

Chapter 2

Wilful Murder and Murder

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Introduction

In Western Australia there are three general offences of homicide: wilful murder, murder and manslaughter.¹ In each case the physical element of the offence is the same, that is, the accused caused the death of the deceased. Wilful murder, murder and manslaughter are mainly distinguished by the presence or absence of a specific mental element. Wilful murder and murder are the most serious offences under the criminal law. Wilful murder is an unlawful killing with an intention to kill and murder is an unlawful killing with an intention to do grievous bodily harm. Generally, an unlawful killing without either of these intentions is manslaughter. The only exception to this general rule is felony-murder (sometimes referred to as constructive murder).² In the case of felony-murder the accused is convicted of murder even though he or she did not intend to harm anyone. One of the Commission's guiding principles for the reform of the law of homicide is that killings committed with the necessary intention are more serious than and should be distinguished from unintentional killings.³ Because the felony-murder provisions in the *Criminal Code (WA)* (the Code) fall outside this general principle, the Commission considers in detail the appropriateness of the felony-murder rule.

In this chapter the Commission also examines whether the mental elements of wilful murder and murder are appropriate and whether they should include the mental element of recklessness. For the purpose of the law of homicide recklessness requires consideration of whether the accused was aware that death (or grievous bodily harm) may result from his or her conduct. Currently in Western Australia, recklessness as to death or grievous bodily harm is not of itself sufficient to establish the mental element of wilful murder or murder. However, in some jurisdictions recklessness is a separate mental element for murder.

Apart from determining the appropriate mental element of murder the Commission considers in this chapter

whether the distinction between wilful murder and murder in Western Australia should be retained. Western Australia is the only jurisdiction in Australia with a separate offence of wilful murder. Every other Australian jurisdiction has only two general offences of homicide: murder and manslaughter. The Law Commission (England and Wales) has recently recommended that the offence of murder should be separated into two offences: first degree murder and second degree murder.⁴ This issue requires a thorough consideration of the differences between the moral culpability of a killing that falls within the definition of wilful murder and a killing that falls within the definition of murder.

HISTORY

Murder at common law

Historically at common law there was only one offence of homicide. Sir Owen Dixon observed that up until the 13th century the law primarily focused on the physical act causing death.⁵ For example, the fact that a person was killed in self-defence or out of necessity did not result in an acquittal but led to a pardon from the King.⁶ It has been reported that up until 1512 it was possible for certain accused to be excused by 'reciting a verse from the Books of Psalms' (known as the 'benefit of clergy').⁷ Legislation enacted in 1512 disallowed the benefit of the clergy to those who had killed with 'malice aforethought'.⁸ By the 16th century the distinction between murder and manslaughter emerged. A killing committed with malice aforethought was punishable by death.⁹ Therefore there was a shift in the focus from the physical act of killing to the mental state of the accused.¹⁰ The Law Reform Commission of Ireland noted that malice aforethought originally required that the killing was planned or premeditated. However, the concept of malice aforethought gradually expanded because it did not necessarily capture those killings that were deserving of the death penalty.¹¹

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1. The offences of infanticide and dangerous driving causing death are not appropriately described as general offences of homicide because they only apply in limited circumstances. Infanticide only applies where the accused is the mother of the deceased, and dangerous driving causing death only applies where the accused has driven a motor vehicle dangerously and has been involved in an incident which has caused the death of another person.
 2. The felony-murder provisions under ss 279(2)–(5) of the *Criminal Code (WA)* (the Code) do not normally require proof of an intention to kill or an intention to do grievous bodily harm. In general terms liability for murder attaches because the accused caused the death of a person by a dangerous act committed for an unlawful purpose: see below 'Felony-murder'.
 3. See Introduction, 'Guiding Principles for Reform'.
 4. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [1.36].
 5. Dixon O, 'The Development of the Law of Homicide' (1935) 9 *Australian Law Journal Supplement* 64.
 6. *Ibid* 65.
 7. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [1.01].
 8. *Ibid*.
 9. Dixon O, 'The Development of the Law of Homicide' (1935) 9 *Australian Law Journal Supplement* 64, 66.
 10. *Ibid* 64.
 11. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [1.02].

In 1877 Sir James Stephen defined malice aforethought as: an intention to cause death or grievous bodily harm; knowledge that the act which caused death would probably result in death or grievous bodily harm; an intention to commit a felony; and an intention to oppose or resist lawful arrest or custody by force.¹² The Law Reform Commission of Ireland explained that malice aforethought has been interpreted at different times to reflect what was considered to be the 'proper scope of the mental element of murder'.¹³ The mental elements of wilful murder and murder under the Code are not far removed from the historical concept of malice aforethought. The crucial issue remains the same: what types of killings are sufficiently serious to be classified as murder? Although the death penalty is no longer applicable, the penalty for murder is the most serious penalty available under Western Australian law – life imprisonment. In Chapter 7 the Commission has concluded that it is no longer appropriate that the penalty for murder is a mandatory sentence of life imprisonment. However, the Commission has recommended that the penalty for murder should be a presumptive sentence of life imprisonment. Accordingly, the Commission's approach to the reform of the law of homicide maintains that murder is the most serious offence under the law with the most serious consequences.¹⁴

The Criminal Code (WA)

The Code in Western Australia was based upon the Queensland Code and both enacted two separate offences of wilful murder and murder. Sir Samuel Griffith (who drafted the Queensland Criminal Code) observed at the time that in many countries there was a distinction between different levels of murder, such as 'first degree murder' and 'second degree murder'. It was on this basis that he recommended the distinction between wilful murder and

murder.¹⁵ From the commencement of the Code until the passage of the *Criminal Code Amendment Act 1961* (WA) both wilful murder and murder carried a mandatory death sentence.¹⁶ From 1961 the death penalty only applied to the offence of wilful murder.¹⁷ The last person to be executed in Western Australia was in 1964 and capital punishment for wilful murder was abolished in 1984.¹⁸

Wilful murder and murder now both carry a mandatory sentence of life imprisonment. The practical difference between the two offences relates to the minimum period of time that the accused must spend in custody before the Governor can consider release. A person convicted of wilful murder may be sentenced to either strict security life imprisonment or life imprisonment whereas a person convicted of murder can only be sentenced to life imprisonment.¹⁹ Section 91 of the *Sentencing Act 1995* (WA) provides that a court must generally set a minimum period of at least 20 years but not more than 30 years for a person who has been convicted of wilful murder and sentenced to strict security life imprisonment.²⁰ Section 90 of the *Sentencing Act 1995* provides that a court must impose a minimum term of at least 15 years and not more than 19 years if the accused is convicted of wilful murder and sentenced to life imprisonment. For murder, the minimum period is at least seven years but not more than 14 years' imprisonment.²¹

The appropriateness of the distinction between wilful murder and murder has been recently considered in Western Australia. In 2003 the Western Australian government introduced into Parliament the Criminal Code Amendment Bill 2003 (WA) which included, among other things, a provision to repeal the offence of wilful murder.²² It was proposed that the offence of murder would include both an intention to kill and an intention to do grievous

12. Stephen J, *Digest of the Criminal Law* (1877) art. 223, as cited in *Hyam v Director of Public Prosecutions* [1975] AC 55, 81 (Viscount Dilhorne).

13. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [1.10].

14. Life imprisonment is available as a penalty for other offences (such as armed robbery and attempted murder); however, the sentence of life imprisonment is a maximum rather than presumptive sentence: see further discussion in Chapter 7, 'Sentencing'.

15. Queensland Law Reform Commission (QLRC), *The Proposed Abolition of the Distinction Between Wilful Murder and Murder*, Working Paper No. 3 (1969) 1–2.

16. The QLRC noted that originally under the Queensland Code it was provided that the penalty of death for murder (but not for wilful murder) could be recorded but not pronounced: see QLRC, *The Proposed Abolition of the Distinction between Wilful Murder and Murder*, Working Paper No. 3 (1969) 1–2. The repealed s 657 of the Code similarly provided that (other than for wilful murder or treason) the death penalty could be recorded instead of pronounced.

17. Section 3 of the *Criminal Code Amendment Act 1961* (WA) abolished the death penalty for the offence of murder.

18. Capital punishment was abolished in Western Australia by the *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA).

19. *Criminal Code* (WA) s 282. The mandatory sentence of life imprisonment only applies to adults convicted of wilful murder or murder. A child convicted of either of these offences may be sentenced to life imprisonment but the court has discretion to order that the child be detained in custody at the Governor's pleasure.

20. Section 91(3) of the *Sentencing Act 1995* (WA) provides that a person convicted of wilful murder can be imprisoned for the 'whole of the offender's life [if] it is necessary to do so in order to meet the community's interest in punishment and deterrence'.

21. For further discussion about the sentencing regime for homicide offences, see Chapter 7, 'Sentencing: Sentencing for Wilful Murder and Murder in Western Australia'.

22. Criminal Code Amendment Bill 2003 (WA) cl 16 and Explanatory Memorandum 5.

bodily harm.²³ The Opposition did not support this proposed amendment (and other amendments in relation to homicide) but supported the remaining provisions of the Bill relating to other aspects of the criminal law.²⁴ As a result, the Bill was split into two parts on 10 September 2003. The proposed changes in relation to homicide became the Criminal Code Amendment Bill 2003 (No. 2) (WA) and this Bill lapsed in January 2005.²⁵ The Commission received its terms of reference for this project in April 2005.

WILFUL MURDER

Wilful murder is defined in s 278 of the Code:

Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.

In order to be convicted of wilful murder the prosecution must prove beyond reasonable doubt that the accused caused the death²⁶ of a person and intended to kill that person or some other person. For example, if an accused intended to kill A by shooting him in a busy shopping centre, but instead missed and killed B, the accused would be guilty of the wilful murder of B.²⁷ It is also not necessary that the accused intended to kill a particular person. If an accused fired shots in a busy location intending to kill someone but without specifically having a particular person in mind he or she would be guilty of wilful murder if the shooting caused the death of one or more people.²⁸

Alternatives to wilful murder

In some circumstances an accused may be convicted of a different offence than the one originally charged. This may happen if the accused is actually charged with an alternative offence, or if the Code specifies one or more statutory

alternative offences.²⁹ If an accused has been charged with wilful murder and the prosecution cannot prove that the accused had an intention to kill, there may be evidence sufficient to establish an alternative offence such as murder or manslaughter. However, s 278 of the Code does not presently provide for an alternative offence to wilful murder. Therefore, the prosecution must charge an accused with any appropriate alternative offence (such as murder) in an indictment that alleges wilful murder as the principal charge. In contrast, s 279 of the Code (which creates the offence of murder) lists a number of possible alternative offences.³⁰

In its Issues Paper the Commission suggested that there does not appear to be any rationale for this anomaly.³¹ The Parliamentary Counsel's Office explained that at the time amendments were made to the Code in relation to alternative offences, it was also proposed to repeal the offence of wilful murder.³² Therefore, no alternative offences were provided for the offence of wilful murder. However, although the amendments in relation to alternative offences were enacted in June 2005, the proposed amendment to repeal the offence of wilful murder was not passed by Parliament.³³

In 2005 Matt Birney, the former leader of the Opposition, introduced the *Criminal Code Amendment (Alternative Offences to Wilful Murder) Bill 2005*. This bill provided for relevant alternative offences to wilful murder. During the second reading speech, Birney argued that in the absence of any alternative offences 'murderers who could not be convicted of wilful murder in Western Australia may now be able to walk free from court'.³⁴ In response, the Attorney General argued that the inclusion of alternative offences in s 278 of the Code was not necessary because it was the 'standard practice' of the Director of Public Prosecutions (DPP) to charge the alternative offence of murder in any indictment alleging wilful murder.³⁵ The

23. Criminal Code Amendment Bill 2003 (WA) cl 17 and Explanatory Memorandum 5.
 24. Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 September 2003, 10827–28 (Mrs CL Edwardes).
 25. Parliamentary Counsel's Office, Submission No. 2 (15 May 2006) 1.
 26. See Chapter 1, 'Causation'.
 27. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.3].
 28. Murray MJ, *The Criminal Code: A general review* (1983) 171.
 29. *Criminal Code (WA)* ss 10A–B. These provisions were inserted on 31 May 2005 by s 36 of the *Criminal Law Amendment (Simple Offences) Act 2004* (WA). A statutory alternative offence is an alternative offence specified in the legislative provision that creates the offence originally charged.
 30. See below 'Murder'.
 31. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 2.
 32. Parliamentary Counsel's Office, Submission No. 2 (15 May 2006) 1.
 33. The *Criminal Law Amendment (Simple Offences) Act 2004* amended the provisions of the Code dealing with alternative offences. This legislation was introduced at the time that the *Criminal Code Amendment Bill (No. 2) 2003* (WA) was being debated in Parliament. As mentioned above, the Criminal Code Amendment Bill 2003 (WA) was split into two parts in September 2003. The proposed amendments in relation to homicide were then contained in the Criminal Code Amendment Bill 2003 (No. 2) (WA). This Bill lapsed in January 2005.
 34. Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 October 2005, 6227 (Mr M Birney, Leader of the Opposition).
 35. *Ibid* 6231 (Mr J McGinty, Attorney General).

Attorney General further stated that the end result is the same regardless of whether there is a provision in the Code to permit an alternative offence to wilful murder or the indictment expressly specifies the alternative offence.³⁶ In other words, in either case the accused can be convicted of murder if there is insufficient evidence to convict the accused of wilful murder. The Criminal Code Amendment (Alternative Offences to Wilful Murder) Bill 2005 was defeated.³⁷ The Commission agrees that, provided the DPP does actually charge the accused with the alternative offence of murder, on every occasion where the accused is charged with wilful murder no injustice could result. However, there does not appear to be any reason not to expressly include the alternative offences to wilful murder in s 278 of the Code.³⁸

MURDER

Murder is defined in s 279 of the Code as follows:

Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say —

- (1) If the offender intends to do to the person killed or to some other person some grievous bodily harm;
- (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
- (3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the

commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

- (4) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;
- (5) If death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of murder.

In the first case it is immaterial that the offender did not intend to hurt the particular person who is killed.

In the second case it is immaterial that the offender did not intend to hurt any person.

In the 3 last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

Section 279(1) sets out the general murder offence; that is, an accused is guilty of murder if he or she caused the death of another person and intended to do grievous bodily harm to that person or to some other person. Sections 279(2)–(5) provide for other less common circumstances where a person may be charged with murder. These provisions (often referred to as felony-murder) are considered below.³⁹ The alternative offences for murder (as specified in s 279) are manslaughter, infanticide, attempted murder, killing an unborn child, concealing the birth of a child and dangerous driving causing death.⁴⁰

36. Ibid.

37. Ibid 6246.

38. The Commission has not made a recommendation in this regard because it has recommended that the offence of wilful murder under s 278 of the Code should be repealed: see below, Recommendation 6. However, if the offence of wilful murder is not repealed the Commission suggests that s 278 of the Code be amended to provide for the appropriate alternative offences.

39. See below, 'Felony-Murder'.

40. The Commission has recommended the repeal of the offence of infanticide and therefore s 279 should be amended to remove infanticide as an alternative offence. See Chapter 3, 'Infanticide'.

The Mental Element of Murder: Intention to do grievous bodily harm

Before discussing whether there should continue to be separate categories of murder it is necessary to consider the appropriate scope of the mental element of murder. While there is no question that an intention to kill should be included in the mental element of murder, there is significant debate about how far the mental element of murder should extend beyond an intention to kill. In Western Australia (and in most other Australian jurisdictions) an accused is guilty of murder if he or she kills with an intention to do grievous bodily harm ('the grievous bodily harm rule'). This rule means that an accused may be guilty of murder even though there was no intention to kill and the accused was not aware that death may have resulted from his or her conduct. The grievous bodily harm rule has been subject to extensive criticism.¹ Regardless of whether the distinction between wilful murder and murder is retained it is necessary to decide if an intention to do grievous bodily harm is sufficiently blameworthy to constitute the mental element of murder.

DEFINITION OF GRIEVOUS BODILY HARM

Grievous bodily harm is defined in s 1(1) of the Code as:

[A]ny bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health.²

There are two parts to this definition. The first limb covers injuries that endanger or are likely to endanger life. For example, a cut to an artery or a stab wound to the heart or another major organ would fall within this part of the definition. The second limb covers injuries that cause or are likely to cause permanent injury to health. For example,

a permanent injury to health may include having a toe or finger cut off³ or being punched in the eye leading to permanent double vision.⁴ In these examples a person would be permanently injured; however, such injuries would not be likely to endanger life.

The two limbs of the definition are viewed as separate descriptions of injuries that amount to grievous bodily harm. In *Pham*,⁵ it was argued that the degree of seriousness of the injury under the first limb (likely to endanger life) qualifies the degree of seriousness of an injury under the second limb (permanent).⁶ Malcolm CJ held that the two limbs of the definition of grievous bodily harm are independent from one another and stated that the 'second limb does not take its flavour from the first, but stands alone'.⁷ Therefore, an injury may constitute grievous bodily harm if it is life-threatening but not permanent and an injury may be permanent even though it is not life-threatening. Of course, a particular injury may be both life-threatening and permanent. In the context of examining the mental element of murder it is significant that an injury may amount to grievous bodily harm even though there is no likelihood that the injury will endanger life.

Availability of medical treatment

In some circumstances an injury may be of such a nature that in the absence of medical treatment the injury is likely to endanger life or cause permanent injury to health, but with appropriate medical treatment the person may recover completely from the injury sustained. Whether an injury amounts to grievous bodily harm is determined by considering the nature of the injury irrespective of the availability or otherwise of medical treatment.⁸ The

1. See for example, Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [1.17]; Victorian Law Reform Commissioner, *Law of Murder*, Report No. 1 (1974) [52]–[59]; Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [130]–[131]; Mitchell B, 'Culpably Indifferent Murder' (1996) 25 *Anglo-American Law Review* 64, 82; *Hyam v Director of Public Prosecutions* [1975] AC 55, 92 (Lord Diplock). The Model Criminal Code Officers Committee (MCCOC) noted that numerous law reform bodies had recommended the abolition of the grievous bodily harm rule. The MCCOC was of the view that an intention to cause serious harm should not be sufficient to establish the mental element of murder. It recommended that the mental element of murder should include an intention to cause death and recklessness as to death: see MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 51 & 58. The Law Reform Commission of Ireland also noted that numerous judges, academics and law reform bodies had criticised the grievous bodily harm rule: see Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.087]–[4.091].
2. Section 1(4)(d) of the Code also provides that a reference in the Code 'to intending to cause or intending to do grievous bodily harm to a person includes a reference to intending to cause a person to have a serious disease'. Serious disease is defined in s 1(1) to mean 'a disease of such a nature [as to either] endanger, or be likely to endanger life [or] cause, or be likely to cause, permanent injury to health'.
3. In *Tranby* (1991) 52 A Crim R 228, 233, Macrossan CJ suggested that 'the severing of a finger or the loss of a hand at the wrist' would amount to a permanent injury to health.
4. In *Kennedy* [2000] QCA 48, [3] the accused punched the victim injuring his eye. The accused was convicted after a trial of doing grievous bodily harm. McMurdo P noted during an appeal against sentence that if left untreated the injury would have led to permanent double vision. See also *Collins* [2001] QCA 547 [16] & [19]–[21].
5. (Unreported, Western Australian Court of Criminal Appeal, Nos. 143 & 144 of 1990, Supreme Court Library No. 8671/1990, Malcolm CJ, 21 December 1990).
6. *Ibid* 3–4 (Malcolm CJ).
7. *Ibid* 4.
8. See *Lobston* [1983] 2 Qd R 720, as cited in Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 73. See also *Pham* (Unreported, Western Australian Court of Criminal Appeal, Nos. 143 & 144 of 1990, Supreme Court Library No. 8671/1990, Malcolm CJ, 21 December 1990, 6).

requirement to assess the injury without considering the availability of medical treatment is now expressly referred to in the definition of grievous bodily harm under the Queensland Code.⁹

Meaning of 'health'

In order to amount to grievous bodily harm under the second limb of the definition, an injury must be permanent (or likely to be permanent) and it must also be an injury to 'health'. The term 'health' is not defined in the Code. In *Tranby*,¹⁰ the Queensland Court of Criminal Appeal considered the meaning of health under the equivalent definition of grievous bodily harm in the Queensland Code. The accused had bitten the victim's ear removing part of her earlobe. There was medical evidence that the injury did not affect the victim's ability to hear and the injury was described as a 'permanent cosmetic disfigurement'.¹¹ The accused appealed against his conviction for the offence of unlawfully doing grievous bodily harm on the ground that the injury did not fall within the definition of grievous bodily harm. The majority of the court held that the injury did not amount to grievous bodily harm because, although permanent, the injury was not an injury to health. It was held that the term 'health' means the 'functioning of the body' and the definition of grievous bodily harm does not include the removal of a part of the body that 'serves no particular function with respect to the rest of it'.¹² As a result of the decision in *Tranby*, the definition of grievous bodily harm in Queensland was amended in 1997.¹³

Meaning of 'likely'

In order to prove that an accused intended to cause an injury likely to endanger life or likely to cause permanent

injury to health it is not necessary for the prosecution to prove that the accused was aware that the injury was likely to have either one of those consequences. In *Charlie*¹⁴ the High Court considered the meaning of 'grievous harm' as it was defined under s 1 of the Northern Territory Code; that is, 'any physical or mental injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health'. Callinan J concluded that this definition does not require proof that the accused is aware of the consequence of the injury. It is sufficient for the mental element of murder that the accused 'intended to do an act or to cause a physical or mental injury which was of such a nature as actually to endanger, or objectively viewed be likely to endanger life, or to cause, or objectively be likely to cause permanent injury to health'.¹⁵

In *Boughey*¹⁶ the High Court considered the meaning of the phrase 'likely to cause death' in s 157(1) of the Tasmanian Criminal Code. Section 157(1)(b) provides that culpable homicide is murder if it is committed with an intention to cause 'bodily harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death'.¹⁷ The majority of the High Court held that the phrase 'likely to cause death' does not mean 'more likely than not' and the phrase should not be explained in terms of a particular 'degree of mathematical probability'.¹⁸ Instead, the phrase should be interpreted according to its ordinary meaning: 'a substantial or real chance as distinct from what is a mere possibility'.¹⁹ On the basis of these decisions it is clear that whether an injury is 'likely to endanger life' and 'likely to cause permanent injury to health' is determined objectively. Further, it is not necessary for the prosecution to prove that the consequences are more likely than not to occur.

9. *Criminal Code* (Qld) s 1.

10. (1991) 52 A Crim R 228 (Qld CCA).

11. *Ibid* 229.

12. *Ibid* 238–39 (De Jersey J, Derrington J agreed that the injury in this case did not amount to an injury to health).

13. Grievous bodily harm is now defined in s 1 of the Queensland Code as 'the loss of a distinct part or an organ of the body'; 'serious disfigurement'; or 'any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health'. It is also stated that these injuries fall within the definition 'whether or not treatment is or could have been available'. The definition was inserted by s 6 of the *Criminal Law Amendment Act 1997* (Qld). There does not appear to be any explanation in the second reading speech as to why this amendment was made: see Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 4870 (Mr DE Beanland, Attorney General and Minister for Justice). However, the Queensland Criminal Code Advisory Working Group recommended in its 1996 report that the definition of grievous bodily harm should be amended because it was too narrow by not including a serious cosmetic disfigurement: see Queensland Criminal Code Advisory Working Group, *Report of the Queensland Criminal Code Advisory Working Group to the Attorney General* (1996) 65. The Commission notes that this recommendation to broaden the definition of grievous bodily harm was considered in the context of an offence of causing grievous bodily harm and not in the context of the mental element of murder.

