharge or detention is entirely in the hands of the hospital superintendent (section 42).

2.39 The unsuitability of this section was highlighted in a case in the County Court at Melbourne in 1975 in which a man who had pleaded guilty to three counts of indecent assault was ordered to be admitted to Royal Park Psychiatric Hospital. There he was examined by the Medical Super-

⁶³ [1975] V.R. 816 (Full Court of Victoria).

⁶⁴ See *Mayne*, unreported, 9 December 1975 (Full Court of Victoria).

intendent and another doctor soon after admission, and they formed the opinion that there was no treatment they could carry out and that he should be released. It so happened that because of a technical informality the judge was able to withdraw his order before that release and a sentence of 4 years imprisonment was imposed.⁶⁵

2.40 In a subsequent case the Full Court, in rejecting a contention that a prisoner sentenced for a number of sexual offences should have been dealt with under section 51, pointed out that there was no way in which the prisoner could be compelled to remain in a recommended hostel. The court was of opinion that the use of section 51 was limited to cases "where the court is satisfied in all the circumstances that the making of an order under the section is *preferable* to passing sentence".⁶⁶

Reform of Section 51.

2.41 Early this year a Consultative Committee was set up to review the Victorian Mental Health Legislation. At its invitation a submission was made by the Law Reform Commissioner in which amendments to section 51 of the *Mental Health Act* 1959 were recommended. A summary of those recommendations is set out hereunder.

1. A court making a hospital order should be empowered to further order that the release of an offender regarded as dangerous be subject to special restrictions.
2. The ultimate decision to release such offender should be taken by the original Court of Commitment upon referral by the hospital superintendent.

(It will be appreciated that this recommendation envisages a system different to that presently operating in England, where under section 65 of the *Mental Health Act* 1959 the power of release is in the hands of the Home Secretary. It has been submitted however that this power should reside in the original Court of Commitment to be exercised at the court's discretion upon referral and recommendation by the Superintendent of the hospital in which the restricted patient is held. It is considered that the court has more experience and expertise in balancing the need for public safety with the demands of individual freedom and has the advantages of both publicity and legal representation. A Ministerial decision on the other hand is not only vulnerable to party political influences but is made in private. Where civil liberties are at stake justice is more likely to be seen to be done in the courtroom than behind the closed doors of the bureaucratic process.)

3. As it is not desirable to impose time limits on hospital orders, all such orders should be of indefinite duration.
4. Offenders admitted to hospital under a hospital order should be treated in the same way as compulsorily admitted patients except (where a restriction order is also made) in relation to discharge.
5. The use of hospital and restriction orders should be subject to statutory prerequisites similar to those delineated in sections 60 and 65

⁶⁵ *R. v. Rapke; ex parte Curtis* [1975] V.R. 641.

⁶⁶ *Carlstrom* [1977] V.R. 366, 367-368.

of the *Mental Health Act* 1959 (U.K.). (See *supra* paras. 2.16, 2.17.) Sections 60 and 65 of course refer to all offenders wherever charged, and this Report deals only with persons charged with the crime of murder.

6. Provision should be made for "interim hospital orders" as suggested by the Butler Committee.

(In England it was found that some problems arose where a person was committed to hospital under section 60 and refused to co-operate with treatment or became intolerably disruptive or where it was sometimes found that a defendant had been feigning a mental disorder. The idea of the "interim hospital order" was that the defendant be committed to a specified hospital for a limited period for compulsory detention for diagnosis and assessment. At the expiration of this period the court would again consider the case and would have discretion as to whether a further hospital order or a custodial order should be made.⁶⁷ It will be appreciated that for any of these recommendations to be effectuated substantial provision for treatment either in local hospitals or as the case may require, in a secure prison hospital such as exists at Grendon in England or, it is understood, in British Columbia, Canada, would be required.)

Release on Recognisance.

2.42 The court is empowered to release a person convicted on a recognisance to be of good behaviour and to appear when required before the court to receive sentence for the offence for which he has been convicted. This type of recognisance is not often used and the Crimes Act 1958 directs that a person convicted of any indictable offence shall not be released upon such a recognisance if in the opinion of the court he can properly and conveniently be released upon probation.

Probation.

2.43 Section 508 of the *Crimes Act* 1958 allows the court to make a probation order where it is of opinion that having regard to the circumstances (which include the nature of the offence and the character and antecedents of the offender) it is expedient to do so. This is an order requiring him to be under the supervision of a probation officer for not less than 1 and not more than 5 years as specified in the order. Such an order may require the offender to comply during the whole or any part of the probation period with such requirements (including a requirement that the offender submit himself to medical, psychiatric or psychological treatment) as the court considers necessary for securing good conduct or for preventing a repetition of the same offence or the commission of other offences.

Treatment in Prison.

2.44 The availability of treatment in prison has already been discussed (*supra*, paras. 2.30-2.32). The court, when considering what punishment to impose, may seek assurances that some treatment for a mentally disturbed offender will be given. Those assurances may be given but the court has no power to order treatment. It may of course recommend it.

⁶⁷ See Butler Report, paras 12.5 to 12.6.

