WELCOME ADDRESS

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ON BEHALF OF THE AUSTRALIAN INSTITUTE OF CRIMINOLOGY (AIC), I want to extend to all of you a warm welcome to this Institute-sponsored conference on the topic of 'Homicide: Patterns, Prevention and Control'.

It is perhaps fitting that this conference should be held in Melbourne—a city renowned, in general, for its tranquillity. Regrettably, this tranquillity was shattered in 1987 by two mass-shootings which have become known as the Hoddle and Queen Street massacres. These two incidents, which occurred within a short time of one another, shocked the nation.

In December 1987, following these tragedies, the then Prime Minister convened a special meeting of the nation's leaders to consider the need for gun control and other measures. One of the proposals that was to flow from this summit was the establishment of a National Committee on Violence (NCV) to review the state of violence in the country, to examine the causes of this violence, and to make proposals for preventing and controlling violent behaviour. The NCV, which I had the privilege of chairing, was established formally in October 1988 and reported its findings to all governments in February 1990.

The genesis of this conference can really be found among the recommendations made by the NCV. Broadly, these recommendations call for three policy directions for governments and for individual Australians to work towards reducing violence in our society.

First, there is a need to adopt a national strategy for the promotion of non-violent attitudes. The degree to which many Australians continue to condone the use of violence in many aspects of their lives is one of the major impediments to achieving a non-violent society.

Secondly, there is a need to reduce factors which aggravate the risk and extent of violence. The Committee identified several factors, such as alcohol consumption and the use of firearms which, whilst not directly causing violence, aggravate its incidence and severity. The Committee also identified a number of measures aimed at mitigating the effect of these factors, including policies to better regulate the ownership of firearms.

Thirdly, the Committee stressed the need for an improvement in the availability of accurate information about the extent and nature of violence so as to provide a proper basis for policy making and for a reduction in the fear of violence.

In a variety of ways this conference addresses each of these three broad policy directions. As the most serious of all forms of violence, homicide has an extremely high profile in our society. All too often, media portrayals suggest that the ultimate solution to a range of problems is the use of extreme violence, including the taking of the life of other human beings. It is to be hoped that this conference will assist in dispelling any romantic beliefs that the community may have about homicide. We will be discussing the ugly realities of the killing of fellow human beings, often by people who profess to love, respect and protect those they slay. What we will be examining in the next three days is far removed from the slick portrayals of murder and mayhem that so frequently appear on our television and cinema screens.

In regard to the reduction of factors which aggravate the risk and extent of violence, this conference will, among other things, look at the vexed question of gun control. The NCV made a number of detailed recommendations about this issue in its final report. Following the further tragic mass shooting that occurred in the Strathfield Shopping Plaza in Sydney in August 1991, there have been some promising moves towards the adoption of these recommendations. However, the agreed upon uniform approach to gun laws adopted at the Special Premiers' Conference in November 1991 still falls short of the proposals made by the NCV.

In particular, we still seem unable to agree on the need to establish a national firearms register, and also on the need to begin to reduce the arsenal of weapons existing in this country. Although a cap has been placed upon the availability of military style assault weaponry of the type used in the Hoddle Street/Queen Street and Strathfield killings, many thousands of these weapons remain in the hands of our citizens. Just who has these weapons and where they are located remain largely unknown because of the absence of a national firearms registration scheme. In these hard economic times governments are also reluctant to incur the substantial costs that would be involved in any firearms buy-back program.

However, the problems of preventing and controlling homicide are obviously far more complex and difficult to solve than through gun control alone. Many forms of violence that may eventually lead to a killing may be traced to attitudes and behaviours that were instilled at childhood. The NCV report emphasised that families can just as easily be the breeding ground for aggression as they can be for nurturing. Changing these early learning experiences represents a major challenge. In the context of the homicide statistics there is perhaps no more chilling fact which points to the need for such change than the NCV's finding that the single most vulnerable age group for homicide victimisation were infants under the age of one year.

It is in the third policy direction—that associated with the provision of accurate information about the extent and nature of violence—that this conference can probably make the greatest contribution. The NCV found that there was a dearth of accurate and reliable information about all aspects of

violence in Australia, including homicide. The Committee recommended, among other things, that this information deficiency should be remedied by the establishment of a national homicide monitoring program within the AIC.

As part of its response to this and other NCV recommendations, the Federal Government has provided funding for this monitoring program within the framework of a broader Violence Prevention Unit, located at the AIC. Last year the AIC published the first of an ongoing annual report on Australian homicide, based on its monitoring of this crime. Heather Strang will report to this conference about the outcome of the second year of this monitoring program.

As Heather Strang will confirm, the good news is that Australians have not experienced the dramatic increases in homicide that have occurred over the past decade or so in countries like the USA. As I am sure another of our distinguished speakers, Professor Lawrence Sherman, will emphasise, the United States provides a frightening example of a nation whose homicide rate continues to escalate. A graphic illustration of the differences between the homicide rates in the USA and Australia can be found by examining certain absolute numbers—in recent years in this country there has been on average about 350 homicides, while in Washington DC alone last year the number of homicides approached 500.

Australia still has no grounds for complacency. Our rate of homicide is above that of many European nations and certain parts of the country experience rates which approach those encountered in American cities. The level of homicide and associated violence experienced by certain Aboriginal communities in this country is especially disturbing.

I am sure that you will find the discussions over the next three days to be stimulating, informative and at times controversial, and I welcome you to this conference.

CHARACTERISTICS OF HOMICIDE IN AUSTRALIA 1990-91

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THE PURPOSE OF THIS PAPER IS TO DESCRIBE THE CHARACTERISTICS OF homicide incidents, victims and offenders in Australia at the present time, so as to provide a framework for the more detailed discussion of various aspects of homicide which will follow in the course of this conference.

The source of these data is police records, collected via the National Homicide Monitoring Program at the Australian Institute of Criminology. This Program was established as a result of recommendations of the National Committee on Violence, which noted the paucity of information available in Australia on the incidence and epidemiology of violence generally, and homicide in particular. It has been made possible through the support of the Australian Police Ministers' Council and the cooperation of police in each jurisdiction.

The aim of the Program is to collect information annually on all homicide incidents and the victims and offenders involved in them. Such information has been collected before, though only in single jurisdictions rather than nationally, and only over limited periods rather than on an ongoing basis.

The National Homicide Monitoring Program has now collected and analysed data on all homicides which occurred in Australia between July 1989 and June 1991. It is too soon to begin to discern trends and patterns in homicide, although after a third year's data has been examined more detailed analysis of this kind will be possible: such knowledge as begins to emerge at that time will be useful not only to provide for basic public understanding about homicide risk, but also to serve as the foundation for the rational formulation of public policy and in the allocation of scarce public resources.

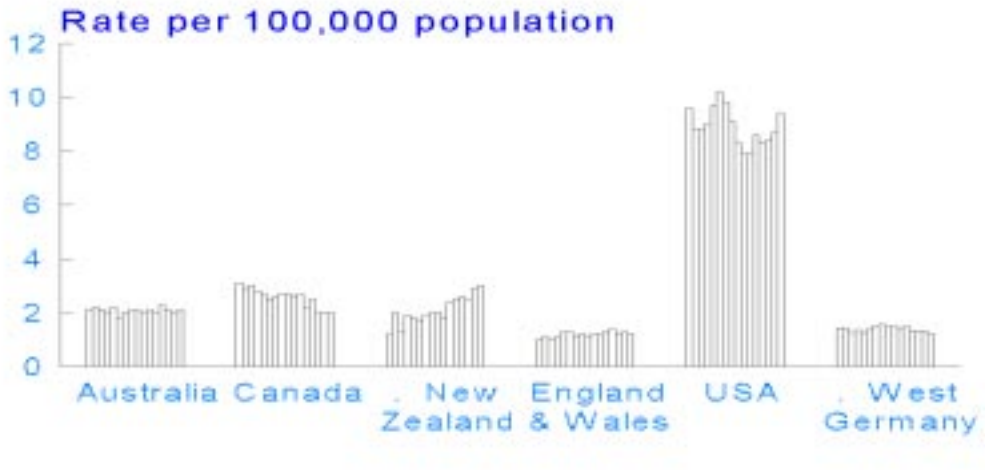
Australian Homicide in Context

Before turning to a description of the character of Australian homicide, as it is revealed in these data, the present situation will be placed in both an international and an historical context.

