# *Wilful Murder, Murder – What's in a Name?*

Thomas Crofts*

## Introduction

The Law Reform Commission of Western Australia was commissioned in 2005 to examine and report on the law of homicide. In May 2006 the Commission published a *Review of the Law of Homicide: An Issues Paper*, which 'considers whether the current categorisation of homicide offences should be retained and whether any amendment should be made to the existing law'. While all Australian jurisdictions, aside from Western Australia, define murder as unlawful killing with an intention either to kill or do grievous bodily harm[1] Western Australia separates these two states of mind into distinct offences. Wilful murder requires an intention to kill, whereas murder is satisfied with an intention to do grievous bodily harm. It is this unique feature of West Australian criminal law that the Commission has been particularly asked to review. Interestingly, while the WA Law Reform Commission is examining whether to abolish the distinction between wilful murder and murder, the English Law Commission (2005:[2.7]) has recommended the introduction of offences which are broadly similar to those existing in Western Australia. According to the English Law Commission's Consultation Paper the offence of 'first degree murder' would be equivalent to wilful murder in Western Australia and include cases of causing death where the offender intended to kill the victim. The offence of 'second degree murder' would, however, be broader than the offence of murder in Western Australia. It would include cases of causing death where the offender intended to do serious bodily harm, was recklessly indifferent to causing death or where the offender killed but had a partial defence to an intentional killing, such as provocation or diminished responsibility. In the final report entitled *Murder, Manslaughter and Infanticide* (2006) the proposed offence of first degree murder is no longer defined as narrowly as in Western Australia and extends to causing death where the person intends serious harm and is aware of the danger of causing death.

The WA Law Reform Commission has been given the task of reviewing the whole of the law in relation to homicide, with issues ranging from the classification of the homicide offences, to whether the specific and general defences in relation to homicide are in need of reform. While such a broad review is desirable it is an ambitious project raising many complex and controversial issues. The question of whether the defences to homicide should be reformed has, for instance, been the subject of much academic debate and separate

* Senior Lecturer, School of Law, Murdoch University.

1 Murder in most jurisdictions also covers in varying definitions the causing of death while in pursuance of a serious or dangerous or violent offence even where the offender did not foresee death. See e.g., *Criminal Code* (WA) s279(2); *Criminal Code* (Qld) s301(1)(d); *Crimes Act* 1900 (NSW) s18(1)(a); *Criminal Law Consolidation Act* 1935 (SA) s12A; *Criminal Code* (Tas) s157(1)(d), (e), (f); *Crimes Act* 1958 (Vic) s3A.

review by the Victorian Law Reform Commission in 2004. This article will not seek to address all the issues raised by the WA Commission; that would be too great a task. Rather the focus here will be on the unique feature of West Australian homicide law, the distinction between wilful murder and murder. This is appropriate given that a main impetus for the review of the law of homicide seems to be the push by the WA Attorney-General for the removal of this distinction. In 2003 there was an attempt with the Criminal Code Amendment Bill 2003 (WA) to delete the offence of wilful murder and redefine murder to include an intention to kill or do grievous bodily harm. This amendment proved to be more controversial than expected with the Opposition refusing to support this aspect of the Bill without the opportunity for more detailed and serious consideration. Faced with objection the proposal was moved into a separate Bill which eventually lapsed but clearly was not forgotten. Perhaps the hope is that after appropriate consideration by the Law Reform Commission the Opposition's desire for a more thorough evaluation of the proposal will be satisfied.

## Abolition of the Distinction between Wilful Murder and Murder

Criminal law reform is political and this is especially so in relation to the highly emotional issue of murder. The concern to reassure the public that people who kill are being appropriately punished clearly lurks behind the push to remove the distinction between wilful murder and murder in Western Australia. Both offences carry the penalty of mandatory life imprisonment for adults. However, wilful murder has a further possible sentence of mandatory strict security life imprisonment (*Criminal Code* (WA) s282). The difference between the offences is also made clear by the minimum periods of detention which must be served before an offender will be eligible for release on parole. For murder the court must set a minimum of at least seven years but not more than 14 years imprisonment (*Sentencing Act* 1995 (WA) s90). The minimum period of detention in relation to wilful murder is more complex. If the sentence is life imprisonment the minimum period is to be set between 15 and 19 years (*Sentencing Act* 1995 (WA) s90), where the sentence is strict security life imprisonment the minimum is raised to 20 and the maximum to 30 years (*Sentencing Act* 1995 (WA) s91(1)). It is also possible for the court to order that the offender be imprisoned for their whole life if it is 'necessary to do so in order to meet the community's interest in punishment and deterrence' (*Sentencing Act* 1995 (WA) s91(3)). In order to determine whether a person should be detained for their whole life the court is to take account of the circumstances of the commission of the offence and aggravating factors.