14. [1999] HCA 23.

15. *Ibid* [75] (Gleeson CJ and McHugh J concurring).

16. (1986) 65 ALR 609.

17. The phrase 'likely to cause death' is also used in s 157(1)(c) of the Tasmanian Code which provides that culpable homicide is murder if it is committed 'by means of an unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person'.

18. (1986) 65 ALR 609, 617 (Mason, Wilson and Deane JJ).

19. *Ibid* 618 (Mason, Wilson and Deane JJ). Gibbs CJ held that the word 'likely' means probable and not possible: at 611.

The Mental Element of Murder:

◀ Intention to do grievous bodily harm

Rather, there must be a substantial and real chance that the particular consequences may result.

Definition of grievous bodily harm in other jurisdictions

In all Australian jurisdictions, other than the Australian Capital Territory and Tasmania, the offence of murder applies if there is intent to kill or intent to do grievous bodily harm (or similar expression).²⁰ The term 'grievous bodily harm' is used in Western Australia, Queensland, and New South Wales.²¹ Section 4(1) of the *Crimes Act 1900* (NSW) provides that grievous bodily harm includes 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm' and 'any permanent or serious disfiguring of the person'.²² The use of the word 'includes' in the statutory definition of grievous bodily harm in New South Wales suggests that the common law meaning of grievous bodily harm would also continue to apply. The offence of murder in Victoria and South Australia is based upon the common law. Murder at common law requires an intention to kill, an intention to do grievous bodily harm or knowledge that death or grievous bodily harm is a probable consequence of one's conduct.²³ There is no set meaning of grievous bodily harm at common law. In common law jurisdictions juries are often directed that grievous bodily harm means 'really serious injury'.²⁴

In the Northern Territory an accused is guilty of murder if he or she causes the death of another person and intended to cause the death of or serious harm to any person.²⁵ Serious harm is defined in s 1 of the *Criminal Code* (NT) as:

- any harm (including the cumulative effect of more than one harm) —
- (a) that endangers, or is likely to endanger, a person's life; or
 - (b) that is or is likely to be significant and longstanding.²⁶

These provisions came into operation in December 2006 and are partly based upon the recommendations of the Model Criminal Code Officers Committee (MCCOC).²⁷ While there are similarities between the definition of grievous bodily harm under the Code and the definition of serious harm under the Model Criminal Code, one difference is that in Western Australia a permanent injury to health could amount to grievous bodily harm even if that injury was not considered to be significant. As mentioned earlier, a permanent injury to health could include an injury to an eye that results in the victim suffering a slight degree of double vision. While this may be a permanent injury to the functioning of the body (the eye) it may or may not be viewed as significant.²⁸

Similarly, at common law the injury must be serious but under the Code an injury to health will constitute grievous bodily harm as long as it is permanent or likely to be permanent irrespective of whether it is considered serious. Thomas Crofts has commented that the definition of

20. In the Australian Capital Territory s 12 of the *Crimes Act 1900* (ACT) provides that it is murder if the accused either intended to cause death or was recklessly indifferent to the probability of causing death. Under s 157(1)(a) and (b) of the Tasmanian Code murder will apply if the accused intended to cause death or intended to cause bodily harm which the accused knew would be likely to cause death in the circumstances. Although the definition of murder in Tasmania is in one sense broader than elsewhere because it includes an intention to cause only bodily harm, it is also appears to be more restrictive because it requires an awareness of the part of the accused that the injury was likely cause death.
21. The term 'grievous bodily harm' is also used in Tasmania but is not directly relevant for the definition of murder. Section 1 of the Tasmanian Code defines grievous bodily harm as 'any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health'. This definition is very similar to the definition in Western Australia although the word 'permanent' is replaced with 'serious'.
22. This definition was inserted by schedule 1 of the *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW).
23. See Chapter 1, 'The Law of Homicide in Western Australia: The historical context'. See also Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Issues Paper (2002) 1.
24. MCCOC, *Non-Fatal Offences Against the Person*, Report (1998) 21. See also Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [122] where it was observed that juries are 'told only that grievous bodily harm means harm of a really serious kind'. In *Wilson* (1992) 174 CLR 313, 336 Brennan, Deane and Dawson JJ stated that 'an act involving an appreciable risk of really serious injury [involves] a risk of grievous bodily harm'. In *Smith* [1961] AC 290, 334 the House of Lords held that grievous bodily harm means bodily harm that is 'really serious'.
25. *Criminal Code* (NT) s 156(1). Previously s 162 of the Northern Territory Code defined murder as an unlawfully killing with intent to kill or intent to do grievous harm.
26. Section 1A of the *Criminal Code* (NT) defines harm as physical harm or harm to a person's mental health. Physical harm includes, among other things, unconsciousness, pain, disfigurement and infection with a disease.
27. The MCCOC recommended that murder should only apply where the accused intends to cause death or is reckless about causing death and accordingly, did not extend murder to include an intention to cause serious harm: see MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 58. The Northern Territory Code adopts the Model Criminal Code definition of serious harm: see MCCOC, *Non-Fatal Offences Against the Person*, Report (1998) 16.
28. In *Collins* [2001] QCA 547, [7] the victim explained that he only suffered from double vision when he looked upwards and therefore did not notice the problem often. The Commission also notes that a significant injury which is neither permanent (nor life-threatening) is excluded from the definition in Western Australia. For example, some fractures (such as broken ribs) may be considered significant but not necessarily permanent. In some cases broken ribs may be left untreated to heal without medical intervention.

grievous bodily harm in Western Australia is narrower than the definition at common law.²⁹ From one perspective this is true. The common law definition is broad enough to include any injury that the jury considers to be really serious. The meaning of grievous bodily harm is more restrictive in Western Australia because the injury must fit within the precise terms of the statutory definition. However, it is possible for an injury to amount to grievous bodily harm in Western Australia even though a jury does not consider that the injury is serious or really serious. Importantly—in the context of considering the grievous bodily harm rule—it is apparent that under the Code, the Model Criminal Code and at common law there are injuries that may amount to grievous bodily harm (or serious harm) even though those injuries are not life-threatening.

THE GRIEVOUS BODILY HARM RULE

The phrase ‘grievous bodily harm’ is included in a number of offences under the Code.³⁰ While there may be an argument for amending the definition of grievous bodily harm generally, the Commission is only concerned with its meaning in the context of the mental element of murder, that is, an intention to do grievous bodily harm. The relevant question is: should an intention to do grievous bodily harm (as that term is currently defined) be sufficient to constitute the mental element of murder?

Criticisms of the grievous bodily harm rule

Correspondence principle

It has been argued that the mental element of an offence should correspond with the harm caused.³¹ Ashworth contended that the grievous bodily harm rule breaches this ‘correspondence principle’.³² In order to comply with the principle the mental element of murder should match the harm caused, namely death. An intention to kill clearly

complies with this principle but an intention to cause grievous bodily harm does not. The MCCOC adhered to this principle by concluding that murder should not include an intention to cause serious harm because the offence of murder ‘should in some way be linked to death as the contemplated harm’.³³

While the Commission appreciates the logic of this argument it agrees with the view that the correspondence principle ‘remains very much an ideal, if anything, rather than an accurate descriptive generalisation about crimes’.³⁴ It has been suggested that, rather than requiring precise correspondence between the mental element and the harm caused, there should be a ‘close match between the label or name attached to a crime, such as “murder” or “manslaughter”, and the nature and gravity of what the [accused] has done’.³⁵ Therefore, instead of precise correspondence there should be ‘close proximity’ between the mental element and the harm done.³⁶ The application of the correspondence principle to the current definition of grievous bodily harm in Western Australia produces two different outcomes. An intention to cause a permanent injury to health does not correspond with harm caused. On the other hand, an intention to cause an injury likely to endanger life corresponds closely with the resulting harm of death.

Changes in medical treatment

Those in favour of the grievous bodily harm rule argue that a person who intends to cause grievous bodily harm is just as morally culpable as a person who intends to kill because a person who intends grievous bodily harm demonstrates ‘wanton disregard for life’.³⁷ The basis of this argument is that it is impossible to know whether serious injury will result in death.³⁸ Ashworth stated that whether death results ‘may depend on the victim’s physique, on the speed of the ambulance, on the distance from the hospital, and on a range of other medical and

29. Crofts T, *Wilful Murderers in Western Australia: Soon to get away with murder?* (2006) 31 *Alternative Law Journal* 203, 203. See also Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 3. Irene Morgan has also observed that the definition of grievous bodily harm is ‘relatively narrow’ whereas the definition at common law is more flexible: see Morgan I, ‘Sentences for Wilful Murder and Murder’ (1996) 26 *University of Western Australia Law Review* 207, 213.

30. For example, under s 294 of the Code it is an offence to do grievous bodily harm with an intent to do grievous bodily harm; under s 297 it is an offence to do grievous bodily harm; and under s 317A it is an offence to assault another with intent to do grievous bodily harm.

31. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 261.

32. *Ibid.* The Law Commission (England and Wales) also recently noted that the grievous bodily harm rule does not adhere to the correspondence principle: see Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [3.17]. See also Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.083].

33. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 53.

34. Horder J, ‘A Critique of the Correspondence Principle in Criminal Law’ [1995] *Criminal Law Review* 759, 759.

35. *Ibid.* 761.

36. *Ibid.* 770.

37. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 261.

38. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.084].

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individual matters'.³⁹ The Law Commission of Ireland adopted this view when it recommended that the mental element of murder should continue to include an intention to cause serious injury.⁴⁰ It stated that:

A defendant who deliberately inflicts serious injury must be taken to know that he is risking life in view of the inherent vulnerability of the human body and mind. Such a defendant therefore possesses sufficient moral culpability to justify a murder conviction.⁴¹

However, it has been asserted that the grievous bodily harm rule is objectionable these days because of advances in medical science and treatment. The Victorian Law Reform Commissioner stated that prior to the use of antiseptics and antibiotics any serious injury or wound would be likely to cause death. But there are now many serious injuries that would be very unlikely to result in death.⁴² The MCCOC also noted that the justification for the grievous bodily harm rule was more compelling in the past when the nature of medical science meant there was little practical distinction between serious harm and death.⁴³

Moral culpability

Those who criticise the grievous bodily harm rule argue that the offence of manslaughter is appropriate if there is an intention to do grievous bodily harm.⁴⁴ Underlying this approach is the view that a person who kills intending to do grievous bodily harm is less morally culpable than a person who kills with an intention to kill.⁴⁵ Examples of non life-threatening injuries are frequently given in support of this argument. Ashworth stated that the definition of grievous bodily harm 'includes a number of injuries which are most unlikely to put the victim's life at risk'.⁴⁶ The Law Reform

Commission of Victoria provided the example of breaking a person's arm to illustrate why a person who intends to do grievous bodily harm is not as culpable as a person who intends to kill.⁴⁷ The Commission notes that broken limbs may constitute grievous bodily harm in Western Australia because there are some fractures that cause or are likely to cause permanent injury to health especially in the absence of medical intervention.⁴⁸

The Law Commission (England and Wales) recently considered whether the grievous bodily harm rule (referred to in its report as the 'serious harm rule') is appropriate. It concluded that the scope of the grievous bodily harm rule should be limited and suggested two ways that this could be achieved. First, the definition of serious harm could be restricted so that there 'is no significant moral difference between the intentional killer and the person who intentionally inflicts serious harm'.⁴⁹ Second, the current broad definition of serious harm could be retained but killing with an intention to cause serious harm would constitute a lesser offence such as second degree murder.⁵⁰ In its 2005 paper the Law Commission (England and Wales) chose the second of these options. It concluded that an intention to cause serious harm should not be included in the mental element of first degree murder. Instead it should form part of the mental element of second degree murder.⁵¹ This reflects the current approach in Western Australia where an intention to kill and an intention to do grievous bodily harm are separated into two offences.

However, the Law Commission (England and Wales) noted that if there was serious objection to its proposal to exclude intention to do serious harm from first degree murder then the definition of serious harm would need to be amended.⁵²

39. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 261.

40. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.101].

41. *Ibid* [4.097].

42. Victorian Law Reform Commissioner, *Law of Murder*, Report No. 1 (1974) [55] & [59]. The Victorian Law Reform Commissioner recommended that the mental element of intention to inflict grievous bodily harm should not be sufficient for the offence of murder.

43. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 51–52.

44. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 261; Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.083]. The Law Society of Western Australia submitted that if there was to be one offence of murder only an intention to kill should satisfy the mental element of the offence. In other words, it was suggested that an intention to do grievous bodily harm should amount to manslaughter and not murder: see Law Society of Western Australia, Submission No. 37 (4 July 2006) 2. The Commission did not receive any other submissions suggesting that an intention to do grievous bodily harm should not be sufficient for the mental element of murder.

45. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.083].

46. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 261. See also Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 45.

47. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [124]. The Law Commission (England and Wales) also referred to the broad scope of the grievous bodily harm rule and noted that serious harm would include breaking a person's hand: see Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [2.47].

48. In *Robinson* [2004] QCA 467 the accused had been sentenced for an offence of dangerous operation of a motor vehicle causing grievous bodily harm. The relevant injury was a broken leg. The victim had recovered from the injury after one year. Jerrard JA observed that even though there was no permanent injury to health, the injuries were of such a nature that if untreated they were likely to cause permanent injury to health: at [11].

49. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [3.12].

50. *Ibid* [3.12].

51. *Ibid* [3.28].

52. *Ibid* [36].

In its final report the Law Commission (England and Wales) revised its original view. Instead of excluding the grievous bodily harm rule from the definition of first degree murder, it recommended that first degree murder should include either an intention to kill or an intention to cause serious injury, as long as it is proved the accused was aware that there was a serious risk of death.⁵³ In summary, the recommendations of the Law Commission (England and Wales) acknowledged that the grievous bodily harm rule is too wide.⁵⁴ A person who intends serious harm may not exhibit a ‘total disregard for human life’.⁵⁵ At the same time it was recognised that the grievous bodily harm rule covers (although is not limited to) killings that are just as morally culpable as killing with an intention to kill.⁵⁶

Intention to cause an injury likely to endanger life

What emerges from the criticisms of the grievous bodily harm rule is that the rule is too broad for the purpose of classifying conduct as murder because it covers conduct that is not life-threatening. Other law reform bodies have suggested or recommended that the scope of the grievous bodily harm rule should be limited. The Law Reform Commission of Victoria recommended that the grievous bodily harm rule should be abolished but at the same time acknowledged that ‘a formulation incorporating concepts such as ‘life-endangering’ would bring the category closer to an intent to kill’.⁵⁷ The Law Commission (England and Wales) noted that:

Proponents of the ‘potentially lethal harm’ view of the ‘serious harm’ rule believe that the only kind of lethally inflicted serious harm that can justify a conviction of murder if intentionally inflicted is life-threatening harm.⁵⁸

As mentioned above, the Law Commission (England and Wales) recently recommended that first degree murder should include an intention to cause serious injury⁵⁹ coupled with an awareness of a serious risk of death. This approach incorporates a subjective test of whether the accused was aware of the risk of death.⁶⁰ The Commission considers below whether an additional subjective element is necessary but at this stage it is important to emphasise that the underlying nature of the injury is that it threatens human life.

The Commission agrees with the view that the definition of grievous bodily harm is too broad to satisfy the mental element of murder. As the MCCOC observed, the second limb of the definition of grievous bodily harm under the Code ‘substantially weakens the meaning of the term’.⁶¹ The Commission is of the view that there is a significant difference in moral culpability between an intention to cause an injury likely to endanger life and an intention to cause a permanent injury to health. For example, an intention to cut off a person’s finger would currently amount to an intention to do grievous bodily harm. If such an injury became infected and resulted in death the accused should not be convicted of murder. While the conduct is clearly reprehensible there is an insufficient connection between the accused’s intention and the resulting death. Therefore, the Commission has concluded that only an intention to cause an injury that endangers or is likely to endanger life should constitute the mental element of murder.⁶² The mental element of murder defined in this manner demonstrates close proximity or correspondence with the harm done. The Commission does not consider that strict correspondence is necessary

53. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.56].

54. *Ibid* [1.17].

55. *Ibid* [1.21].

56. *Ibid* [2.60]–[2.61].

57. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [130]. The Law Reform Commission of Victoria recommended that the grievous bodily harm rule should be abolished because in Victoria the mental element of recklessness would cover cases where an accused intended to cause a life-threatening injury: at [143]–[144]. The Victorian Law Reform Commissioner observed that in England in 1866 it was recommended that murder should be limited to an intention to kill or an intention to do ‘grievous bodily harm *dangerous to life*’: see Victorian Law Reform Commissioner, *Law of Murder*, Report No. 1 (1974) [11] (emphasis added).

58. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [3.95].

59. The Law Commission (England and Wales) recommended that serious injury should not be defined. It stated that a jury would not convict an accused of murder unless the harm intended was ‘very serious indeed’: see Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.88] & [2.93]. The Commission notes that in Western Australia a jury may convict an accused of murder where it is proved that the accused intended to cause a permanent injury to health and that it is not necessary for the jury to be satisfied that the injury intended was very serious.

60. Yeo has noted that an additional requirement of subjective awareness of the risk of death was recommended by the English Criminal Law Revision Committee in 1980 and the Law Commission (England and Wales) in 1989: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 45.

61. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 51.

62. The Commission notes that the Law Reform Commission of Ireland considered the definition of grievous bodily harm under the Western Australian and Queensland Codes when conducting its reference on the mental element of murder. It was noted that if it was concluded that the Code definition was too broad the second limb dealing with permanent injuries could be excluded so the term grievous bodily harm was restricted to a ‘bodily injury of such a nature as to endanger or be likely to endanger life’. It was stated that an ‘advantage of this approach is that it would minimise the constructive nature of the provision, by ensuring that it only applied to injuries of a particularly serious character’. The Law Commission of Ireland did not make a final conclusion as to whether, and if so, serious injury should be defined: see Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [5.32].

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provided that the moral culpability associated with the relevant intention is equivalent or closely equivalent to an intention to kill. Any difference between the moral culpability of a person who intends to cause an injury likely to endanger life and a person who intends to kill is minimal.⁶³

Should the nature of the injury continue to be determined objectively?

Currently in Western Australia when considering if an accused intended to do grievous bodily harm the jury (or judge alone) determine whether the injury intended was likely to endanger life (or cause permanent injury to health).⁶⁴ Thus, an accused may have intended to inflict a particular injury without knowing that the injury was likely to endanger life. It has been argued that a person who intends to cause an injury likely to endanger life is not as morally blameworthy as a person who intends to kill because the former may not be aware of the life threatening nature of the injury.⁶⁵ Underlying the approach of the Law Commission (England and Wales) is the view that a person should not be convicted of murder unless he or she was aware that death may result.⁶⁶ The concept of subjective awareness of death is essentially the same as recklessness as to death. The Commission considers below whether recklessness should constitute a separate mental element for murder. However, at this stage the discussion is limited to whether it is appropriate to include an additional requirement for subjective awareness over and above the existing subjective requirement to prove an intention to cause an injury likely to endanger life.

The Law Commission (England and Wales) observed that many law reform bodies, judges and academics favour a 'fully subjective approach' for determining criminal liability.⁶⁷

The fully subjective approach motivates laws that require proof that an accused was aware that the injury he or she intended was life-threatening.⁶⁸ The Commission recognises the attraction of the fully subjective approach. In theory it appears reasonable that people should not be convicted of murder unless they were aware that death may result from their conduct. However, from a practical point of view the fully subjective approach is problematic.

Following the fully subjective approach it is argued that an accused who intended to cause the relevant injury and was aware that death was likely to result is more morally culpable than a person who intended to cause the injury but was not aware that death was likely. However, the failure of an accused to appreciate the life-threatening nature of the injury does not necessarily reduce moral culpability. The Law Reform Commission of Ireland stated that:

Insisting on conscious awareness of a risk of death excludes certain types of misconduct. Thus, a defendant who claims that he was in such a rage that he 'acted without thinking', or a defendant who is so indifferent as to whether his victim lives or dies that he does not consider the risk of death, or a defendant who claims that he was preoccupied by another aspect of what he was doing, would escape liability if conscious appreciation is a necessary ingredient of the mental element of murder.⁶⁹

It has been explained that focusing on the subjective awareness of the accused ignores the fact that 'severe moral condemnation is merited by a failure to foresee what any decent human being would foresee'.⁷⁰ Thus, the failure to appreciate the risk of death may be just as morally blameworthy as actual awareness. In some cases there may be a reasonable or credible explanation for why an accused did not realise death may result from an injury

63. The Commission recognises that an accused who has caused the death of another with an intention to cause a permanent injury may be acquitted of manslaughter on the basis of the defence of accident under s 23 of the Code on the basis that the resulting death was not reasonably foreseeable. Nevertheless, such an accused could be convicted of doing grievous bodily harm with an intention to do grievous bodily harm under s 294 of the Code. Currently, an accused could only be convicted of such an offence if it was separately charged in the indictment. The Commission has recommended that an offence under s 294 of the Code should be listed as an alternative offence for manslaughter. The penalty for an offence under s 294 is the same as the penalty for manslaughter; that is, a maximum of 20 years' imprisonment: see Chapter 3, 'Manslaughter'.

64. See above, 'Definition of grievous bodily harm'.

65. Crofts T, 'Wilful Murderers in Western Australia: Soon to get away with murder?' (2006) 31 *Alternative Law Journal* 203, 204.

66. Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [3.106].

67. *Ibid* [3.3.129]. Stanley Yeo is one such commentator who has stated that while objective fault elements may be appropriate for establishing criminal responsibility generally they are not appropriate for determining responsibility for homicide: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 293.

68. For example, s 229(a)(ii) of the Canadian Criminal Code provides that it is murder if the accused meant to cause bodily harm and knew that death was likely and was reckless about causing death. As discussed above, the Law Commission (England and Wales) recommended that first degree murder should include an intention to cause a serious injury coupled with awareness of a serious risk of death. Section 157(1)(b) of the Tasmanian Code provides that it is murder if the accused intended to cause bodily harm and knew that death was likely.

69. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.084]. The Law Commission (England and Wales) noted arguments raised against including a requirement for subjective awareness of the risk of death. In cases where an accused intentionally inflicted serious injury during a 'fit of temper, in a panic, or under the influence of drink or drugs' the accused would be able to raise a reasonable doubt that he or she was not aware of the life-threatening nature of his or her conduct: see Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [3.126].