Figure 1 shows Australia's overall homicide rate compared with five similar countries—Canada, New Zealand, England and Wales, West Germany and the USA—over the period 1974 to 1989. As one would expect, Australia's rate is similar to all these countries, except for the USA, whose rate dwarfs all the others. Australia's rate is currently about 2.1 per 100,000 population, which is slightly lower than Canada and slightly above England and Wales.

Figure 1

Reported Homicide Rate per 100,000 Population, 1975 to 1990

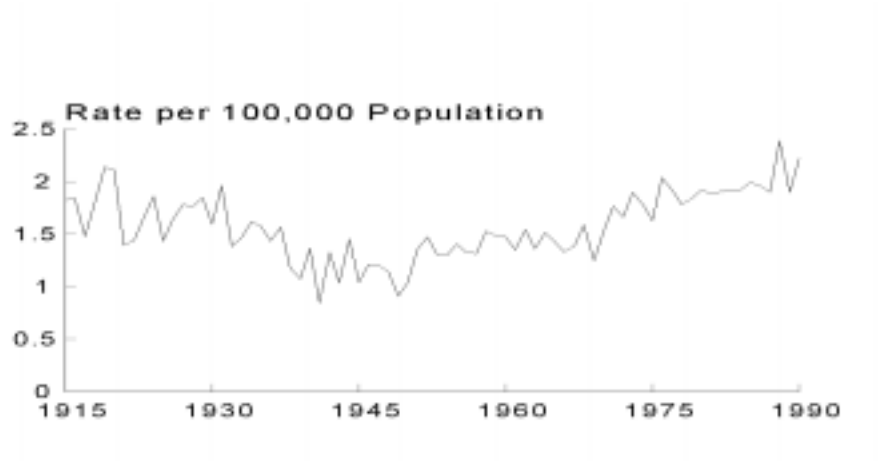


Source: Mukherjee, S.K. & Dagger, D. 1990, *The Size of the Crime Problem in Australia*, 2nd edn, Australian Institute of Criminology, Canberra.

There have been significant changes in homicide rates in the course of Australian history. Available evidence indicates that the rate last century was much higher than today. However rates declined in the latter half of the 1800s and early twentieth century. Figure 2 indicates Australia's homicide rate since 1915: it shows that rates continued to decline until the second World War. Rates then increased at the end of the war, and gradually continued to do so, fluctuating around an upward trend. Figure 3 shows male and female rates separately: they tend to coincide, though female rates are consistently lower than male rates.

Figure 2

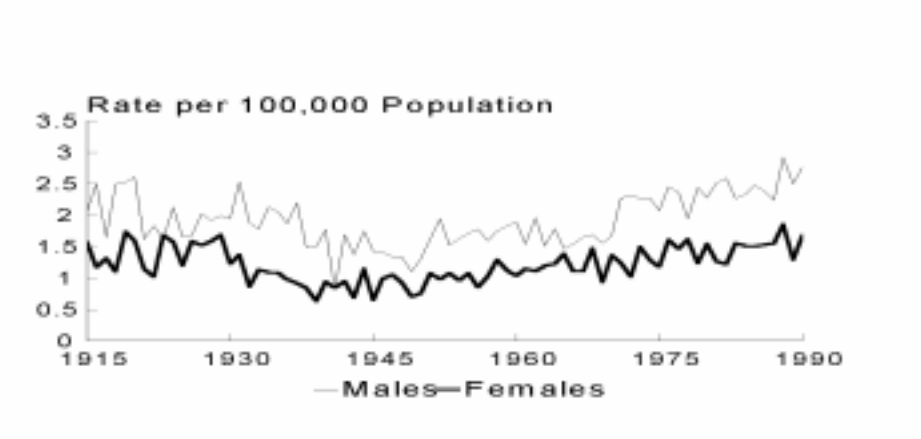
Number of Homicides per 100,000 Population, Australia 1915-1990



Source: Mukherjee, S.K., Scandia, A., Dagger, D. & Matthews, W. 1989, *Source Book of Australian Criminal and Social Statistics 1804-1988,* Australian Institute of Criminology, Canberra.

Figure 3

Number of Male and Female Homicides per 100,000 Population Australia 1915-1990

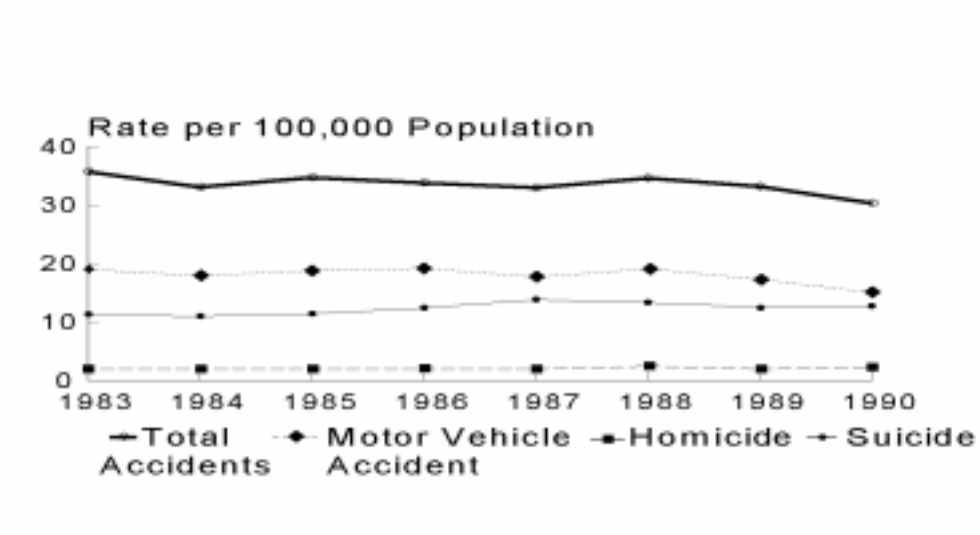


Source: Mukherjee, S.K., Scandia, A., Dagger, D. & Matthews, W. 1989, *Source Book of Australian Criminal and Social Statistics 1804-1988,* Australian Institute of Criminology, Canberra.

Although homicide is the most serious offence under the law, and the crime which engenders the most fear, it is important to understand that it remains a relatively rare occurrence in Australia overall: Figure 4 shows the rate per 100,000 for various causes of death between 1983 and 1989. Compared with accidents—both motor vehicle and other—and with suicide, homicide remains both relatively low and stable.

Figure 4

Death Statistics, Australia 1983-1990



Source: Mukherjee, S.K., Scandia, A., Dagger, D. & Matthews, W. 1989, *Source Book of Australian Criminal and Social Statistics 1804-1988*, Australian Institute of Criminology, Canberra.

Salient Features of Australian Homicide

In the year 1990-91, there were a total of 323 homicide incidents in Australia, involving 351 victims and 338 identified offenders (this term is used to include both suspects and those charged and convicted of an offence). There were forty-five incidents where no suspect/offender had been identified at the time the data were collected.

The salient feature of Australian homicide is its male character and the relative youth of many of those involved, both as victims and offenders. Over the past two years male victims have outnumbered females by around two to one. For offenders, the proportion of male and female offenders has approached 10:1.

Over the past two years, around 40 per cent of victims were aged under thirty, and a further 20 per cent aged between thirty and thirty-nine. Nearly 60 per cent of offenders were aged under thirty and a further 20 per cent aged between thirty and thirty-nine.

Another salient factor is that of Aboriginality. (In these data, the term 'Aboriginal person' includes Torres Strait Islanders). Aboriginal homicide requires special comment not because it differs markedly in character from homicide in Australia generally, but because of the sheer volume. Over the past two years Aboriginal persons have made up around 13 per cent of all victims of homicide and nearly 20 per cent of offenders. In the great majority of these incidents, both victim and offender were Aboriginal persons, and in almost all cases victim and offender were members of the same family or very well-known to each other.

The last significant feature to be mentioned here is the very high rate of homicide occurring in the Northern Territory compared with other jurisdictions. It is clear that a consideration of the demographic character of that jurisdiction, which includes a high proportion of Aboriginal people and a high proportion of unattached, transient young men, is vital in explaining this situation.

This paper will now turn to a more detailed analysis of the nature of homicide incidents which occurred in 1990-91 and features of those involved in them.

Characteristics of Homicide Incidents in 1990-91

The character of each homicide incident depends upon the contextual features of each: these include the jurisdiction in which it occurs, its geographical and physical location, the day and time it occurs, the choice of weapon or method and the precipitating circumstances, which are related both to motive and to background events.

