

# Appendices

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# Appendix A: List of Recommendations

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## Introduction

**Recommendation 1 Inquiry on euthanasia and related matters** [p. 4]

1. That the Attorney General of Western Australia establish an inquiry into how the law in Western Australia should respond to euthanasia, mercy killings, suicide pacts and any other related matter.
2. That the Attorney General of Western Australia direct that this inquiry be undertaken in consultation with medical experts and other relevant organisations and individuals.

**Recommendation 2 Review of reforms to the law of homicide** [p. 5]

That the Western Australian government review the practical operation of the laws of homicide after any of the recommendations in this Report have been implemented for a period of five years.

## The Law of Homicide in Western Australia

**Recommendation 3 Review of statutory definitions in consultation with the medical profession** [p. 27]

That the Department of the Attorney General consult with the medical profession and relevant organisations and individuals to determine:

- (a) an appropriate statutory definition of death which is applicable to the laws of Western Australia and which may be inserted into relevant legislation;
- (b) if the definition of when a child becomes a person capable of being killed under s 269 of the *Criminal Code* (WA) requires amendment with regard to the current level of medical knowledge and technology; and
- (c) if s 290 of the *Criminal Code* (WA) requires amendment to, among other things, reflect a statutory period of gestation beyond which a child is presumed to be capable of being born alive.

## Wilful Murder and Murder

**Recommendation 4 Mental element of murder** [p. 50]

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.

**Recommendation 5 Repeal unnecessary categories of felony-murder** [p. 53]

That s 279(3), s 279(4) and s 279(5) of the *Criminal Code* (WA) be repealed.

**Recommendation 6 Repeal of wilful murder** [p. 84]

That s 278 of the *Criminal Code* (WA) be repealed.

**Recommendation 7 Murder**

[p. 84]

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.

## **Manslaughter and Other Homicide Offences**

**Recommendation 8 Alternative offences to manslaughter**

[p. 91]

That s 280 of the *Criminal Code* (WA) be amended to insert s 294 of the *Criminal Code* (WA) as an additional alternative offence to manslaughter.

**Recommendation 9 Duty of parents and other carers to provide necessities of life to a child under the age of 16 years**

[p. 93]

That s 263 of the *Criminal Code* (WA) be amended to delete the phrase ‘head of the family’.

**Recommendation 10 Review of the duty of persons in charge of children under the age of 16 years**

[p. 94]

That the Department of the Attorney General and the Department of Child Protection jointly conduct a review of s 263 of the *Criminal Code* (WA) to determine whether:

- (a) The duty of every person who is in charge of a child under the age of 16 years in his or her household should be extended to include a duty to protect or rescue the child from harm and to take reasonable precautions to avoid danger to the health, safety or life of the child.
- (b) The duty under s 263 should be extended to those who are temporarily in charge of a child under the age of 16 years in circumstances where the child is not a member of their household.

**Recommendation 11 Criminal negligence**

[p. 99]

That a provision be inserted into Chapter XXVII of the *Criminal Code* (WA) to provide that:

- (1) Where it is alleged that a person has caused death, grievous bodily harm or bodily harm by the failure to perform a duty in this chapter, it must be proved that the conduct of the person objectively involved a risk of at least the alleged harm.
- (2) Satisfaction of the requirement in (1) alone is not sufficient to establish criminal responsibility for the alleged harm.

**Recommendation 12 Duty in relation to dangerous conduct** [p. 102]

That s 266 of the *Criminal Code* (WA) be replaced by the following provision:

**266. Duty of persons in relation to dangerous conduct**

It is the duty of every person to use reasonable care and take reasonable precautions to avoid or prevent danger to the life, safety or health of another if the danger arises from an act of the person or from anything in the person's possession or control.

**Recommendation 13 Repeal the offence of infanticide** [p. 117]

That s 281A and s 287A of the *Criminal Code* (WA) be repealed and that consequential amendments be made to s 277 and s 283 and to any other relevant legislative provision to abolish the offence of infanticide in Western Australia.