70. Gordon G, 'Subjective and Objective Mens Rea' (1975) 17 *Criminal Law Quarterly* 355, 384.

that is objectively likely to endanger life. Legally acceptable reasons for failing to appreciate the dangerousness of one's actions are mental impairment, immature age and pressure or fear arising from threats or extraordinary emergencies. In each of these cases there are defences available to relieve an accused from criminal responsibility.⁷¹ The Commission is of the view that in any other case the failure to think about the consequences to human life of inflicting a life-threatening injury is sufficiently blameworthy to justify a conviction for murder. Therefore, the Commission does not consider that it is appropriate or necessary to require that the prosecution must prove the accused was aware that death may result. The requirement for the prosecution

to prove that the accused intended to cause the relevant injury respects the principle that an accused should not be convicted of murder in the absence of subjective blameworthiness.⁷²

Recommendation 4

Mental element of murder

That an intention to cause a bodily injury of such a nature as to cause or be likely to cause a permanent injury to health is not sufficient to establish the mental element of murder.

71. For example, the defences of insanity, immature age, self-defence, duress and extraordinary emergency.

72. The Law Commission (England and Wales) observed the grievous bodily harm rule adheres to the subjectivity principle because there must be proof that the accused had the relevant intention at the time of the killing: Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [3.17].

Felony-Murder

INTRODUCTION

At common law—in addition to the categories of murder based upon an intention to kill or do grievous bodily harm—there were two distinct forms of constructive murder. Constructive murder has been described as an ‘unintentional killing by an act of violence’.¹ The two forms of constructive murder at common law were known as felony-murder and escape-murder. In general terms, felony-murder covered an act of violence which occurred during the commission of a felony² (serious crime) and escape-murder applied to an act of violence committed in order to escape, prevent or resist lawful arrest or custody.³ The *Criminal Code* (WA) (the Code) provides that it is murder if the accused caused the death of another by an act of such a nature as to be likely to endanger life in the prosecution of an unlawful purpose. The concepts of felony-murder and escape-murder are combined because either committing a felony or escaping from custody would amount to an unlawful purpose. For this reason, and for ease of reference, the Commission uses the term ‘felony-murder’ to cover both these categories.

What distinguishes felony-murder from the general definition of murder is the absence of an intention to cause death or grievous bodily harm.⁴ Instead, the degree of culpability associated with felony-murder is treated as equivalent to an intentional killing because the accused has killed a person while committing a serious criminal offence. The absence of a specific mental element has led to extensive criticism of the felony-murder rule. The scope of the rule varies between jurisdictions; however, in Western Australia the rule is more limited than elsewhere and therefore some of the criticisms of the felony-murder rule do not apply. In Chapter 1 the Commission explained that one of its guiding principles for the reform of the law of homicide is that intentional killings are more serious than and should be distinguished from unintentional killings.⁵

Retaining the felony-murder rule would constitute an exception to this general principle.

Historical origins

At common law murder was distinguished from manslaughter by the presence of ‘malice aforethought’. In the case of felony-murder and escape-murder ‘malice aforethought’ was implied.⁶ The origins of felony-murder have been traced to the 17th century when Lord Coke stated that:

If the act be unlawful it is murder. As if A meaning to steal a deer in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A had no intent to hurt the boy, nor knew not of him . . . [so also if one] had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful.⁷

On this basis the rule was extremely wide. Any unlawful killing that would otherwise constitute manslaughter would become murder if death was caused by an unlawful act. It has been observed that the historical foundation of felony-murder is ‘tenuous and ill defined’.⁸ Lanham has argued that Lord Coke's rule was not supported by case authorities at the time and that felony-murder is a ‘rule of such doctrinal feebleness that it ought never to have survived the seventeenth century, much less the twentieth’.⁹ However, subsequent developments have restricted the operation of the felony-murder rule. Accordingly, the Commission is of the view that it is important to judge the contemporary formulations of the rule rather than focus on arguments about its historical foundation.

In the 18th century the common law rule in England was restricted so that the unlawful act causing death would only be murder if the unlawful act was a felony.¹⁰ The felony-murder rule was subject to ongoing criticism in England and a number of cases further narrowed the scope

1. Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 59.
2. The term ‘felony’ is no longer used in Australia. Historically, at common law a felony was an offence that resulted in forfeiture of land, goods or death. Subsequently, certain serious offences were categorised by legislation as ‘felonies’: *ibid.*
3. *Ibid.*
4. The Commission notes that s 279(3) of the Code is not strictly a felony-murder provision because there must be an intention to cause grievous bodily harm as well as the requirement to prove that the accused had the purpose of facilitating the commission of a crime or the flight of an offender. Section 279(3) is unnecessary because any case falling within its provisions would also fall within the general definition of murder under s 279(1).
5. See Introduction, ‘Guiding Principles for Reform’.
6. Royal Commission (UK), *Report on Capital Punishment 1949–1953* (1953) 27. The Royal Commission observed the term ‘malice aforethought’ is not interpreted according to its ordinary meaning but rather is a technical term used to describe ‘a number of different mental attitudes which have been variously defined at different stages in the development of the law, the presence of any one of which in the accused has been held by courts to render a homicide particularly heinous and therefore to make it murder’.
7. Coke E, *The First Part of the Institutes of the Laws of England: a Commentary on Littleton* (first published 1628) (London: E & R Brooke, 19th ed., 1832) 56.
8. Fletcher G, ‘Reflections on Felony-murder’ (1981) 12 *South Western University Law Review* 413, 421.
9. Lanham D, ‘Felony Murder – Ancient and Modern’ (1983) 7 *Criminal Law Journal* 90, 91 & 101.
10. Royal Commission (UK), *Report on Capital Punishment 1949–1953* (1953) 30.

of the rule, in particular, to felonies that involved a dangerous act.¹¹ At common law in Australia the felony-murder rule was also restricted to felonies involving violence and further, the act causing death must have been a violent or dangerous act.¹² In 1957 the felony-murder rule was abolished in the United Kingdom following a recommendation of the *Royal Commission on Capital Punishment*.¹³ However, in most Australian jurisdictions a statutory form of the felony-murder rule remains.

THE LAW IN RELATION TO FELONY-MURDER IN WESTERN AUSTRALIA

In addition to an unlawful killing with an intention to do grievous bodily harm, murder is defined under s 279 of the Code as follows:

- (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
 - (3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
 - (4) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;
 - (5) If death is caused by wilfully stopping the breath of any person for either of such purposes;
- ...

In the second case it is immaterial that the offender did not intend to hurt any person.

In the 3 last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

In general terms, each of these separate provisions requires proof that the accused was engaged in unlawful conduct. Other than in the case of s 279(3), the prosecution does not have to prove a subjective mental element. Section 279(2) (and its equivalent in Queensland) has been relied on to convict a person of murder. However, it appears that ss 279(3)–(5) have rarely, if ever, been used.¹⁴ Before considering whether the general felony-murder provision under s 279(2) should be retained it is convenient to first consider whether ss 279(3)–(5) are necessary.

Sections 279(3)–(5)

In its Issues Paper the Commission explained that s 279(3), s 279(4) and s 279(5) appear unnecessary because the circumstances that would fall within the ambit of these provisions would also fall under either the general murder offence in s 279(1) or alternatively under s 279(2).¹⁵ Section 279(3) requires proof that the accused intended to do grievous bodily harm for the purpose of facilitating the commission of a crime or the flight of an offender. This provision is unnecessary because s 279(1) of the Code (which only requires proof of an intention to do grievous bodily harm) is sufficient.¹⁶

Section 279(4) applies if death is caused by 'administering any stupefying or overpowering thing' and s 279(5) applies if death is caused 'by wilfully stopping the breath of any person'. In both cases it is also necessary to prove that the purpose of the accused was to facilitate the commission of a crime or the flight of an offender. Either of these purposes would constitute an unlawful purpose as required

11. Ibid. See also *Ryan* (1967) 121 CLR 205, 241 (Windeyer J) where it was observed that there 'was a time when a man was guilty of murder, and punished accordingly, if while doing any unlawful act he happened to kill another man, however unexpectedly and unintentionally. This harsh rule became gradually mitigated. By the eighteenth century, although a man who in the course of committing a crime unintentionally killed another might still for that reason be guilty of murder, this was only when the crime was a felony. By the middle of the nineteenth century doubts had begun to be expressed about this doctrine ... The generally accepted rule of the common law today is, however, that an unintended killing in the course of or in connexion with a felony is murder if, but only if, the felonious conduct involved violence or danger to some person': See also *Brown and Brian* (1949) 56 ALR 462, 466 (Lowe J) as quoted in *Butcher* [1986] VR 43, 50 where it was stated that '[f]or fifty years past the view prevailing in England seems consistently to have been that death unintentionally brought about in the commission or furtherance of a felony is only murder in the actor if the felony is one which is dangerous to life and likely itself to cause death'.

12. Willis J, 'Felony Murder at Common Law in Australia – The Present and the Future' (1977) 1 *Criminal Law Journal* 231, 233–35.

13. *Homicide Act 1957* (UK) s 1. See Royal Commission (UK), *Report on Capital Punishment 1949–1953* (1953) 41. The felony-murder rule was also abolished in Ireland by s 4 of the *Criminal Justice Act 1964*: see Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) 8.

14. The Commission was unable to find any reported or unreported appeal cases where these subsections (or the equivalent provisions in Queensland) had been relied on to support a charge of murder. This excludes cases where an accused may have pleaded guilty to murder on the basis of one of these subsections. The Office of the Director of Public Prosecutions (DPP) advised the Commission that ss 279(3)–(5) are 'rarely used in practice': see Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 3. Justice McKechnie also explained that '[i]n 30 years of practice as a lawyer and a judge I have not seen resort to the provisions of s 279(3) to (5)': Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 2.

15. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 3.

16. Murray MJ, *The Criminal Code: A general review* (1983) 173. The Commission has recommended that the definition of the mental element of murder should no longer include an intention to cause a permanent injury. If s 279(3) was repealed an accused who caused the death of another person with an intention to cause a permanent injury to health for the purpose of facilitating the commission of an offence or the flight of an offender could be charged with an offence under s 294 of the Code (doing grievous bodily harm with an intention to do grievous bodily harm).

by s 279(2) of the Code.¹⁷ In 1983 the Murray Review noted that in most cases the relevant act under s 279(4) or s 279(5) would amount to an act of such a nature as to be likely to endanger life.¹⁸ Certainly, an act of wilfully stopping the breath of a person would be likely to endanger life. In the case of administering any stupefying or overpowering thing such an act may or may not be likely to endanger life depending upon the circumstances.

In its submission the Festival of Light Australia argued that s 279 of the Code should be retained in its entirety because it may not be possible to prove that an act of administering a stupefying or overpowering thing was an act likely to endanger life.¹⁹ But as the Murray Review concluded there does not appear to be any justification for extending the scope of felony-murder to include acts that are not likely to endanger life.²⁰ Similarly, the DPP stated in its submission that the offence of murder should not apply to an act that causes death if it was not likely to endanger life.²¹ All but one submission received by the Commission in response to this issue agreed that ss 279(3)–(5) were unnecessary and should be repealed.²² The Commission has concluded that there is no justification for extending the felony-murder rule to conduct that is objectively unlikely to endanger life. If such conduct results in death the offence of manslaughter is appropriate.

Recommendation 5

Repeal unnecessary categories of felony-murder

That s 279(3), s 279(4) and s 279(5) of the *Criminal Code* (WA) be repealed.

Section 279(2)

Section 279(2) of the Code is similar to the common law felony-murder rule.²³ There are three elements of murder under 279(2):

1. an unlawful killing (the accused must have caused the death);
2. the death must have been caused by an act of such a nature as to be likely to endanger life; and
3. the act must have been done in the prosecution of an unlawful purpose.

Act likely to endanger life

Whether the relevant act is an act of such a nature as to be likely to endanger life is determined objectively. In *Stuart*,²⁴ it was stated that it is sufficient if the ‘act which caused the death was in fact likely to endanger human life, whether or not the offender knew it was dangerous’.²⁵ In *Macartney*,²⁶ the phrase ‘likely to endanger life’ was recently considered by the Western Australian Court of Appeal. The accused appealed against his conviction for murder under s 279(2) of the Code. The trial was conducted by a judge alone and the trial judge found that the accused caused the death of the deceased. The trial judge concluded that the accused had abducted and sexually assaulted the deceased, placed tape around the deceased’s mouth and in some way the accused had suffocated the deceased.²⁷ The trial judge was unable to determine the precise act that caused the death.

Wheeler J stated that ‘it must be found beyond reasonable doubt that there was act which, regarded objectively,

17. Murray MJ, *The Criminal Code: A general review* (1983) 174.

18. *Ibid.*

19. Festival of Light Australia, Submission No. 16 (12 June 2006) 2.

20. Murray MJ, *The Criminal Code: A general review* (1983) 174. Colvin et al have also observed that s 279(3) is ‘redundant’ and s 279(4) and s 279(5) are arguably unnecessary: see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.2]. The recommendations of the Murray Review in relation to s 279(3), s 279(4) and s 279(5) were the basis of proposed amendments to the Code in 2003. The Criminal Code Amendment Bill (No. 2) 2003 (WA) lapsed in January 2005. During the second reading speech for the Criminal Code Amendment Bill 2003 the Attorney General noted that it was proposed to repeal ss 279 (3)–(5) of the Code and that this course had been recommended by the Murray Review: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 6164 (Mr JA McGinty, Attorney General). The Attorney General also indicated that the former Chief Justice supported these changes: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 6165 (Mr JA McGinty, Attorney General).

21. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 3.

22. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 2; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 2; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 3. The Festival of Light Australia submitted that all of these subsections should be retained: Festival of Light Australia, Submission No. 16 (12 June 2006) 2.

23. Murray MJ, *The Criminal Code: A general review* (1983) 173. In *Macartney* [2006] WASCA 29 [108] Steytler P observed the s 279(2) has ‘its origins in the common law notion of felony-murder’.

24. (1974) 134 CLR 426. See also *Gould & Barnes* [1960] Qd R 283, 298 (Townley J; Philp J and Mansfield CJ concurring); *Macartney*, *ibid* [113] (Steytler P).

25. *Ibid* 438 (Gibbs J; Menzies and Mason JJ concurring). In *Gould & Barnes*, *ibid* 293 (Philp J), 296 (Townley J) it was held that there was a difference between describing something as likely to endanger life and something which had a tendency to endanger life.

26. [2006] WASCA 29.

27. *Ibid* [19] (Steytler P).

was of such a nature as to give rise to a substantial, real and not remote chance that the life of the victim would be endangered'.²⁸ Wheeler J referred to the various acts that may have caused the death. One possibility was that the accused had put a plastic bag over the deceased's head. Another possibility was that the deceased's nose was somehow blocked at the same time that her mouth was covered with tape. A third possibility was that the deceased's chest was compressed by the accused either lying or sitting on the deceased's chest and abdomen during the attack (and at the same time as her mouth was covered). Wheeler J observed that in the circumstances of this case each of the possibilities were objectively acts of such a nature as to be likely to endanger life.²⁹ Roberts-Smith J stated that the relevant act under s 279(2) must be 'one which will probably or apparently expose the victim's life to risk, or put in peril' and he also concluded that in the circumstances of this case death was caused by an act objectively likely to endanger life.³⁰

The act causing death must be separate from the unlawful purpose

The provisions of s 279(2) do not apply unless there is a separate unlawful purpose.³¹ In other words, the act which causes death cannot be the same as the unlawful purpose. In *Hughes*,³² the High Court stated that the equivalent provision under the Queensland Code applies 'to an act of such a nature as to be likely to endanger human life when the act is done in the prosecution of a further purpose which is unlawful'.³³ In *Stuart*,³⁴ the accused and another man were convicted of felony-murder under the Queensland Code. Both men formed a plan to set fire to a nightclub at a time when patrons were known to be inside.

The reason for lighting the fire was to extort money from other nightclub owners by convincing them that they needed protection to avoid a similar fate.³⁵ The accused was not present when the fire which killed 15 people was lit. It was accepted that the accused and his accomplice did not intend to kill or injure anyone. It was held that the lighting of the fire was an act of such a nature as to endanger life and it was done in the prosecution of two possible unlawful purposes, either arson or extortion.³⁶

Defence of accident under s 23 of the Code

One of the criticisms of the felony-murder rule is that an accused may be convicted of murder in circumstances where no one would have foreseen that death would result. Section 23 of the Code provides that a person will not be criminally responsible for an event (such as death) if that event was not intended, not foreseen and not reasonably foreseeable in the circumstances.³⁷ When analysing the criticisms of the felony-murder rule it is important to consider whether the defence of accident under s 23 of the Code may operate in some cases to relieve an accused of criminal responsibility for murder.³⁸

In *Burke*,³⁹ it was stated that if the requirements of s 279(2) of the Code are satisfied, in particular, that the act was of such a nature as to be likely to endanger life, it is difficult to see how the defence of accident could apply. In making this observation Burt CJ noted that in order to rely on the defence of accident it is necessary that death was not reasonably foreseeable by an ordinary person.⁴⁰ Therefore, it is suggested that in any case where death was caused by an act likely to endanger life, death would be reasonably foreseeable. However, the opposite view

28. Ibid [139].

29. Ibid [148]–[150].

30. Ibid [470] & [479]. Steytler P dissented because he did not consider it was possible to conclude in this case that every possible act that may have caused death was an act of such a nature as to be likely to endanger life: at [122]–[123]. The accused appealed to the High Court but on 9 February 2007 the High Court refused leave to appeal from the decision of the Court of Criminal Appeal: see *Macartney* [2007] HCA Trans 55. Kirby J stated there was no error by the Court of Appeal and there did not appear to be any miscarriage of justice.

31. The unlawful purpose is not restricted to the strict elements of a particular offence and therefore 'an act done in the course of attempting to get away after the commission of an offence would be an act done for an unlawful purpose': see *Macartney* [2006] WASCA 29, [112] (Steytler P). See also *Georgiou; ex parte Attorney General (Qld)* [2002] QCA 206 [53] where the Queensland Court of Criminal Appeal also observed that the words 'unlawful purpose' in the equivalent section under the Queensland Code are not the same as 'an offence', and therefore trying to get away after committing an offence would be included within the meaning of an unlawful purpose.

32. (1951) 84 CLR 170.

33. Ibid 174–75 (emphasis added). In this case the accused had killed the deceased by repeatedly punching her. The court held that the assault could not constitute both the dangerous act and the unlawful purpose. See also *Gould & Barnes* [1960] Qd R 283, 292 (Philip J).

34. (1974) 134 CLR 426.

35. Ibid 430 (McTiernan ACJ).

36. Ibid 440 (Gibbs J; Menzies and Mason JJ concurring).

37. For further discussion of the defence of accident see Chapter 4, 'Unwilled Conduct and Accident'.

38. It should also be noted that the defence under the first limb of s 23 (that the act occurred independently from exercise of the will of the accused) may also be available in felony-murder cases. An accused would not be criminally responsible for murder if the act (which was of such a nature as to be likely to endanger life) occurred independently from the exercise of the accused's will.

39. (1983) 8 A Crim R 410.

40. Ibid 414 (Burt CJ; Olney J concurring).

has been noted in a number of cases, namely that the defence of accident may apply to a case that would otherwise fall within s 279(2) of the Code.

In *Stuart*,⁴¹ the majority of the High Court observed that the defence of accident may alleviate the potential harshness of the equivalent felony-murder provision under the Queensland Code.⁴² Therefore, in order for the defence of accident to apply it must be possible to find that an act was likely to endanger life, but at the same time conclude that death was not reasonably foreseeable by an ordinary person in the position of the accused. In *Hind & Harwood*,⁴³ Fitzgerald P stated that it is necessary to consider the interaction of s 302(2) of the Queensland Code (equivalent to s 279(2) of the Western Australia Code) and the defence of accident.⁴⁴ He noted that the felony-murder provision under s 302(2)

requires only that the act be 'likely to endanger human life', not that it be likely to cause death ... It is presumably for that reason that, in some circumstances, an ordinary person might reasonably not have foreseen death as a consequence of an act although the act was of such a nature as to be objectively likely to endanger human life; ie, to place human life in danger.⁴⁵

In *Fitzgerald*,⁴⁶ the Queensland Court of Criminal Appeal again considered the interaction of the defence of accident with the equivalent felony-murder rule under the Queensland Code. In this case the accused pointed a loaded gun at the deceased's head at close range during the course of an armed robbery. The weapon was discharged and the accused claimed that he had not intended to kill or harm the deceased but had only meant to scare her. McPherson JA observed that in the context of the facts of this case it was very difficult to see how the defence of accident could operate to excuse the accused of murder. The act of pointing the weapon at the deceased without the safety catch on was clearly an act of such a nature as to be likely to endanger life. McPherson JA stated that once the weapon was discharged it was 'practically

inevitable that death would be caused' and therefore there was no basis for arguing that death was not reasonably foreseeable.⁴⁷

In *Macartney*,⁴⁸ Roberts-Smith J stated that there is a difference between an act of such a nature as to be likely to endanger human life and the whether an act was 'likely to cause death'.⁴⁹ He further stated that the relevant act under s 279(2) must be 'one which will probably or apparently expose the victim's life to risk, or put in peril'. He said:

[I]t can be seen that the statutory expression related the 'likelihood' not to the causing of death, but to the putting of life in danger. An act may be likely to be dangerous to life without be likely to cause death ... The danger may be real (and likely), simply because, objectively, death is a reasonable possibility, even though in itself not likely.⁵⁰

Despite the cases suggesting that the defence of accident under s 23 is applicable to felony-murder under the Code, the Commission is not aware of any case where the defence of accident has been successfully relied on as a defence to murder under s 279(2). In most cases of felony-murder (such as discharging or using weapons while committing an offence) the act will be of such a nature as to be likely to endanger life and if death results it will be reasonably foreseeable. However, as discussed below, examples have been given where it is considered unfair that an accused is convicted of murder in the absence of proof that the accused intended to cause death or do grievous bodily harm.⁵¹ In such cases the defence of accident may be available in circumstances where a jury determines that objectively the relevant act was likely to endanger life but that an ordinary person in the same circumstances would not have foreseen that death might actually occur. The following example illustrates how the defence of accident might be applicable even if the death-causing act is objectively of such a nature as to be likely to endanger life.

41. (1974) 134 CLR 426.

42. *Ibid* 438 (Gibbs J; Menzies and Mason JJ concurring). In this particular case it was held that death was reasonably foreseeable and therefore the defence of accident did not provide an excuse.

43. (1995) 80 A Crim R 105 (Qld CCA).

44. *Ibid* 112.

45. *Ibid* 113–14. However, in the circumstances of this case Fitzgerald P held that 'an ordinary person would reasonably have foreseen that there was a real possibility' that the act of pointing the rifle at the deceased without the safety catch on would cause death.

46. (1999) 106 A Crim R 215.

47. *Ibid* 220–21 (McPherson JA; Davies JA and White J concurring). McPherson JA noted that there was binding authority that the defence of accident could operate in conjunction with the felony-murder provision (*Stuart* (1974) 134 CLR 426) but there was no scope for the defence to apply in this case.

48. [2006] WASCA 29.

49. *Ibid* [459].

50. *Ibid* [470].

51. See below, 'Subjectivity Principle'.

Example

A is committing an armed robbery in a bank. After seeing a security guard approach, A attempts to escape. While running away A trips and stumbles over B who is lying on the ground. A falls onto B and the force of A's body weight on B's chest and neck prevents B from breathing, causing his death.