Jurisdiction

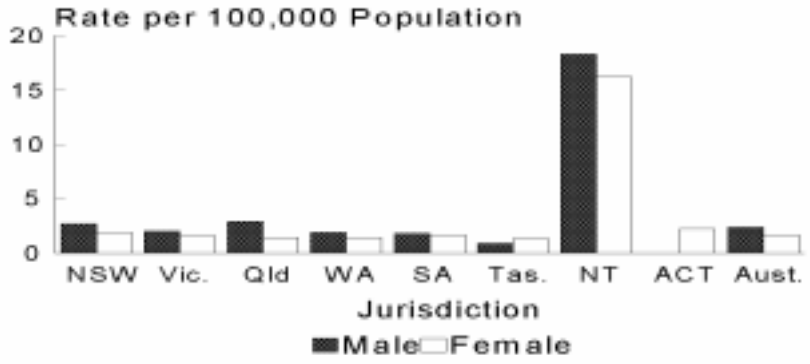
As Figure 5 shows, the rate of homicide victimisation is fairly uniform across Australia, with the exception of the Northern Territory: here the rate is more than eight times that for Australia as a whole, while the rate for women is almost twenty times that for Australian women generally. Figure 6 shows a similar distribution for offending, with the exception of the much lower rate of offending for women generally, especially in the Northern Territory.

In 1990-91, in every jurisdiction except the Australian Capital Territory, around 90 per cent of incidents involved one victim only and one offender only (nineteen incidents involved multiple victims and thirty-nine incidents multiple offenders, from the total of 323 incidents).

The overall rate of victimisation remained stable over the past two years, and in some jurisdictions the rate declined slightly in 1990-91. Nearly all the increase occurred in two jurisdictions: in New South Wales the rate per 100,000 of the population increased from 1.8 to 2.3, and in the Northern Territory it increased from 12.8 to 17.3.

Figure 5

Jurisdiction and Sex of Victims, Australia 1990-91



Geographical area

As would be expected, more than half of incidents occurred in the major metropolitan areas around Australia: in most instances the proportion occurring in each capital city closely reflected the proportion of the population living in those centres. Regional centres and country towns accounted for a further quarter of all incidents.

Location

About 60 per cent of all incidents occurred within residential premises. The vast majority of these were the victim's own home, which not infrequently was also the offender's home, as one-quarter of victims were cohabiting with the offender at the time of the incident. A higher proportion of women than men (57 per cent versus 38 per cent) were killed in their own homes. A further 15 per cent of incidents occurred in streets or car parks, mostly in suburban locations.

Shops, shopping malls, sporting venues, public transport and its environs, taxis and other vehicles, public parks and beaches together accounted for fewer than ten per cent of all incidents.

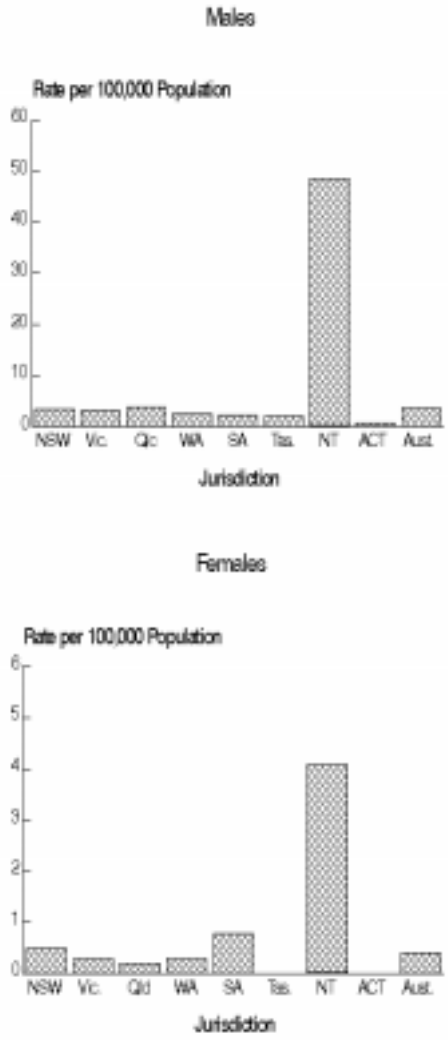
Time of day/Day of week

Half of all incidents occurred on Friday, Saturday or Sunday, most of Sunday's occurring in the early hours of the morning. The pattern was similar across all jurisdictions.

Of those incidents for which the time of occurrence was known, 40 per cent occurred between six in the evening and midnight, and a further 30 per cent occurred between midnight and six in the morning.

Figure 6

Jurisdiction and Sex of Offenders*
Australia 1990-91



* There were 45 incidents in which no offender was identified.

Note: These figures are not comparable as different rates per 100,000 population are used.

Precipitating factors

Figure 7 shows the primary precipitating factors in homicide in 1990-91. Australia-wide, altercations relating to jealousy or the termination of a sexual relationship accounted for 16 per cent of incidents. Domestic altercations between spouses or other family members accounted for at least 13 per cent of all incidents. Thus almost one-third of incidents relate to the breakdown of

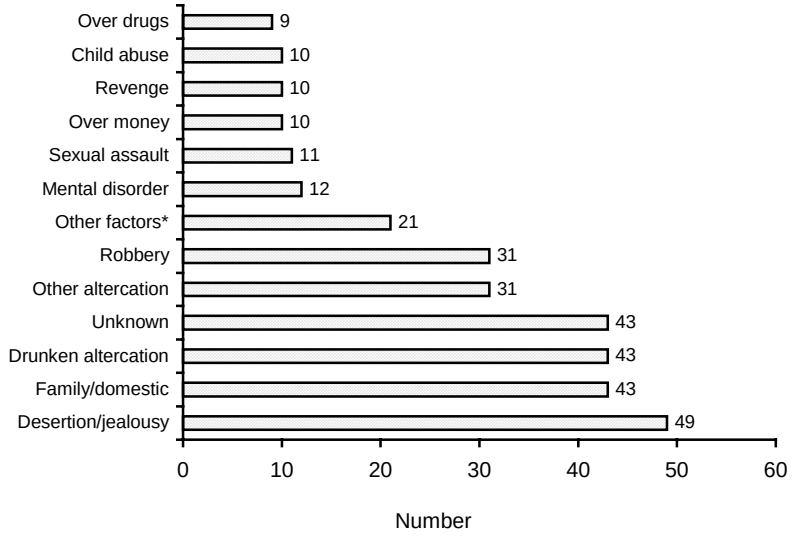
family relationships. A further 13 per cent involved drunken altercations over apparently trivial issues, usually between male peers.

In all jurisdictions these factors were the most common in the precipitation of the incident. In the Northern Territory, two-thirds of all incidents related to one or other of these factors: this reflects their predominance in homicides involving Aboriginal persons throughout Australia.

Homicides resulting from another criminal offence remain relatively uncommon, although there has been an increase in robberies with a fatal outcome: 10 per cent of all homicides involved a robbery, and more than half of these occurred in New South Wales. Three per cent of incidents involved a sexual assault and two-thirds of these occurred in New South Wales.

Figure 7

Primary Precipitating Factors, Australia 1990-91



* Homosexual 'hate' — 3
Carelessness — 4
Suicide pact — 4
Intellectual disability — 1
Other factors not involving an altercation — 9

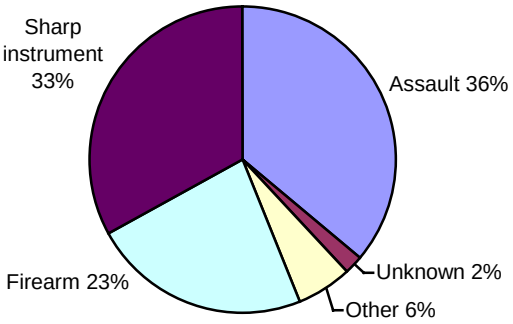
In forty-three incidents the primary precipitating factor was unknown.

Weapon/method

Figure 8 shows that in 1990-91 assault was the most common method of homicide (this category includes strangulation and the use of a blunt instrument, as well beatings). Knives and other sharp instruments accounted for a further 33 per cent of all incidents, and firearms 23 per cent. Overall, this was very close to the situation in 1989-90. About half of all firearms-related homicides occurred in New South Wales.

Figure 8

Primary Weapon/Method, Australia 1990-91



Where firearms were involved, nearly half of all victims were killed with .22 calibre rifles and a further one-quarter with shotguns. Handgun killings remain relatively rare (ten victims).