While discussion of the penalties for homicide was included in the WA Law Reform Commission's terms of reference the issue of the life sentence for murder was expressly excluded from the terms of reference of the English Law Commission (2006:[1.1]). This seems to have influenced the English Commission's recommendations. The 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 (Tadros 2006:608; Wilson 2006:485). This is in contrast to the WA Attorney-General's desire to remove the distinction between the offences because of his unease with killers avoiding the more severe minimum term of detention by being convicted of murder rather than wilful murder (McGinty 2005).

Removing the distinction between the offences would eliminate the incentive to plead guilty to the lesser offence and remove the difficulties facing the jury in distinguishing whether the offender intended to kill or intended grievous bodily harm. A further argument

in support of a merged murder offence is that sometimes a person who intends to kill may be less culpable than a person intending to do grievous bodily harm. Conversely, there may be cases where a person who intends to inflict a serious injury is just as morally culpable as a person who intends to kill. A final reason for removing the distinction between wilful murder and murder is that it would bring the law on homicide in Western Australia into line with the other Australian jurisdictions. These arguments will be assessed to determine whether they support the creation of a single murder offence.

### *The Difficulty Discerning an Intention to Kill*

The main feature distinguishing wilful murder from murder is the intention of the offender. Proof of whether a person intended to kill the victim or intended to cause them grievous bodily harm can come from direct evidence (such as what the offender says) or it may be inferred from the circumstances of the killing (such as a deliberate stabbing of the victim). This task of determining whether an offender intended to kill or intended to cause grievous bodily harm is one for the jury. Grievous bodily harm is defined in the *Criminal Code* (WA) 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, permanent injury to health' (s1(1)). Given that this definition is narrow there may be cases where the line between intending such harm and intending death is a very fine one, and in such cases the jury may struggle to determine which intention the offender actually had (Morgan 1996:213). Removing the distinction between wilful murder and murder would therefore remove this difficulty and is one of the reasons the WA Attorney-General cites in support of a single offence of murder. In his view, '[t]his distinction between wilful murder and murder can complicate cases for judges and juries and create unnecessary trauma for witnesses and victims' families' (McGinty 2005).

While it is true that it may be difficult to discern an offender's intention, it is the function of the jury to decide questions of fact even where such questions are difficult and most jury research 'paints a positive picture of the jury's fact-finding abilities' (Redmayne 2006:102). Juries are regularly expected to make difficult judgments in regard to other offences and distinctions between offences or elements of offences cannot and should not be removed because the intention of the accused is difficult to discern. If this argument were taken seriously it would mean, for instance, that the offence of attempted murder should also be amended or abolished because it too requires juries to discern whether an offender had an intention to kill. There is no suggestion, however, that juries experience difficulty with regard to this offence. Indeed, the English Law Commission (2005:[3.8]) found that there are around 80-90 convictions a year for attempted murder in England and Wales. This is taken to reveal that an offence of 'first degree murder' clearly is viable in English law. The Commission (2005:[3.8]) also noted that there are 'other crimes in which a very specific intent must be proven, where no calls for reform have followed from difficulties with proof'.

Furthermore, abolishing the distinction will not mean that the distinction in intention will become irrelevant; it could be taken into consideration at the stage of sentencing (WA Law Reform Commission 2006:3). If determining the actual intention of the offender is important then the argument that this is difficult does not convince one of the need to take the decision away from the jury. Juries have attributes which mean that they may be in a more advantageous position than a judge or small panel of judges at determining from the facts presented whether a person intended to kill or intended grievous bodily harm. This is partly due simply to the size of the jury; in the words of Lord Devlin (1956:149), 'I think it must be agreed that there are some determinations in which twelve minds are better than one, however skilled'. The jury is likely to have a broader range of experience than a judge

and can draw on these different experiences to reach a decision. Further, the 'social class of the jurors is likely to differ from the judge, and this may give them better insight into the sort of situation which is the subject of the trial' (Redmayne 2006:101).

Reserving the decision about what intention the offender possessed for the judge would also take away some of the transparency of the conviction. While the relative level of seriousness of the homicide can be taken account of at sentencing and reflected in the sentence given, this is not as clear as the label of the offence for which the offender is convicted. According to the principle of fair labelling distinctions between offences and their proportionate wrongfulness should be signalled by the label attached to the offence (Ashworth 2006:88). Being convicted of wilful murder signifies that this is a more serious offence than murder. Taking this decision away from the jury would deny the community input into the decision-making process and one of the fundamental values of the jury system is that it involves citizens in governance. Not only do citizens make the determination about whether a person is guilty, but also it 'involves them in a dialogue with the legislature and prosecutors' (Redmayne 2006:102). If juries are unwilling to convict of certain offences this may prompt law reform. The classical example here is the creation of the offence of causing death by dangerous driving because of the reluctance of jurors to convict of the more serious offence of manslaughter (Wilson 2007:162). The fact that juries do not appear to have a problem convicting people of wilful murder suggests that the community does place importance on the label of this offence and does not see the need for reform of this aspect of the homicide laws.