The act that causes death in the example above is an act of such a nature as to be likely to endanger life. However, it is arguable that an ordinary person in A's circumstances would not have reasonably foreseen the death of B.⁵²

THE FELONY-MURDER RULE IN OTHER AUSTRALIAN JURISDICTIONS

A form of felony-murder exists in all Australian jurisdictions other than the Northern Territory,⁵³ the Australian Capital Territory⁵⁴ and the Commonwealth.⁵⁵ In each jurisdiction where it exists the felony-murder rule is statutory.⁵⁶ Some of these statutory provisions have restricted the scope of the felony-murder rule by limiting the offences to which it applies. For example, s 18(1)(a) of the *Crimes Act 1900* (NSW) provides that a person is guilty of murder if the act or omission causing death is done 'in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years'.⁵⁷ The rule in Western Australia is not so restrictive and applies to any unlawful purpose. However, the provision in New South Wales is also wider than the rule in Western Australia

because the conduct causing death need only be done at the same time or soon after the commission of the other offence. In Western Australia the act that causes death must be done in the prosecution of the unlawful purpose. Further, under the New South Wales provision it is not necessary that the act or omission causing death was dangerous. It has been observed that the rule in New South Wales is

capable of working even more capriciously than the felony-murder rule at common law by reason, first, of its arbitrary attachment to crimes punishable with penal servitude for life regardless of the degree of personal danger involved in the crime in question, and secondly, of its extension to acts committed after the incidental crime.⁵⁸

For example, under the New South Wales provision an accused could be convicted of murder because the victim of an aggravated sexual assault tripped over while trying to escape and died after she fell and knocked her head on a sharp object.⁵⁹

Similarly, the felony-murder rule in Victoria is restricted by specifying the type of offences that come within its scope. Section s 3A of the *Crimes Act 1958* (Vic) replaces the common law felony-murder rule in Victoria. The statutory rule under s 3A(1) replaces the term 'felony' with a crime which includes an element of violence and has a penalty of life imprisonment or imprisonment for 10 years or more. In *Butcher*,⁶⁰ the Full Court of the Victorian Supreme Court stated that the difference between s 3A of the *Crimes Act 1958* (Vic) and felony-murder at common law is that the former is restricted to a specified class of offences, namely those with an element of violence and with the prescribed penalty.⁶¹ It was further stated that the rule under s 3A only applies to an offence with violence as an

52. A would still be guilty of the underlying offence of armed robbery. It is also important to note that the defence of accident under s 23 is subject to the express provisions of the Code dealing with negligent acts and omissions. If the provisions dealing with negligent acts and omissions are applicable criminal responsibility is not determined by reference to s 23 of the Code: see *Ugle* [2002] HCA 25, [24] (Gummow and Hayne JJ), [55] (Kirby J). See also *Stevens* [2005] HCA 65, [67] (Kirby J).
53. In December 2006 felony-murder was abolished in the Northern Territory: see *Criminal Reform Amendment Act (No 2) 2006* (NT) s 17. During the second reading speech of the *Criminal Reform Amendment Act (No 2) 2006* the Northern Territory Attorney General, Dr Toyne, explained that the felony-murder provisions were being abolished because to 'equate an accidental killing with murder is directly contrary to the fault-based approach to determining culpability. In the absence of intention or recklessness where the death is truly accidental, the government considers that it is not appropriate or just for a person to be convicted of murder': see Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 August 2006 (Dr Toyne, Attorney General and Minister for Justice).
54. See *Crimes Act 1900* (ACT) s 12.
55. See *Criminal Code* (Cth) s 71.2 for the definition of murder of a UN or associated person.
56. *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Code* (Qld) s 302(1)(b)–(d); *Criminal Law Consolidation Act 1935* (SA) s 12A; *Criminal Code* (Tas) s 157(1)(c); *Crimes Act 1958* (Vic) s 3A.
57. Examples of such offences under the *Crimes Act 1900* (NSW) are aggravated sexual assault in company which has a maximum penalty of life imprisonment (s 61JA(1)); sexual intercourse with a child under the age of 10 years which has a maximum penalty of 25 years' imprisonment (s 66A); kidnapping aggravated by causing bodily harm which has a maximum penalty of 25 years' imprisonment (s 86(3)); robbery aggravated by wounding which has a maximum penalty of 25 years' imprisonment (s 96); and robbery aggravated by being armed with a dangerous weapon which has a maximum penalty of 25 years' imprisonment (s 92).
58. Fisse B, *Howard's Criminal Law* (Sydney: Law Book Company, 5th ed., 1990) 76.
59. Assuming that a jury was satisfied that the accused substantially contributed to the victim's death (and therefore causation was established).
60. [1986] VR 43.
61. *Ibid* 50.

element and does not 'apply simply because the particular crime committed was in fact one which was committed violently'.⁶² Importantly, for the purpose of comparison with Western Australia, there is no requirement that the death must have been caused by a violent or dangerous act.

In contrast, rather than specifying the nature of the unlawful purpose, the provisions in Western Australia and Queensland confine the operation of felony-murder to death caused by a dangerous act.⁶³ In South Australia the felony-murder is limited in terms of the offences listed as well as the nature of the act that causes death. Section 12A of the *Criminal Law Consolidation Act 1935* (SA) provides that it is murder if a person causes the death of another by an 'intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more'.⁶⁴

Section 157(1)(c) of the Tasmanian Code provides that culpable homicide is murder if it is committed by means of 'an unlawful act or omission' and the accused knew or ought to have known that the act or omission was likely to cause death. Like other felony-murder provisions, this section applies even though the accused did not intend to kill or do grievous bodily harm to any person or even foresaw that such harm may arise. It is sufficient if the accused 'ought' to have known that the conduct was likely to cause death.⁶⁵ In *Boughey*,⁶⁶ the majority of the High Court held that whether the accused ought to have known that the conduct was likely to cause death is determined by reference to the personal characteristics of the accused and not a hypothetical reasonable person. Thus it was observed that the test is still subjective.⁶⁷ The felony-murder provision in Tasmania is in one sense very broad because it applies when a person is killed by any unlawful act or omission. It does not require that the act which caused death was done for a further separate unlawful purpose. However, its scope is restricted by the

requirement that the accused must have known or ought to have known that the conduct was likely to cause death.

The essence of felony-murder in all jurisdictions is that death is caused while the accused is committing an offence. Unlike other jurisdictions the felony-murder rule in Western Australia is not restricted by specifying the type of offences to which the rule can apply. In Western Australia any unlawful purpose is sufficient. However, the Commission is of the view that s 279(2) of the Code (and the equivalent provision under the Queensland Code) are arguably the most restrictive felony-murder provisions in Australia because it is necessary for the prosecution to prove beyond reasonable doubt that the accused caused the death by conduct that was objectively life-threatening.

ARGUMENTS IN FAVOUR OF ABOLISHING FELONY-MURDER

Felony-murder provisions are unnecessary

The Commission received four submissions asserting that the felony-murder rule is unnecessary because s 7 and s 8 of the Code adequately cover circumstances that would fall within the provisions of s 279(2).⁶⁸ For example, the Aboriginal Legal Service stated that:

Deaths which occur in the context of the commission of another criminal offence should only attract liability as homicides if the conduct falls within ss 7 and 8 of the *Criminal Code*.⁶⁹

Sections 7 and 8 of the Code mainly deal with attributing criminal responsibility when more than one person is involved in the commission of an offence. Section 7(a) of the Code simply provides that the person who did the relevant act or omission is guilty of the offence. The remaining provisions of s 7 explain how another person who did not actually do

62. Ibid 51.

63. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 61. The provisions in relation to felony-murder in Queensland are identical to the provisions under the Code in Western Australia: see *Criminal Code* (Qld) s 302 (1)(b)–(d).

64. Section 5 of the *Summary Procedure Act 1921* (SA) defines a minor indictable offence as an offence with a penalty of five years' imprisonment or less (although there are a number of specified exceptions). A major indictable offence is any indictable offence that is not a minor indictable offence: see s 4(1).

65. Sections 157(1)(d) provides that it is murder if the accused caused death 'with an intention to inflict grievous bodily harm for the purpose of facilitating the commission' of a specified number of crimes or for the purpose of 'facilitating the flight of the offender'. Although this provision is in one sense a felony-murder rule because it relates the death being causing during the commission of a serious offence, it also requires proof of an intention to cause grievous bodily harm. An intention to cause grievous bodily harm is not in itself sufficient to establish murder in Tasmania. On the other hand, an intention to cause bodily harm coupled with knowledge that death was a probable consequence is defined as murder under s 157(1)(b) of the Tasmanian Code. Sub-sections 157(1)(e) and (f) are similar to Western Australia's provisions dealing with administering a stupefying thing or wilfully stopping the breath of any person. In both these cases the conduct must be done for the purpose of committing one of the specified offences or facilitating the flight of the offender in relation to one of those specified offences. New Zealand has similar felony-murder provisions: see *Crimes Act 1961* (NZ) ss 167 & 168.

66. (1986) 65 ALR 609.

67. Ibid 622 (Mason, Wilson and Deane JJ).

68. Law Society of Western Australia, Submission No. 37 (4 July 2006) 3; Michael Bowden, Submission No. 39 (11 July 2006) 2; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 3; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2.

69. Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2.

the relevant act or make the relevant omission can be held criminally responsible for committing the offence. Section 7 states that:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aids another person in committing the offence;
- (d) Any person who counsels or procures any other person to commit the offence.

Section 8 of the Code determines criminal responsibility when two or more people have a common intention to commit one offence and a further or different offence is actually committed. Section 8 provides that:

- (1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.
- (2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person —
 - (a) withdrew from the prosecution of the unlawful purpose;
 - (b) by words or conduct, communicated the withdrawal to each other person with whom the common intention to prosecute the unlawful purpose was formed; and
 - (c) having so withdrawn, took all reasonable steps to prevent the commission of the offence.

Under s 8 of the Code an accused may be held criminally responsible for the further offence even though he or she did not intend for that offence to be committed and was not even aware that such an offence may be

committed. Criminal liability is determined objectively. If the further or different offence is a probable consequence of the original plan, the accused is criminally responsible. In *Brennan*,⁷⁰ Starke J stated that:

A probable consequence is, I apprehend, that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act; though it may be that the particular consequence is not intended or foreseen by the actor.⁷¹

Example

If three accused planned to commit a robbery on a bank while armed with loaded guns and also agreed that the weapons would be used to frighten anyone who stood in their way, each accused could be held criminally responsible for the probable consequences of carrying out their plan. So, if one accused deliberately shot a customer who tried to call for help, the other two accused might be convicted of wilful murder or murder even though neither fired the weapon or intended to harm anyone. It is not necessary under s 8 for the prosecution to prove that either of the two accused were aware that death may result in the circumstances.⁷²

Section 8 of the Code is similar to felony-murder because both attribute criminal responsibility without the requirement to prove a subjective state of mind on the part of the accused. While each provision is comparable in this manner they are not identical. Section 8 applies when there are two or more involved in an unlawful purpose but s 279(2) may apply when there is only one accused. It is also important to note that s 8 and s 279(2) may operate together. If two accused formed a common intention to commit an offence and one of them caused death by an act of such a nature as to be likely to endanger life (as required by s 279(2)) then the second accused may also be guilty of murder under s 279(2) if the nature of the act was a probable consequence of carrying out the original crime.⁷³

70. (1936) 55 CLR 253.

71. Ibid 260–61. In *Darkan* the court held that the meaning of 'probable consequence' in s 8 (and s 9) of the Queensland Code is that 'the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen': *Darkan* [2006] HCA 34, [78] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

72. At common law the position is different. The doctrine of extended common purpose requires proof that the accused was actually aware of the *possibility* that the further offence would be committed: see *Clayton* [2006] HCA 58, [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). The majority of the High Court in *Darkan* observed that the law has developed different methods for ensuring that criminal liability for accessories is kept 'within just limits': *Darkan*, ibid [76] (Gleeson CJ, Gummow, Heydon and Crennan JJ), [125] (Kirby J). The common law requires subjective foresight of the possibility of the further offence being committed, while under the Code the offence committed must have been objectively probable (rather than possible).

73. *Stuart* (1974) 134 CLR 426, 441 (Gibbs J; Menzies and Murphy JJ concurring). The decision of Gibbs J was approved by the Western Australian Court of Criminal Appeal in *Seiffert* (1999) 104 A Crim R 238, 247–48 (Pidgeon J; Kennedy and White JJ concurring).

In *Alexanderson*,⁷⁴ MacRossan CJ observed that the equivalent felony-murder provisions under the Queensland Code

attribute responsibility for murder to persons who may not be acting out of any particular ill-will directed at the victim of their actions ... Offenders in this category take the risk of being caught by this result because of their participation in the activity. The philosophy adopted in these subsections of 302(1) is reflected in the scheme embraced by s 8 and it provides some encouragement for thinking that the words there found, which can attribute to an accessory a criminal responsibility identical with that of the principal actors, were deliberately chosen.⁷⁵

The effect of s 8 and s 279(2) of the Code may be to attach criminal responsibility for murder in circumstances where the accused did not intend to kill or harm the deceased. In both cases the underlying rationale appears to be the same.⁷⁶ Those who kill unintentionally while engaging in dangerous criminal behaviour are more blameworthy than those who unintentionally kill while engaging in lawful behaviour. Despite the similarities and overlap between the provisions of s 8 and s 279(2), the Commission does not agree with the submission that s 279(2) is unnecessary. If s 279(2) was repealed, a single accused who unintentionally caused the death of another by an act likely to endanger life during the commission of a crime would be guilty of manslaughter. However, where there were two or more accused engaged in a criminal purpose one of the accused could be convicted of murder even though he or she did not intend to kill or harm the

deceased. Section 279(2) is necessary for the purpose of attributing criminal responsibility where there is only one accused.

Subjectivity principle

The main objection to the felony-murder rule is that it does not require proof of a subjective blameworthy state of mind.⁷⁷ Numerous law reform bodies have recommended that the felony-murder rule should be abolished and have relied on the lack of a specific mental element in support of this conclusion.⁷⁸ When examining the felony-murder provisions under the Canadian Criminal Code,⁷⁹ the Supreme Court of Canada observed that it is a 'fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally'.⁸⁰ Thomas Crofts has recently argued that:

If death is accidental in the sense that it is not foreseen by the offender, then it should not constitute the same offence as an intentional infliction of life threatening harm with resulting death.⁸¹

The Commission has received a number of submissions supporting the repeal of the felony-murder rules under the Code.⁸² Three of these submissions emphasised that an accused should not be convicted of murder in circumstances where the accused did not intend to kill or do grievous bodily harm and was not even aware that death was possible.⁸³

74. (Unreported, Queensland Court of Criminal Appeal, Nos. 369, 367, 379 & 356 of 1994, MacRossan CJ, 8 March 1996).

75. *Ibid* 24 (MacRossan CJ)

76. It has been suggested that the severity of the extended common purpose rule at common law might be justified in the same way as constructive murder provisions: see Leader-Elliott I, 'Fault Elements in Murder – A Summary of Australian Law' in Law Commission (England and Wales), *The Law of Murder: Overseas comparative studies* (2005) 20.

77. See eg Fisse B, *Howard's Criminal Law* (Sydney: Law Book Company, 5th ed., 1990) 70–71; Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 50. Crump and Crump observed that the critics of the felony-murder rule have focused on *mens rea* as the 'only legitimate determinant of the grade of a homicide resulting from a felony': see D Crump & SW Crump, 'In Defense of the Felony Murder Doctrine' (1985) *Harvard Journal of Law and Public Policy* 359, 366.

78. See Law Reform Commissioner of Victoria, *Law of Murder*, Report No. 1 (1974) [40]; Criminal Code Review Committee, *Final Report of the Criminal Code Review Committee to the Attorney General* (1992) 194; MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 63–64; Law Reform Commission of Canada, *Homicide*, Working Paper No. 33 (1984) 49–50. Yeo noted that the South Australian Criminal Law and Penal Methods Reform Committee recommended in 1977 that felony-murder should be abolished because it required no mental element at all: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 93. Even the Murray Review (which recommended that s 279(2) of the Code should be retained) observed that if 'the primary distinction between the offences of wilful murder and murder and other unlawful killings is taken to be the intent of the killer, then it is certainly clear that there is no logical justification for the retention of [s 279 (2)]': see Murray MJ, *The Criminal Code: A general review* (1983) 173.

79. Following a series of Canadian cases the felony-murder provisions under the Canadian Code that do not require a minimum of subjective awareness of death are no longer operative: see *Vaillancourt* [1987] 2 SCR 636; *Martineau* [1990] 2 SCR 633 [13] (Lamer CJ; Dickson CJ; Wilson, Gonthier and Cory JJ concurring); *Meiler* (1999) 136 CCC (3d)11, [53]; see also Holland W, 'Murder and Related Issues: An analysis of the law of Canada' in Law Commission (England and Wales) *The Law of Murder: Overseas comparative studies* (2005) 7.

80. *Martineau*, *ibid* [12] (Lamer CJ; Dickson CJ; Wilson, Gonthier and Cory JJ concurring).

81. Crofts T, 'Wilful Murderers in Western Australia: Soon to get away with murder?' (2006) 31 *Alternative Law Journal* 203, 204.

82. Paul Ritter, Submission No. 4 (29 May 2006) 1; Alexis Fraser, Submission No. 30 (15 June 2006) 15; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 6; Law Society of Western Australia, Submission No. 37 (4 July 2006) 3; Michael Bowden, Submission No. 39 (11 July 2006) 2; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 3; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2; Department for Community Development, Submission No. 42 (7 July 2006) 4; Angelhands, Submission No. 47 (3 August 2006) 1. The Commission notes that the last two of these submissions did not provide any reason in support of their view that felony-murder should be abolished.

83. Paul Ritter, Submission No. 4 (29 May 2006) 1; Alexis Fraser, Submission No. 30 (15 June 2006) 15; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 6. Crofts recently reiterated his view that felony-murder should be abolished: Crofts T, 'Wilful Murder, Murder – What's in a Name?' (2007) 19(1) *Current Issues in Criminal Justice* 49, 57.

Examples have been cited in support of the contention that it would be unfair to convict an accused of murder in the absence of a specific mental element. The MCCOC stated that:

A prisoner fires a warning shot in the night well over the heads of pursuing prison officers but the bullet hits a guard who is out of sight and positioned on the roof of a building. The activity is clearly dangerous and against the public interest, however, manslaughter ... is a far more appropriate charge, not murder.⁸⁴

Under s 279(2) of the Code it would be necessary to prove that the firing of a warning shot over the heads of the prison officers was an act of such a nature as to be likely to endanger life. A jury would probably find that such an act was likely to endanger life. However, under s 23 of the Code it would also be necessary for the prosecution to prove beyond reasonable doubt that death was reasonably foreseeable in all of the circumstances. Assuming the accused did not know that the officer was on the roof of the building it is arguable that an ordinary person in the position of the accused would not have reasonably foreseen that the firing of the weapon would have caused the death of the officer.

The Law Reform Commission of Victoria noted that a punch or a push (inflicted during the commission of a crime) causing a victim to fall over and hit his or her head on the pavement would amount to murder.⁸⁵ In Western Australia it would be unlikely that such an example would constitute murder under s 279(2) of the Code. First, the prosecution would have to prove beyond reasonable doubt that a punch or push was an act of such a nature as to be likely to endanger life. Even if this element was proved beyond reasonable doubt the accused might rely on the defence of accident to argue that death was unforeseeable in the circumstances.

What the above examples demonstrate is that in Western Australia the severity of the felony-murder rule is diminished by the strict requirement that the act causing death must have been likely to endanger life coupled with the availability of the defence of accident. In 1977 the South Australian Criminal Law and Penal Methods Committee observed that punishing as murder a killing that takes place during the commission of a felony such as rape, arson or escaping

from jail is not rational because these types of crimes do 'not necessarily entail any danger to life'.⁸⁶ In 1974 the Law Reform Commissioner of Victoria strongly criticised the felony-murder rule and argued that the rule turns an accidental death into murder even though no one would have realised there was any danger to life.⁸⁷ The Western Australia provision is not open to these criticisms.

Critics of the felony-murder rule have suggested that the rule would be less objectionable if there was a requirement to prove that the accused was aware that death was a possible or probable consequence of the accused's conduct.⁸⁸ Underlying this suggestion is the view that a subjective mental element, such as foresight or awareness, demonstrates greater culpability than an objective assessment of the degree of risk. For example, on this basis it would be argued that an accused who was actually aware that firing a gun in a crowded location was likely to endanger life is more morally culpable than an accused who fired the gun in the same circumstances but was not aware that such an act was dangerous to life. As the Commission noted earlier, the failure to appreciate a risk of death may be just as morally culpable as actual awareness. It has been stated that:

[T]he callousness, ruthlessness and selfishness exhibited by such a failure may well be morally worse than the behaviour of someone who regretfully takes a calculated risk and does all he can to minimize that risk.⁸⁹

The following examples illustrate the point.

Example

A enters a bank in order to commit a robbery. A is armed with a shotgun and as he enters he shouts out to all who are present to lie down with their heads on the ground. A then fires a warning shot in the air to make it clear that any resistance will be met with severe repercussions. Despite the warning to lie down, a man stands up at the same time that A fires the warning shot and is killed. When A fired the warning shot he was aware that death was likely, but tried nevertheless to prevent it.

84. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 63.

85. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [145].

86. South Australian Criminal Law and Penal Methods Committee, *The Substantive Criminal Law*, Fourth Report (1977) 15, as cited in Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 93.

87. Law Reform Commissioner of Victoria, *Law of Murder*, Report No. 1 (1974) [40].

88. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 263; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 6.

89. Gordon G, 'Subjective and Objective Mens Rea' (1975) 17 *Criminal Law Quarterly* 355, 384.

Example

In comparison, B enters a bank to commit a robbery and fires a shot to frighten the customers and staff but does not first warn them to lie down. Again a person is killed. B claims that he did not even think about whether his conduct might cause death because he was only thinking at the time about how much money he would get.

It is certainly arguable that it would not be just for A to be guilty of murder but B to be convicted of manslaughter. The awareness of the consequences or lack thereof at the relevant time does not sufficiently distinguish the moral culpability of A and B.

ARGUMENTS IN FAVOUR OF RETAINING FELONY-MURDER

Moral culpability is equivalent to intentional murder

The principal argument in favour of the felony-murder rule is that the existence of an unlawful purpose ‘magnifies the wrongfulness of the killing’.⁹⁰ The Commission received a number of submissions in support of retaining the felony-murder rule.⁹¹ Justice Miller, Justice McKechnie and the DPP emphasised that the rule should be retained because of the seriousness of the conduct involved.⁹² Justice McKechnie explained that although the ‘criminality’ of felony-murder is different to intentional murder it requires the same degree of punishment.⁹³ The following case example supports this view.