**Recommendation 14 Review of s 59 and s 59B of the *Road Traffic Act 1974* (WA)** [p. 125]

1. That an independent body conduct a review of all cases in Western Australia where a person has been charged under s 59 or s 59A of the *Road Traffic Act 1974* (WA) since the law was amended in 2004.
2. That this review determine whether the removal of the requirement for the prosecution to prove a causal link between the dangerous driving and the death or injury has operated unfairly to any accused.
3. That this review consider whether and, if so why, the amendments have resulted in more convictions for the offences of dangerous driving causing death, dangerous driving causing grievous bodily harm and dangerous driving causing bodily harm.

**Recommendation 15 Dangerous driving causing death and dangerous driving causing grievous bodily harm to be separated into two offences** [p. 128]

1. That s 59 of the *Road Traffic Act 1974* (WA) be amended to remove the offence of dangerous driving causing grievous bodily harm.
2. That a new s 59AA be enacted in the *Road Traffic Act 1974* (WA) to create the offence of dangerous driving causing grievous bodily harm. The provisions of s 59AA should be in identical terms to s 59, other than in relation to the penalties provided for the offence.

**Recommendation 16 Amendment to the circumstances of aggravation under s 59B of the *Road Traffic Act 1974* (WA)** [p. 130]

That s 59B(3)(a) of the *Road Traffic Act 1974* (WA) be repealed for the reason that driving a vehicle without the consent of the owner or the person in charge of the vehicle should not be classified as a circumstance of aggravation because it is not relevant to the manner of driving.

**Recommendation 17 Penalties for dangerous driving causing death, dangerous driving causing grievous bodily harm and dangerous driving causing bodily harm** [p. 132]

1. That the *Road Traffic Act 1974* (WA) be amended to provide that the maximum penalty for dangerous driving causing death is greater than the maximum penalty for dangerous driving causing grievous bodily harm and, in turn, the maximum penalty for dangerous driving causing grievous bodily harm is greater than the maximum penalty for dangerous driving causing bodily harm.
2. That the *Road Traffic Act 1974* (WA) be amended to provide for a greater summary conviction penalty for dangerous driving causing death and dangerous driving causing grievous bodily harm committed in circumstances of aggravation.

**Recommendation 18 Dangerous navigation causing death** [p. 133]

1. That an offence of dangerous navigation causing death be enacted under the *Marine Act 1982* (WA) and that the offence be based upon the provisions of the offence of dangerous driving causing death under s 59 of the *Road Traffic Act 1974* (WA).
2. That the offence of dangerous navigation causing death be specified as an alternative verdict for manslaughter under s 280 of the *Criminal Code* (WA).

## Defences to Homicide

**Recommendation 19 Intention and motive** [p. 157]

That a new s 23 of the *Criminal Code* (WA) be inserted into the *Criminal Code* (WA) to provide:

**23. Intention and motive**

- (1) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (2) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

**Recommendation 20 Unwilled conduct** [p. 157]

That s 23A be inserted into the *Criminal Code* (WA) to provide:

**23A. Unwilled conduct**

- (1) A person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will.
- (2) Subsection (1) is subject to the provision in Chapter XXVII of the *Criminal Code* (WA) dealing with negligent acts and omissions.

### Recommendation 21 Accident

[p. 157]

That s 23B be inserted into the *Criminal Code* (WA) to provide:

#### 23B. Accident

- (1) A person is not criminally responsible for an event which occurs by accident.
- (2) A person is not excused from criminal responsibility for causing death or grievous bodily harm if death or grievous bodily harm is directly caused by the deliberate application of force by the person, but the death or grievous bodily harm would not have occurred but for the presence of a defect, weakness or abnormality in the victim.
- (3) The rule in subsection (2) above applies even though the death or grievous bodily harm was not intended or foreseen by the person and not reasonably foreseeable by an ordinary person.
- (4) Subsection (1) is subject to the provisions in Chapter XXVII of the *Criminal Code* (WA) dealing with negligent acts and omissions.

### Recommendation 22 Jury directions in cases of self-defence

[p. 169]

1. That a new section be inserted into the *Evidence Act 1906* (WA) to provide that when the defence of self-defence is raised under s 248 of the *Criminal Code* (WA) the judge shall inform the jury that:
  - (a) an act may be carried out in self-defence even though there was no immediate threat of harm, provided that the threat of harm was inevitable; and
  - (b) that a response may be a reasonable response for the purpose of self-defence under s 248 of the *Criminal Code* (WA), even though it is not a proportionate response.
2. That a further section be inserted into the *Evidence Act 1906* (WA) to provide that when the defence of excessive self-defence is raised under s 249 of the *Criminal Code* (WA), the judge shall inform the jury that an act may be carried out in self-defence even though there was no immediate threat of harm, provided that the threat of harm was inevitable.