The jury also plays an important role from the perspective of the offender in that a person is judged by his or her peers 'who are less likely to be distanced socially – or in terms of age and race – from him than a professional judge' (Redmayne 2006:104). This is especially important where the charge concerns the most serious of offences. It should be noted, however, that the advantage is not that a jury will make prosecution more difficult. Rather the point is that because of their fact-finding abilities the jury will ensure a fair trial and that a person is convicted of an offence which reflects the community's understanding of the level of wrongfulness. The concern to make sure that a person's peers determine whether they are guilty of wilful murder or murder was one reason the WA Shadow Attorney-General gave for opposing merging wilful murder into murder when it was proposed in 2003 (Walker, WA Parliamentary Debates (Legislative Assembly) 10 September 2003:10952).

### *A Wilful Murderer may be Morally Less Culpable than a Murderer*

The offences of wilful murder and murder should ideally allow the worst cases of murder to be clearly identified by the label of the offence. An argument for removing the distinction between wilful murder and murder is that the offence labels might not appropriately reflect the worst cases of murder because a person who causes the death of the victim intending to kill them may in some instances be morally less culpable than a person who intends to cause grievous bodily harm. An example would be where a person intentionally kills their terminally ill spouse or where a person intentionally kills their partner in response to a prolonged period of abuse. Taking the first example, the Victorian case of *Maxwell* illustrates the unease that the courts feel at even classifying a person who intentionally kills another in compassionate circumstances as a murderer (and presumably in Western Australia there would be even more reluctance to convict such a person of wilful murder). In this case a husband brought about the death of his terminally ill wife at her request by placing a bag over her head and filling it gradually with helium. Even though the husband

took active steps to cause death, intending to cause death, he was convicted of aiding suicide rather than murder.

The fact that in such cases a person may be regarded to be morally less culpable than a person who commits murder is not, however, a compelling reason to abolish the distinction between these offences. Generally a person who kills intending to kill is more culpable than a person who causes death but intends only grievous bodily harm. Where there are exceptions an appropriate system should be developed to signal the lesser degree of culpability rather than extending the offence so that it covers a wider range of culpability. The question of how such cases should be dealt with was not canvassed by the WA Law Reform Commission. This is presumably because of a desire to avoid reform of the law of homicide becoming bogged down in the highly emotional and controversial debate over the legalisation of active voluntary euthanasia, a topic which is regularly debated before the Parliament of Western Australia (see e.g., the Voluntary Euthanasia Bills of 2002, 2000, 1998, 1997; the topic was also recently raised in relation to the Amendment (Consent to Medical Treatment) Bill 2006). Ashworth (2007:343) has also noted in relation to the English Law Commission's deliberations, that '[a]ny attempt at homicide law reform that includes this topic is likely to meet acute controversy that might well derail the whole project of reform'. Nonetheless, considering that the example of killing a terminally ill spouse has been cited by the WA Law Reform Commission as a reason for merging the murder offences it is appropriate at least to outline how such cases could be better catered for. This could be by way of the introduction of a new partial defence or a new offence with an appropriate label, such as mercy killing or killing on request.

A partial defence could apply where a person kills the victim at their request, where the victim has been diagnosed as suffering a terminal illness. A further condition could be that the parties must be in a special relationship, such as a conjugal, parental, filial, fraternal, carer or other close relationship. The new partial defence could operate in a similar way to the defence of provocation, which would reduce the offence of wilful murder or murder to manslaughter. An alternative and perhaps preferable approach given the wide range of conduct already covered by the offence of manslaughter would be, however, to create a new specific offence. The offence label would clearly signal the reduced level of culpability and the compassionate circumstances of the killing rather than leaving these to be deduced from the sentence given for manslaughter. A model for this can be found in the German *Criminal Code* which provides for the offence of 'killing on request' (§216). A person is guilty of this offence and liable to a sentence of between six months and five years where they kill a person at the victim's express and earnest request.

The approach of a separate offence labelled 'mercy killing' was also recommended by the English Criminal Law Revision Committee in 1976 ([79]-[87]). This offence would attract a maximum penalty of two years where the offender killed a person who they had reasonable grounds for believing to be either permanently subject to great bodily pain and suffering, permanently helpless from bodily or mental incapacity, or subject to rapid and incurable bodily or mental degeneration. A clear criticism of this approach was that it did not direct attention to whether the victim wished to be killed. Although the English Law Commission did not wish to make recommendations on this issue in 2006, it did propose that it should be the subject of a separate more detailed consultation process ([7.2]).

The second example referred to by the WA Law Reform Commission where a wilful murderer may be regarded by society as less culpable than a murderer is when a person intentionally kills their partner who has subjected them to long-term abuse. In this regard the Commission (2005:8) has sought opinion on whether the defences of provocation or

self-defence ought to be amended to enable battered women to rely on them or whether a separate defence for battered women should be established. In-depth analysis of this question is deserving of an independent study and is beyond the scope of this article. Discussion here is limited to the question of whether the example supports an abolition of the distinction between murder and wilful murder.