Choice of weapon varies with circumstance: firearms were not commonly used in drunken or other kinds of altercations, where beatings and knives were the most common cause of death. Over half of all robbery-related homicides resulted from an assault.

As far as sex of the victim is concerned, a higher proportion of women than men were the victims of fatal assaults, and a significant proportion of these were strangulations. A slightly higher proportion of men than women were the victims of firearms.

Male and female offenders differed as to their choice of weapon: 11 per cent of women used a gun, compared with 22 per cent of men; over half of all women offenders used knives or other sharp instruments.

Firearms are very rarely used in homicides involving Aboriginal persons: there is a correspondingly higher incidence of assault as the cause of death.

Illicit drug involvement

In only 5 per cent of all incidents were illicit drugs definitely involved. These incidents usually related either to disputes over dealing, getting money for drugs or acquiring drugs for personal use. Most of these incidents occurred in New South Wales and Victoria. It is possible that a proportion of the robbery-related homicides also were drug-related—indeed that illicit drugs were involved in a number of other incidents too—but no firm information was available on this.

Characteristics of Homicide Victims 1990-91

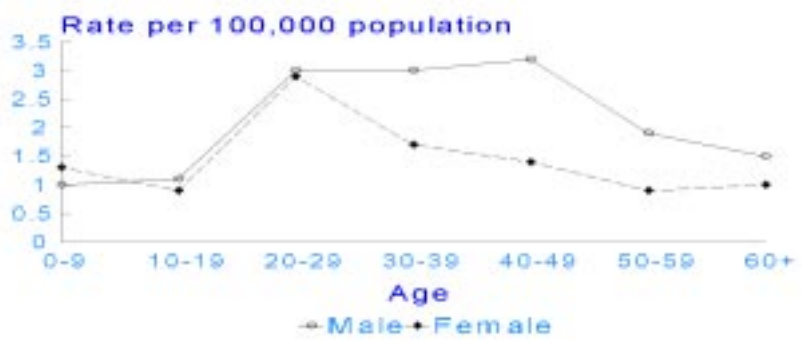
There were 351 victims of homicide throughout Australia in 1990-91.

Sex and age

Nearly two-thirds of victims were male and about one-quarter of all victims were aged in their twenties. About a half of all female victims were aged under thirty, whereas the ages of male victims was spread over a wider range. Figure 9 shows the rate for different age groups.

Figure 9

Age of Victims, Australia 1990-91



It is important to note the special vulnerability of infants. Children aged under one year were at the greatest risk of any age group in 1990-91, with a rate of 3.5 per cent per 100,000 age specific population (up from 2.8 in 1989-90). Females in this age group appeared to be especially at risk, with a rate per 100,000 of 4.8. Altogether, there were twenty-nine victims aged under ten years: three-quarters of these children were killed by their parents or de facto parents.

As far as jurisdictional differences are concerned, young people appeared to be at higher risk in New South Wales in 1990-91. Nearly 60 per cent of all victims under twenty died in New South Wales: one-quarter of all New South Wales victims were aged under twenty. In the Northern Territory, nearly half of all victims were aged between twenty and twenty-nine, compared with one-quarter nationally.

As far as juveniles are concerned, girls under twenty seemed to be at higher risk than boys in that age group.

Although there were nine victims under the age of one year, there were twenty victims aged between one and ten years: most of these (70 per cent) were killed by their parents or de facto parents.

Marital status

For around 60 per cent of victims, marital status was single or no longer married. Fewer than 30 per cent of males were known to be married, compared with 43 per cent of females.

Employment status

Of those victims where employment status was known, around half of males were employed and one-quarter of females. A proportion of women were out of the workforce by choice owing to domestic responsibilities: however, these figures indicate that being out of the workforce may of itself indicate enhanced risk.

Race

Aboriginal persons make up 1.5 per cent of the Australian population, but composed 13 per cent of all homicide victims in 1990-91 (11 per cent of all males and 16 per cent of all females). Whereas the overall homicide rate for 1990-91 was 2.1 per 100,000, for Aboriginal persons it was 18.7. When the figures are disaggregated by sex, the enhanced risk of Aboriginal women is evident: the risk overall for Australian males compared to females for 1990-91 approached 2:1, whilst for Aboriginal persons it was 1:1 (that is, 50 per cent of all Aboriginal victims were women).

It is useful to assess Aboriginal vulnerability by jurisdiction. In the Northern Territory, where Aboriginal persons make up 22 per cent of the population, 56 per cent of all victims were Aboriginal persons. Proportionately the figures for Queensland and Western Australia are even more noteworthy: in Queensland Aboriginal persons make up 2.4 per cent of the population and 18 per cent of victims, and in Western Australia Aboriginal persons compose 2.7 per cent of the population and 35 per cent of victims.

There was a total of eleven cases where the offender was an Aboriginal person and the victim was white: in a further five instances, the offender was white and the victim was an Aboriginal person. None of these cases appeared to be racially motivated and Australian homicide remains overwhelmingly intra-racial.

There was little noteworthy regarding other non-white races, except to observe the low incidence and the fact that when homicide occurred, both victim and offender were almost always the same race.

Alcohol/drug use

This was known for only two-thirds of all victims. However, of these, nearly half were known to be alcohol affected (most of these were males). In the Northern Territory, this proportion rose to 70 per cent: this figure is linked to the finding that 85 per cent of Aboriginal victims were recorded as being alcohol affected.

There was some variability according to age: more of the younger than older victims were alcohol affected. There was a negligible incidence of other drug influence amongst any victims.

Criminal history

Criminal histories were available for about 80 per cent of victims. Of these, over one-third of all victims had a criminal record, about half of them for violent offences. Two-thirds of these were male. For Aboriginal persons, about half of all victims had criminal records of some kind. Very low figures were recorded for those of other races.

Characteristics of Homicide Offenders 1990-91

There were 338 identified suspects and offenders in relation to the 323 homicide incidents which occurred in 1990-91. There were forty-five incidents for which no suspect had been identified at the time of data collection.

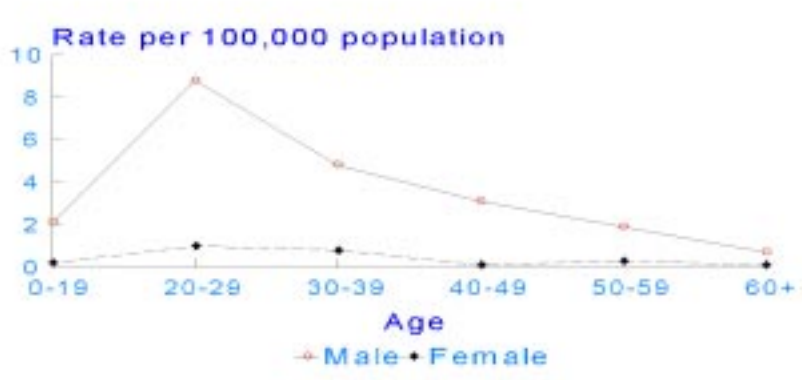
Age and sex

Figure 10 shows that homicide offenders were overwhelmingly male: males outnumbered females by a factor of ten. They were predominantly young: nearly 20 per cent were aged under nineteen and a further 40 per cent aged between twenty and thirty.

Nearly 60 per cent of all homicides involved both male victims and male offenders. For nearly one-third of all pairs the victim was female and the offender male. Only 10 per cent of pairs involved a female offender.

Figure 10

Age of Offenders, Australia 1990-91



Marital status

There were quite different patterns in marital status for men and women: over half of men were single or divorced but only 16 per cent of women; one-third of men were married or in a de facto relationship and nearly three-quarters of women.

Employment status

For those offenders where employment status was known, less than one-third were employed. For women, the proportion was less than 20 per cent.

Race

Twenty-one per cent of all offenders were Aboriginal persons: this figure was inflated by one particular incident which resulted in eleven Aboriginal offenders being charged, but without this case the figure would still be 18 per cent. This figure applies for both Aboriginal men and women.

There are jurisdictional differences in the race of offenders similar to those for victims: in the Northern Territory, Aboriginal persons make up 22 per cent of the population and 70 per cent of the offenders (56 per cent of victims); in Queensland they compose 2.4 per cent of the population and 20 per cent of the offenders (18 per cent of victims) and in Western Australia 2.7 per cent of the population and 32 per cent of the offenders (35 per cent of victims).

There were very low rates of offending by other non-white races.

Alcohol/drug influence

Information about the influence of alcohol or drugs was available for only just over half of all identified offenders: of these, three-quarters were under the influence of alcohol. This applied across all jurisdictions and for both male and female offenders.