### Recommendation 23 Self-defence

[p. 172]

1. That sections 248–250 of the *Criminal Code* (WA) be repealed.
2. That a new s 248 of the *Criminal Code* (WA) be enacted to provide that a person is not criminally responsible for an offence if the act constituting the offence was carried out in self-defence.
3. That the new s 248 provide that an act is carried out in self-defence if:
  - (a) the person believed on reasonable grounds that it was necessary to use force to defend himself or herself or another person; and
  - (b) the person believed that the act was necessary in order to effectively defend himself or herself or another person; and
  - (c) the act was a reasonable response to the circumstances as the person perceived them (on reasonable grounds) to be.
4. That the new s 248 provide that an act is not carried out in self-defence if the person was responding to lawful conduct and that conduct is not lawful just because the person engaging in the conduct is not criminally responsible for it.

**Recommendation 24 Repeal of section 31(3) of the *Criminal Code* (WA)**

[p. 173]

That s 31(3) of the *Criminal Code* (WA) be repealed.

**Recommendation 25 Defence against home invasion**

[p. 176]

That s 244 of the *Criminal Code* (WA) be amended by adding that force intended to cause death or grievous bodily harm cannot be used in defence of property only.

**Recommendation 26 Introduce partial defence of excessive self-defence**

[p. 183]

That a new s 249 be inserted into the *Criminal Code* (WA) to provide that a person will be guilty of manslaughter and not murder if the act done in self-defence was not a reasonable response to the circumstances as the person perceived them, on reasonable grounds, to be and

- (a) the person believed on reasonable grounds that it was necessary to use force in defence of himself, herself or another person; and
- (b) the person believed that the act was necessary in order to effectively defend himself or herself or another person.

**Recommendation 27 Duress**

[p. 199]

1. That s 31(4) of the *Criminal Code* (WA) be repealed.
2. That s 32(1) of the *Criminal Code* (WA) provide that a person is not criminally responsible for an act or omission if he or she does the act or makes the omission under duress.
3. That s 32(2) of the *Criminal Code* (WA) provide that a person does an act or makes an omission under duress if he or she reasonably believes that:
  - (a) a threat has been made that will be carried out unless the offence is committed;
  - (b) there is no reasonable way to make the threat ineffective; and
  - (c) the act or omission is a reasonable response to the threat.
4. That s 32(3) of the *Criminal Code* (WA) provide that subsections (1) and (2) do not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out an act or omission of the same kind actually carried out or for the purpose of carrying out unlawful conduct in circumstances where it is likely that such threats would be made.

**Recommendation 28 Extraordinary emergency**

[p. 201]

That s 25 of the *Criminal Code* (WA) be repealed and replaced with a new section that provides:

**25. Extraordinary emergencies**

Subject to the provisions of this Code dealing with acts or omissions done under duress and in self-defence, a person is not criminally responsible for an act or omission if the person reasonably believes that —

- (a) circumstances of sudden or extraordinary emergency exist; and
- (b) doing the act or making the omission is the only reasonable way of dealing with the emergency; and
- (c) the act or omission is a reasonable response to the emergency.

**Recommendation 29 Repeal of the partial defence of provocation** [p. 222]

That s 281 of the Commission be repealed, but only if the Commission's recommendation to replace the mandatory penalty of life imprisonment for murder with a presumptive sentence of life imprisonment is implemented.

**Recommendation 30 Review of the complete defence of provocation under the Code** [p. 223]

That the Department of the Attorney General conduct a review of the complete defence of provocation under ss 245 and 246 of the *Criminal Code* (WA) to consider whether the defence should be retained and, if so, to which offences it should apply.

## Mental Impairment Defences

**Recommendation 31 Delusions resulting in special verdict** [p. 233]

That s 113(1) of the *Criminal Procedure Act 2004* (WA) be amended to provide:

**113. Special verdict may be required**

- (1) If in a trial the question arises whether, under *The Criminal Code* s 27, the accused was not criminally responsible for an act or omission by reason of mental impairment or by the effect of delusions, the judge must direct the jury that if it finds the accused not guilty of the charge on this basis, it must return a special verdict of not guilty by reason of mental impairment.