In a recent case in the Federal Court of Australia in its appellate jurisdiction Sir Gerard Brennan of the High Court who was then a judge of the Federal Court remarked:

"If there be statutory provisions governing the making of hospital orders or the giving of directions as to psychiatric treatment the statute would probably specify both the occasion for and the conditions of exercise of particular statutory power . . ."⁶⁸

He went on to say:

"but where there is no statutory power which might authorise the application of force to a prisoner without his consent during his incarceration, I know of no jurisdiction impliedly vested in a court to direct the application of force in order to effect some psychiatric treatment. The compulsory administration of drugs or the compulsory application of electro-convulsive therapy are not treatments which may be ordered by a court in the absence of special statutory powers. Much less may a court devoid of those powers purport to authorise the application of force at the discretion of prison authorities."⁶⁹

Prison without Treatment.

2.45 In effect a sentence without any recommendation as to treatment leaves it to the Classification Committee and the Government Psychiatrist to recommend and implement such treatment as is possible with the resources available. Moreover if a fixed term of imprisonment is imposed with a minimum period to be served it is always open to the Parole Board upon expiry of the minimum term to release the offender under a parole order requiring him to consent to undergo psychiatric treatment.⁷⁰

2.46 It is to be remembered that psychiatric treatment whenever contemplated for the rehabilitation or the promotion of mental health of an offender must be undertaken with an awareness on the part of the prisoner of what the treatment involves and with his consent to undergo it. These matters were highlighted in the recent case of *Tutchell*⁷¹ in the Victorian Full Court.

Tutchell had pleaded guilty to a number of sexual offences involving (*inter alia*) young boys and girls and had been sentenced to a long term of imprisonment. He appealed against the sentences imposed and the Full Court heard evidence from psychologists and Dr. Bartholomew and received a report from them and other psychiatrists. It was shown to the court that Tutchell had an established tendency to commit offences of the type of which he had been convicted and it seemed likely that if he was given a prison sentence without receiving any treatment he would on his release resume the commission of these kinds of offences. The court was concerned mainly to take a course which if possible would protect young girls and boys from sexual offences by him. There was no satisfactory treatment available in the prison and the court was compelled to a conclusion that he could not be treated outside, principally for two reasons.

⁶⁸ Channon (1978) 20 A.L.R. 1, 7-8.

⁶⁹ *Ibid.*

⁷⁰ Community Welfare Services Act 1978, section 195.

⁷¹ [1979] V.R. 248.

Firstly, treatment would depend on Tutchell's consenting to a requirement in a probation order that he submit himself to psychiatric or psychological treatment and the court felt there was serious reason to doubt whether he understood what would be involved and whether he was capable of expressing a real and informed willingness to submit to it. Secondly, because of the necessity for the various persons and authorities involved in carrying out the plan to provide treatment agreeing to fulfil their respective responsibilities the proposed plan of treatment was not feasible. Because of what were undoubtedly good reasons the Mont Park Hospital could not undertake the responsibility of accepting Tutchell as a voluntary patient. In the result the court sentenced him to a reduced term of imprisonment.

Reform of Law of Murder.

2.47 There is one further matter which needs emphasis before turning to the justification of a new defence, that is to repeat and stress again the need to reform the law of murder recommended by the Law Reform Commission in Report No. 1. In that Report it was recommended that all three forms of constructive murder be abolished and that the crime of murder be redefined in the following terms:—

"(1) Where a person kills another, the killing shall not amount to murder unless done with an intent to kill.

(2) A person has an "intent to kill" if, but only if, his purpose is to kill or he realizes or believes that his actions are certain, or more likely than not, to kill.

(3) The "intent to kill" may relate to the person in fact killed or to another, and need not relate to any particular person."

The present forms of constructive murder — intentionally causing serious bodily injury which in fact results in death, unintentional killing in the course or furtherance of a crime of violence,⁷² and causing death by an act of violence done to a person known to be an officer of justice acting in the execution of his duty, or a person assisting him and done with the object of preventing lawful arrest or detention — would all then become crimes of manslaughter. In all of these crimes the intention to kill is absent.

Special Defences to Intentional Killings.

2.48 We then look to the defences to what are or seem on their face to be, intentional killings.

Insanity needs no discussion as the accused's state of mind relieves him from criminal responsibility. Self-defence provides a well-known justification for killing and further justifications and excuses may be found in situations of necessity and duress which have been dealt with in Report No. 9.

The Problem of Mental Abnormality.

2.49 Mental abnormality remains. How far can the mentally abnormal person who has intentionally killed be excused? Is punishment a proper or the only solution? Can treatment assist and ensure his peaceful absorption into the structure of an ordered community? These are problems faced by

⁷² In place of the felony-murder rule: see *Crimes (Classification of Offences) Act 1981*, section 3.

every judge at some time in his judicial life — problems which this Report attempts to face. In a sense reaction to provocation is just one facet of these problems but provocation is a concept of such long standing in our criminal law that it seems proper to treat it separately as has been done here. But with other and usually less transient manifestations of mental abnormality we have so far failed to reach a coherent and principled solution.