Proportionately more Aboriginal offenders than whites were under the influence of alcohol: no offender of any other race was known to be alcohol affected.

There was no significant involvement of any illicit drug by offenders.

Criminal history

At least two-thirds of all offenders had a previous criminal history, and for more than half of these a violent offence had been recorded. In the case of women offenders, about one-third had previous convictions, over half of these for violent offences.

When these data are disaggregated by race, we find that at least 80 per cent of all Aboriginal offenders had criminal histories compared with 65 per cent of whites: twice as many Aboriginal offenders as whites had previous convictions for serious assault.

Murder-Suicide

A total of twenty-three offenders committed suicide following the incident, and a further four attempted suicide. These made up 8 per cent of the total of identified offenders. They were all male and none was an Aboriginal person. In two-thirds of these cases, the victim and offender were or had been in a spousal relationship: in most of the remaining instances, the victim and offender were closely related to each other.

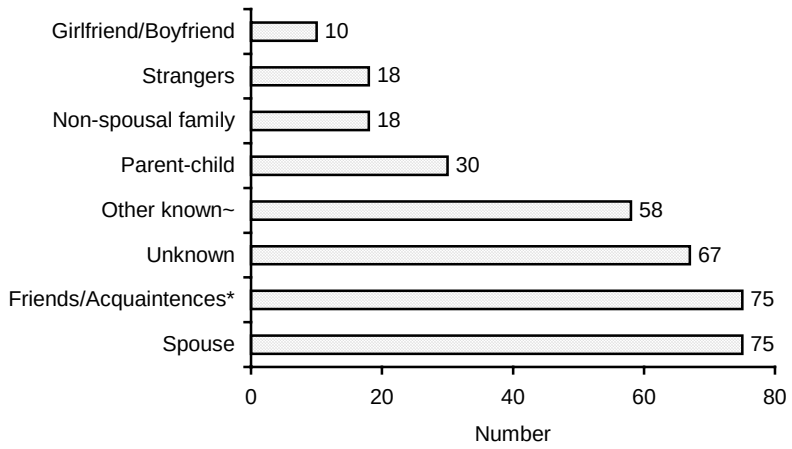
Relationship between Victim and Offender

One of the most revealing variables in homicide, from the point of view of determining the underlying dynamics of each incident, is the relationship between victims and offenders.

Figure 11 shows the proportion of different kinds of relationship in homicides occurring in 1990-91. Of those cases where the relationship was known, 26 per cent of victims were spouses of the offender (present or former, married or de facto). Of these, 85 per cent were women. Forty-two per cent of all female victims were killed by spouses, and 6 per cent of all males.

Figure 11

Relationship Between Victims and Offenders, Australia 1990-91



~ Refers to sex rivals, prostitute/client relationships, business relationships, citizen/police and others known to each other but the nature of the relationship is unknown.

* Refers to friends, long and short-term acquaintances, homosexual relationships and gang members.

The next largest category was the 24 per cent of instances where the relationship is broadly described as friends and acquaintances: this also includes girlfriend-boyfriend, ex girlfriend-boyfriend, homosexual relationships, short-term (less than 24-hour) acquaintances and gang members.

A further 17 per cent of victims knew the offender in some way: this category includes business relationships, prostitute-client relationships and sex rivals. In only 5 per cent of cases was the offender known to be stranger: of course, the real figure is likely to be higher than this, as an unknown proportion of the forty-five unsolved cases would have involved stranger offenders.

As far as jurisdictional differences are concerned, the Northern Territory had a higher than expected proportion of spousal homicides (37 per cent). This is a consequence of the relatively high levels of these incidents amongst Aboriginal persons: the relationship with the victim was spousal for 17 per cent of white offenders overall and 34 per cent of Aboriginal offenders.

Conclusion

This description of the characteristics of victims and perpetrators of homicide in 1990-91, and of the circumstances in which the incidents occurred, reveals the enhanced vulnerability of those on the margin in our society—a vulnerability which can only increase in economic hard times when the poor and disadvantaged are squeezed most.

However, attention should be drawn to the special vulnerability of young children in Australia. Generally speaking, young children do not appear to be over represented as victims of homicide, considering the proportion of the total population that they constitute—although, for the past several years children in Australia under the age of one year were actually at greater risk than any other age group.

The point this paper wishes to make, however, is that 1990–91 saw the deaths of twenty-nine children under the age of ten. In none of these cases was a charge of infanticide laid, where it was available: all resulted in charges of manslaughter or murder. None of these children were going to pubs or getting into potentially lethal arguments with their peers: they were victims in the truest sense of the word, with no control over their circumstances. They were completely vulnerable. They were frequently the object of their parents' unreasoned rage towards them, or towards each other. It is suggested that a compassionate society has a special responsibility to protect those who cannot protect themselves, and twenty-nine young children died last year because we failed in that responsibility.

Of course, homicides represent only the tip of the iceberg of violence in our society: almost all homicides begin as another kind of confrontation—a spousal argument, a robbery, a drunken fight between acquaintances, the abuse of a child—that escalates to a fatal event. But whilst homicides remain relatively rare events, these kinds of nonfatal confrontations are not.

The key to homicide prevention is to focus on those situations which are the most dangerous and on the people who are at highest risk of victimisation. By finding out as much as we can about homicide incidents, the

people involved in them and the relationships between them, we can begin to devise strategies to lessen the risks associated with such individuals and such circumstances, and so discover how lives may be saved.

PREVENTING HOMICIDE THROUGH TRIAL AND ERROR

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SKIP GOODMANSON HAD BEEN A MINNEAPOLIS POLICE OFFICER FOR TWO decades, but he had never had a case that was a 'homicide waiting to happen'. And nothing he did about it seemed to help. Goodmanson had recently joined an experimental police unit designed to do nothing but solve problems at the hottest crime spots in the city. The Repeat Call Address Policing (RECAP) Unit had been assigned the top 250 commercial and residential addresses in the city, ranked by total number of emergency calls to police. This turned out to be far more work than the five RECAP officers could handle, especially when each one of the addresses could have four or more apartments with chronic repeat calls for domestic violence.

Few of those calls, fortunately, resulted in serious injury, but one of the sixty addresses Skip Goodmanson was assigned appeared to be headed that way. He detected the case from his weekly computer printout when he noticed eleven calls in three weeks from the same apartment. These calls, in response to assaults of increasing severity, resulted in apparently ineffective action by all sectors of the criminal justice system.

The assaults culminated in a particularly brutal incident, and it was Skip Goodmanson's conviction that this near-homicide would not have happened if the system had just been tougher: if his fellow officers had made more arrests, if the prosecutors had filed charges on all the arrests that were made, if the judge had not released the offender on bail, or if the sentence had been longer. Maybe he was right, but maybe not.

The system had been very tough in trying to protect Shirley Lowery in Milwaukee in early 1992. She was finally stabbed to death in the county courthouse by her ex-boyfriend. The government had provided her with bodyguards while moving her possessions out of their residence, and the local police had long practised a mandatory arrest policy for domestic violence. Yet the only reason the offender came to the courthouse that day, carrying a butcher's knife and a pistol, was because he had been summoned by the court about a permanent injunction barring him from contact with Shirley Lowery. Perhaps if the court had not summoned him, he may never have killed her.

The point of these two stories is that the lessons of experience may be unclear at best, and at worst, deceptive. As Dr. Johnson put it, 'if experience were the best teacher, then the streets of London would be wisest of all'. In both the Minneapolis and the Milwaukee cases, it is equally plausible to conclude that the murderous assaults were the result of either too little legal intervention or too much. While more intervention may deter the deterrable, it may only challenge the defiant to become even more violent. Without a more systematic means of examining cause and effect, such stories can teach us little about how to prevent homicide more effectively.

The key question for this keynote address, then, is how can we learn to prevent homicide more effectively? This answer is through trial and error—but far more aggressively and systematically than we have ever tried before. This paper will begin by explaining and illustrating the range of trial and error methods, especially in light of recent experiments in domestic violence control. It will then suggest four key targets for homicide prevention, areas in which the payoff from successful learning could be very great indeed: chronically violent households, violent pubs and entertainment 'hot spots', infant surveillance, and emergency medical care. This paper will conclude with one question on which we have already learned far too much from trial and error, and about which the entire world should be pressuring my country, the USA, to stop polluting the globe: gun availability.