**Recommendation 32 Procedure for determining insanity at trial** [p. 237]

That the procedure for determining the issues of insanity and intent (or other required mental elements of an offence) at trial should not be regulated.

**Recommendation 33 Defence of mental impairment** [p. 238]

1. That s 26 of the *Criminal Code* (WA) be repealed.
2. That s 27 of the *Criminal Code* (WA) be repealed and replaced with the following formulation:

**27. Mental Impairment**

- (1) A person is not criminally responsible for an act or omission by reason of mental impairment if at the time of doing the act or making the omission he or she is in such a state of mental impairment as to deprive him or her of capacity to —
  - (a) understand what he or she is doing;
  - (b) control his or her actions; or
  - (c) know that he or she ought not to do the act or make the omission.
- (2) A person whose mind, at the time of doing or omitting to do an act, is affected by delusions, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he or she was induced by the delusions to believe to exist.
- (3) A person is presumed not to have been suffering a mental impairment unless the contrary is proved.

**Recommendation 34 Wording of special verdict**

[p. 239]

That the words 'on account of unsoundness of mind' in s 93, s 113(1), s 113(2)(b) and s 146 of the *Criminal Procedure Act 2004* (WA) be replaced with the words 'by reason of mental impairment' and that consequential amendments be made to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) and any other relevant legislation.

**Recommendation 35 Presumptive (rather than compulsory) custody orders for homicide offences** [p. 243]

1. That the imposition of a custody order on a mentally impaired accused for an offence (including a homicide offence) listed under Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) or its equivalent in future legislation be presumed but not compulsory.
2. That, in considering whether a custody order should be imposed upon a mentally impaired accused, the court should have regard to the following factors:
  - (a) whether a sentence of imprisonment would be imposed on the mentally impaired accused in all the circumstances if he or she was found criminally responsible for the crime;
  - (b) whether the mentally impaired accused is currently considered dangerous to the community or to him or herself;
  - (c) whether it is in the public interest to order that the mentally impaired accused be held in custody;
  - (d) whether the mentally impaired accused can be treated within the community (and whether appropriate facilities are available for this purpose);
  - (e) whether the mentally impaired accused currently suffers a relevant mental impairment; and
  - (f) the circumstances of the offence for which the mentally impaired accused was found not guilty by reason of mental impairment.
3. That, in considering whether the presumption of a custody order for a particular offence should be displaced, the court may be informed by any relevant source including the Mentally Impaired Accused Review Board, the accused's treating physicians and the Office of the Chief Psychiatrist for Western Australia.
4. That the decision to impose a custody order be subject to appeal.

**Recommendation 36 Court to nominate limiting term for custody order**

[p. 245]

That the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (or its successor) be amended to provide that:

1. when imposing a custody order the court be required to nominate a limiting term that is capped at the term of imprisonment that the court would have imposed had the person been found guilty of the offence; and
2. the limiting term nominated by the court be subject to appeal.

**Recommendation 37 Supervised release order for mentally impaired accused** [p. 246]

1. That a definite term Supervised Release Order be established as an alternative disposition available to a court for a mentally impaired accused found not guilty of a Schedule 1 offence.
2. That the court have complete discretion to set the term of the Supervised Release Order with regard to all the circumstances, but that the term not exceed five years (or such other statutorily limited term deemed appropriate by the government following consultation with relevant groups including the judiciary and the Mentally Impaired Accused Review Board).
3. That provision be made for a court to order interim custody of the mentally impaired accused for assessment by a psychiatrist or other expert, whose opinion may have bearing upon whether the court imposes a custody order or a Supervised Release Order.
4. That the Supervised Release Order have conditions (including compliance, treatment, residential and training conditions) set by the Mentally Impaired Accused Review Board and that the Board take into account any recommendations of the court when setting such conditions.
5. That provision be made for a court to order interim custody of a mentally impaired accused to be released on a Supervised Release Order to enable the Mentally Impaired Accused Review Board to determine the conditions to be placed on such order.
6. That the Mentally Impaired Accused Review Board make its first consideration within five working days of the imposition of the Supervised Release Order and that the mentally impaired accused be released on such order within 30 days of the making of the order by the court.
7. That the Supervised Release Order be supervised by a 'designated officer' under s 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) or such other officer as nominated by the Mentally Impaired Accused Review Board as being sufficiently experienced to supervise mentally impaired offenders.
8. That the decision to impose a Supervised Release Order be subject to appeal.

