Partial Defences to Murder: Provocation and Infanticide

NSW Law Reform Commission, Report 83, Sydney 1997; 146 pp.

The partial defences to murder in Australian criminal law have acted as lightning rods for the critique of the law of homicide over recent years. Criticism has frequently been directed at their gendered character — at how they operate for men and for women, and about what they say about masculinity and femininity. There has also been criticism of the outmoded and distorted medical/psychiatric bases of diminished responsibility and infanticide.

The NSW Law Reform Commission (NSWLRC) was asked to review the partial defences in 1993 and issued *Discussion Paper 31* later that year. A report on diminished responsibility was published in 1997, dealing with the issue separately to allow a quick response to the public controversy following the use of the defence in the Cassel case. *Report 82* recommended retention of the defence, with clarification of its criteria. In *Report 83* the NSWLRC considers such important issues as the relevance of gender, ethnicity and sexuality to the definition of elements of the defence; the broadening of the definition of 'provocative conduct', including whether it should be possible to include non-violent homosexual advances as provocative conduct; the availability of the defence to battered women who kill; and the thorny question of the 'objective test': that is, the 'ordinary person' test currently applied in all Australian jurisdictions.

In this limited space I will focus on the last issue in relation to provocation, the reform of the 'ordinary person' test. The Report offers, however, a detailed review of the defences, and of the current state of options of reform. It is clearly written and thoroughly documented; it also reports some empirical work on the operation of the defences, all of which make it a valuable and highly readable resource.

The 'ordinary person' test reflects the requirement that an offender's reaction to the provocation be tested against what could provoke 'the ordinary person in the position of the accused'. The High Court in *Stingel*'s case in 1990 redefined and narrowed the test, reversing earlier trends towards a more subjective assessment of the offender's culpability. *Stingel's* case established a two-part test which severely limited the scope for considering the offender's personal characteristics; it can also be quite complex to apply. The test has been criticised on these grounds, and more generally on the ground that the notion of a homogenous 'ordinary person' is simply unrealistic in today's society. There has also been, of course, the competing concern to maintain *some* objective standard of 'blameworthiness', of what constitutes an 'allowable' provoked response.

The NSWLRC proposes to replace the 'ordinary person' test with a subjective test, together with the application of community standards of blameworthiness. The proposed test — similar to one recommended by the (now deceased) Victorian Law Reform Commission in 1991 — would ask whether the accused, 'taking into account all of his or her characteristics and circumstances, should be excused ... [such] as to warrant the reduction of murder to manslaughter'. This test allows the offender's personal characteristics to be taken properly into account, whilst at the same time requiring the jury to evaluate the extent of culpability, thus retaining some 'community' benchmark of blameworthiness.

This is probably the only realistic approach to this unsatisfactory area of the law. But the new formulation obviously still leaves the availability of the partial defence very much to chance — to individual juries' prejudices and stereotypes, and to whether the particular defendant is seen as 'sympathetic'.

The proposal to virtually abolish the objective test for provocation is controversial enough. But the NSWLRC also recommends the abolition of the partial defence/offence of infanticide. The defence of infanticide was introduced in the UK in 1922, and subsequently adopted in Australian jurisdictions, ostensibly as a sympathetic option, where a woman was charged with murder for killing her young baby, often in circumstances of great psychological, social and economic oppression. Its introduction may, of course, have disadvantaged some women, ensuring a conviction (albeit with a lower penalty) where they might have benefitted from a jury's reluctance to convict of murder with a complete acquittal. The defence provides an excuse (reflecting its 19th-century origins) for the woman who becomes 'temporarily deranged' after childbirth, where 'her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation ...' (*Crimes Act 1900* (NSW), s.22A.) On this basis, it is available only in relation to the killing of the specific child whose birth allegedly gave rise to this mental disturbance, and provided that child is not more than 12 months of age.

There is now only a handful of convictions for infanticide in Australia each year. The defence/offence has been criticised as being based on a construction of women as sick, as victims of their biology; as based on outmoded notions of mental disturbance; and as inappropriately restrictive in its application. On the other hand, it clearly benefits some women, whether they are 'actually' suffering from the mental disturbance defined in the provision, or pushed beyond their limits by the stresses of parenthood, isolation, poverty and other pressures and given sympathetic psychiatric diagnosis.

Although the majority of submissions received by the Commission did not support the abolition of the infanticide defence/offence, the Commission concludes that cases where women kill their children under severe mental stress/disorder should be dealt with under the general defence of diminished responsibility, reformulated as proposed in *Report 82*. It recommends abolition of the defence of infanticide subject to the retention of the general defence.