Learning Through Trial and Error

Learning through trial and error is the foundation of all human progress. In the area of cancer treatment, some half a million chemical compounds were tested in order to discover only forty forms of chemotherapy that are moderately effective (Oldham 1987). In the area of economics, the people of Russia have judged their experiment in total government control a failure, and now hope to learn from trial and error how best to structure a free market economy.

Methods of trial and error are far more advanced in some arenas, however, than in others. Controlled experiments in national economic policy, for example, are impossible, because each subject is an entire country, or even the world. It is very hard to learn systematically from a sample of one—which may help to explain why we still have not learned how to prevent recessions. Medical science, in contrast, has flourished because there is no shortage of sick people for experiments. But the systematic, trial and

error methods of epidemiology and experimentation have been slow to catch on in the arena of crime control, even though there is no shortage of offenders and victims for testing better strategies. We may take heart and guidance from the fact that systematic methods were also initially slow to catch on in preventive medicine, and until they did, much of what doctors did to help patients was doing more harm than good.

How much of what we do in the name of preventing homicide or other violence actually causes more of it? We will never know until we carefully test what we are doing. Systematic learning through trial and error cannot be done on a case-by-case basis. It does not come easily through the normal flow of daily experience. Experience is valuable in generating hypotheses, but is not enough for testing hypotheses. Testing requires the hard work of collaboration between researchers and practitioners, the creation of control groups, and gathering a lot more data than ordinary operations require. But that is a price many practitioners are willing to pay, and they are increasingly doing so in the USA.

Experiments in Domestic Violence Control

One recent example of systematic trial-and-error learning in violence control is the seven controlled experiments in policing domestic violence conducted across the USA in the past decade. In 1981, forty-four Minneapolis police officers volunteered to give up their discretion in misdemeanour domestic assault cases in order to conduct a randomised comparison of arrest, mediation and separation in cases where arrest was legally possible. The results of this experiment, which was designed and directed by myself, showed that arrest reduced the prevalence of repeat violence against the same victim by half, from about 20 per cent to 10 per cent (Sherman & Berk 1984).

This highly publicised experiment was followed by a major shift from mediation to arrest as the most common police policy for domestic violence in cities in the USA (Sherman & Cohn 1989). Many advocates cited the Minneapolis experiment as the major justification for new laws requiring mandatory arrest in misdemeanour domestic cases, now enacted in fifteen states (Sherman 1992a). Some of them even cited the Minneapolis experiment as evidence that arrest could have a preventive effect on domestic homicide, even though there was absolutely no data on homicide in the Minneapolis experiment. Multimillion dollar lawsuits against the police for failing to prevent homicides have been won around the USA, with 'expert' witnesses testifying on the basis of the non-existent Minneapolis data that arrest would have prevented the homicide.

The authors of the Minneapolis experiment, however, have testified on behalf of police agencies on the limitations of their data to misdemeanour assault cases. More important, the Minneapolis reports cautioned against passing mandatory arrest laws until the experiment could be replicated in other cities. Their two major concerns were: first, that arrest might have different effects in different cities; and second, that arrests might have different effects on different kinds of people. Worst of all, there was a fear that arrest might increase domestic violence under certain conditions.

The National Institute of Justice accepted our recommendation to fund a multimillion dollar replication program in 1986, and all but one of the replication experiments has now been reported. The results confirmed both the fears of the Minneapolis experimenters. They first showed that arrest had different effects in different cities. Three of the six experiments found some evidence of an individual deterrent effect from arrest, while the other three found that arrest had actually increased the rate of domestic violence overall (Sherman 1992b). A possible explanation for this difference across cities is found in the most consistent result of the entire research program: the different effects of arrest on different kinds of people within each city.

In Milwaukee—the only replication experiment directed by myself—the hypothesis that unemployed and unmarried people would react differently to arrest from persons with more of a 'stake in conformity' was tested and confirmed. While arrest reduced repeat violence among employed persons by 9 per cent, it increased it by 43 per cent among unemployed persons. Arrest also increased repeat violence by 30 per cent among unmarried suspects, with a small deterrent effect among married suspects. The greatest increase arrest caused in repeat violence (49 per cent) was found among suspects who were both unemployed and unmarried, and hence had the least stake in conformity to lose from more violence.

These findings were eventually confirmed in data from the Omaha experiment, conducted by Dunford, Huizinga and Elliott (1990). While the marriage effect was not found, the unemployment effect was even stronger, with a 52 per cent increase in the rate of violence caused by arresting unemployed suspects in Omaha, compared to a 37 per cent reduction in repeat violence caused by arrest among employed suspects (Sherman & Smith 1992).

Based on these results, two independent investigators have confirmed the unemployment interaction: Berk et al. (1992) with the Colorado Springs experiment and Pate and Hamilton (1992) with the Miami experiment. Thus in four out of four experiments where the hypothesis was tested, the results consistently show that arrest has different effects on different kinds of people and, unfortunately, the results show that the suspects most likely to come to police attention for domestic violence are the ones most likely to increase their violence against women in general if they are arrested. While this leaves us in a major quandary about how to police domestic violence, it is a far better thing to have learned of our dilemma than to proceed with good intentions in blissful ignorance. We have done the trials, and learned our error.

Key Targets for Homicide Prevention

The domestic violence experiments should make us very cautious about policies for homicide prevention in Australia. As the National Committee on Violence said in its report:

> programs and policies for the prevention and control of violence [should] be subject to rigorous, independent evaluation. Provision for this evaluation should be incorporated in the design and budget of the program in question. Good intentions, warm feelings, and trendy ideas . . . are simply not a sufficient basis for the expenditure of public

> funds. Measures which are heralded as successful in one jurisdiction, whether in Australia or overseas, should not be blindly embraced without careful provision for their evaluation and their eventual dismantling in the event of unsatisfactory performance. Australia simply cannot afford to waste money on ineffective ventures (Australia 1990).

It might be added that no country can afford to pursue policies which actually increase violence, regardless of their cost. The way to avoid pursuing those policies is to adopt all new policies on a trial and error basis, with strong, randomised research designs used to evaluate their effects wherever possible. Since so much of the homicide problem in Australia is related to domestic/family violence, this paper recommends four key target areas for testing homicide prevention ideas. These areas are:

- chronically violent families;
- pub and hot spot violence;
- infant surveillance; and
- emergency medical care.

What can we do about chronically violent families?

Unfortunately, we cannot predict very well which chronically violent families will wind up in a homicide. The early Police Foundation (1976) study of domestic homicides in Kansas City did find that 85 per cent of all domestic homicides had been preceded by at least one police call at that address in the past two years, and 50 per cent had at least five prior calls. This led many of us to expect that homicide could be predicted with some accuracy. Unfortunately, the study asked the wrong question. The right question, at least for making predictions, is what proportion of addresses with repeated domestic disturbance calls have domestic homicides.

The answer, according to our analysis in Minneapolis, is about 3 per cent over five years, or less than 1 per cent per year. Even at addresses with nine or more domestic calls in one year, the rate of domestic homicide is fortunately only 3 per 1,000. While the rate of domestic homicide increases substantially as the number of domestic calls increases, three-fifths of all domestic homicides occur at addresses to which police have never been called. The highest rate of domestic homicide per address is 17 per 1,000 high call addresses over five years. On an annual basis of prediction, that equals 3 per 1,000. With foresight rather than hindsight, a prediction of homicide from chronic domestic disturbance calls would be wrong 997 times out of 1,000. That does not seem to be much of an 'early warning system'. Vastly over-predicting domestic homicide would not start World War III, but it could certainly divert scarce police resources with little payoff (Sherman 1992a).

Similarly poor predictions resulted in Milwaukee when individual couples, as distinct from street addresses, were examined. The data included all 15,000 domestic assault reports over three years. Of the thirty-two domestic homicides

during that period, only one of the couples had a prior police record of an assault. Even 110 prior episodes of gun pointing and death threats were followed by no homicide (Sherman, Schmidt, Rogan & DeRiso 1991).

Even with the difficulty of predicting homicide, however, it is worth pursuing the problem of chronically violent families. As Skip Goodmanson's case illustrates, some of these families have very high levels of serious violence. While it cannot be predicted which chronically violent families will result in the rare event of homicide, investing in chronically violent families can be justified on several grounds. Perhaps the clearest of these is cost: the chronic families consume the most police time. Just 20 per cent of the couples reporting any domestic violence in the Milwaukee experiment, for example, produced almost half (46 per cent) of all the reported cases. Most of the couples, in contrast, did not have any repeat cases. There is thus a clear distinction between the chronic and non-chronic couples. And among the chronic couples, a small portion of repeat cases involve serious violence.