In recent years there has been much comment on whether provocation continues to have a role to play in modern society and both Tasmania and Victoria have recently concluded it does not and abolished this defence. The Victorian Law Reform Commission recommended abandoning the defence primarily because of the view that a person who intends to kill should be labelled a murderer. In its opinion the fact that a person killed due to a loss of self-control 'is not sufficient to distinguish them from other intentional killers' (2004:[1.21]). The current structure of homicide offences in Western Australia could accommodate the view that a person who intends to kill another should be labelled murderer even though they killed because of a loss of self-control. Indeed, this argument could support retention of the distinction between wilful murder and murder. Provocation in relation to homicide[2] could be restricted to cases of wilful murder and reduce the charge to murder rather than manslaughter. This system has been recommended by the English Law Commission (2006:[5.1]). It has the advantage that there is a reduced level of stigma for such a killer in that they are not convicted of the most heinous of the homicide offences.

However, if the concern is to reflect the lower level of culpability of the offender it may be argued that the label of murderer is still too harsh, especially in the case of an offender who kills their abusive partner. As noted by Quick and Wells (2006:516), 'shaking off the shackles of a murder label is often as important a focus of the post-conviction struggle of abused women who kill, as is their quest for freedom'. Although the gender bias of the defence is a concern, Tolmie (2005:38) argues that provocation may still have a role to play in the 'grey area of criminal culpability', that is cases where a middle ground is needed between an acquittal and a murder conviction. This means that the defence is still important for battered defendants who are not purporting to be acting in self-defence, for instance, where they kill in response to emotional rather than physical abuse (Tolmie 2005:42). If the defence is to be retained, which itself needs further consideration, it would need reforming so that it progresses from its gendered origins and is made less complex to apply. Such measures might include moving away from the traditional requirement of loss of self-control (which is said to reflect a typically male pattern of behaviour) and addressing the difficult concept of the 'reasonable person'.

The two examples discussed demonstrate that there may be cases in which an intentional killer is regarded to be less culpable than a person who caused death intending grievous bodily harm, but they do not convince of the need to abolish the distinction between wilful murder and murder. Rather these cases highlight that there is a need for better and more coherent ways of dealing with exceptional cases where an intentional killer does not deserve labelling with the most serious form of homicide. Such alternative methods could be the use of partial defences or the development of separate offences which connect the label of the offence to the level of culpability and wrongdoing.

### *A Murderer may be Morally as Culpable as a Wilful Murderer*

The reverse of the argument above is that the distinction between wilful murder and murder should be removed because a person who chooses to inflict a serious injury on another person which puts their life at risk is as morally culpable as a person who intends to kill.

2 In WA provocation is also a full defence to an assault based offence (*Criminal Code* (WA) s246).

This person has shown such disregard for human life that they deserve convicting of the most serious offence (Irish Law Reform Commission 2001:[4.083]). This argument may carry more weight in Western Australia, where the definition of grievous bodily harm is not as wide as in other jurisdictions, such as England and Wales (see English Law Commission 2005:[3.60]). There is, however, a moral difference between an offender who acts wanting to or knowing that they will kill a person and an offender who intends to inflict an injury which endangers (or is likely to endanger) life or cause permanent injury to health. There may be cases where a person intends to cause a permanent injury to the health of another where death is not a foreseeable consequence. Nonetheless a person can be liable for murder even when they positively do not intend to kill the victim, provided of course that they intended grievous bodily harm.

It is interesting to note that German criminal law clearly recognises this difference in moral culpability. A person who kills another while only intending to inflict bodily harm (the harm may, but need not, be grievous) is not liable for a homicide offence at all, rather for the offence of 'Bodily injury resulting in death' (*Criminal Code* (Germany) §227), which is classified as a non-fatal offence against the person. This example highlights that a clear distinction can be made regarding the culpability of a person who acts intending or foreseeing that death is virtually certain to occur and a person who acts without foreseeing that death may occur.

The offence of wilful murder should be reserved for those especially serious cases of homicide where the physical element (causing death) and the fault element (intention to cause death) coincide. Otherwise 'the law runs the risk of turning its most serious crime into a constructive offence' (Irish Law Reform Commission 2001:[4.083]). Furthermore, if murder were to cover both intention to kill and to cause grievous bodily harm juries may be reluctant to convict a person of this most serious offence where the perpetrator intended to do grievous bodily harm but did not intend to kill the victim and did not foresee death. The Law Reform Commission of Victoria (1990-1991:[131]) noted that it received submissions from experienced practitioners to the effect that juries were generally reluctant to convict for murder under this rule. Lord Goff (1988:49) also comments on his similar experience of the jury in England. The juries' reluctance to convict of murder may be because they judge such cases as distinct from, and less culpable than, the situation where a person kills intending to kill. Retaining the offences of wilful murder, murder and manslaughter allows the law to create a series of offences graded according to the moral blameworthiness of the mental state of the offender and which reflect community perception of the gravity of the offence.