The abolition of the defence of infanticide would probably disadvantage some women. The diminished responsibility defence potentially requires proof of a more serious mental disorder. On the other hand, it would be available to a wider range of offenders, and in relation not only to a child under the age of 12 months as currently applies to the defence of infanticide. It is also possible that more severe sentences would be imposed, given the current differences in sentencing patterns for manslaughter and infanticide in New South Wales. It is important that the particular pressures suffered by some women as mothers, and in becoming mothers, be capable of providing mitigation in appropriate situations where they lead to serious violence. This should not, however, be at the expense of the inappropriate biologistic stereotyping which presently underlies

the defence of infanticide. Whether diminished responsibility will provide the answer is, however, still unclear. Certainly in jurisdictions which do not have this defence (such as Victoria) abolition of the infanticide defence/offence should not be contemplated, although it could usefully be amended to address some of its anomalies.

BRONWYN NAYLOR

Bronwyn Naylor teaches law at Monash University.

Thanks to Ania Wilczynski for background information.

The Cartel Lawyers and their Nine Magic Tricks

by Evan Whitton; Griffen Press Pty Ltd; 254 pp; $29.95 softcover.

> ...The world is still deceiv'd with ornament,
> In law, what plea so tainted and corrupt
> But, being season'd with a gracious voice
> Obscures the show of evil.
>
> Shakespeare

If we thought that in going to a court of law, criminal or civil, the truth would be the centre and only matter for consideration — this book will make us pause. Whitton argues that the search for truth is subverted by many powerful forces that impinge upon the legal system.

The extreme adversary system in Australia, England, America and other places, obscures the truth and enshrines a system where the search for truth faces an array of hurdles in the legal system. There is no conspiracy — just a historical set of procedures and practices and obscure laws set in stone, which serve the interests of lawyers and, occasionally, the truth.

Whitton examines such notable legal cases as Sir Terence Lewis in Queensland, John Elliott in Melbourne, the celebrated Lindy Chamberlain trial (the dingo was acquitted), and perhaps the equally notorious OJ Simpson trial in America — and a host of others. His examination of these cases makes compelling reading. Whitton takes the view that our legal system needs urgent review in order to place truth on the throne of justice from which she has been banished. He does not seem confident that his view will be listened to or acted upon.

We may quibble about the style of writing — quick staccato, machine-gun like firing of quotes and facts which tumble from his pen. Whitton moves around the world and through the centuries to find his evidence and present it for our consideration. We may not demur, however, about the incisive research, his fairly stated views of those both favourable and unfavourable to his own views. His arguments are both lucid and compelling.

Even when Whitton is in the area of less substantial facts (how many guilty go free) he makes a reasoned case for his assertion that the current legal system results in significant numbers of guilty escaping justice, and some innocents being jailed.

This book has crucial implications for law and justice in Australia and he makes a solid case for change. Most importantly, however, he demonstrates that unless truth is enthroned in the courts we may expect the common law to be viewed with cynicism by the common man, a corrosion of trust in the legal process, and ultimately a weakening of democracy.

This book is a 'must' for all citizens concerned with broad issues of law and social justice. Lawyers especially will find that an excellent case has been made for a serious examination of their profession.

PETER LYNN

Peter Lynn has worked in the criminal justice sysytem for 30 years and been an adviser to governments on prison matters.

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Evan Whitton; Griffen Press Pty Ltd; 254 pp; $29.95 softcover.

One might have expected more of a five time Walkley Award-winning journalist — or maybe not! Evan Whitton's *The Cartel — Lawyers and Their Nine Magic Tricks* is a carping indictment of the common law system annoyingly reported in tabloid style journalism — rather overdone on generalisation and third (fourth and fifth!) party quotes, decidedly short on detail and considered analysis.

Whitton apologises early in his work for the 'Dick and Dora prose' he adopts, something which is in his view necessary to ensure that the text remains accessible to 'judges and lawyers (who) have always seemed to find clarity of thought and utterance difficult, a phenomenon known as *la maladie Anglais'*. Notwithstanding the concessions Whitton makes for my profession I found his language and content lacking clarity of both thought and utterance — a phenomenon I might call *la maladie Whittonais*.

The central thesis of *The Cartel* is that the common law system not only fails to pursue truth but deliberately aims to obscure it. Lawyers have, in Whitton's view conspired with lazy judges over the centuries to develop, extend and preserve a bag of magic tricks designed to undermine the essential truth-seeking nature of a 'proper' legal system. It is a position presented in the most condescending fashion and is based on an unsubstantiated assumption that the vast majority of lawyers and judges are committed to misleading the general public about the real nature of the legal system.

In developing his position Whitton traverses merrily and simplistically through legal history dating back to the 11th century where 'the cartel' of the book's title was formed. This infamous syndicate of 'some two dozen lawyers and untrained and ignorant judges' was solely responsible for perpetrating the greatest crime ever committed — the rejection of the Continental inquisitorial legal system in favour of a common law system. From there and over a period of six centuries, the cartel was able to develop (in apparent isolation from political and historical contexts) the nine so-called magic tricks:

1. The notion that truth is not relevant to justice
2. The development of the jury system
3. The 'grossly excessive' adversarial system
4. The Right to Silence
5. The Rule Against Hearsay
6. The Rule Against Similar Fact Evidence
7. The Confusing Standard of Proof
8. The Christie Discretion and
9. The Exclusionary Rule.