Police computer systems can easily be designed to flag the chronically violent families. When such families are identified, they need to be included in systematic, randomised tests of a wide range of ideas for intervention. These interventions could be mounted by social service agencies, women's shelters, police, churches, relatives or even neighbours. The important thing is to test them in stages: first in a few demonstration cases, then in a larger experiment of 100 cases or so, and then, if the results still look promising, in a larger experiment in several different cities.

The fact that domestic homicide cannot be predicted does not detract from our excellent ability to predict less lethal violence among chronic couples. Among couples with nine or more incidents, it can predicted that they will have further incidents with 75 per cent accuracy. Chronically violent buildings can also be identified with 72 per cent accuracy, regardless of the specific couples living in them at any given time. It would be surprising if similar predictive accuracy cannot be found in Australia.

Thus assuming we clearly know where to begin, the next question is what to do. For example, it would be valuable to test frequent surprise police visits to chronically-violent addresses, as well as programs to enlist relatives and neighbours to stay in close touch with the victim and call police instantly in the event of an assault. Maximum prosecution for threats or any other cause may also be worth testing, with prosecutors actually doing something about this very small but high risk group.

Chronically violent couples are also good candidates for testing the value of court orders of protection. The effectiveness of these orders has been called into question since three New York women were killed in quick succession in 1989 by their husbands after the restraining orders were issued. One of the women even carried a radio-operated alarm around her neck that was connected to the police. These tragedies anticipated the Shirley Lowery case in Milwaukee, which led to increased use of the bodyguard service. Both the orders and actual protection procedures could be tested in a randomised experiment, which could justify the major expense to the state involved in providing bodyguards for free. Financial and counselling assistance in moving to another state is another option for the most serious cases. It may be

that protection orders backfire, while one or more of the procedures of protection may be highly cost-effective. The only way to find out is to invest in trial and error research.

Pubs and hot spots

The prediction of domestic violence by residential locations is matched by the great ability to predict pub violence. As in the case of residences, a small percentage of all pubs usually produce the majority of all violence. This is important to remember, since over the past decade over 12 per cent of all Milwaukee homicides began or ended in a pub: this is twice the percentage reported by Strang (1991) for Australia, but it is still the leading type of location outside the home even in Australia.

The Crime Control Institute's study of pub homicides in Milwaukee found that homicides were eighteen times more likely to happen in a pub than in all other kinds of addresses city-wide. Pubs are also seven times more likely to be the locations of aggravated assault. Yet only 10 per cent of all pubs produced 43 per cent of all violent crimes in pubs. Moreover, almost all of that violence in the hottest pubs occurred between the hours of 7 p.m. and 3 a.m.

Thus over a five year period, it can be predicted with up to 86 per cent accuracy which pubs will have more violent crime, and with 83 per cent accuracy the hours during which those violent crimes will occur.

The level of violence in these pubs can be staggering. Moby Dick's Bar of Minneapolis, for example, is a 'hot spot of crime'; one of the 3 per cent of all addresses in that city that produce over half of all the crime. The bar was famous for serving a 'whale of a drink'. It also served cocaine with the cocktails. And if you went there every night for a year, you had a one in four chance of being assaulted, at least according to official data. (Sherman, Gartin & Buerger 1989). A similar pub in Vancouver was subjected to an observational study which found that there was an act of violence—mostly unreported to police—observed to occur every twenty minutes (Graham, La Rocque, Yetman, Ross & Guistra 1980).

Pub violence also spills over into the surrounding block. The odds of a Milwaukee block becoming chronically violent outside the pub are three times higher if there is a violent pub on the block (51 per cent) than if there is not (15 per cent).

The trial and error response to these data should be a variety of options for making violent pubs less violent. The most obvious solution is revocation of a liquor license in that location, which is what the Minneapolis achieved with two of the most homicidal bars in town. But less extreme measures may also be effective, especially those concentrating on pub management techniques. Simply warning the pub managers, for example, that they have too much violent crime and will be closed if they do not reduce it may have some beneficial effects. It may also encourage them to hide violent crimes from the police. There are no easy answers here, but creative thinking and persistence should be able to come up with strategies that work.

Infant surveillance

One of the most interesting findings of Strang's analysis (1991) was that the highest risk of homicide victimisation in 1989-90 was in the youngest age group—under one year. While the total number of victims is not high, the rate may suggest that serious consideration be given to the question of how to intervene in potentially lethal child abuse. Countries vary enormously in respect to infant surveillance, with the USA doing almost nothing and the French almost raising your baby by official decree of visiting nurses. Just as epidemiological research has identified high risk factors for chronically violent couples and pubs, similar research might be able to identify infants at high risk of abuse.

One good place to begin might be chronically violent couples. Using police data to identify those couples, researchers could interview relatives, neighbours, physicians or others about their knowledge of any excessive force used against infants by the couple. With a large enough sample, these findings could be compared to rates of officially detected incidents of injury to infants. If those couples are found to be more abusive than average, a wide range of strategies from intensive visiting to foster care might be tested and refined through trial and error. The involvement of physicians and nurses in identifying such cases is critical. But they may play an even larger role in reducing homicides, after an attack but before a death has occurred.

Emergency medical care

Emergency medical care is rarely given credit for homicide prevention. Yet the biggest reduction in homicide in this century—observed after World War I in both Australia and the USA—may well have been due in large part to the widespread introduction of telephones, automobile ambulances and emergency rooms, rather than solely due to a decline in assaultive behaviour. Even today, variations across Florida counties in the speed and quality of post-assaultive medical care strongly affect the lethality of aggravated assaults, and hence the total homicide rate (Doerner & Speir 1986; Doerner 1988). This may also have something to do with the variations in homicide rates within Australia, such as the much higher rates in the Northern Territory. How can emergency medical care be improved? Again, the specifics will need careful testing through trial and error to be determined, but selected investments in equipment, special training for ambulance technicians, and perhaps the ambulance system itself could make a substantial dent in Australia's homicide problem. While many might call this suggestion beside the point of reducing assaultive behaviour, it may have a significant effect on deaths resulting from such behaviour.

Another important medical issue is the question of the effect of alcohol on the body's trauma defence mechanisms. Alcohol reportedly slows the body's reaction to puncture or bullet wounds, jeopardising cardiocirculatory functions and depressing the central nervous system shock reactions which aid in survival (Doerner 1988, p. 176). This may explain the finding that alcohol use is more common in homicide victims than in aggravated assault victims (Pittman & Handy 1964, p. 470). Alcohol may thus be even more of a

medical problem in surviving assaults than it is a behavioural problem in causing assaults. This clue gives a mandate to doctors: discovery of some medical intervention to neutralise those specific effects of alcohol and allow the body's shock defence system to work could be a major breakthrough in homicide prevention.

The Trial and Error of Open Access to Guns

Of all the things that Australia can do to prevent homicide, the most important may be to cap the number of guns now in circulation, especially high powered and semiautomatic guns. Whatever the cultural traditions and politics of guns may be, there is growing evidence that the total homicide rate is heavily determined by gun density in the society. The often-cited exception of Switzerland should not divert us from the weight of the evidence on the other side: that homicides in cities in the USA have risen directly with the proportions of homicides committed with guns (McDowall 1991), that regions within the USA with higher gun density generally have higher homicide rates, and that the same pattern is found in comparisons across nations (Killias 1990).

Figure 1 shows the relationship between proportions of homicides committed with guns and total homicide rates in nine industrialised countries. With the Swiss exception, there is almost a straight line towards higher homicide rates with higher gun use. The line is even clearer in Figure 2, with both suicides and homicides. Whether gun use varies more by cultural preference than by gun availability cannot be said, but the possibility of guns playing such a strong causal role in homicide is serious enough to examine. Australia already has more than twice the homicide rate of England and Wales, and over twice the measured level of gun density. Australia obviously has a long way to go to catch up to the USA, but it is a vision of Australia's future to be avoided if at all possible.

The USA is currently suffering a steady national growth in homicides—10 per cent in 1990—fuelled by soaring rates in central cities. Washington DC, with a population of 600,000 people, has more homicides annually (489 in 1991) than Australia's entire population of 17 million. In just five years, homicides in Washington DC have risen from a rate of 30 homicides per 100,000 to over 80 per 100,000. Other cities with large populations of young black males and concentrated poverty areas have experienced similar increases. At the same time, the arrest rate of all juveniles for committing homicide nationwide has doubled, from 5 to 10 per 100,000.