### *The Distinction is an Anomaly*

A final reason to abolish the distinction between wilful murder and murder would be to bring the law in Western Australia into line with the law in the other Australian jurisdictions. Distinguishing these forms of murder is a unique feature of West Australian criminal law. At common law both an intention to kill and do grievous bodily harm are classified as murder and the Queensland *Criminal Code*, the closest Code to the WA *Criminal Code*, abolished this distinction in 1974. In the Second Reading Speech on the Criminal Code Amendment Bill 2003, the Attorney-General remarked that removing the distinction would follow the lead taken in the other States (WA Parliamentary Debates (Legislative Assembly) 3 April 2003:6159).

While consistency in criminal law in Australia may be desirable it does not in itself warrant abolition of the distinction when there are good reasons for its retention. Furthermore, it may be the case that the offence divisions in Western Australia are

increasingly recognised as more appropriately reflecting the different degrees of culpability in homicide. As noted by the English Law Commission (2006:[1.32]):

> [T]he two categories of murder and manslaughter have had to bear the strain of accommodating changing and deepening understandings of the nature and degree of criminal fault ... They have also had to satisfy demands that labelling and sentencing should be based on rational and just principles.

The English Law Commission is certainly of the view that three offence tiers provides a more rational structure and properly reflects degrees of fault.

## Arguments in Favour of Retaining the Distinction between Wilful Murder and Murder

The above arguments do not persuade that it would be advantageous to abolish the distinction between wilful murder and murder and indeed there is much that speaks in favour of retaining the two separate offences. In recommending that England and Wales adopt a three tier division of homicide offences the English Law Commission was guided primarily by the ladder principle. The key features of this principle are that:

> Individual offences of homicide, and partial defences to murder, should exist within a graduated system or hierarchy of offences. This system or hierarchy should reflect degrees of seriousness (of offences) and degrees of mitigation (in partial defences). Individual offences should not be so wide that they cover conduct varying greatly in terms of gravity. Individual partial defences should reduce the level of seriousness of a crime to the extent warranted by the degree of mitigation involved (English Law Commission 2005:[1.32]).

The existing offence distinctions in Western Australia do respect the ladder principle. The degree of harm intended or foreseen as a virtual certainty is the determining factor in the steps of the homicide offences: if death is intended or foreseen as a virtual certainty it is wilful murder; if serious harm is intended or foreseen as a virtual certainty it is murder; if some harm is intended or risked it is manslaughter.

An exception here is that under the *Criminal Code* (WA) s279(2) a person can be convicted of murder without intending to cause death or grievous bodily harm and without even foreseeing death as possible. The lack of subjective mental element is compensated for by the commission of an act which is dangerous to life in pursuance of a further unlawful purpose. Here the test of whether the act is dangerous is determined objectively and so there is no requirement that the offender foresaw the death to even the slightest degree (*Stuart*). This form of murder exists in various definitions in all Australian States but not the Australian Capital Territory and the Northern Territory. In Queensland, due to the common heritage of the codes, the offence is defined in the same way as in Western Australia (*Criminal Code* (Qld) s301(1)(d)). In New South Wales, to be liable for murder the death must be caused as a result of attempting or committing a serious offence, that is, one punishable by 25 years imprisonment (*Crimes Act* 1900 (NSW) s18(1)(a)), otherwise where the act is unlawful and dangerous it will amount to manslaughter. In South Australia and Victoria the death must be caused by an act of violence done in pursuance of a crime punishable by 10 years imprisonment (*Criminal Law Consolidation Act* 1935 (SA) s12A) or life or 10 years (*Crimes Act* 1958 (Vic) s3A). In Tasmania this form of murder requires an intentional infliction of grievous bodily harm, administration of a stupefying thing or stopping the breathing of a person for the purposes of attempting, committing or fleeing from one of the specified offences (*Criminal Code* (Tas) s157(1)(d), (e), (f)). The specified offences include piracy, murder, escape or rescue from prison or lawful custody, resisting lawful apprehension, rape, forcible abduction, robbery with violence, robbery, burglary and arson.

The existence of this form of murder has in general been criticised as offending the principle of justice (see e.g., Model Criminal Code Officers Committee 1998:65; Bronitt & McSherry 2005:475). The only factor distinguishing this form of murder from manslaughter in Western Australia is the fact that the offender happens to be involved in committing the act for a further unlawful purpose. However, this factor is, as Fisse (1990:71) points out, 'not a rational ground of distinction'. In not directing attention to the state of mind of the offender this approach equates intentional infliction of life threatening harm with accidental or careless killing. Yet, there is a large difference in culpability between these situations. As noted by the English Law Commission (2005:[2.23]), 'even those who attribute very great significance to the moral or religious significance of the sanctity of life draw a distinction between, on the one hand, accidental or careless killing and, on the other hand intentional killing'.