2.50 Where a killing has been brought about by an emotionally disturbed person whose reason has been distorted by intense jealousy or by pity or by other forms of pain both mental and physical, the criminal law does not distinguish the quality of guilt of such persons from that inherent in the cold-blooded and vicious killer. And so the person who kills out of depression, or in agonizing concern for a terminally and painfully ill parent, spouse or child, he who feels driven to kill by an obsessive jealousy brought about by behaviour which taunts and humiliates him, or the battered wife who, fearful, confused and resentful at last in an irrational explosion of violence destroys her tormentor — none of these would be able to put forward a claim to be allowed a manslaughter verdict and so escape the sentence for murder, viz. imprisonment for the term of natural life. So too, the 30 year old man with the mentality of a child of 6 who kills in an access of childish anger also faces a verdict of murder with its mandatory punishment.

2.51 Drs. Parker and Sime, two forensic psychiatrists of considerable experience, both criticise the limitations of the defence of provocation as it has developed in English (and Australian) law. In a Paper presented to a Seminar on Provocation at the State College of Victoria at Coburg in September 1979 they called for consideration of what they described as the "gentle murderer" in whom they saw characteristics such as the following:

- (a) He has usually been under appreciable provocation over a period of time. This can extend to a number of years or may be over a shorter period, and is usually in a matrimonial setting.
- (b) Whilst the final "trigger" for killing can be overt enough to allow a successful defence of provocation in many cases it may be so minimal as to be hardly noticeable.
- (c) The essential personality of the individual is gentle, non-aggressive, non-responsive to stirring, and forever trying too desperately to please. There is a long-standing non-reaction to continuous and often considerable provocation.
- (d) The individual is very depressed and stressed at the material time.
- (e) There is often an obsessional element in a usually quiet, contained and repressed essential personality.
- (f) The killing is usually by a sudden impulsive act and one which can be very violent.

2.52 The accused woman in the recent and much publicised case in Adelaide would seem to have possessed a number of these characteristics. There being no defence of diminished responsibility in South Australia, no evidence appears to have been given of her general psychiatric state but it was made clear that she had been the subject of violent treatment by her husband for over 20 years and had seen the same type of treatment meted out to her children. A crisis point was reached when she saw visible evidence of the

result of violent treatment of one of her daughters, with her mental state being aggravated by a recital to her later by the daughter of a long course of incestuous conduct with the female members of the family.

On her own account she had formed an intention to kill her husband at least some hours before the event but as she was described by witnesses as being in a state of shock it can be assumed that a psychiatrist would have had no difficulty in describing her mental condition as being within the accepted bounds required for the defence of diminished responsibility. In the result the circumstances were of such an appalling nature that the jury acquitted in what can only be described as a "sympathy verdict".

The "Murderer".

2.53 The word "murderer" still carries a powerful stigma and it is suggested that it is both just and reasonable to reserve that stigma for the deliberately vicious and calculating offender. Moral culpability is still an important element in the administration of the criminal law and should play a real part in evaluating the quality of guilt. Where responsibility for the criminal act of killing a human being is affected by some abnormality of the mind which is beyond the control of the person performing the criminal act, it would seem that fairness and justice demand both that the stigma to be attached to the act should be lessened and that some help should if possible be made available to cure the mental defect both for the comfort of the offender and the good of society. A first step in effectuating these objectives would be to provide a defence which will show that such an offender should not be classed as a murderer.

2.54 In the course of discussions it has been suggested that the initial move towards solving problems in this area is to remove the mandatory penalty of life imprisonment for murder so that the complete power of sentencing rests with the judge. It is not known how far this course would be acceptable politically but the considerations set out in the foregoing paragraphs lead to the view taken in this Report that for the present, at any rate, the mandatory penalty should stay as marking the public aversion felt to the crime of coldblooded and evil killing. It is thought too that such a penalty may well have a deterrent effect amongst those of sound mind and evil intent who are disposed to commit such a crime.

The Formulation of a Defence.

2.55 How the defence suggested should be expressed is not easy. The English section⁷³ has led to difficulties as for example when psychiatrists have been required to testify whether the defendant's abnormality of mind substantially impaired his mental responsibility, this being a legal or moral concept, not a medical one. The Butler Committee recommended that the English section should be reworded and suggested the following:

"Where a person kills or is party to the killing of another he shall not be convicted of murder if there is medical or other evidence that

⁷³ For convenience the section is repeated here:

Section 2 (1).

"Where a person kills or is 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".

he was suffering from a form of mental disorder as defined in section 4 of the *Mental Health Act 1959* (Eng.)⁷⁴ and if in the opinion of the jury the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter."

The Committee was of the view that by tying the section to a definition of mental disorder the formula would provide a firm base for the testifying psychiatrist to diagnose and comment on the defendant's mental state while leaving it to the jury to decide the degree of extenuation that the mental disorder merits. This suggested wording was recently considered by the Criminal Law Revision Committee in England in its Fourteenth Report. It thought the final words of the Butler Draft were too wide. It pointed out that the jury would need some guidance as to what extenuating circumstances ought to reduce the offence and in practice that would mean that the mental disorder has to be substantial enough to merit that reduction. In its view the latter part of the suggested section should read:—

"the mental disorder was such as to be substantial enough reason to reduce the offence to manslaughter."⁷⁵

This view is accepted.

2.56 The Victorian *Mental Health Act 1959* has no definition of "mental disorder" but defines "mentally ill" as meaning to be suffering from a psychiatric or other illness which substantially impairs mental health and also contains a definition of "intellectually defective" as meaning "to be suffering from an arrested or incomplete development of mind".