In *Mills*,⁹⁴ the accused went to a liquor store (in company with another person) armed with a shotgun with the intention of committing an armed robbery. The accused

pointed the shotgun at the deceased while demanding money. The trial judge found that the shotgun discharged when the accused pulled the trigger ‘in the excitement or panic of the moment when, in an agitated and nervous state, he was endeavouring to persuade the deceased to hand over the contents of the cash register’.⁹⁵ The accused appealed against his sentence of a minimum term of 16 years’ imprisonment with an additional term of seven years’ imprisonment. The accused argued that the sentence was excessive and the main ground of appeal was that felony-murder involved less culpability than cases of murder involving intention to kill or an intention to cause grievous bodily harm.⁹⁶ All three judges of the New South Wales Court of Criminal Appeal rejected this argument. Gleeson CJ stated that ‘it would be difficult to select a better case than the present for the purpose of demonstrating its falsity’.⁹⁷ He further emphasised that the accused used a loaded weapon in close proximity to the deceased for the purpose of obtaining a few hundred dollars and accordingly the offence was very serious.⁹⁸

There are very few reported or unreported appeal cases dealing with felony-murder in Western Australia.⁹⁹ Nevertheless, some recent Western Australian cases where the accused was convicted of murder under s 279(2) of the Code demonstrate the seriousness of the conduct. In *Birks*,¹⁰⁰ the accused was convicted of arson and murder after deliberately lighting a fire in an accommodation unit at a hotel. A man staying in a nearby unit was killed in the fire. In *Macartney*,¹⁰¹ the accused caused the death of his victim after abducting and sexually assaulting her and placing tape around her mouth.

The recent case of *Arthurs*¹⁰² is a pertinent example of the extremely serious moral wrongdoing involved in felony-murder cases. On 17 September 2007 the accused pleaded guilty to the murder of an eight-year-old girl in a suburban shopping centre toilet. The accused was originally charged

90. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.9].
 91. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 2; Women Justices’ Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 1; Festival of Light Australia, Submission No. 16 (12 June 2006) 2; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 2–3.
 92. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (9 June 2006) 2; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 2–3.
 93. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 2.
 94. (Unreported, New South Wales Court of Criminal Appeal, No. 60306 of 1994, 3 April 1995).
 95. *Ibid* 1 (Cole JA).
 96. *Ibid* 3 (Cole JA), 4 (Gleeson CJ).
 97. *Ibid* 4 (Gleeson CJ).
 98. *Ibid*. This decision was approved in *Robinson* [2001] NSWCCA 180, [12] (Meagher JA).
 99. Because transcripts of proceedings are not publicly available the Commission is not aware of the number of offenders who have been convicted of or pleaded guilty to murder on the basis of s 279(2) of the Code.
 100. [2007] WASCA 29.
 101. [2006] WASCA 29.
 102. (Transcript of Proceedings, Supreme Court of Western Australia, No. 166 of 2006, McKechnie J, 17 September 2007).

with wilful murder; however, the DPP accepted a plea to murder.¹⁰³ According to the transcript of proceedings, this decision was made on the basis that there were no 'reasonable prospects of a conviction for wilful murder'. In particular, there was insufficient evidence to prove that the accused intended to kill.¹⁰⁴ This case has caused significant public debate, particularly about the appropriateness of the distinction between wilful murder and murder.¹⁰⁵ However, according to the transcript of proceedings the accused pleaded guilty to murder on the basis of the felony-murder provision under the Code.¹⁰⁶ This provision does not require proof of an intention to kill or cause grievous bodily harm. While it is presently impossible to know if the prosecution could have proven that the accused intended to cause grievous bodily harm, this case clearly supports the view that the felony-murder rule captures highly culpable conduct.

Felony-murder and recklessness

In 1991 the Law Reform Commission of Victoria observed that those who support the retention of felony-murder are concerned about cases where an accused has 'shown wilful disregard for the lives of others'.¹⁰⁷ Because recklessness is a separate mental element for murder in Victoria it concluded that felony-murder should be abolished.¹⁰⁸ However, recklessness is not in itself sufficient to constitute the mental element of murder in Western Australia. The Commission considers below whether recklessness should be a separate mental element of murder. There is a significant overlap between those cases that fall within the concept of recklessness and those cases that fall under the felony-murder rule.¹⁰⁹ The Commission notes that most of the examples used to justify the need for recklessness would also fall within the scope of felony-murder in Western Australia.

Those who favour recklessness often do so because it adheres to the subjectivity principle.¹¹⁰ For example, an accused can only be found to have been reckless about death if he or she was actually aware that death would probably result. The Commission has already indicated its view that the failure to appreciate or think about the consequences of one's actions may be just as blameworthy as actual awareness of those consequences.¹¹¹ As one commentator has stated:

[T]he requirement of foresight in reckless indifference offers nothing of intrinsic moral value to the notion of unjustified and inexcusable risk-taking which inadvertence due to rage, lust, fear, intoxication does not also add. It is unrealistic, in the heat-of-the-moment contexts in which the commission of serious crime typically involve, that the defendant's attitude will be expressed otherwise than in his action. Rapists do kill their victims by mistake. It is a risk implicit in the highly-charged context which rapes and their aftermath typically involve; similarly with armed robbery and kidnap.¹¹²

The Commission is of the view that recklessness in the absence of felony-murder will not necessarily capture all the cases of unintentional killing where the degree of moral blameworthiness is so serious that the accused should be convicted of murder.

Policy considerations

Despite extensive criticism of the felony-murder rule it remains in force in a number of jurisdictions. The MCCOC observed that the community is generally unsympathetic to people who kill during the course of committing a criminal offence.¹¹³ In relation to s 279(2) of the Code, the Murray Review concluded that 'although logic may be against the retention of the rule, policy considerations are to the contrary'.¹¹⁴ It was observed that, if a person has deliberately engaged in conduct that is likely to endanger life for a criminal purpose and has in fact caused the death

103. Two counts of sexual penetration of a child under the age of 13 years were discontinued because there was a 'reasonable possibility that [the victim] had been sexually penetrated by the offender after she had passed away': *ibid* 137.

104. *Ibid* 136.

105. See for example, Gibson R, 'Police Bungle May Have Cost Little Sofia her Life,' *The West Australian*, 18 September 2007, 1 where it was reported that the DPP said there was insufficient evidence to establish that the accused killed the victim "with an intention to kill her as opposed to an intention to inflict serious injury".

106. Counsel for the accused stated that 'the plea in relation to count 1, that of murder, is entered pursuant to section 279 (2) of the Criminal Code, and that the director has acknowledged that the plea is entered on that basis': (Transcript of Proceedings, Supreme Court of Western Australia, No. 166 of 2006, McKechnie J, 17 September 2007) 137.

107. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [149].

108. *Ibid*.

109. Willis J, 'Felony Murder at Common Law in Australia – The Present and the Future' [1977] 1 *Criminal Law Journal* 231, 245.

110. Willis argued that recklessness is a 'more humane and civilised successor of felony-murder'. He expressed the view that cases where an accused did not know that death or grievous bodily harm was likely to occur should not be included in the category of murder: see Willis, *ibid* 245–46.

111. See above, 'Should The Nature of The Injury Continue to be Determined Objectively?'

112. Wilson W, 'The Structure of Criminal Homicide' [2006] *Criminal Law Review* 471, 481.

113. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 63.

114. Murray MJ, *The Criminal Code: A general review* (1983) 173.

of a person, the conduct is so serious as to justify a sentence of mandatory life imprisonment. Accordingly, attaching the label of murder achieves this goal.¹¹⁵

It has been argued in support of the felony-murder rule that:

Felony murder reflects a societal judgment that an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not.¹¹⁶

While this observation is clearly correct, it is more appropriate to compare an unintended death that is caused during a robbery with an unintended death that is not caused during the commission of a crime. For example, the armed robber who ‘accidentally’ kills a person after discharging a gun in order to frighten the customers at a bank would be considered more culpable than a person who discharges a gun while hunting legally and accidentally kills a bystander. Therefore, categorising as murder, rather than manslaughter, a killing that takes place during the commission of a crime enables the law to reflect the community’s view of the degree of wrongdoing and allow the punishment to reflect the seriousness of the homicide.

Deterrence

In Chapter 1 the Commission noted that in Australia during the period from 1989–1999 approximately 13 per cent of homicides took place during the course of committing another crime. The most common crime in this context was robbery.¹¹⁷ Research indicates that during the period 2004–2005 the proportion of homicides that took place during the commission of another crime increased. It was reported that during this period 24 per cent of homicide incidents took place in conjunction with another crime.¹¹⁸ Although these figures do not represent the number of homicide incidents that could be classified as felony-murder,¹¹⁹ the data demonstrate that there is a significant

proportion of homicides occurring during the course of other criminal conduct.

The MCCOC observed that one argument in support of felony-murder is deterrence.¹²⁰ However, the MCCOC argued that because felony-murder killings are unintentional and unforeseen they cannot be deterred and only the underlying crime can be deterred.¹²¹ This argument fails to recognise the significance of deterring the underlying crime. If those who decide to engage in violent criminal enterprises are aware that if they inadvertently kill someone they will be convicted of murder, this may provide a sufficient deterrent for some to decide not to engage in the criminal enterprise or to do so in a less violent and dangerous manner. If there are less violent crimes being committed there will no doubt be fewer killings as a result. It has been observed that the felony-murder rule

is attempting to deter the commission of such felonies in a dangerous or violent way. For example, a potential robber may be encouraged to use an unloaded gun, to use a club rather than a gun, to use no weapon at all; or a potential arsonist or burglar may be encouraged to make certain that a target building is unoccupied.¹²²

However, others have expressed doubts about the deterrent value of the felony-murder rule. The Law Reform Commission of Victoria noted that the felony-murder rule was not well known and therefore could have little deterrent effect.¹²³ The Law Reform Commission of Canada observed that if the death penalty does not deter, it is highly unlikely the felony-murder rule would operate as an effective deterrent.¹²⁴ The Commission is unable to express an opinion one way or another as to whether conviction and punishment under the criminal justice system is a sufficient deterrent to many prospective criminals. Accordingly, the Commission does not significantly rely upon the argument that the felony-murder rule deters unintended killings committed during the course of a criminal offence.

115. Ibid 174. While the Commission does not agree that the penalty for murder should be mandatory life imprisonment, it agrees that the conduct covered by the felony-murder rule should attract the most serious penalty under the law.

116. D Crump & SW Crump, ‘In Defense of the Felony Murder Doctrine’ (1985) *Harvard Journal of Law and Public Policy* 359, 363.

117. See Chapter 1, ‘Context in Which Homicides Usually Take Place’.

118. Mouzos J & Houliaras T, *Homicide in Australia: 2004–05 National Homicide Monitoring Program Annual Report*, (Canberra: Australian Institute of Criminology, 2006) 9.

119. The data include homicides that are the secondary crime but also homicides that are the primary crime where, for example, robbery or arson is committed after the killing.

120. The deterrence argument was also noted by the Law Reform Commission of Canada, *Homicide*, Working Paper No. 33 (1984) 48.

121. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 63.

122. CE Torcia (ed), *Wharton’s Criminal Evidence* (New York: Lawyers’ Cooperative, 14th ed., 1979) 207–208, as quoted in *R v Martineau* [1990] 2 SCR 633 [82] (L’Heureux-Dube’ J) (emphasis omitted).

123. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [148].

124. Law Reform Commission of Canada, *Homicide*, Working Paper No. 33 (1984) 49.

CONCLUSION

The Commission acknowledges that the majority of submissions were in favour of abolishing the felony-murder provisions under the Code. However, a significant proportion of those favouring repeal indicated that they did not consider felony-murder was necessary because of the provisions of s 7 and s 8 of the Code. As the Commission has explained, this argument is misconceived. In the absence of the felony-murder rule under s 279(2) of the Code an anomaly would arise. If two or more accused were involved in committing an offence together and one accused intentionally caused the death of a person, each of the other accused may be convicted of murder in the absence of proof of any subjective mental element. However, if one accused caused the death of person during the commission of an offence he or she would always be convicted of manslaughter if there was no proof of an intention to kill or cause an injury of such a nature as to be likely to endanger life.

The Commission accepts that in theory under s 279(2) a person may be convicted of murder even though he or she was not aware that the conduct was likely to endanger life. However, in most cases where a jury finds that the

act was objectively likely to endanger life the accused would (or should) have been aware of the dangerous nature of the conduct. Typical cases of felony-murder are death caused by unintentional shooting during a robbery or death caused as a result of arson. In each case it is difficult to imagine that anyone would not be aware that pointing a loaded gun at a person or lighting a fire where people are situated is likely to endanger human life. As discussed above, the failure to appreciate or think about the dangerous consequences of one's actions does not necessarily indicate less culpability.

The Commission has concluded that s 279(2) of the Code should be retained. Many of the criticisms of the felony-murder rule do not apply to the law in Western Australia. It has been stated that the most appropriate way to limit the felony-murder rule is to require that death is caused by an act 'clearly dangerous to human life'.¹²⁵ Because s 279(2) requires that death is caused by an act of such a nature as to be likely to endanger life and because the defence of accident may operate to excuse such a killing if death was not reasonably foreseeable in the circumstances, the Commission is satisfied that the felony-murder rule is appropriate.

125. D Crump & SW Crump, 'In Defense of the Felony Murder Doctrine' (1985) *Harvard Journal of Law and Public Policy* 359, 397.

Intention and Recklessness

As explained in Chapter 1 some offences under the Code contain a mental element which must be proved beyond reasonable doubt before the accused can be held criminally responsible.¹ In Western Australia the mental element for wilful murder and murder is intention; that is, either intention to kill or intention to do grievous bodily harm. In some jurisdictions the mental element for murder includes both intention and recklessness. In general terms, a person intends a result if he or she means to bring it about. As Yeo has observed, the 'core meaning of intention is one of purpose, aim or objective'.² The concept of recklessness has been described as 'an actual awareness (also referred to as knowledge or foresight) of a risk of a prohibited consequence occurring and proceeding nevertheless to take that risk'.³ In those jurisdictions where recklessness is sufficient on its own to establish the mental element of murder, an accused may be found guilty of murder if he or she foresees that death or grievous bodily harm is a probable consequence even though the accused did not intend to cause death or grievous bodily harm.

In its Issues Paper the Commission asked whether the mental element of wilful murder or murder in Western Australia should be extended to include recklessness. A secondary question was whether the mental element of murder should include only recklessness as to death or should include both recklessness as to death and grievous bodily harm.⁴ As discussed above, the Commission has concluded that the mental element of murder should be limited to an intention to cause an injury of such a nature as to endanger life or be likely to endanger life.⁵ Accordingly, there is no need to consider whether recklessness as to grievous bodily harm should be a sufficient mental element for murder.

INTENTION

Intention is not defined under the Code. In *Willmot*,⁶ it was stated that the 'ordinary and natural meaning of the

word "intends" is "to mean to have in mind".⁷ It was further observed that 'intention' is different to the concept of desire. A person may intend something but not necessarily wish or desire that it should happen.⁸ For example, a person may intend to kill his or her terminally ill partner but at the same time that person may not wish or want their partner to die. Whether an accused intended to cause death or grievous bodily harm is a subjective question which requires the jury to determine what was in the accused's mind at the relevant time. However, in *Winner*,⁹ Kirby ACJ observed that:

Because it is impossible for any court, judge or jury, to actually enter the mind of an accused person and search for his or her intent at the critical time, it is inescapable that the forensic process by which intent is judged (when it is denied) will address the objective facts from which an inference of intention may be derived. This is why it is so often said that a person's acts may provide the most convincing evidence of intention ... If it were otherwise intention, absent acknowledgment or reliable confession, could scarcely ever be proved.¹⁰

Therefore, intention may be inferred from the words and actions of the accused at the relevant time and from other surrounding circumstances.¹¹ For example, in *Stanton*,¹² the accused was convicted of the wilful murder of his estranged wife. After hiring a car, the accused went to the deceased's house and parked the car some distance away. He entered the house without warning and discharged a firearm in the direction of the deceased at close range. He subsequently left the house without offering any assistance to the deceased. The central issue at the trial was whether the accused intended to shoot the victim or merely to scare her by discharging the firearm. The accused denied that he had any intention to kill or do grievous bodily harm. The majority of the High Court concluded that there was 'ample evidence on which a jury could infer intent to kill'.¹³ It was further observed that if the jury were satisfied that the accused had meant

1. See Chapter 1, 'How Criminal Responsibility is Determined'.

2. Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 3.

3. *Ibid.*

4. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 3.

5. See above, Recommendation 4.

6. (1985) 18 A Crim R 42.

7. *Ibid* 46 (Connolly J) (Qld CCA).

8. *Ibid.*

9. (1995) 79 A Crim R 528 (NSW CCA).

10. *Ibid* 542.

11. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.7]. The Murray Review observed that the jury is not 'required to believe the incredible and that all other things being equal they may find that intent from a consideration of the nature of the accused's conduct in the context of all the surrounding factual circumstances': see Murray MJ, *The Criminal Code: A general review* (1983) 172.

12. [2003] HCA 29.

13. *Ibid* [3] (Gleeson CJ, McHugh and Hayne JJ).

to shoot the victim then his 'intent was obviously to kill' because of the nature of the weapon used and the close range from which it was discharged.¹⁴

It has been suggested that the term 'intention' does not require any precise definition and should be interpreted by reference to its ordinary meaning.¹⁵ Nevertheless, the meaning of intention for the purpose of the criminal law has been subject to extensive debate. In 1961 the House of Lords in England held that a person intends the 'natural and probable consequences of his acts'.¹⁶ Therefore, under this test, intention was judged objectively.¹⁷ This decision was widely criticised¹⁸ and the rule was legislatively abolished in England in 1967.¹⁹

Although it is now clear in both England²⁰ and Australia²¹ that intention must be judged subjectively, there are differing views about how the concept of foresight is relevant for the purpose of determining intention. Awareness or foresight of consequences is logically relevant to a person's intention. As Fairall and Yeo observed, intention necessarily involves foresight of some degree because a person cannot intend a consequence if he or she did not foresee it.²² On the other hand, foresight of a consequence does not necessarily mean that the person intended the consequence. If a person is aware that death may result from his or her conduct it is necessary to consider what degree (if any) of foresight is sufficient to ground a

conclusion that the accused must have intended to cause the result.

It has been suggested that this issue arises in cases where the purpose or aim of the accused is something other than causing death (or grievous bodily harm).²³

Example

A lights a fire in a shopping centre for the purpose of causing a disturbance so that he can rob a bank. A is aware that by lighting a fire in a shopping centre it is likely that some people could be seriously hurt or killed. But if a person died, that does not necessarily mean A intended to kill that person.

There is no difficulty in those jurisdictions where recklessness is a separate mental element for murder. However, in jurisdictions (such as Western Australia) where recklessness is not a separate mental element for murder, there are different approaches to the issue.

Intention includes recklessness

One approach is to include the concept of recklessness within the definition of intention and accordingly evidence that an accused was aware that death would probably result would be sufficient in itself to establish intention. Although this view has been expressed in some cases,²⁴ it

14. Ibid [5]. See also *Cutter* (1997) 143 ALR 498, 503. In this case the accused was arrested and placed in a police van. During the course of being forcibly removed from the police van the accused pulled out a knife and stabbed a police officer in the throat. A minor artery was severed and the wound did not in fact endanger life. However, the wound was very close to a major artery which if severed would have been life threatening. The accused was convicted of attempted murder (which requires proof of an intention to kill) after a trial before a judge alone. The majority of the High Court (Brennan CJ; Dawson and Gummow JJ concurring) held that because the accused was intoxicated and angry about his treatment by the police in the circumstances it was not possible to exclude the possibility that the accused stabbed the police officer in anger but without an intention to kill. The majority observed that, although the deliberate stabbing of the police officer in the area of the throat could support an inference of an intent to kill and it may be obvious to a reasonable person that such an action would probably result in death, the court was still required to consider what was in the accused's mind at the relevant time.
15. In *Willmot* (1985) 18 A Crim R 42, 46 Connolly J stated that there is no uncertainty in relation to the meaning of the term intention in the Queensland Code and that 'it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language'. See also *Reid* [2006] QCA 202, [67] (Keane JA).
16. *DPP v Smith* [1961] AC 290, 327.
17. It has been noted that historically in England an accused charged with murder was not entitled to give evidence. Therefore, it was necessary for a jury to be assisted by objective presumptions because there was no direct evidence about the accused's intention: see Dine J, 'Intention: History and *Hancock*' (1987) 51 *Journal of Criminal Law* 72, 73. The Commission notes that although an accused may now elect to give evidence he or she may choose not to do so and accordingly the jury will not necessarily have any direct evidence from the accused in relation to his or her intention.
18. Stanley Yeo stated that the decision in *Smith* received 'scathing criticisms from both jurists and judges': Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press 1997) 22.
19. The objective presumption was abandoned in England with the enactment of the *Criminal Justice Act 1967* (UK): see Lord Irvine of Lairg, Lord Chancellor 'Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian law of criminal culpability' (2001) 23 *Sydney Law Review* 5, 8–9.
20. Dine J, 'Intention: History and *Hancock*' (1987) 51 *Journal of Criminal Law* 72, 72; Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 23.
21. The High Court of Australia rejected the objective formulation of intention in *Parker* (1963) 111 CLR 610.
22. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 15–16.
23. Dine J, 'Intention: History and *Hancock*' (1987) 51 *Journal of Criminal Law* 72, 76.
24. In *Vallance* (1961) 108 CLR 56, 62 & 83, Dixon CJ and Windeyer J expressed the view that foresight of probable consequences is equivalent to intention under the provisions of the Tasmanian Code. However, their minority decision about the construction of the provisions of the Tasmanian Code (in particular s 13) has since been rejected by the High Court: see *Kaporonovski* (1973) CLR 209, 215 (McTiernan ACJ and Menzies J), 231 (Gibbs J; Stephen J concurring). In *Crabbe* (1985) 58 ALR 421 the High Court stated that engaging in conduct with the knowledge that death or grievous bodily harm will probably result is 'just as blameworthy' as engaging in conduct with an intention to kill or cause grievous bodily harm. The court further observed that there is some case authority for the proposition that engaging in conduct with the knowledge that death or grievous bodily harm will probably result may be 'regarded as having intended those consequences to occur'. However, the court declined to decide whether this proposition was correct.

is not now generally accepted that intention and recklessness are treated as equivalent concepts.²⁵

Intention means purpose and awareness that consequences are virtually certain to occur

This approach treats recklessness of the highest degree (that is, awareness that death or grievous bodily harm is virtually certain to occur) as equivalent to intention. Fairall and Yeo have stated that 'knowledge of the certainty of a result is for all practical purposes equivalent to intention'.²⁶ The Law Commission (England and Wales) noted that the ordinary meaning of intention (purpose or aim) is sometimes too narrow. For example, if A plants a bomb on a plane for the purpose of making an insurance claim, even if A is aware that death will certainly result, A's intention or purpose is not to kill. A's purpose is to destroy the plane. The Law Commission (England and Wales) suggested that in order to catch such an accused within the offence of murder it has been necessary to extend the meaning of intention to include foresight of virtual certainty.²⁷ The Law Commission of Ireland recommended that intention should be defined in legislation as conscious object or purpose as well as foresight of virtual certainty. It was considered necessary to cover a case where it was not an accused's purpose or object to cause death but he or she 'nevertheless foresees it as a near inevitable by-product or "virtually certain" consequence'.²⁸

Leader-Elliott has observed that whether knowledge of virtual certainty is equivalent to intention is a question yet to be determined by Australian courts.²⁹ Nevertheless, the MCCOC incorporated this concept into its definition of intention. The Model Criminal Code provides that a person has intention in relation to a result if the person 'means to

bring it about or is aware that it will happen in the ordinary course of events'.³⁰ In other words, if it was proved beyond reasonable doubt that an accused was aware that death would happen in the ordinary course of events, the accused is held to have intended to kill.