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 (Model Criminal Code Officers Committee 1998:63). Continuing to classify these two situations as murder represents a further reason to retain the distinction between wilful murder and murder. Without this distinction the offence of murder would encompass too wide a range of culpable states of mind.

It may, however, be time for the WA Law Reform Commission to recommend abolition of this form of murder. From a historical perspective, the rule should be seen as an error which it is time to rectify. In an article tracing the history of the doctrine Lanham (1983:101) concludes that '[i]t is a rule of such doctrinal feebleness that it ought never to have survived the seventeenth century, much less the twentieth'. The murder-felony rule only came into existence because of a misunderstanding of the law of homicide by Lord Chief Justice Coke in the early 17th century (Lanham 1983:91). Even as early as 1883 Stephen (1883:57) noted that the authorities cited by Coke did not support this doctrine. In England, this form of homicide was abolished in 1957.

A further fundamental principle of criminal law which supports the existing distinctions in WA homicide law is the principle of fair labelling. This principle requires that distinctions between offences and their proportionate wrongfulness should be indicated by the label attached to the offence (Ashworth 2006:88). Each offence should 'convey the offender's moral guilt' (Williams 1983:85) and 'the moral essence of the wrong involved' (Horder 1994:335). The key importance of fair labelling is that '[i]rrespective of punishment, conviction for a specific offence stands as an enduring feature of moral and legal record, as a testimony to the precise respect in which the defendant failed in her or his basic duties as a citizen' (Horder 1994:339).

Horder (1994:339) notes that in seeking to name the moral wrong-doing of the offender the principle of fair labelling runs the risk of the extremes of 'particularism' or 'moral vacuity'. Particularism refers to defining offences with such precision that they are inflexible and invite technical argument. At the other extreme is the danger that offences are defined so broadly that they are morally vacuous. The offences of wilful murder and murder do not fall foul of either of these 'vices'. They clearly indicate a difference in moral culpability determined by whether the offender intended to kill or whether they intended to do grievous bodily harm. If the offence of murder were to span such a wide degree of culpability, ranging from intentional killing to killing where the offender did not foresee death but was committing an objectively regarded dangerous act, then the danger is that the offence would become morally vacuous. This was recognised by the English Law Commission (2005:[2.5]): 'Morally significant labels, such as 'manslaughter' or 'murder',

should not be used to cover such a broad range of conduct that, as it were, their currency becomes debased, and the label becomes unfair or lacking in proper meaning'.

The principle of fair labelling ensures fairness because offenders are convicted, labelled and punished in proportion to their culpability. It also communicates society's core values and in seeing that offenders are convicted according to the perceived wrongfulness of their behaviour it strengthens and confirms these values (Mitchell 2001:398). If the labels of offences do not coincide with community attitudes then juries may be reluctant to convict of the offence and public confidence in justice may be undermined. For example, as discussed above, it was necessary to create the offence of 'dangerous driving causing death' (*Road Traffic Act* 1974 (WA) s59) because juries were reluctant to convict people of manslaughter where the death of the victim was caused through driving. The new offence has a label which accords with society's perceptions of the culpability of the offender.

Public confidence in the justice system can also be undermined when offenders are not convicted of offences which coincide with community perceptions of the wrongfulness of their behaviour. In having two murder offences 'there is a real incentive for killers to avoid harsher punishment by pleading guilty only to murder' (McGinty 2005). This could lead to a public perception that those who ought to be convicted of wilful murder are 'getting away with murder'. It is questionable, however, whether the appropriate remedy to this would be to abolish the distinction between the offences. Public dissatisfaction with some accused evading conviction for wilful murder is not necessarily a sign that the public would support removing the distinction between the offences. Indeed, as these labels have existed since the introduction of the *Criminal Code* in Western Australia it is likely that the West Australian public attach importance to the labels 'wilful murder' and 'murder'. During debate on the Criminal Code Amendment Bill 2003, Johnson argued in opposition to the removal of the distinction between the offences that the people of Western Australia would share the view wilful murder is more serious than murder (WA Parliamentary Debates (Legislative Assembly) 10 September 2003:10947).

Although in Western Australia there is no research to support this claim, research in England and Wales reveals that public opinion 'shows a very high level of agreement that an intent to kill is (subject to considerations of excusable motive) an indication that the crime was especially serious' (English Law Commission 2005:[2.13]). This study (Mitchell 2005) has convinced the English Law Commission that confining 'first degree murder' to cases of an intention to kill would bring the law into line with community standards (2005:[2.13]). Taking the opposite step and removing the distinction between wilful murder and murder in Western Australia could cause a perception in the community that the government has 'gone soft' on offenders because it no longer wishes to signify those worst case murders.