Mental disturbance or abnormality or disorder for which the defence suggested in this Report is meant to provide requires a widely embracing definition. The term "mental disorder" is not used in the *Mental Health Act 1959* and consequently it would be confusing to insert such a definition in that Act. However there is no reason why one should not be included in the *Crimes Act* itself. A paragraph along the following lines would be needed:

"'Mental disorder' for the purposes of this section means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind."

Accordingly it is recommended that there be a defence of diminished responsibility in terms substantially as follows:

Where a person kills or is party to the killing of another he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined hereunder and if in the opinion of the jury the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter.

Then would follow the definition of mental disorder set out in paragraph 2.56 above.

The provision of such a defence would at once enable the court both to impose a sentence more fitting to the gravity of the particular crime and

⁷⁴ Section 4 defines "mental disorder" as meaning mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind.

⁷⁵ para. 93.

the moral culpability of the offender, and in appropriate cases make provision for psychiatric treatment where considered necessary and feasible.

2.57 However it must be realised that the defence cannot of itself enable the court to deal with the psychiatrically disturbed person who should be confined to and treated in a secure hospital. For such people the availability of hospital orders and hospitals adequately staffed is essential. See para. 2.41.

Intoxication.

2.58 The view that the crime of murder should be reserved for deliberately vicious and calculated killings has formed the basis of the reasoning in this Report. Logically, therefore, a killing which cannot be characterised in this way because the person who kills is intoxicated, whether by alcohol or other drugs, should not be murder. Intoxication, on this analysis, might then suffice as a form of mental disorder capable of being substantial enough reason to reduce the offence to manslaughter. A statutory means of effecting this change would be to add to the definition of "mental disorder" in para. 2.56 "... however caused including by the taking of alcohol or other drugs."

It has already been recommended in para. 1.27 that intoxication should be a matter to be taken into account in the defence of provocation. This, however, is not a radical proposal since the common law has long recognised that drunkenness is relevant to the question of whether the accused was in fact provoked (the subjective test).⁷⁶ In the general criminal law, however, and in diminished responsibility in particular, it is more problematical whether intoxication by itself should extenuate crime. This has been the subject of enduring debate—as evidenced recently by the polarisation of views in the High Court in *O'Connor*.⁷⁷ It is considered that, since the issue has proven so intractable and so controversial, it should be the subject of further detailed investigation which is not appropriate in the context of this Report. Some thought might be given, for example, to the suggestion of Barwick C. J. in *O'Connor* that there be created an offence of being so intoxicated as not to be responsible for one's criminal acts.⁷⁸

Accordingly it is not recommended at this stage that intoxication be included in the defence of diminished responsibility.

The Sentence for Manslaughter.

2.59 Conviction for manslaughter in England and in all Australian States except Victoria and Tasmania carries a maximum penalty of imprisonment for life. In Tasmania the maximum is 21 years and Victoria 15 years. Curiously there is a large number of offences for which a greater maximum is provided in this State—20 years for at least a dozen offences (including making a demand with a threat to kill or injure, kidnapping, robbery, hijacking an aircraft) and 25 years for armed robbery. No logical reason can be detected for downgrading the gravity of manslaughter where the circumstances can range so widely from the near excusable to the most bizarre and depraved.

2.60 In England there is a well established system of secure mental hospitals, Broadmoor in Berkshire with a capacity for approximately 750 patients, Rampton in Nottinghamshire able to hold about 1000, and Moss

⁷⁶ e.g. *Thomas* (1837) 7 Car. & P. 817; 173 E.R. 356.

⁷⁷ (1980) 54 A.L.J.R. 349.

⁷⁸ *Ibid.*, at 358.

Side in Lancashire with about 400. In addition there is Grendon Psychiatric Prison with a capacity for about 300 and with a Psychiatrist Medical Superintendent. Consequently there has developed the tendency earlier noted to make hospital orders where it is felt that effective treatment can be given in lieu of prison sentences and where also prison patients can be detained as indefinitely as seems necessary. Although the Butler Committee made a number of recommendations with regard to the management of mentally abnormal offenders the system of hospital orders seems to be working reasonably well. However the Committee thought that as a general rule the dangerous psychopath should be kept in prison, if feasible in a psychiatric prison like Grendon. In the comparatively rare cases of the dangerous psychopath who has killed and successfully pleaded diminished responsibility the court has imposed a sentence of life imprisonment. This is done with the realisation that under the provisions of the *Criminal Justice Act 1967* the Home Secretary has power to release on licence and recall.

2.61 It has earlier and elsewhere been suggested that hospital orders should be provided for in Victoria where in appropriate cases they can be made and that ultimate control of the disposition of prisoners in respect of whom such orders have been made should be retained by the court. Of course as yet there is nowhere near sufficient provision for secure detention in hospital. Thus to provide for the case of the dangerous offender it seems desirable to give to the court the power to impose a sentence of life imprisonment. Unlike the mandatory penalty of imprisonment for the term of natural life the manslaughter penalty should be aligned with the provisions of section 190 of the *Community Welfare Services Act*. This would mean that in imposing a sentence of life imprisonment for manslaughter on the ground of diminished responsibility the legislation should direct the court to fix a lesser term ("the minimum term") during which the offender should not be eligible to be released on parole. The position would then be that after the expiration of the term the Parole Board would review the mental condition of the prisoner and if thought proper release him under appropriate conditions.