**Recommendation 38 Assessment and treatment orders for accused found guilty** [p. 248]

1. That provision be made in the *Sentencing Act 1995* (WA) to enable a court to make orders for the assessment and treatment of an accused person found guilty of an offence, but who appears to the court to have a mental condition that requires or would benefit from treatment or specific care.
2. That continuing orders made under such provision be subject to regular review by the Mentally Impaired Accused Review Board.
3. That in drafting these provisions regard be had to Part 4 of the *Sentencing Act 1995* (NT).

**Recommendation 39 No partial defence of diminished responsibility** [p. 259]

That no partial defence to murder of diminished responsibility or substantial mental impairment be introduced in Western Australia.



## Domestic Violence and Homicide

**Recommendation 40 Use of gender-neutral terms** [p. 264]

That any reform to the law of homicide in Western Australia be expressed in gender-neutral terms.

**Recommendation 41 Expert evidence on question of reasonableness** [p. 293]

That the *Evidence Act 1906* (WA) be amended to provide that if an accused seeks to rely on self-defence, opinion evidence about domestic violence may be led where relevant to assist in the determination of:

- (a) the reasonableness of the accused's belief that it was necessary to use force to defend himself, herself or another person; or
- (b) whether the act was a reasonable response to the circumstances as the accused perceived them to be.

**Recommendation 42 Persons who can give expert evidence about domestic violence** [p. 294]

That the *Evidence Act 1906* (WA) be amended to provide that a person may give opinion evidence about domestic violence where their qualifications in that field are based solely on their experience.

## Sentencing

**Recommendation 43 Strict security life imprisonment** [p. 304]

That the sentence of strict security life imprisonment be abolished.

**Recommendation 44 Penalty for murder** [p. 317]

1. That s 282 of the *Criminal Code* (WA) be repealed and replaced with the following:

**282. Penalty for murder**

- (1) A person, other than a child, who commits the crime of murder must be sentenced to imprisonment for life, unless, given the circumstances of the offence or the offender, a sentence of imprisonment for life would be clearly unjust.
- (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of the crime of murder, it must give written reasons for not doing so.
- (3) If a court does not impose a sentence of imprisonment for life on an offender convicted of the crime of murder, the maximum penalty is imprisonment for 20 years.
- (4) A child who commits the crime of murder is liable to imprisonment for life or an order that the child be detained in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may, from time to time, direct.

2. That s 91 of the *Sentencing Act 1995* (WA) be repealed.
3. That s 90 of the *Sentencing Act 1995* (WA) be repealed and replaced with the following:  
**90. Imposing life imprisonment**
  - (1) A court that sentences an offender to life imprisonment must, unless it makes an order under subsection (3), set a minimum period of at least 10 years and not more than 30 years that the offender must serve before being eligible for release on parole.
  - (2) The minimum period begins to run when the term of life imprisonment begins.
  - (3) A court that sentences an offender to life imprisonment must order that the offender 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.
  - (4) In determining whether an offence is one for which an order under subsection (3) is necessary, the only matters relating to the offence that are to be taken into account are —
    - (a) the circumstances of the commission of the offence; and
    - (b) any aggravating factors
4. That consequential amendments be made to any other relevant legislation as a result of the above recommendations.

**Recommendation 45 Improving public understanding and awareness of sentencing practices for homicide in Western Australia** [p. 319]

1. That the Attorney General consult with the Chief Justice, other judicial officers, and relevant organisations and individuals to determine the most appropriate body to undertake the responsibility for improving public understanding and awareness of sentencing practices for homicide in Western Australia.
2. That the Attorney General ensure that there is a designated body to monitor sentencing practices for homicide offences; collect, disseminate and analyse sentencing data in relation to homicide; publish reports; and provide easily accessible information to the public and to the judiciary.

## Appendix B: Submissions and Contributors

### Submissions

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The Commission wishes to thank the following people for providing information, assistance or advice on aspects of this reference:

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