It should also be noted that the offender's desire to evade conviction for a more serious offence cannot be a reason to abolish the distinction between related offences. In many cases there is an incentive for an offender to plead guilty to an offence with a lower penalty, for instance, a person may be more inclined to plead guilty to common assault rather than assault with intent because the former carries a lower penalty. The ease of conviction should not be a factor which determines the relative classification of wrongful behaviour.

## Alternative Reform Proposals

While the focus of the reform discussion and of this article is whether Western Australia's unique distinction between wilful murder and murder ought to be retained or abolished, this

does not represent the only reform option. In the following discussion, two different proposals are outlined. The first supports retention of the three tier structure of the homicide offences while the second argues for a single homicide offence.

### *Retain the Current Divisions but Reserve Wilful Murder for Especially Serious Homicides*

The dividing line between wilful murder and murder in Western Australia is the mental state of the offender (aside of course from unlawful and dangerous act murder). However, 'traditional mental concepts are not the only factors which drive our intuitions about how wrongful on our scale a particular killing is' (Tadros 2006:602). Therefore even if it is felt that the current distinction between an intention to kill or cause grievous bodily harm should not be retained and that both states of mind should form one offence there may be value in retaining the three tier structure. Wilful murder could be reserved for certain serious cases of homicide, such as where the offender killed the victim in an especially cruel or degrading way, where the killing was racially motivated or the victim particularly vulnerable. This would allow the most heinous murders to be given a distinct label showing an extra condemnation of the offender. An example for this model can be found in the offence of murder (Mord) in the German *Criminal Code*.[3] A murderer is defined in §211(2) as a person who kills 'due to lust for killing, in order to satisfy his sexual desires, motivated by greed or other base motives, deviously or cruelly or with means dangerous to the public, or in order to enable or to cover another crime'.

Similarly, some US States identify certain cases of homicide as separate offences deserving more severe (or lenient) treatment. This proposal is attractive because it allows the most serious label to be reserved to identify killers who deserve special stigmatisation and condemnation. It may of course be necessary to re-label the offence (such as to 'first degree murder' or 'aggravated murder') as the public may associate wilful murder with an intention to kill rather than killing in such aggravated circumstances.

There are, however, drawbacks with such a proposal. First, it would require the determination of certain worst case homicides and this may be a complex and controversial task. There are likely to be wide ranging views on what factors make a killing more blameworthy and '[a]ny single factor that is picked out to help to differentiate the law of homicide will only make a marginal difference, a drop in the tormented pool of contested moral concerns' (Tadros 2006:602). Difficulties may also arise where an aggravating feature meets a mitigating factor. For example killing a partner while they are vulnerable to attack might be regarded as an aggravating factor, yet this may have been in response to years of abuse, which would be a mitigating factor Similarly, killing a person who is terminally ill could be classified as an aggravating circumstance (because the person is vulnerable) while at the same time a mitigating circumstance (because the purpose was to end pain and suffering). A further problem is that such an approach could mean that conviction for the aggravated form of murder would depend on the determination of 'legal niceties' as to whether a certain killing fits the categories identified (English Law Commission 2005:[1.110]). This could lengthen proceedings and increase the emotional and financial costs involved. Such increased complexity and cost may be easier to justify where the death penalty is involved for the more serious offence, but less easy where the penalties are similar (Ashworth 2006:256).

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3 Although it should be noted that Germany does not have a three tier structure of homicide: Manslaughter is the base offence, defined as killing that is not murder (§212) and Murder is the aggravated offence.

The problems with determining the categories of aggravation could be reduced by taking examples from other areas of the WA *Criminal Code*. Aggravating circumstances can be found in relation to offences against the person and include, for instance, where the offender commits the offence in company with another person or persons (s319(1)(a)(ii), s391(a)(i)), where the offender does something likely to seriously and substantially degrade or humiliate the victim (s319(1)(a)(iii)), where the victim is particularly young (s319(b)), old (s319(1)(b), s391(b)) or a public officer (s318), or where the offence was racially motivated (s80I). The problem of aggravating factors meeting mitigating factors does not pose a serious obstacle to this proposal because appropriately defined offences or defences could make sense of these situations. As discussed above mercy killing or killing on request could be developed to cover situations where a person ends the life of someone who is terminally ill, while self-defence, provocation or a battered spouse defence might be appropriate for a person who kills their abusive partner.