2.62 The justification for imposing a life sentence in the case of an offender convicted of manslaughter because of diminished responsibility is well expressed by Sir Harry Gibbs, when as a judge of the Queensland Supreme Court, he stated:—

"A person found guilty of manslaughter by reason of the provisions of Section 304A of the Code is liable to imprisonment with hard labour for life. Cases of manslaughter by reason of diminished responsibility may, like other cases of manslaughter, vary greatly in their nature, and the appropriate sentence may vary accordingly, but the imposition of a proper sentence is, under the Code, the responsibility of the Court, not of the Executive. In some cases in which it appears that there is no likelihood that the convicted person would be a danger to the public if set at liberty and that there were mitigating circumstances a light term of imprisonment or no imprisonment at all may be appropriate. On the other hand there are cases in which the mental condition of the convicted person would make him a danger if he were at large and in some such cases sentences of life imprisonment may have to be imposed to ensure that society is protected. It is true that the proper place for many of such persons is

a mental hospital rather than prison, but the Court has no power (such as that conferred by section 60 of the *Mental Health Act, 1959*, of the United Kingdom) to order that the offender be admitted to hospital, and it cannot abdicate its duty to impose a proper sentence on the assumption that if the offender were sentenced to a short term of imprisonment, he might be transferred to and kept in a security patients' hospital. Even in cases where it is hoped that mental treatment may so ameliorate the condition of the offender that it would eventually be safe to discharge him, although it is not known how long it would take to achieve this result, it may still be necessary, in the present state of the law, for the court to impose a sentence of life imprisonment, *if that is not otherwise inappropriate to the circumstances of the crime*, rather than let loose a man whose abnormality of mind may lead him to commit further killings."⁷⁹

2.63 It is therefore recommended that the maximum penalty for manslaughter in Victoria be altered to one of life imprisonment and that section 190 of the *Community Welfare Services Act* be appropriately amended to provide for the court to fix a minimum term in such a sentence.

2.64 In the foregoing discussion the recent decision of the High Court in *Veen*⁸⁰ has not been overlooked. In that case the majority of the court held that a mentally disordered offender should not be sentenced to a longer term of imprisonment simply because he is dangerous, at least where he is unlikely to receive any psychiatric treatment in prison which might improve his condition (see Working Paper No. 7, paras. 46-50). It is thought however that since the High Court's decision was specifically referable to the situation in N.S.W. prisons its relevance to Victorian conditions is debatable and is better left to the determination if necessary of the Victorian Supreme Court.

Evidence by Prosecution.

2.65 The question has arisen of the necessity for a provision to deal with the calling of evidence of insanity by the prosecution where an accused person puts forward a defence of diminished responsibility, and of evidence of diminished responsibility where a defence of insanity is put forward. There has long been a rule of practice by virtue of which the prosecution is in general not allowed to call evidence that the accused is insane, even with his consent. There is a presumption that the defendant at the relevant time was in full possession of his faculties until the contrary is shown and he can refuse to permit evidence potentially raising the issue of insanity being adduced. This matter was dealt with in England by the Criminal Law Revision Committee in its Third Report of September 1963. The Committee acceded to the argument in favour of allowing the prosecution to call evidence of insanity, that when the defence have put the accused's state of mind in issue by arguing diminished responsibility it should be open to the prosecution to call evidence to show what his true state of mind was and therefore to ask for a verdict of guilty but insane — this being the then English form of verdict.

⁷⁹ *Pedder*, unreported 29 May 1964.

⁸⁰ (1979) 23 A.L.R. 281.

2.66 Following on the Third Report the *Criminal Procedure (Insanity) Act* 1964 was enacted in England. Section 6 of the Act provided as follows:

"6. Where on a trial for murder the accused contends —

- (a) that at the time of the alleged offence he was insane so as not to be responsible according to law for his actions; or
- (b) that at that time he was suffering from such abnormality of mind as is specified in subsection (1) of section 2 of the Homicide Act 1957 (diminished responsibility)

the court shall allow the prosecution to adduce or elicit evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence."

If the recommendation for adoption of a defence of diminished responsibility is accepted then it is further recommended that a section along similar lines to section 6 above be enacted.

Burden of Proof.

2.67 Where a defence of provocation is taken it is for the defence to point to evidence either in the case for the prosecution or in its own case that there was such provocation. But this having been done, the prosecution must prove beyond reasonable doubt to the satisfaction of the jury that the killing was not brought about as a result of provocation. In the English *Homicide Act* 1957 which introduced the defence of diminished responsibility it was provided that the burden of proof should be on the defence, although it is for the defence to satisfy a jury not beyond reasonable doubt but rather on the balance of probability that the accused was suffering from diminished responsibility.⁸¹ Where the defence exists it is common and indeed natural for both provocation and diminished responsibility to be urged on behalf of the person accused. It can be and undoubtedly often is confusing to a jury to be told that on the one hand the prosecution must satisfy them in one way in the case of provocation and on the other hand the accused must satisfy them to a different degree in the case of diminished responsibility. The English Criminal Law Revision Committee in both its Eleventh⁸² and its Fourteenth Report,⁸³ and the Butler Committee⁸⁴ recommended that provision should be made to adopt the same burden of proof for both defences i.e. that described above in respect of provocation. This seems to be an eminently sensible course.