This approach has been criticised. It has been suggested that extending the concept of intention to include foresight of virtual certainty is artificial and has been done in order to ensure that particular types of killings are categorised as murder.³¹

If what we wish is to reduce the standard of criminal liability for murder, why not do so openly and call *reckless* that which it is? If we feel that terrorists and others like them should be brought within that most heinous of crimes—murder—we should reformulate the *mens rea* of murder to include recklessness.³²

Examples have also been provided to demonstrate why foresight of virtual certainty cannot always be treated as the same as intention. One example is a doctor who administers drugs to a patient for the purpose of relieving pain³³ knowing that it is inevitable that death will ultimately result. This example may well fall within the Model Criminal Code definition of intention.³⁴ Other examples mentioned include the following:

Example

Due to their religious beliefs A and B do not provide consent for a blood transfusion to be administered to C, their child.³⁵ A and B are aware (because doctors have advised them) that in the absence of a blood transfusion C will almost definitely die. If C dies it is not logical to say that A and B intended to kill her.

25. Yeo noted a few Australian cases that had included recklessness as part of the meaning of intention but he concluded that overall 'the preponderance of Australian authority is in favour of maintaining a distinction between intention and foresight of consequences in the law of murder': see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 57.
26. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 15.
27. Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [4.6].
28. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [5.15]. It has been noted that English law reform bodies have supported the extension of intention to include foresight of virtual certainty: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 31.
29. Leader-Elliott I, 'Fault Elements in Murder – A Summary of Australian Law' in Law Commission (England and Wales), *The Law of Murder: Overseas comparative studies* (2005) 4–5.
30. MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 20. This definition has recently been enacted in the Northern Territory: see *Criminal Code* (NT) s 43AI.
31. Fennell C, 'Intention in Murder: Chaos, confusion and complexity' (1990) 41 *Northern Ireland Legal Quarterly* 325, 325.
32. *Ibid* 335.
33. Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [4.72].
34. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 48–49. The MCCOC recommended that if its definition of intention is adopted consideration should be given to ensuring that the definition does not have unintended consequences for the medical treatment of terminally ill patients.
35. This example was referred to in Fisse B, *Howard's Criminal Law* (Sydney: Law Book Company, 5th ed., 1990) 48–49.

Example

D is trapped in a burning high storey building with E, his child.³⁶ The nature of the fire is such that it is not possible to escape by walking out of the building. D pushes E out of a window knowing that E will almost certainly die but hopes that a miracle will happen and E will survive the fall. It is not correct to say that when D pushed E out of the window he intended to kill E.³⁷

The meaning of intention is limited to purpose

This approach limits the meaning of intention to its ordinary common sense definition and accordingly the concepts of intention and recklessness are treated separately. In other words, foresight or awareness of the consequences can never be equated with intention. But this does not mean foresight or awareness is irrelevant. At common law in both England and Australia the concepts of intention and recklessness are separated. The difference between these two jurisdictions is that in Australia recklessness is a separate mental element³⁸ but in England (as is the case in Western Australia) recklessness is not a separate mental element for murder.³⁹ In those jurisdictions where recklessness is not a separate mental element evidence of awareness or foresight may still be relied on by a jury to infer intention.⁴⁰ In England it has been held that in order for evidence of recklessness to be relied upon to infer intention there

must be evidence that the accused was aware that death (or grievous bodily harm) was a virtual certainty.⁴¹ The Law Commission (England and Wales) described this rule as follows:

The jury *may* – but not *must* – find that the defendant (D) intended the result if D thought it would be a certain consequence (barring some extraordinary intervention) of his or her actions, whether he or she desired it or not.⁴²

However, the law in Western Australia (and Queensland) is not so restrictive and evidence that the accused was aware death (or grievous bodily harm) would probably result may be relied upon as one factor for determining intention.⁴³ In *Willmot*,⁴⁴ the accused was convicted of murder. Under the relevant provisions of the Queensland Code a person is guilty of murder if he or she intended to kill or do grievous bodily harm. The accused had grabbed the deceased around the throat, hit her head against the floor, placed a gag in her mouth and then put his hands around her neck and choked her. The accused claimed that he did not intend to kill her or to do grievous bodily harm. At one stage the trial judge directed the jury that the accused would be guilty of murder if he had realised at the relevant time that ‘what he was doing “might” or was likely to endanger her life or cause grievous bodily harm’.⁴⁵ Campbell J held that this direction was misleading because it was not sufficient that the jury were satisfied that the accused foresaw that death or grievous bodily harm was a *possibility* of his conduct.⁴⁶ Connolly J stated that knowledge of the probability of death or grievous bodily harm is not an element of murder under the Queensland Code ‘although,

36. This example was referred to in Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [4.43]–[4.44].
37. The Commission notes that the defence of extraordinary emergency would be likely to excuse this person from criminal responsibility for murder. However, it is against common sense for the law to hold that such a person intended to kill.
38. *Crabbe* (1985) 58 ALR 417.
39. In England the mental element of murder is either intent to kill or intent to cause grievous bodily harm: see Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [3.3]. See also *Hancock* [1986] 1 AC 455, 471 (Lord Scarman, Lord Keith of Kinkel, Lord Roskill, Lord Brightman and Lord Griffiths concurring). It has been observed that in England prior to 1961 recklessness was considered to be a separate mental element for murder: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 21.
40. In *Moloney* [1985] AC 905, 928–29 (Lord Bridge of Harwich; Lord Hailsham of St Marylebone LC, Lord Fraser of Tullybelton, Lord Edmund-Davies and Lord Keith of Kinkel concurring) it was held that foresight of the consequences of engaging in particular conduct is *evidence* from which intention to kill or intention to cause grievous bodily harm can be inferred. It was made clear that recklessness and intention are separate concepts.
41. See *Nedrick* (1986) 1 WLR 1025, 1028; *Woollin* (1999) AC 82, 95 (Lord Steyn; Lord Browne-Wilkinson, Lord Nolan, Lord Hoffmann and Lord Hope of Craighead concurring). When commenting on the English law, Campbell queried why the probability of death or grievous bodily harm must be ‘overwhelming’ before intention to cause death or grievous bodily harm can be inferred. Campbell argued that proof of ‘any lesser degree of certainty, such as proof that either of those consequences is foreseen as probable or merely possible, may also be evidence upon which a jury could infer that the accused had the requisite intention’: see Campbell I, ‘Recklessness in Intentional Murder Under the Australian Codes’ (1986) 10 *Criminal Law Journal* 3, 9.
42. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [3.13].
43. In *Laycock & Stokes* [1999] QCA 307, [61]–[66] (McMurdo P; McPherson JA and Atkinson J concurring) it was argued that the jury should have been directed in terms of the decision in *Woollin*; namely, that a jury cannot infer intention unless the accused was aware that death was a virtual certainty. It was held that no such direction was required under the Queensland Code.
44. (1985) 18 A Crim R 42.
45. *Ibid* 44.
46. *Ibid*. Moynihan J agreed with the orders made and with the reasons expressed by both Campbell and Connolly JJ.

if established, it leads almost inevitably to the conclusion that death or grievous bodily harm was intended'.⁴⁷ In the circumstances of this case, despite the accused's assertion that he did not intend to kill or do grievous bodily harm 'it was clearly open to the jury to conclude that the cruel death which this young woman suffered must have been and in fact was intended by him'.⁴⁸ In *Reid*,⁴⁹ the majority of the Queensland Court of Appeal emphasised the need, when intention is an element of an offence under the Queensland Code, to prove beyond reasonable doubt the 'actual, subjective intention' of the accused.⁵⁰

Conclusion

In summary, there is some dispute as to whether foresight of virtual certainty is the same as intention or is more appropriately described as evidence from which intention can be inferred. But as Weinberg observed, this is really just a question of semantics because in practical terms if a person knew that his or her conduct would certainly cause death and engaged in that conduct anyway a jury would be likely to find that the person intended to cause death.⁵¹ Similarly in *Parker*,⁵² Windeyer J stated that:

If the immediate consequence of an act is obvious and inevitable, the intentional doing of the act imports an intention to produce the consequence. Thus to suppose that a sane man who wilfully cuts another man's throat does not intend to do him harm would be absurd.⁵³

In most cases where an accused was aware that death would probably result from the relevant conduct and nevertheless the accused engaged in that conduct, a jury would conclude that the accused must have intended to

cause death. However, this general proposition does not necessarily apply in every case. As discussed above there may be cases where, even though an accused was aware that death was virtually certain to occur, it would not be appropriate to conclude that the accused intended to kill. In the Commission's view the approach of treating evidence of recklessness as evidence from which a jury can infer intention is appropriate. As Campbell has stated, proof of 'recklessness without one more step could not justify a conviction under the Griffith Codes. That extra step is that an inference of intention must be drawn'.⁵⁴

In its submission, the Western Australia Police suggested that intention should be expressly defined so that 'a jury may infer intent where the consequences of an act were highly probable'.⁵⁵ It was further suggested that this would alleviate the need for a separate element of recklessness.⁵⁶ However, evidence of recklessness (or awareness of risk) can now be considered by a jury along with all of the other circumstances to determine if the accused had the required intention. The Commission does not consider that it is appropriate to define intention to include awareness of even the highest degree of probability because a jury should be required to take the extra step and positively determine whether the accused did in fact have the relevant intention.⁵⁷

Once it is established that no degree of foresight of consequences should automatically result in finding of intention, it is necessary to determine whether the law should be amended in Western Australia to include recklessness as a separate mental element for wilful murder and/or murder.⁵⁸

47. Ibid 47. This paragraph was cited with approval by the Queensland Court of Criminal Appeal in *Laycock & Stokes* [1999] QCA 307, [65] (McMurdo P; McPherson JA and Atkinson J concurring).

48. Ibid.

49. [2006] QCA 202.

50. Ibid [51] (Keane J) & [93] (Chesterman J). Chesterman J stated that as 'a matter of evidence, proof that an accused knew, or foresaw, that the probable consequence of his deliberate act was, for example, death, will usually establish that the accused intended to cause the death': at [111].

51. Wienberg M, 'Moral Blameworthiness: The 'objective test' dilemma' (2003) 24 *Australian Bar Review* 1, 9.

52. (1963) 111 CLR 610.

53. Ibid 648.

54. Campbell I, 'Recklessness in Intentional Murder Under the Australian Codes' (1986) 10 *Criminal Law Journal* 3, 12. See also *Cutter* (1997) 143 ALR 498, 510 where Kirby J stated that where intention is an element of an offence under the Code 'mere recklessness towards, or foresight of the likelihood of, such harm occurring without such a specific intent is not sufficient'. See also *Draper* [2000] WASCA 160, [49] (Murray J).

55. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 2.

56. Ibid 3.

57. The Commission notes the Law Commission (England and Wales) recently recommended that the term intention should be defined according to the common law in England. That is, evidence that the accused was aware death or grievous bodily harm was a virtually certain consequence may be used by a jury to infer intention: Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [3.27].

58. Yeo has observed that under Australian common law it has been unnecessary to consider whether intention should include recklessness because recklessness is a separate mental element for murder: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 58. The Commission is of the view that it is preferable conceptually to decide how intention should be interpreted before considering whether recklessness should be introduced because adding the mental element of recklessness to murder can only be justified if it covers conduct that should be included within the definition of murder.

RECKLESSNESS AS A SEPARATE MENTAL ELEMENT OF MURDER

The Code in Western Australia does not refer to the concept of recklessness.⁵⁹ The offences of wilful murder and murder under s 278 and s 279(1) of the Code refer only to an intention to kill or an intention to do grievous bodily harm. In *Macartney*,⁶⁰ Roberts-Smith J observed that the provisions of the Code in Western Australia 'modified' the common law by requiring an intent to kill (wilful murder) or an intent to cause grievous bodily harm (murder) and abolishing 'reckless' murder.⁶¹

In the Northern Territory recklessness is not sufficient to establish the mental element of murder.⁶² On the other hand, recklessness as to death (but not grievous bodily harm) is sufficient for the mental element of murder under statutory provisions in the Australian Capital Territory, New South Wales and Tasmania.⁶³ Recklessness as to death or grievous bodily harm is sufficient to establish the mental element of murder at common law in Australia.⁶⁴ The common law in relation to murder applies in South Australia and Victoria.⁶⁵ In *Crabbe*,⁶⁶ the High Court held that knowledge that death or grievous bodily harm would *possibly* result is not sufficient to establish the mental element of murder at common law.⁶⁷ Rather, it must be proved that the accused knew that death or grievous

bodily harm would probably result. Further, the court held that probable means 'likely to happen'.⁶⁸

Arguments in favour of recklessness

Reckless killing is morally equivalent to intentional killing

The argument for including recklessness in the mental element of murder is that intention and foresight of probable consequences are morally equivalent. In *Crabbe*,⁶⁹ the High Court observed that:

The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm.⁷⁰

The Commission received a number of submissions stating that recklessness as to death or grievous bodily harm should be sufficient to establish the offence of murder.⁷¹ Numerous law reform bodies have also recommended that recklessness should form part of the mental element of murder. The MCCOC agreed with the views expressed above in *Crabbe* that a person who foresees the probability of death is 'just as blameworthy' as the person who intends to kill.⁷² In 1991 the Law Reform Commission of Victoria recommended retaining recklessness as to death.⁷³ It was

59. The position in Queensland is the same as in Western Australia.

60. [2006] WASCA 29.

61. *Ibid* [473] (Roberts-Smith J).

62. Section 156 of the *Criminal Code* (NT) provides that the mental element for murder is either an intention to cause death or an intention to cause serious harm. In December 2006, the Northern Territory Code adopted the Model Criminal Code definition of intention but did not follow the Model Criminal Code definition of murder; namely, an intention to cause death or recklessness as to death.

63. *Crimes Act 1900* (ACT) s 12(1)(b); *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Code* (Tas) s 157(1)(b)(1) require: (a) proof of intention to cause death; or (b) intention to cause 'bodily harm which the offender knew to be likely to cause death'; or (c) an unlawful act or omission that 'the offender knew or ought to have known, to be likely to cause death in the circumstances, though he had no risk to cause death or grievous bodily harm to any person.'

64. *Crabbe* (1985) 58 ALR 417, 421.

65. See for example, *Foster* [2001] SASCA 20, [488] where Gray J followed the formulation in *Crabbe*, *ibid*; see also *Faure* [1999] VSCA 166.

66. (1985) 58 ALR 417.

67. *Ibid* 420–21. In 1991 the Law Reform Commission of Victoria concluded that recklessness should continue to be defined in terms of the *probability* of the result: see Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [135]–[143].

68. *Ibid* 417, 420. In *Boughey* (1986) 65 ALR 609, 617 Mason, Deane and Wilson JJ noted that it would not be appropriate to direct a jury that the term probable means 'more likely than not' or any other degree of 'mathematical probability'.

69. (1985) 58 ALR 417.

70. *Ibid* 420. Also see the High Court decision of *Boughey* (1986) 161 CLR 10, 43 where Brennan J stated that: 'Although we have accepted in this country that an intention to kill is not necessarily the same mental state as knowledge that death will probably result, we have regarded the two mental states as comparable in heinousness. We have understood that to be the orthodox view of the common law.'

71. Women Justices' Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 1; Ron Campaign, Submission No. 21 (12 June 2006) 1; Steven Robinson & Katharina Barlage, Submission No. 24 (14 June 2006); Colette Doherty, Submission No. 25 (14 June 2006) 1; Jan Garabedian, Submission No. 26 (15 June 2006) 1; Arena Joondalup – Pauline Harris, Submission No. 29 (15 June 2006) 1; Department of Community Development, Submission No. 42 (7 July 2006) 4; Angelhands, Submission No. 47 (3 August 2006) 1. Submission Nos. 21, 24, 25, 26 & 29 were identical.

72. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 59. The MCCOC recommended that the mental element of murder should be an intention to cause death and recklessness as to death. Recklessness was defined in the following way: 'A person is reckless with respect to a result when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk': see MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 20. It is further provided that whether the taking of a risk is unjustifiable is a question of fact. The MCCOC did not consider that an intention to cause grievous bodily harm or serious harm should be sufficient for murder and accordingly did not consider that recklessness as to grievous bodily harm should be sufficient.

73. The Law Reform Commission of Victoria concluded that intent to do grievous bodily harm should not form part of the definition of murder and, therefore, also concluded that recklessness as to causing grievous bodily harm should be excluded from the definition of murder: Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [143]–[144].

observed that recklessness as to death should remain as a separate mental element because 'a person's preparedness to run a known risk of killing another is so culpable as to be equivalent to that of an intentional killer'.⁷⁴ The Law Reform Commission of Ireland noted that some reckless killings are just as heinous as intentional killings and should therefore be categorised as murder.⁷⁵ Examples given in support of its conclusion were an arsonist who set fire to a building, a person who discharged a firearm into an occupied house or a person who drove a truck into a bar after being thrown off the premises.⁷⁶

Arguments against recklessness

The concept of recklessness is complex

In its submission the DPP expressed the view that including recklessness in the mental element of murder would unduly complicate the law.⁷⁷ One argument against including recklessness as a separate mental element of murder is that it may blur the line between murder and manslaughter. The concept of recklessness is also relevant when determining criminal responsibility for manslaughter.⁷⁸ Recklessness (for the mental element of murder) requires subjective awareness of the risk of death whereas recklessness or criminal negligence (for the purpose of manslaughter) can be determined objectively; that is, what a reasonable person should have foreseen.⁷⁹ Although the Law Reform Commission of Victoria recommended that murder should include recklessness as to death, it recognised that the concept of recklessness may be complicated especially in a case where the court must also consider negligent manslaughter. It was stated that in such a case a jury has to 'distinguish between the actual foresight of the defendant (recklessness) and *what a reasonable person in the circumstances would have foreseen*

(negligent manslaughter).⁸⁰ For this reason the Law Reform Commission of Victoria suggested that a jury should only be directed in relation to recklessness when 'absolutely necessary'.⁸¹ Leader-Elliot has commented that 'Australian courts are alive to the risk that an unfounded recklessness direction can confuse the distinction between murder and manslaughter'.⁸² He further stated that:

The caselaw on recklessness and awareness of risk appears to have reached a dead end. Nothing in these slippery permutations of probability, likelihood, real and substantial chances offers any determinate guidance for a jury that must decide whether an accused is to be convicted of murder or manslaughter.⁸³

On the other hand, it has been argued that because there are different levels of recklessness the 'type of recklessness selected for murder can be adequately distinguished from the type required for manslaughter'.⁸⁴ Yeo suggested that recklessness for murder could be defined as knowledge of a high probability and recklessness for manslaughter could be knowledge of a lesser degree of risk such as probability or possibility.⁸⁵ However, the Commission notes that the degree of risk may not always be the best indicator of the degree of moral culpability associated with recklessness. A person may be aware that death is a possibility and be more blameworthy than a person who is aware that death is probable. The Law Reform Commission of Ireland referred to a 'Russian roulette' case where the accused pulled the trigger of a gun three times aware that there was a bullet in one of the five chambers. In this case there was a 60 per cent chance that the gun would fire. However, it was noted that if there had only been a 20 per cent chance that the gun would fire the degree of risk of death may have only been viewed as 'possible' and therefore such an accused could not be convicted of murder.⁸⁶

74. Ibid [135].

75. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.008].

76. Ibid [4.007].

77. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 3.

78. In *Pacino* (1998) 105 A Crim R 309, 311 Kennedy J outlined that trial judge's direction to the jury including that criminal negligence is 'recklessness involving grave moral guilt'. See also *Agnew* [2003] WASCA 188 [52] where Murray J stated that '[w]hat is required is a degree of recklessness involving serious moral guilt, something for which the jury thinks it to be appropriate that the accused ought to be punished as for the commission of a criminal offence'.

79. Fisse B, *Howard's Criminal Law* (Sydney: Law Book Company, 5th ed., 1990) 58.

80. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [143].

81. Ibid. Barwick CJ observed in *La Fontaine* (1976) 136 CLR 62, 69 that a direction in relation to recklessness should not be given unless relevant to the facts of the case. Gibbs J also noted that it is difficult to explain to a jury the differences between recklessness for murder and recklessness for manslaughter: at 77.

82. Leader-Elliot I, 'Fault Elements in Murder – A Summary of Australian Law' in Law Commission (England and Wales), *The Law of Murder: Overseas comparative studies* (2005) 9.

83. Ibid 14.

84. Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 39.

85. Ibid 40.

86. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.019]. The Law Reform Commission of Victoria also considered this type of scenario and concluded that the law of recklessness should not be changed to accommodate a very unusual case. Allowing foresight of a possibility of death would capture cases as murder that are properly described as manslaughter: see Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [139].

The Commission also emphasises that if a jury is required to find subjective or actual awareness of the risk of death they will no doubt in many cases resort to the objective standard of a reasonable person to decide this issue. In the absence of direct evidence from an accused as to whether he or she was aware of the risk of death, a jury will often infer that an accused must have known of the risk of death if a reasonable person would have known. Further, subjective awareness of the risk of death is not always more culpable than failure to appreciate the risk. A person may be aware that death is probable while another person does not appreciate that death is almost certainly going to result. The failure to appreciate the obvious may demonstrate a higher degree of callousness and moral blameworthiness than the person who was aware of a lesser degree of risk.⁸⁷

The Law Reform Commission of Ireland also observed that a test of recklessness based solely on the degree of risk is problematic. Failure to take into account any social justification for the conduct may lead to reckless conduct being inappropriately categorised as murder or fail to catch those reckless killings that ought to be classified as murder because the degree of risk fell short of the specified test.⁸⁸ The Model Criminal Code uses 'substantial' in order to avoid consideration of mathematical chances but also includes the element that the taking of the risk must have been unjustifiable.⁸⁹ The Commission notes that its recommended mental element of murder (intention to cause an injury likely to endanger life) and felony-murder under s 279(2) of the Code both reflect the notion that reckless or dangerous conduct is more serious when it has no social justification. A person who intends to cause an injury and a person who intends to commit an offence do not have any justification for engaging in life-threatening conduct.

A separate mental element of recklessness is unnecessary

Those who argue that a reckless killing is just as morally culpable as an intentional killing, consider recklessness is necessary to capture those killings (where there is no intention to kill) that are so heinous they should be classified as murder. However, many of these killings would be

covered by the mental element of an intention to cause an injury likely to endanger life. In 1983 the Murray Review concluded that cases involving recklessness as to death would usually also fall within the scope of the mental element of murder (that is, an intention to cause grievous bodily harm). The Murray Review stated that where an accused intended to cause an injury of such a nature as to be likely to endanger life this 'may amount to conduct where the likelihood of death occurring was appreciated, but the accused proceeded recklessly as to whether or not that would be the result'.⁹⁰ Similarly, the Law Commission (England and Wales) observed that many cases of killing with intention to do serious harm would also involve recklessness but that recklessness covers 'some highly culpable killings that fall outside the scope of the 'serious harm' rule'.⁹¹

The Law Commission (England and Wales) gave a number of examples of conduct that would not fall within either the mental element of an intention to kill or the mental element of an intention to do serious harm:

Examples

A sets fire to a house at night knowing that B is asleep inside. A only intends to frighten B and hopes that B will wake up and escape in time. B is killed while trying to escape from the house.⁹²

C breaks into the house of D, an elderly man. C ties up D and leaves him in that position knowing that the house was isolated and the man had few visitors. The man later died.