In sum the main drawback with this proposal is that it could lead to more complex and lengthened trials, although this danger may be reduced by adopting descriptors already used elsewhere in the WA *Criminal Code*. An alternative approach which would avoid this difficulty would be to link these circumstances of aggravation to the recommended minimum period of custody, rather than include them as elements of the offence. This is the approach currently taken in England and Wales (Sch 21 to s269 *Criminal Justice Act* 2003 (UK)). This schedule lists factors which lead to a starting point of whole life (e.g., murder of two or more people with a substantial degree of planning, murder of a child if involving abduction, or murder for the purpose of advancing a political, religious or ideological cause: 4(2)) or a minimum of 30 years (e.g., murder of police officer, murder of more than one person, murder involving sexual, sadistic, racial, religious or homophobic motivation: 5(2)). Further aggravating and mitigating factors are then listed which may either increase or decrease the starting point period of detention. Such an approach could be adopted whether the distinction between wilful murder and murder is retained or not and should lead to a more consistent approach to sentencing.

### *Create a Single Homicide Offence*

An alternative and opposite proposal to the above would be to eliminate all distinctions between the homicide offences and retain only one offence labelled 'criminal homicide' or 'culpable homicide'. Differences in culpability would be taken account of at the stage of sentencing rather than in the offence for which the offender was convicted. Naturally this would mean that the sentence for the new offence would no longer be mandatory life imprisonment but a maximum of life imprisonment. This approach was recommended by Lord Kilbrandon in *Hyam v DPP* (at 98):

> There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment.

More recently Blom-Cooper and Morris (2004) have also argued for a single offence of homicide. In their view mitigating factors should be dealt with through the sentence given rather than through the rigid offence structures and partial defences. This has the advantage that it would reduce the complexity and adversarial element of the trial because there would not be the incentive for the perpetrator to argue that their offence was manslaughter rather than murder (or wilful murder). Aside from the advantages for the administration of justice this approach could also benefit those close to the victim in reducing the danger of the perpetrator blaming the victim as a defence strategy to reduce the crime from (wilful)

murder to manslaughter (English Law Commission 2005:[2.33]). This desire to ease the burden of the trial on victims' relatives is one of the reasons why the WA Attorney-General supports removing the distinction between wilful murder and murder (although not between murder and manslaughter) (McGinty 2005).

Despite these advantages the proposal of a single homicide offence has found little support among law reform bodies. It was rejected shortly after Lord Kilbrandon suggested it by the English Criminal Law Revision Committee (1976:[15]) on the basis that the term '"murderer" expresses the revulsion which ordinary people feel for anyone who deliberately kills another human being'. A single homicide offence would violate the principle of fair labelling in subsuming wide differences in moral culpability into one offence. Respect for the sanctity of life requires that a distinction is drawn between intentional and careless or accidental killing. A further concern was that if the offence of murder were abolished people 'would be likely to think that the law no longer regarded the intentional taking of another's life as being especially grave'. The English Law Commission also rejected this option in 2005 in favour of a 'firm and clear connection between the sanctity of life and the structure of the law of homicide' ([2.37], [2.38]). This proposal for a single homicide offence has also been considered and rejected by law reform bodies in Australia and New Zealand (NSW Law Reform Commission 1997; Victorian Law Reform Commission 1990-1991; New Zealand Criminal Law Reform Committee 1976).

## Conclusion

Western Australia is unique in Australia in providing separate murder offences depending on whether the offender intended to kill or intended to do grievous bodily harm. This distinction could be seen to be an historical relic which adds complexity to homicide trials and which it is time to modernise. However, there is much that speaks in favour of this distinction which allows the most serious homicides to be identified. A person who intends to kill is generally more morally blameworthy and committing a more serious offence than a person who intends grievous bodily harm and who may not even foresee that death may occur. The offence labels clearly allow this difference in moral culpability to be identified. An exception which is in need of reform is the possibility of conviction for murder where an offender commits a dangerous act for a further unlawful purpose without intending or foreseeing death or grievous bodily harm.

Undoubtedly the division between wilful murder and murder can make homicide trials more complex because a person may seek to avoid conviction for wilful murder in order to be spared the severest penalty and it may be difficult for the jury to discern whether an intention to kill or do grievous bodily harm existed. However, neither of these arguments convince of the need to abolish the distinction. There is always an incentive for an offender to plead guilty to a lesser offence in order to avoid the severest penalty, yet this cannot be an argument for removing distinctions leaving broad ranging offences. Further, while it may be difficult to discern an intention to kill from an intention to do grievous bodily harm this clearly is possible, otherwise there would be no convictions for attempted murder. There are good reasons to believe that the jury is competent to make this determination and little reason to think that this decision will become easier if transferred to the sentencing judge. Such an approach would deny community input and cloud the transparency of the conviction.

The fact that there is a move in England and Wales to introduce offences similar to those existing in Western Australia also shows that the division of wilful murder and murder is far from an historic relic. In recommending a similar offence structure the English Law

Commission was guided by the ladder principle and to a lesser extent the labelling principle. The homicide offences in Western Australia generally satisfy these principles and show that the division of wilful murder and murder can be an example to other jurisdictions.

## Cases

*Boughey v The Queen* (1986) 161 CLR 10.

*Hyam v DPP* [1975] AC 55.

*Stuart v The Queen* (1974) 134 CLR 426.

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