It is recommended that like provision should be made in Victoria.

Although not strictly within the terms of reference upon which this Report is based the foregoing recommendation calls for further mention of the defence of insanity. Since the enunciation of the McNaghten Rules the courts have held the law to be that the onus is on the person accused to prove insanity if he raises that defence. Dr. Glanville Williams, one of the great modern writers in the criminal law, argues convincingly that the normal burden of persuasive proof of guilt of the criminal offence charged should remain on the prosecution.⁸⁵ The late Sir John Barry wrote in similar

⁸¹ *Dunbar* [1958] 1 Q.B. 36.

⁸² *Evidence* (Cmd. 4991) para. 140 (1972).

⁸³ para. 94.

⁸⁴ para. 19.18.

⁸⁵ *Criminal Law. The General Part* (1961) pp. 516-521.

vein⁸⁶ and Mr. Justice Sholl in 1959 described the conflict created by the onus of proof in insanity as "contrary to the tradition and genius of the common law" and saw it as a matter for urgent legislative consideration.⁸⁷ In 1960 Mr. Justice Monahan held that the burden of proof had never moved from the prosecution and that the defence carries only the evidential burden, that is of producing or pointing to evidence leading to the accused being shown to be insane. However the other two members of the court in which this matter was being determined held to the contrary.⁸⁸ Here, as with diminished responsibility, difficulties arise in charging a jury, as for example where evidence of both insanity and automatism (the latter of which carries the normal burden of proof) is before the court at the close of trial.

2.69 The Butler Committee in 1975⁸⁹ and the Criminal Law Revision Committee in 1972⁹⁰ both thought that the burden of proof in respect of insanity should rest upon the prosecution in the sense that if insanity were raised, the burden should be on the prosecution to prove in the case of murder both that the accused intended to kill and that he was of sane mind when he carried out his intention.

2.70 It is suggested that consideration be given to providing for the persuasive burden of proof in respect of insanity to be the same as that for provocation and diminished responsibility.

Additional Matters.

2.71 In Working Paper No. 7 reference was made to two further possible reforms in relation to diminished responsibility (paras. 92-93) and it was there indicated that a final view would not be attempted until all comments had been received. Only one such comment deals with these two matters and that in terms of approval of the reforms suggested. They are:

Charges of Manslaughter.

2.72 Paragraph 95 of the Fourteenth Report of the English Criminal Law Revision Committee reads:

"Under the present law diminished responsibility is a defence to a charge of murder. A person cannot be charged or indicted for unlawful killing by reason of diminished responsibility. Many practitioners think there ought to be such an offence. A commonly met situation is this. A man is killed. An hysterical woman telephones for the police. When they arrive, she admits that she has killed the man. She is arrested, charged with murder and committed in custody for trial on that charge. Once she gets to prison it is obvious to the medical officer there that she is suffering from a mental disorder. Following the usual practice in murder cases an independent consultant psychiatrist is retained to examine the defendant and report on her condition.

⁸⁶ "The Defence of Insanity & the Burden of Proof" (1939) 2 Res Judicatae 42, 49.

⁸⁷ *Carter* [1959] V.R. 105, 110-111.

⁸⁸ *Mizzi* unreported. (Vic. Full Court); see Morris & Howard, *Studies in Criminal Law* (1964), pp. 60-61.

⁸⁹ Butler Report, paras. 18.39-18.41.

⁹⁰ Eleventh Report, para. 140.

He agrees with the diagnosis of the prison medical officer. Nevertheless the defendant still, in practice, has to be indicted for murder."

For some years as a result of a Court of Criminal Appeal decision judges had to leave the jury to decide whether a defence of diminished responsibility had been made out and pleas of guilty on this basis could not be taken.⁹¹ The Report went on to say:

"This [situation] resulted in some distressing trials. In the early 1960's the judges decided that when there was no dispute that the defendant was suffering from mental abnormality amounting to diminished responsibility, he could plead 'not guilty to murder but guilty to manslaughter by reason of diminished responsibility' and that such a plea could be accepted by the court. This was approved by the court of Appeal in *Cox** . . . Even this more humane and sensible procedure is not completely satisfactory. The mental condition of a disturbed person is not likely to be improved by having a charge of murder outstanding. Further, it cannot be right that charges should be preferred in the most solemn way known to the law, i.e. on indictment, when the prosecution know that there is a defence to the charge which is likely to succeed. In our Working Paper we suggested that if relevant medical evidence is available provision should be made for allowing a person to be indicted for manslaughter although he has been committed for trial on a charge of murder. A number of those who commented on our Working Paper welcomed this suggestion. They included the Law Society, the Association of Chief Police Officers, the Metropolitan Police Solicitor, the Women's National Commission and the National Council of Women of Great Britain. The Senate of the Inns of Court and the Bar also welcomed our suggestion . . ."