E accelerates towards F (a police officer) at a road block with the intention of frightening F but is unable to swerve away at the last minute and F is killed.

G injects H with an illegal drug knowing that the drug might contain impurities dangerous to life. H goes into a coma and dies.⁹³

The Law Commission of Ireland concluded that murder should include 'reckless killing which manifests an extreme indifference to the value of human life'.⁹⁴ In support of its conclusion it was stated that:

87. See Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 11; Gordon G, 'Subjective and Objective Mens Rea' (1975) 17 *Criminal Law Quarterly* 355, 373.

88. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.016]–[4.022].

89. MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 20.

90. Murray MJ, *The Criminal Code: A general review* (1983) 172.

91. Law Commission (England and Wales), *A New Homicide Act for England and Wales?* Consultation Paper No. 177 (2005) [3.172].

92. The Commission notes this example is based upon the facts of *Hyam* [1975] AC 55.

93. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.98].

94. Law Reform Commission of Ireland, *Homicide: The mental element in murder*, Consultation Paper No. 17 (2001) [4.075].

It would be unsatisfactory if arsonists or terrorists, for example, who foresee a substantial risk of death resulting from their actions are guilty only of manslaughter. Such defendants have deliberately and intentionally pursued a course of conduct which exposes members of the public to a substantial risk of death.⁹⁵

The Commission agrees that these examples may not be covered by the concept of intention; however, each example referred to above would be likely to fit within the definition of felony-murder under s 279(2) of the Code. In each case (other than the last example) the accused has killed the person by an act likely to endanger life and the relevant act was done in the prosecution of an unlawful purpose. In the last example of injecting a person with a dangerous drug, it would depend upon the circumstances. If such an act was done for the purpose of subduing a victim while the accused was committing an offence then clearly it would fall within s 279(2). The Commission does not therefore consider that the mental element of recklessness is necessary in order to cover the most serious killings that do not fall within the mental element of intention.

Recklessness is not as morally culpable as intention

The majority of submissions received by the Commission in relation to recklessness stated that the concept of recklessness is adequately or appropriately dealt with under the offence of manslaughter.⁹⁶ Implicit in this view is the argument that reckless conduct is not as morally blameworthy as intentional conduct and should therefore not fall within the scope of murder. The Law Reform Commission of Canada observed that generally a reckless killing is regarded as less serious than an intentional killing: 'it is worse to do harm on purpose than to do that same harm through recklessness'.⁹⁷

The Commission agrees that as a general rule intentional killings are more blameworthy than reckless killings. Although there are some examples of reckless killings that can be

equated with intentional killings, a finding of recklessness in itself is not determinative of the seriousness or moral culpability of the killing. Leader-Elliot observed that:

Particular instances of intentional murder and murder by recklessness can be matched in moral horror in one dimension at least – that of callousness – when the conduct of the offender displays utter indifference to the value of the victim's life. That level of indifference may be uncommon in cases of recklessness: in most instances of reckless murder one might surmise that the offender would not have persisted in the conduct had they realized that the fatal outcome was certain.⁹⁸

It has been explained that a person may be aware of the risk of death but still hope that death or grievous bodily harm does not eventuate. On the other hand, a person may not be aware of the risk but does not actually care whether his or her actions result in death or grievous bodily harm.⁹⁹ This demonstrates the difficulty with the concept of recklessness because the requirement to find actual awareness of the risk of death does not necessarily capture those unintentional killings that can be equated with intentional killings.

The Commission's view

Ashworth concluded that all reckless killings should not be classified as murder but agreed that there are some such killings that may be considered as morally reprehensible as an intentional killing. The difficulty, he argued, is where exactly to draw the line.¹⁰⁰ The Commission has recommended that in addition to an intention to kill, an intention to cause an injury that endangers or is likely to endanger life should be sufficient to establish the mental element of murder. It is difficult to imagine a case where an accused who intended to cause a life-threatening injury was not also reckless as to causing death. Further, the Commission has recommended that the felony-murder provision under s 279(2) of the Code should be retained. This enables killings which take place during the course of a crime and involve conduct that is dangerous to life to be classified as murder. Again such killings would usually involve recklessness.

95. Ibid [4.070].

96. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Paul Ritter, Submission No. 4 (29 May 2006) 1; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 2; Festival of Light Australia, Submission No. 16 (12 June 2006) 2; Alexis Fraser, Submission No. 30 (15 June 2006) 15; Law Society of Western Australia, Submission No. 37 (4 July 2006) 3; Michael Bowden, Submission No. 39 (11 July 2006); Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 3.

97. Law Reform Commission of Canada, *Homicide*, Working Paper No. 33 (1984) 53 & 62. The Law Reform Commission of Canada recommended that there should be separate categories of intentional homicide and reckless homicide and the penalty for reckless homicide should be less than the penalty for intentional homicide. See also Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 11.

98. Leader-Elliot I, 'Fault Elements in Murder – A Summary of Australian Law' in Law Commission (England and Wales), *The Law of Murder: Overseas comparative studies* (2005) 10.

99. Mitchell B, 'Culpably Indifferent Murder' (1996) 25 *Anglo-American Law Review* 64, 68.

100. Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 261.

In its recent examination of the law of homicide, the Law Commission (England and Wales) considered research conducted in relation to the public's opinion about murder. This research found that the 'public assumes that murder involves an intention to kill or its moral equivalent, namely a total disregard for human life'.¹⁰¹ The Commission believes that the mental element of an intention to cause an injury likely to endanger life and felony-murder under s 279(2) covers those cases whether the accused has displayed a 'total disregard for human life'. In the first case the accused intended to injure the deceased and in the second case the accused intended to engage in unlawful conduct. These factors ensure that only the most culpable killings are categorised as murder. Further, these elements do not exhibit the complexity associated with the law of recklessness. Accordingly, the Commission has concluded that recklessness should not be a separate and independent mental element of the crime of murder.

101. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [1.21].

The Distinction between Wilful Murder and Murder

Currently wilful murder is treated more seriously than the offence of murder in terms of sentencing. Although the penalty for both offences is a mandatory sentence of life imprisonment, the term of imprisonment that can be set as the minimum period to be served before the offender is eligible to be considered for release on parole is different for each offence.¹ The Commission has concluded that the mental element of murder in Western Australia should not include an intention to cause an injury likely to result in permanent injury to health. The Commission has also concluded that recklessness should not of itself be sufficient to establish the mental element of wilful murder or murder. On this basis the mental element of wilful murder is an intention to kill and the mental element of murder (other than in the case of felony-murder) would be an intention to cause an injury that endangers or is likely to endanger life. In its Issues Paper the Commission sought submissions in relation to whether the distinction between wilful murder and murder should be abolished in favour of a single offence of murder.² In the Issues Paper the question was considered on the basis of whether it is appropriate to distinguish between an intention to kill and an intention to do grievous bodily harm. Because the Commission has recommended that the mental element of murder should no longer be an intention to do grievous bodily harm, the question that must now be considered is whether it is appropriate to distinguish between an intention to kill and an intention to cause an injury likely to endanger life.

THE LAW IN OTHER JURISDICTIONS

Western Australia is the only Australian jurisdiction with a separate offence of wilful murder. The Queensland Code also originally had separate offences of wilful murder and

murder. In 1971 following a recommendation by the Queensland Law Reform Commission (QLRC) the distinction between wilful murder and murder was abolished.³ The general murder offence in Queensland is now defined as an unlawful killing with an intention to kill or an intention to do grievous bodily harm.⁴ The other Code jurisdictions in Australia have never distinguished between wilful murder and murder.⁵

At common law in both England and Australia there has always been one offence of murder incorporating both an intention to kill and an intention to do grievous bodily harm.⁶ The common law definition of murder applies in Victoria and South Australia. In New South Wales, murder is defined in legislation but largely adopts the common law definition.⁷ The Australian Capital Territory has one offence of murder but it is the only jurisdiction in Australia that does not include an intention to do grievous bodily harm (or serious harm) as part of the mental element.⁸

ARGUMENTS FOR RETAINING WILFUL MURDER AND MURDER

Wilful murder is more serious than murder

Those who support the status quo argue that wilful murder is more serious than murder because intent to kill is more culpable than intent to cause grievous bodily harm or serious harm. The Commission received a number of submissions that argued the distinction between wilful murder and murder is appropriate on this basis.⁹

In 1991, the Law Reform Commission of Victoria observed that the strongest argument in favour of abolishing the category of murder based on intent to cause grievous

1. See Chapter 7, 'Sentencing'.
2. Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Issues Paper (2006) 2–3.
3. *Offenders Probation and Parole Act Amendment Act 1971* (Qld) s 5. See Queensland Law Reform Commission (QLRC), *Abolition of the Distinction Between Wilful Murder and Murder*, Report No. 2 (1970) 8.
4. *Criminal Code* (Qld) s 302(1)(a).
5. In the Northern Territory up until December 2006 the mental element of murder was either an intention to kill or an intention to do grievous harm: see previous s 162(1)(a) of the *Criminal Code 1983* (NT). In December 2006 the offence of murder was amended and the mental element is now defined as an intention to cause death or serious harm to any person: see *Criminal Code 1983* (NT) s 156(1). Despite largely adopting the provisions of the Model Criminal Code, the Northern Territory did not adopt the Model Criminal Code definition of murder. Under ss 157(1)(a) and (b) of the Tasmanian Code murder will apply if the accused intended to cause death or intended to cause bodily harm which the accused knew would be likely to cause death in the circumstances. This is similar to the definition of the mental element of murder in New Zealand. Under s 167 of the *Crimes Act 1961* (NZ) the mental element of murder includes an intention to kill or an intention to cause 'any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not.
6. As discussed above the difference between the definition of murder in England and Australia relates to the mental element of recklessness. In England recklessness is not sufficient to establish the mental element of murder but in common law jurisdictions in Australia recklessness is sufficient: see 'The Meaning of Intention is Limited to Purpose'.
7. *Crimes Act 1900* (NSW) s 18(1)(a). In New South Wales only recklessness as to death is sufficient but at common law in Australia recklessness as to death or grievous bodily harm will constitute the mental element of murder.
8. Under s 12(1) of the *Crimes Act 1900* (ACT) the mental element of murder is either an intention to cause death or reckless indifference to the probability of causing death.
9. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 1–2; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 3–4; Law Society of Western Australia, Submission No. 37 (4 July 2006) 1; Michael Bowden, Submission No. 39 (11 July 2006) 1; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 1.

bodily harm is that ‘there is a significant difference between someone who intends to cause death and someone who intends to do serious injury but neither intends nor foresees death.’¹⁰ Dr Thomas Crofts stated in his submission that:

In general a person who actually intends to kill their victim is committing a more serious wrong and is more morally culpable than a person who intends to cause serious harm but does not intend to kill the victim.¹¹

In support of this argument Dr Crofts relied on the preliminary findings of the Law Commission (England and Wales). In 2005 the Law Commission (England and Wales) proposed that the offence of murder should be separated into two categories: first degree murder and second degree murder. It was suggested that the mental element of first degree murder should be intent to kill and that the penalty of mandatory life imprisonment should only apply to first degree murder.¹² It was proposed that the mental element of second degree murder should be intent to do serious harm or recklessness as to death.¹³ However, in its final report the Law Commission (England and Wales) revised its original view that first degree murder should only encompass an intention to kill. It was recommended that first degree murder should include either an intention to kill or an intention to cause serious injury coupled with awareness that there was a serious risk of death.¹⁴ In reaching this conclusion the Law Commission (England and Wales) acknowledged that the mental element of intention to kill would not necessarily capture all of the most culpable killings. It was stated that the revised definition of first degree murder should:

give some reassurance that when D stabs (or shoots) another in the head or chest, a charge of first degree murder will be perfectly appropriate. In such cases, it can usually be readily found that D intended to do serious injury and was aware of a serious risk of causing death, especially, but not solely, when the stabbing (or shooting) is repeated.¹⁵

Although the Commission does not agree that it is necessary to include a requirement that the accused must have been aware that there was a risk of death, the approach of the

Law Commission (England and Wales) is similar to the conclusions reached by this Commission. Both have concluded that the definition of grievous bodily harm (or serious harm) is too wide for the purposes of the mental element of murder. The Law Commission (England and Wales) equates an intention to cause a serious injury coupled with awareness that there is a serious risk of death with an intention to kill. In other words, the Law Commission (England and Wales) considered that a killing with an intention to kill is not always the most culpable form of homicide. Bearing in mind the Commission’s recommendations in relation to the mental element of murder, it is arguable that there is also little difference in moral culpability or seriousness between an intention to kill and an intention to cause an injury likely to endanger life.

Community’s understanding

It has been argued that the distinction between wilful murder and murder properly reflects the community’s view of the seriousness of a deliberate killing.¹⁶ During the debates in Parliament about the proposed repeal of the offence of wilful murder, Dr Janet Woollard stated that:

In the community there is a big difference between being labelled as a person who has committed wilful murder and a person who has committed murder. The people I have spoken with in the community would not like to see those definitions changed.¹⁷

Crofts has also stated that ‘it is likely that the labels of “wilful murder” and “murder” have symbolic significance to the West Australian public’ and

removing the distinction between the offences could cause the perception in the community that the government is devaluing the offence and is letting wilful murderers get away with murder because it no longer wishes to signify those worst case murders.¹⁸

However, it is apparent that the community’s view of the meaning of wilful murder and murder may not necessarily

10. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [124].

11. Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 3.

12. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [2.11]–[2.12]. The Law Commission’s terms of reference expressly required it to take into account the ‘continuing existence of the mandatory life sentence for murder’ when formulating its recommendations for reform [1.1]. As Crofts has acknowledged ‘[t]he priority of limiting the mandatory life sentence to the worst cases of murder clearly swayed the English Commission towards splitting murder into first degree and second degree, and define the former narrowly’: Crofts T, ‘Wilful Murder, Murder – What’s in a Name?’ (2007) 19(1) *Current Issues in Criminal Justice* 49, 50.

13. *Ibid* [2.7]. It was also proposed that partial defences such as provocation and diminished responsibility would reduce first degree murder to second degree murder. The proposed penalty for second degree murder was a maximum of life imprisonment.

14. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.56].

15. *Ibid* [2.60]–[2.61].

16. Crofts T, ‘Wilful Murderers in Western Australia: Soon to get away with murder?’ (2006) 31 *Alternative Law Journal* 203, 204.

17. Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 10954 (Dr JM Woollard).

18. Crofts T, ‘Wilful Murderers in Western Australia: Soon to get away with murder?’ (2006) 31 *Alternative Law Journal* 203, 205.

◀ The Distinction between Wilful Murder and Murder

be accurate.¹⁹ Some of the arguments presented during the debates in Parliament in relation to the proposed repeal of the offence of wilful murder indicate a lack of understanding of the legal requirements for the offence of wilful murder. For example, it was stated that 'wilful murder is premeditated and carefully thought out'.²⁰ Similarly, it was stated that:

Murder is a horrific crime in any context. Wilful murder is a more heinous crime because it has involved a lot of planning and premeditation by the perpetrator.²¹

Brian Tennant explained in his submission that it was his understanding that 'wilful murder is pre-meditated, planned and the offender intended to kill'.²² The view that wilful murder is premeditated and planned is not necessarily correct. A person may be convicted of wilful murder even where the intention to kill was formed contemporaneously with the act that caused death. Conversely, under the current law an accused will be convicted of murder (rather than wilful murder) even though he or she planned to seriously attack the deceased long before the offence took place.

Juries rather than judges should determine the intention of the accused

As the Commission explains in the introduction to this Report, the role of the jury is to determine criminal responsibility. In a trial, the jury decides questions of fact and the judge determines questions of law. In a wilful murder trial, the jury will decide if the accused intended to kill. If the jury are not satisfied beyond reasonable doubt that the accused intended to kill, the jury will then have to consider if the accused intended to do grievous bodily harm. If so, and if all other elements of the offence have been proved, the accused will be guilty of murder. One

argument in favour of retaining the distinction between wilful murder and murder is that the jury, rather than the judge, should determine whether the accused intended to kill or alternatively if the accused intended to do grievous bodily harm.²³ The basis of this argument is that if there is only one offence of murder and the accused is convicted, the sentencing judge will be required to decide the precise nature of the accused's intention for the purpose of sentencing.

Crofts has argued that even though it may be difficult for juries to determine the precise intention of an accused in a homicide trial, this decision should remain with the jury rather than a judge. He explained that juries are generally required to determine questions of fact and taking the factual question of the accused's intention away from the jury 'denies the community input into the trial process, which is the fundamental value of a jury system'.²⁴ In parliamentary debate on this issue, Sue Walker stated that 'a person charged with the most serious crime in the criminal calendar should be judged by his peers, not by a judge'.²⁵ The majority of submissions received by the Commission on this issue argued that it was preferable for juries rather than judges to make the decision about the nature of the accused's intention.²⁶ For example, Michael Bowden submitted that abolishing the distinction between wilful murder and murder will mean that accused will lose their right to trial by jury.²⁷ The Aboriginal Legal Service submitted that:

It would be an anathema to long standing principles applicable to criminal trials (which have served the community well over many years) to remove from juries this important fact finding function.²⁸

The Commission received only two submissions stating that judges are better placed to determine the accused's

19. Further, it is also apparent that important public references about homicide data do not distinguish between wilful murder and murder. On 7 March 2006 Dr Constable questioned the Attorney General about the number of people who have been convicted of either wilful murder or murder that have been released from custody: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 March 2006, 81 (Dr E Constable). Statistics prepared by the Western Australia Police and statistical reports from the Crime Research Centre of Western Australia do not distinguish between wilful murder and murder and instead refer only to murder: see for example, Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia 2004* (Perth: Crime Research Centre, 2005); Western Australia Police, *Annual Reported Crime Statistics: 2005–2006*.
20. Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 September 2003, 10833 (Mr AD Marshall).
21. Ibid 10835 (Mr RF Johnson); see also Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 10946 (Mr RF Johnson).
22. Brian Tennant, Submission No. 15 (12 June 2006) 1.
23. During the debate in Parliament on the Criminal Code Amendment Bill 2003, the Opposition expressed the strong view that juries rather than judges should determine the intention of the accused: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 September 2003, 10828 (Mrs CL Edwardes) and Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 10947 (Ms SE Walker).
24. Crofts T, 'Wilful Murderers in Western Australia: Soon to get away with murder?' (2006) 31 *Alternative Law Journal* 203, 203. See also Crofts T, 'Wilful Murder, Murder – What's in a Name?' (2007) 19(1) *Current Issues in Criminal Justice* 49, 51.
25. Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 10947 (Ms SE Walker).
26. Paul Ritter, Submission No. 4 (29 May 2006) 1; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 5; Law Society of Western Australia, Submission No. 37 (4 July 2006) 2; Michael Bowden, Submission No. 39 (11 July 2006) 1; Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006) 2; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 1–2.
27. Michael Bowden, Submission No. 39 (11 July 2006) 1.
28. Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2.

intention.²⁹ The Women's Justices' Association expressed the view that juries may not have sufficient understanding of the 'subtle differences' between intent to kill and the other circumstances that constitute murder.³⁰

While the Commission agrees that for homicide offences the right to a trial by jury is fundamental, it does not consider that abolishing the distinction between wilful murder and murder will remove or significantly affect this right. In examining this issue the Commission refers below to some case examples from other Australian jurisdictions. These examples are useful because in those jurisdictions there is no distinction between wilful murder and murder.

The role of juries

In any case where the accused has pleaded not guilty the jury will still have the central fact-finding role in determining whether the accused is criminally responsible for the offence of murder. Bearing in mind the Commission's recommendation that the mental element of murder should not include an intention to cause a permanent injury, the jury will have to determine if the accused intended *either* to kill or to cause an injury likely to endanger life.³¹ Justice McKechnie observed in his submission that juries 'are ideally placed to determine the *existence* of intent to kill or intent to do grievous bodily harm'.³²

In addition to determining the existence of one of the relevant mental elements, a jury will also have to decide if the physical elements of the offence have been proved beyond reasonable doubt and whether any defences are available.³³ In *Watson*,³⁴ for example, the accused was convicted of murder following a trial before a jury. The accused had repeatedly stabbed the deceased in the neck. In order to convict the accused of murder the jury had to be satisfied beyond reasonable doubt that the accused *either* intended to kill or intended to do grievous harm. During the sentencing remarks the judge stated that he was satisfied beyond reasonable doubt that the accused had intended to kill the deceased.³⁵ Although the decision

as to the accused's precise intention was determined by the judge, the jury had already determined beyond reasonable doubt that the accused had formed one of the relevant intentions and had also considered and rejected the defences of mental impairment and diminished responsibility.³⁶ Clearly this accused was not deprived of his right to a trial before a jury.

Further, if a judge was of the view that the appropriate sentence would be dependent upon whether the accused either intended to kill or intended to cause an injury likely to endanger life, the judge could ask the jury to give a 'special verdict'. Section 113(2) of the *Criminal Procedure Act 2004* (WA) provides that the judge can require a jury to give a special verdict on a specific fact if the appropriate sentence would depend upon a finding about that fact.

Practical considerations

In practice if there was a single offence of murder and an accused decided to plead guilty it would be likely that the accused would enter a plea on the basis of an agreed position in relation to his or her intention. An accused may agree to enter a plea of guilty on the basis that there was no intent to kill but there was an intention to cause an injury likely to endanger life.³⁷ If the prosecution did not accept the accused's version of the facts then the accused would be likely to plead not guilty and a trial before a jury would take place. Only in those cases where an accused has already pleaded guilty and the prosecution disputes the accused's version will there be a need for a trial on the issues before a judge alone. And a trial on the issues will only take place if the judge is of the view that it is necessary to do so for sentencing purposes.

Relevance of intention for sentencing

The argument that abolishing the distinction between wilful murder and murder will mean that judges rather than juries will determine the precise intention of the accused, assumes that the accused's intention is determinative of

29. Women Justices' Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 1; Angelhands, Submission No. 47 (3 August 2006) 1.

30. Women Justices' Association of Western Australia (Inc), *ibid* 1.

31. See above, Recommendation 4.

32. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 1 (emphasis added). Similarly, the Western Australia Police supported the abolition of the distinction between wilful murder and murder and noted that juries should determine the 'existence of an intent to either kill or do grievous bodily harm, being a matter of fact and a central element of the offence of wilful murder or murder': see Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 1.

33. For further discussion of the role of the jury in the context of the Commission's overall reforms, see Introduction, 'Guiding Principles for Reform: Principle Four'.

34. (Unreported, Supreme Court of the Northern Territory, SCC 20411360, Martin CJ, 22 March 2006).

35. *Ibid* 4.

36. *Ibid* 3–4.

37. For example, in *Joseph* [2003] NSWSC 1080, [24] the accused pleaded guilty to murder. The plea of guilty was accepted by the prosecution on the basis that the accused intended to do grievous bodily harm.