The Committee recommended that provision be made enabling a Magistrates' Court, if the defendant consents, to commit for manslaughter by reason of diminished responsibility or, if he has been committed for trial on a charge of murder, allowing a defendant, if he consents, to be indicted for manslaughter by reason of diminished responsibility. The inclusion of the requirement for the consent of the defendant was based on the difficult situation which can arise where a person's mental condition may be in issue, e.g. the possibility of prejudice to a defendant who wishes to plead another defence such as alibi or mistaken identity.

It is recommended that provision be made enabling a Magistrates' Court if the defendant consents to commit for manslaughter by reason of diminished responsibility or if he has been committed for trial on a charge of murder allowing a defendant with his consent to be so indicted for manslaughter.

Attempted Manslaughter.

2.73 In Working Paper No. 7 (para. 93) it was suggested that the recommendation of the English Criminal Law Revision Committee that there should be created an offence of attempted manslaughter by reason of provocation and/or diminished responsibility might be adopted in Victoria. It is

⁹¹ Matheson [1958] 1 W.L.R. 474.

*[1968] 1 W.L.R. 308.

considered illogical that while a killing under provocation or diminished responsibility is manslaughter an attempted killing under the same circumstances should be attempted murder.⁹² This illogicality was one of the major reasons for the recommendation of the English Committee.

2.74 The position in this State is however somewhat more complex than that existing in England due to the presence of sections 11 to 14 in the *Crimes Act* (Vic.) 1958.

Acts done with intent to commit Murder and attempts to Murder.

11. (1) Whosoever administers to, or causes to be administered to or to be taken by, any person any poison or other destructive thing, or by any means wounds or causes to any person any bodily injury dangerous to life, with intent in any such case to commit murder, shall be guilty of felony, and being convicted thereof shall be liable to imprisonment for a term of not more than twenty years.

(2) Whosoever attempts to administer to or attempts to cause to be administered to or taken by any person any poison or other destructive thing, or shoots at or in any manner attempts to discharge any kind of loaded arms at any person, or attempts to drown suffocate or strangle any person, with intent in any such case to commit murder, shall (whether any bodily injury is effected or not) be guilty of felony, and shall be liable to imprisonment for a term of not more than fifteen years.

12. Whosoever by the explosion of gunpowder or other explosive substance unlawfully and maliciously destroys or damages any building with intent to commit murder or whereby the life of any person is endangered, shall be guilty of felony, and shall be liable to imprisonment for a term of not more than fifteen years.

13. Whosoever unlawfully and maliciously sets fire to any ship or vessel or any part thereof or any part of her tackle apparel or furniture or any chattel therein, or casts away or destroys any ship or vessel with intent in any such case to commit murder or whereby the life of any person is endangered, shall be guilty of felony and being convicted thereof shall be liable to imprisonment for a term of not more than twenty years.

14. Whosoever attempts to commit murder shall be guilty of felony, and shall be liable to imprisonment for a term of not more than fifteen years.

The above provisions were derived from sections 11 to 15 of the *English Offences Against the Person Act* 1861 (24 & 25 Vict. c. 100). These sections were repealed in England by the *Criminal Law Act* 1967 which enacted *inter alia* that a person indicted for murder may be found guilty of attempted murder (sec. 6(4)) and that a person convicted on indictment of an attempt to commit an offence may be sentenced to fine and imprisonment up to the maximum specified for the completed offence (section 7(2)). Thus the sentence for attempted murder in England may be anything up to life imprisonment.

⁹² The present state of the law in Victoria with respect to the availability of provocation as a defence to uncompleted homicidal assaults is uncertain: see *Newman* [1948] V.L.R. 61 and *Spartels* [1953] V.L.R. 194 cf. *Falla* [1964] V.R. 78.

2.75 The offences set out in sections 11 to 13 of the Victorian Act, it will be noted, require an intent to murder; they specify particular means of attempting to commit murder and would appear to be unnecessary in the light of section 14. **It is recommended** therefore that sections 11, 12 and 13 of the *Crimes Act* 1958 be repealed and, in accordance with the recommendation of this Report that the maximum penalty for manslaughter be increased to imprisonment for life (see para. 2.63), section 14 of that Act be amended as follows:

14. Whosoever attempts to commit murder shall be guilty of an indictable offence and shall be liable to punishment up to imprisonment for life.

2.76 This reform would facilitate the creation of an offence of attempted manslaughter which would be similarly punishable.

It is therefore recommended that where a person who attempts to kill is at the time of the offence acting under such provocation and/or diminished responsibility as would have reduced the offence to manslaughter had death resulted, the person shall not be convicted of attempted murder but may be convicted of attempted manslaughter.