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the seriousness of the offence for sentencing purposes. But that is not necessarily the case. A judge will only determine the precise nature of an accused's intention when sentencing for murder if the judge is of the view that it is necessary to do so to decide the appropriate sentence.³⁸ In its submission the DPP expressed the view that it would not be necessary in every case of murder for the sentencing judge to determine whether the intention was an intention to kill or an intention to do grievous bodily harm.³⁹

In *Angeles*,⁴⁰ the accused pleaded guilty to the murder of his wife and daughter. The accused viciously attacked his wife with an iron bar causing severe injuries. She died as a result of asphyxiation due to vomiting. The accused beat his daughter to death with the iron bar. The sentencing judge stated that it was unnecessary to consider whether the accused intended to kill or intended to cause grievous harm.⁴¹ He further stated that the accused

needlessly took the lives of two innocent people in a fit of rage. The objective circumstances of [the] offending mean that [the] crimes are serious examples of the crimes of murder.⁴²

Even where a judge makes a finding about the accused's intention it will generally be one of a number of factors considered for sentencing purposes. In *Ide*,⁴³ the accused was convicted by a jury of the murder of his sister. In New South Wales the mental element for murder is either intent to kill or intent to do grievous bodily harm or recklessness as to death. The accused had shot his sister during a heated exchange which occurred against a background of a bitter family dispute. For the purposes of sentencing the judge found that the accused had intended to kill his sister.⁴⁴ At the same time the judge considered a number of other factors which were relevant for sentencing purposes. The prosecution submitted that the killing was premeditated, planned and financially motivated. They also submitted that the accused was not remorseful. The judge did not accept that these facts were proven to the required standard and sentenced the accused on the basis that he was genuinely remorseful and that, at the time of the killing,

he was in a 'state of extreme anger and frustration'.⁴⁵ This case illustrates that judges are required to decide questions of fact for sentencing purposes in any event.

The real question is whether the precise nature of the accused's intention (rather than the existence of the requisite intention) has such a significant bearing on moral culpability that the accused should be convicted of a different offence with different consequences. The Commission has recommended that the mental element of murder should be an intention to cause an injury that endangers or is likely to endanger life. The Commission is of the view that removing, from the definition of murder, the mental element of an intention to cause a permanent but non life-threatening injury, will eliminate the vast majority of cases where it could be argued that there is a significant difference in moral culpability between wilful murder and murder. If the distinction between wilful murder and murder was abolished, the mental element of murder would be *either* an intention to kill or an intention to cause an injury that endangers or is likely to endanger life. Accordingly, any need for a judge to determine the precise intention of an accused convicted of murder will be significantly reduced.

ARGUMENTS FOR ABOLISHING THE DISTINCTION BETWEEN WILFUL MURDER AND MURDER

Consistency with other Australian jurisdictions

A number of submissions received by the Commission submitted that the distinction between wilful murder and murder should be abolished because Western Australia is the only jurisdiction in Australia to retain the two separate offences.⁴⁶ During the second reading speech for the Criminal Code Amendment Bill 2003, the Attorney General noted that in all other Australian jurisdictions there is only one offence of murder.⁴⁷ During parliamentary debates, Cheryl Edwardes indicated that she did not consider that

38. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 1.

39. *Ibid* 2.

40. (Unreported, Supreme Court of the Northern Territory, SCC 20303322, Martin CJ, 10 August 2004).

41. *Ibid*

42. *Ibid*. The accused was sentenced to the mandatory sentence of life imprisonment with a non-parole period of 25 years' imprisonment. The sentencing judge imposed the minimum non-parole period because the accused would be 92 years of age at the earliest possible time for release.

43. [2003] NSWSC 1110.

44. *Ibid* [18] Whealy J.

45. *Ibid* [35].

46. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (9 June 2006) 1; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 1–2.

47. Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 6163 (Mr JA McGinty, Attorney General).

consistency between the law in Western Australia and the rest of Australia was a sufficient justification for amending the law.⁴⁸ The Commission also received a number of submissions agreeing that the objective of consistency is not an adequate reason for removing the distinction between wilful murder and murder.⁴⁹ The Commission agrees that achieving consistency is not of itself a sufficient justification for amending the law of homicide. However, it is useful to note that every other Australian jurisdiction operates without any apparent difficulty with only one offence of murder.

Abolition of the death penalty

In Western Australia from 1961 until 1984 the death penalty was available for wilful murder, but not for murder. Justice McKechnie and the DPP both submitted that, following the abolition of the death penalty, there is no longer any reason for maintaining a distinction between wilful murder and murder.⁵⁰ The abolition of the death penalty was the main reason for the QLRC recommendation in 1970 that the offence of wilful murder be abolished.⁵¹ The QLRC was of the view that because the penalty for wilful murder and murder was the same (mandatory life imprisonment) there was no longer any reason for retaining the 'fine distinction between wilful murder and murder'.⁵² The Murray Review in 1983 noted that in jurisdictions where the death penalty has been abolished the offence of wilful murder has been subsumed with the offence of murder. Because at the time of conducting the review the death penalty remained in force in Western Australia, the Murray Review did not recommend the abolition of the offence of wilful murder.⁵³

The Commission acknowledges the argument that, because both wilful murder and murder attract a mandatory sentence of life imprisonment, there is no need to retain the distinction between them. However, in terms

of penalty, there remains a significant difference between the two offences. A person convicted of wilful murder cannot be released from custody before serving at least 15 years in prison. A person convicted of murder may in some cases be released after serving seven years' imprisonment.⁵⁴ The Commission is of the view that the central question is not whether the differences in penalty between the two offences is significant enough to retain the distinction, but whether the differences between the mental elements for the two offences continue to justify distinguishing the offences and the consequences that follow a conviction.

Difficult to distinguish between an intention to kill and an intention to do grievous bodily harm

One argument in favour of abolishing the distinction between wilful murder and murder is that it is difficult for juries (or a judge alone) to determine whether the accused intended to kill or intended to do grievous bodily harm. The DPP stated in its submission that it can be difficult for juries to determine the precise intention of the accused.⁵⁵ During the second reading speech for the Criminal Code Amendment Bill 2003 the Attorney General referred to the view of the former Chief Justice that the distinction between wilful murder and murder is difficult for juries to understand.⁵⁶ Morgan has also argued that it 'will not always be easy for a jury to distinguish' between an intention to kill and an intention to do grievous bodily harm.⁵⁷

The Law Commission (England and Wales) acknowledged in its consultation paper that one argument against its original proposal to limit first degree murder to an intention to kill is that in some cases it will be difficult to prove intent to kill as distinct from intent to cause some other form of serious harm. However, the Law Commission (England and Wales) noted that there have not been any

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48. Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 September 2003, 10829 (Mrs CL Edwardes); see also Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 10947 (Ms SE Walker). See also Crofts T, 'Wilful Murder, Murder – What's in a Name?' (2007) 19(1) *Current Issues in Criminal Justice* 49, 55.
49. Law Society of Western Australia, Submission No. 37 (4 July 2006) 2.
50. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (9 June 2006) 1; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 1.
51. QLRC, *Abolition of the Distinction Between Wilful Murder and Murder*, Report No. 2 (1970) 5–8. The death penalty was abolished in Queensland in 1922 and the penalty for both wilful murder and murder was a mandatory sentence of life imprisonment.
52. *Ibid* 8.
53. Murray MJ, *The Criminal Code: A general review* (1983) 171.
54. Section 91 of the *Sentencing Act 1995* (WA) provides that a court must generally set a minimum period of at least 20 years and not more than 30 years for a person who has been convicted of wilful murder and sentenced to strict security life imprisonment. Section 90 provides that a court must impose a minimum term of at least 15 years and not more than 19 years if the accused is convicted of wilful murder and sentenced to life imprisonment. For murder the minimum period is at least seven years but not more than 14 years' imprisonment.
55. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 1.
56. Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 6163 (Mr JA McGinty, Attorney General).
57. Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 213.

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particular problems in proving an intention to kill in cases of attempted murder and did not find the argument compelling.⁵⁸ In its final report the Law Commission (England and Wales) stated that there are approximately 80–90 convictions per year for the offence of attempted murder and this indicates that there are no significant problems with respect to proving an intention to kill.⁵⁹ Crofts has also made this point. He stated that if the argument that it is difficult for juries to find an intention to kill is valid, then the offence of attempted murder would also need to be repealed or merged with another offence.⁶⁰ He concluded that these statistics show that the offence of wilful murder is 'clearly viable'.⁶¹

The offence of wilful murder is viable and there are some cases where it will be simple for a jury (or judge alone) to decide the intention of the accused at the relevant time. For example, it would be extremely unlikely to find anything other than an intention to kill if the accused had deliberately shot a person in the head at close range. The issue is not whether the offence of wilful murder is viable but whether it is appropriate or necessary. The MCCOC noted that there are situations where it would be 'virtually impossible' to distinguish between an intention to kill and an intention to cause serious harm.⁶² For example, a person may have been killed by being deliberately run over by a car⁶³ or deliberately kicked in the head on a number of occasions. In these examples it may be easy for a jury to find that the accused intended to *either* kill or cause grievous bodily harm but difficult to choose one of these intentions. This is because certain conduct may ordinarily result in either death or grievous bodily harm whereas other conduct would usually only result in death.

The Commission does not consider the argument that there are successful convictions for attempted murder to be sufficient to reject the conclusion that it is difficult to distinguish between an intention to kill and an intention to do grievous bodily harm. First, it is not suggested that

it is always difficult to distinguish between the two intentions. Second, in cases of attempted murder the evidence may be significantly different. Where the victim is still alive he or she would usually give evidence and be able to explain to the jury the circumstances leading up to the offence. In the case of wilful murder and murder the jury usually only has the evidence of the accused and/or the objective facts surrounding the offences such as the nature of the attack and the weapon used.

The Commission received a number of submissions emphasising that juries are just as capable as judges of determining whether the accused intended to kill or do grievous bodily harm.⁶⁴ Justice Miller stated that 'I have not seen any difficulty experienced by juries in determining the existence of an intent to kill'.⁶⁵ The Law Society of Western Australia and the Criminal Lawyers' Association stated in their submission that:

Juries have always been the arbiters of fact except in very special circumstances. There is no evidence other than anecdotal or speculative to suggest that juries are less able than judges to determine this question.⁶⁶

The Commission agrees that there is no evidence to suggest that juries are less capable of determining whether an accused intended to kill or intended to do grievous bodily harm. However, the ability or otherwise of juries to determine the precise intention of the accused is not the central issue. The important point is that it may be difficult in some cases for anyone to distinguish between an intention to kill and an intention to do grievous bodily harm. On the basis of the Commission's recommendation that the mental element of murder is an intention to cause an injury likely to endanger life, it will be more difficult to decide between the two intentions. Removing the distinction between the two offences will mean that it will only be necessary to decide the precise nature of the accused's intention in those cases where such a finding will be determinative of the appropriate sentence.

58. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [3.5]–[3.9].

59. *Ibid* [2.14].

60. Crofts T, 'Wilful Murderers in Western Australia: Soon to get away with murder?' (2006) 31 *Alternative Law Journal* 203, 203.

61. *Ibid*. See also Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 5.

62. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 51.

63. In *Winner* (1995) A Crim R 528, 536 (NSW CCA) the accused was convicted of murder after swerving his vehicle in the direction of two boys who were riding bicycles on the other side of the road. One of the boys was killed. One issue at the trial was whether the accused had intended to hit one of the boys with his car. Kirby ACJ indicated that if it was found that the accused had intended to hit one of the boys then inevitably it would be concluded that the accused *either* intended to kill or inflict grievous bodily harm on one of the boys. The Commission considers that this is one case example where it would be difficult to decide if the intention of the accused was to kill or alternatively to inflict grievous bodily harm.

64. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 3.

65. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 2.

66. Law Society of Western Australia, Submission No. 37 (4 July 2006) 2; Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006) 2.

Merciful or compromise verdicts

Justice McKechnie stated in his submission that he has seen ‘juries deliver what they would undoubtedly regard as a mercy verdict of murder in circumstances where a proper verdict would have been one of wilful murder’.⁶⁷ By combining the mental elements of wilful murder and murder into one offence of murder it is suggested that juries will be less likely to compromise their verdict or deliver a mercy verdict.⁶⁸ The chance of a compromised verdict is potentially higher in homicide cases because the jury is required to decide such cases by a unanimous verdict.⁶⁹

The Commission does not consider that this argument is particularly convincing. Any suggestion that juries compromise their verdicts in homicide cases is merely speculation because jury deliberations are private. In any event, as the Commission has previously stated:

It is generally accepted that a jury has a right to bring in a less serious verdict, or what has been described as a merciful verdict, when, on the application of community values it considers it appropriate, even though the evidence strictly calls for a different verdict.⁷⁰

If the distinction between wilful murder and murder was abolished a jury may still compromise its verdict or deliver a mercy verdict by convicting the accused of manslaughter instead of murder.

Impossible to categorise murders on the basis of specific factors

Wilful murder and murder are currently distinguished by reference to the nature of the accused’s intention. However, there are many factors that may affect the seriousness of a murder. The Commission considers that a

killing with an intention to cause death or an injury likely to endanger life should be distinguished from unintentional killings. The only exception to this conclusion is felony-murder and, as the Commission has explained, felony-murder is particularly serious because the accused engaged in life-threatening conduct for an unlawful purpose. To single out an intention to kill as the sole factor for categorising a killing as wilful murder is problematic.

Law reform bodies and other commentators have recognised the difficulty in classifying one type of murder as more serious than another.⁷¹ The MCCOC stated that:

The single largest obstacle against introducing a separate offence of first degree murder is formulating an underlying rationale which operates to accurately isolate the worst murder cases.⁷²

Morgan has contended that the distinction between an intent to kill and an intent to cause grievous bodily harm is a ‘very crude measure of the overall seriousness of an offence because it takes no account of the circumstances in which the offence occurred’.⁷³

Although he was generally in favour of retaining the distinction between wilful murder and murder, Dr Thomas Crofts put forward an alternative proposal for distinguishing more serious examples of homicide. In his submission he suggested that the offence of wilful murder could be reserved for the ‘worst cases of killing’ and ‘would allow the most heinous murders to be given a distinct label showing an extra condemnation of the offender’.⁷⁴ For example, he said that wilful murder could apply to ‘especially cruel or degrading’ killings, where the killing was ‘racially motivated’ or the victim was vulnerable.⁷⁵ At the same time Dr Crofts acknowledged that identifying and applying such categories may be difficult.⁷⁶

67. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 1 (12 September 2005) 1.

68. This argument was referred to as one argument in favour of abolishing the distinction by the Criminal Lawyers’ Association although it did not express a conclusion one way or another as to whether the distinction should be abolished: Criminal Lawyers’ Association, Submission No. 40 (14 July 2006) 2.

69. *Criminal Procedure Act 2004* (WA) s 114.

70. LRCWA, *Review of the Criminal and Civil Justice System in Western Australia*, Project No. 92, Consultation Drafts (1999) vol. 2, 933.

71. See eg Ashworth A, *Principles of Criminal Law* (Oxford: Clarendon Press, 2nd ed., 1995) 263–64; Mitchell B, ‘Culpably Indifferent Murder’ (1996) 25 *Anglo-American Law Review* 64, 70.

72. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 5.

73. Morgan I, ‘Sentences for Wilful Murder and Murder’ (1996) 26 *University of Western Australia Law Review* 207, 213.

74. Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 4. The Commission notes that in Canada first degree murder is distinguished from second degree murder on the basis of a number of listed factors. Such factors include that: the killing was deliberate and planned; the victim was a police officer or prison officer; and that death was caused while committing or attempting to commit a number of serious offences: see *Criminal Code* (Canada) s 231. The penalty for both first degree murder and second degree murder is a mandatory sentence of life imprisonment. However, in terms of the time period required to be served before being eligible to be considered for release on parole, first degree murder and second degree murder are distinguished. Generally, a person convicted of first degree murder is required to serve 25 years’ imprisonment without eligibility for parole and a person convicted of second degree murder will be required to serve a period between 10 years and 25 years’ imprisonment before being considered for release: see *Criminal Code* (Canada) s 745.

75. Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 4.

76. *Ibid* 4.

◀ The Distinction between Wilful Murder and Murder

In 1974 the Victorian Law Reform Commissioner recognised that it was extremely difficult to distinguish cases of murder on the basis of specific factors. For example, it was noted that some jurisdictions (such as the United States and Belgium) had distinguished premeditated murder from unpremeditated murder.⁷⁷ The Victorian Law Reform Commissioner concluded that:

The basic difficulty which has prevented the formulating of a satisfactory scheme for defining degrees of murder is that the relative heinousness of any murder cannot be determined by looking at the particular feature or features of the crime which bring it within one of those general descriptions which have to be used in the compiling of a list of murders in the first degree. The degree of heinousness can only be ascertained by examining the whole of the circumstances of the crime including such matters as motive, character, and situation of the offender.⁷⁸

Similarly, the Law Commission (England and Wales) noted that premeditation itself does not necessarily mean that the offence is more serious. For example, mercy killings would invariably involve a degree of premeditation and a victim of serious domestic violence may also plan to kill her abuser in order to prevent further violence and abuse.⁷⁹

An intention to kill and an intention to cause an injury likely to endanger life are morally equivalent

It has been argued that there is moral equivalency between an intention to kill and an intention to do grievous bodily harm. Morgan stated that:

Whilst there is in theory a distinction between an intent to kill and an intent to do [grievous bodily harm], it is submitted that this is insufficient in itself to support an automatic and substantial differentiation in sentence.⁸⁰

Justice McKechnie submitted that the practical difference between intent to kill and intent to do grievous bodily harm is 'very slight'.⁸¹ He further stated that:

The graduation of criminality between a person who beats another to the point of death but death is an unintended consequence, and one who beats another to death with death as an intended consequence is small.⁸²

In his submission Dr Thomas Crofts referred to the argument that mercy killings demonstrate that killing with intent to kill is not necessarily more serious than a killing with intent to do grievous bodily harm. However, he submitted that instead of removing the distinction between wilful murder and murder, these cases show that there should be separate offences or defences to cover their circumstances.⁸³ The Commission has not examined mercy killing in this reference,⁸⁴ but notes that it is just one example that demonstrates that an intention to kill is not necessarily more culpable than intent to cause an injury likely to endanger life.

The Commission is of the view that any difference between the culpability of a killing with an intention to kill and a killing with an intention to cause an injury likely to endanger life is minimal. Further, in some cases, an intention to cause an injury likely to endanger life will be more culpable.⁸⁵ It will depend upon all of the circumstances of the case. For example, if an accused deliberately set a person on fire for the purpose of permanently disfiguring the victim this would constitute an intention to cause an injury likely to endanger life but not an intention to kill. If the victim died it is difficult to see how such an accused could claim that the circumstances of the offence were significantly less serious than a deliberate killing.⁸⁶

77. In some instances premeditation has been interpreted literally; that is, any case where the accused has thought about killing someone and then made a choice to do so. Such an interpretation would apply even if there was only a split second between the original thought and the decision to kill. An alternative interpretation is to set a time limit (such as two hours). It was observed that this option is necessarily arbitrary: see Victorian Law Reform Commissioner, *Law of Murder*, Report No. 1 (1974) [20].

78. Victorian Law Reform Commissioner, *ibid* [15].

79. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [2.44].

80. Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 213.

81. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 1 (12 September 2005) 1.

82. *Ibid*.

83. Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 2; Crofts T, 'Wilful Murderers in Western Australia: Soon to get away with murder?' (2006) 31 *Alternative Law Journal* 203, 203.

84. See Introduction, 'Matters Beyond the Scope of this Reference'.

85. For example in *Hillsley* [2006] NSWCCA 312 the accused was convicted of murder on the basis of an intention to cause grievous bodily harm. The nature of the attack would be likely to fit within the Commission's recommended mental element for murder (intention to cause an injury likely to endanger life): the accused struck the deceased (while he was sleeping) on the head with a hammer. Immediately following the attack the accused took the accused's child from her bedroom and sexually assaulted her. The accused claimed that he planned the attack as revenge over a dispute about money and work. The accused also claimed that he did not intend to kill the deceased: in fact he hoped that the deceased would survive and that finding out about the sexual assault of his child would constitute further 'payback'. The accused was sentenced to 16 years' imprisonment for the murder with a total sentence of 30 years for other offences including the sexual assault. On appeal, the sentence for murder was increased to life imprisonment. The New South Wales Court of Criminal Appeal held this murder was in the 'worst class': at [22].

86. The Commission notes that a similar factual scenario occurred in *Minhaj* [2000] WASCA 52. However, in this case the victim did not die. The accused was convicted of unlawfully doing grievous bodily harm to his wife with intent to maim, disfigure or disable her.

THE COMMISSION'S RECOMMENDATIONS

The Commission received a number of submissions in support of abolishing the distinction between wilful murder and murder⁸⁷ but also received a number of submissions arguing that the distinction between the two offences should remain.⁸⁸ However, all submissions received by the Commission on this issue commented on the basis that there were only two options. The first is to retain the distinction and the second is to repeal the offence of wilful murder so that murder is either an intention to kill or an intention to do grievous bodily harm. The Commission has concluded that an intention to do grievous bodily harm is not the appropriate element of murder. Instead murder (other than felony-murder) should require at least an intention to cause an injury likely to endanger life. In its submission the Western Australia Police recognised that:

[I]n principle, there is a very clear conceptual difference between wilful murder and murder. An intention to bring about a person's death clearly entails a greater moral culpability than an intention to do some kind of permanent injury to a person's health.⁸⁹

Because the Commission has recommended that an intention to cause a permanent injury to health should not constitute the mental element of murder, many of the arguments against abolishing the distinction between the two offences are no longer applicable or convincing.

Accordingly, the Commission has concluded that the offence of wilful murder should be repealed.

Recommendation 6

Repeal of wilful murder

That s 278 of the *Criminal Code (WA)* be repealed.

Recommendation 7

Murder

That s 279 of the *Criminal Code (WA)* be amended to provide that it is murder if, and only if, the accused unlawfully kills another person and —

- (1) the accused intended to cause the death of the person killed or some other person;
- (2) the accused intended to cause a bodily injury of such a nature as to endanger or be likely to endanger the life of the person killed or of some other person; or
- (3) death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life.

87. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 1; Women Justices' Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 1; Department of Community Development, Submission No. 42 (7 July 2006) 4; Angelhands, Submission No. 47 (3 August 2006) 1; Office of the Commissioner of Police, Submission No. 48 (4 August 2006) 1; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 1–2.

88. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 1–2; Brian Tennant, Submission No. 15 (12 June 2006) 1; Festival of Light Australia, Submission No. 16 (12 June 2006) 1; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 3–4; Michael Bowden, Submission No. 39 (11 July 2006) 1; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 1. See also Alexis Fraser, Submission No. 30 (15 June 2006) 14–15, who supported the retention of two separate offences of murder. Ms Fraser submitted that there should be two offences called 'Murder 1' and 'Murder 2' and the jury should have the power to deliver a verdict of Murder 1 if it considered that there was a 'significant degree of intentional cruelty or degradation'. The Commission also notes that the Criminal Lawyers' Association did not express a firm view on this issue: Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006) 1–2.

89. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 1.