SUMMARY OF RECOMMENDATIONS

1. The objective test in provocation should be abolished by an amendment to the *Crimes Act* 1958 and the jury directed to consider only whether the accused was genuinely provoked to lose the power of self control. (paras. 1.16-1.24).
2. It should be further enacted that provocation may be by things done or by things said or by both together. (para. 1.25)
3. Lawful arrest or imprisonment or conduct authorised by a lawful warrant or by any of the provisions of sections 457 to 463B of the *Crimes Act* 1958 should not be capable of amounting to provocation in law. (para. 1.29)
4. Diminished responsibility as a partial defence to a charge of murder should be made available in Victoria by an amendment to the *Crimes Act* 1958 (paras. 2.49-2.53)
5. Legislation to effect this reform should be expressed in terms similar to those suggested by the Criminal Law Revision Committee, with the addition of a definition of "mental disorder" for the purposes of the section (paras. 2.55-2.56)
6. The maximum sentence for manslaughter in section 5 of the *Crimes Act* 1958 should be increased to imprisonment for life. (para. 2.59-2.63)
7. A section similar to section 6 of the English *Criminal Procedure (Insanity) Act* 1964 should be enacted in Victoria (paras. 2.65-2.66)
8. The persuasive burden of proof in diminished responsibility should be on the Crown and this should be the subject of legislation (para. 2.67)
9. Provision should be made enabling a Magistrates' Court to commit for manslaughter by reason of diminished responsibility if the defendant consents or if he has been committed for trial on a charge of murder allowing a defendant with his consent to be so indicted for manslaughter. (para. 2.72)
10. There should be a crime of attempted manslaughter by reason of provocation and/or diminished responsibility. To facilitate this reform sections 11, 12 and 13 of the *Crimes Act* 1958 should be repealed and the maximum sentence for attempted murder in section 14 of that Act be increased to imprisonment for life. (paras. 2.73-2.76)

APPENDIX A
PERSONS CONVICTED OF MANSLAUGHTER ON THE BASIS OF DIMINISHED RESPONSIBILITY (ENGLAND & WALES) — SENTENCE

	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Imprisonment for up to 1 yr.	—	—	—	1 4.3	1 2.8	—	—	1 2.4	—	2 3.9	1 2.0	—	—	—	1 1.5	2 2.6	—	—	1 1.5	—	—	1 1.3	1 0.9
1-2 years inc.	—	4 16.0	2 9.5	3 13.0	5 13.9	2 5.9	3 6.5	—	2 4.3	2 3.9	1 2.0	3 6.8	1 2.1	4 6.1	4 5.9	5 6.6	4 5.0	6 7.6	3 4.5	8 8.7	4 4.9	9 11.4	2 1.8
3-4 years inc.	—	3 12.0	3 14.3	2 8.7	—	1 2.9	2 4.3	1 2.4	—	2 3.9	3 6.1	3 6.8	1 2.1	1 1.5	3 4.4	4 5.3	9 11.2	3 3.8	4 6.1	7 7.6	12 14.6	3 3.8	14 12.9
5-9 years inc.	4 36.4	4 16.0	7 33.3	4 17.4	1 2.8	1 2.9	2 4.3	2 4.9	2 4.3	5 9.8	—	2 4.5	2 4.3	5 7.6	3 4.4	3 3.9	2 2.5	6 7.6	6 9.1	6 6.5	8 9.8	5 6.3	10 9.2
10 years & over	3 27.3	1 4.0	—	—	3 8.3	1 2.9	—	—	—	2 3.9	—	—	—	—	—	—	2 2.5	—	2 3.0	1 1.1	2 2.4	—	1 0.9
Life	3 27.3	10 40.0	8 38.1	11 47.8	9 25.0	7 20.6	14 30.4	9 21.9	12 25.5	5 9.8	8 16.3	2 4.5	6 12.8	11 16.7	12 17.6	7 9.2	10 12.5	19 24.0	14 21.2	20 21.7	21 25.6	21 26.6	24 22.1
48 Total Imprisonment	10 90.9	22 88.0	20 95.2	21 91.3	19 52.8	12 35.2	21 45.7	13 31.7	16 34.0	18 35.3	13 26.5	10 22.7	10 21.3	21 31.8	23 33.8	21 27.6	27 33.7	34 43.0	30 45.5	42 45.6	47 57.3	39 49.4	52 47.8
S.60 Order	—	—	—	—	)	)	)	5 12.2	5 10.6	7 13.7	1 2.0	6 13.6	6 12.8	3 4.5	6 8.8	9 11.8	8 10.0	5 6.3	7 10.6	10 10.9	7 8.5	7 8.9	3 2.8
S.65 Order	—	—	—	—	16 44.4	20 58.8	25 54.3	18 43.9	19 40.4	24 47.1	29 59.2	22 50.0	27 57.4	32 48.5	32 47.1	36 47.4	27 33.7	26 32.9	20 30.3	21 22.8	18 22.0	20 25.3	22 20.2
Other*	)	)	)	)	)	)	)	2 4.9	1 2.1	—	2 4.1	2 4.5	1 2.1	4 6.1	1 1.5	—	5 6.2	4 5.1	1 1.5	9 9.8	2 2.4	5 6.3	2 1.8
Probation	)	1 9.1	3 12.0	1 4.8	2 8.7	1 2.8	2 5.9	—	3 7.3	6 12.8	2 3.9	4 8.2	4 9.1	3 6.4	6 9.1	6 8.8	10 13.2	13 16.2	10 12.7	8 12.1	10 10.9	8 9.8	14 10.1
GRAND TOTAL	11	25	21	23	36	34	46	41	47	51	49	44	47	66	68	76	80	79	66	92	82	79	92

* Includes conditional discharge, approved school, recognizance, suspended sentence, Borstal training.
Source: Criminal Statistics for England & Wales Tables III & V (1957-63), Tables 11(a) & III (1964-1977) and Tables 5(a) & 6 (1978).
Italicised figures represent percentages of the Grand Total in each year.

END