How did homicide rise so rapidly? Did people suddenly become much more cruel? Did Reaganomics cause an overnight breakdown of the social order? Or did something less mysterious occur—like a rapid change in the means of destruction? The latter theory is more believable. Throughout the 1980s, semi-automatic pistols flooded into poor black areas. In Washington, semi-automatic pistols increased from 25 per cent of all guns seized by police in 1981 to 56 per cent in 1991. Crack cocaine provided the cash and the culture for carrying expensive 'semi' guns around as a major article of clothing. Guns have become integrally tied up with self-respect and the local status hierarchy.

Figure 1

Percentage of Homicides with Guns vs. Total Homicides per Million

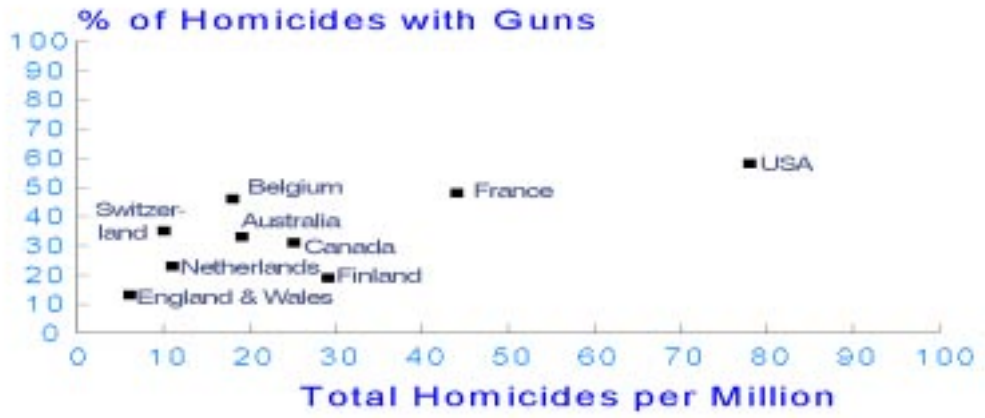
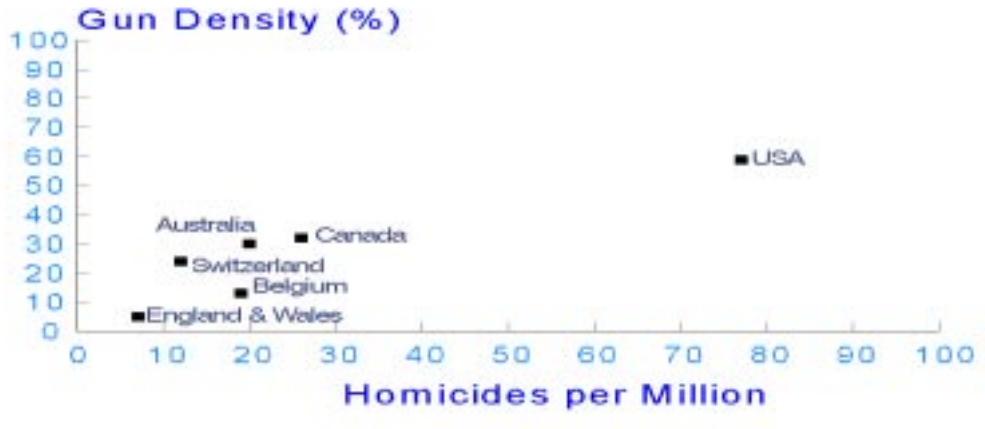


Figure 2

Gun Density* vs. Homicides per Million



* Defined as number of suicides and homicides committed by gun, divided by total suicides and homicides.

The importance of semi-automatic guns can be demonstrated with just one statistic: in 1991 the number of gun assaults in Washington declined, but the number of homicides from guns increased. Why? Because the number of bullets in the bodies of the victims increased. Five years ago, most victims had one or two bullet wounds; today, it is often eight or ten. The more bullet wounds, the greater the chance of death. Even the type of bullet makes a difference, with semi-automatic pistols reportedly shooting 'hotter' bullets that tumble more within the body, tearing more organs and fracturing more bones than a revolver bullet (Thomas 1992).

The semi-automatic has fomented a revolution in homicide. Instead of trying to kill a specific person, today's killer will spray bullets at an entire crowd—in a pub, at a party, on a porch, or on a street corner. The result has been soaring increases in innocent bystanders being shot and killed, up to 100 per cent increases per year (Sherman, Steele Laufersweiler, Hoffer & Julian 1989).

The power to spray bullets has spawned the 'driveby' shooting, reminiscent of the gangster movies with big submachine guns in the 1930s. Now the guns are small, inexpensive, easy-to-conceal semi-automatics, which can rattle off eighteen bullets as you pass by a target crowd. In one target area in Kansas City where a community policing program against guns is being tested, there were twenty-four driveby shooting incidents in 1991 in eighty blocks. Los Angeles has seen drivebys become a staple of gang warfare, and even small rural communities have reported this innovation in death.

The USA's gun problem is clearly tied to its problems of structural unemployment, race, and residential segregation by social class. Most Americans suffer little risk of a gun homicide, but if current trends continue, the contagion of gun violence will spread.

This description of what has happened in the USA does not constitute a highly scientific analysis of what the effects of growing gun density would be in Australia, but that is one trial and error you may not wish to undertake. The growing economic problems of a post-industrial age can quickly create disenfranchised groups, cut off from the mainstream economy, as Australian young people may increasingly become. If Australia were to combine that factor with widespread gun availability, it may expect an explosion in homicide.

Conclusion

Asking an American for advice on how to reduce homicides is tantamount to asking a Russian for advice on how to improve your economy. We may not know what to do, but we sure know what not to do. Whether Australia can avoid our fate seems largely dependent on its political decisions about guns. Whether Australia's homicide rate can be even further reduced may depend more on the ability to develop effective prevention methods for chronically violent families, pubs, potentially victimised infants, and emergency medical care systems.

Australia is blessed with a highly developed discipline of criminology. Criminologists like Gordon Hawkins, John Braithwaite and Duncan Chappell have brought Australia renown around the world. The creation of the Australian Institute of Criminology (AIC) two decades ago made Australia a world leader in developing a scientific basis for crime control policy, and the AIC has become one

of the most productive research centres to be found in its subject area. With that foundation firmly established, it is time for Australia to move forward to greater collaboration between criminologists and crime control agencies.

Some academic criminologists define their role as a criminology of the criminal justice system, studying its behaviour as the principal focus of inquiry. Others define their role as criminology for the system, answering the often fairly narrow or descriptive kinds of questions that the system raises in its day to day operations. But in my view, we can accomplish the most in controlling homicide by doing criminology with the operational agencies.

Yes, you can learn something about controlling disease by studying matters of hospital administration, but not a whole lot. Even more can be learned by studying the patterns of epidemics, and developing theories about their causes, but the most is learned about combating disease by enlisting doctors from all over the country in systematic comparisons of different drugs, surgical procedures, vaccines or other measures. It is not the biochemistry of medical practice, or even for medical practice, that makes the most difference; it is the biochemistry with medical practice that saves the most lives. So will a criminologist with the police, the courts, the prisons, the medical and social services.

Most of all, Australia's ability to reduce its homicide rate will depend on its commitment to the experimental method. While some lessons of trial and error—such as gun accessibility in the USA—appear so obvious that no experimentation is needed, others—such as the effects of arrest on domestic violence—are far more ambiguous. Wherever there is little experience with an idea or program, experimentation is essential for learning just what effect it will have, and of all the things we have learned from the trial and error method, the most important is how little we can ever learn about specific methods without scientifically controlled evaluations.

The political rhetoric may say we do not need research, we just need to get tough on crime, but World War II was fought and won through innovative research and development. Five to 10 per cent of our defence budgets are spent on research and development. Does criminal justice spending anywhere even approach that? Yet it is only with scientific testing that the methods of crime control which may be doing more harm than good may be discovered. In crime prevention, as in disease prevention, the primary ethical principle is this—first, do no harm.

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A SCENARIO OF MASCULINE VIOLENCE: CONFRONTATIONAL HOMICIDE

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THIS REPORT PRESENTS THE RESULTS OF A STUDY OF CONFRONTATIONAL homicide in Victoria. Confrontational homicide is a form of male-to-male homicide which centres most typically around some form of status contest between males. The lethal violence flows out of an initial argument, followed by a physical confrontation, and then by one or another of the parties involved becoming the victim of lethal violence. Concern for this form of homicide was set in motion by a previous study (Polk & Ranson 1991) of homicide in Victoria, which looked at all homicides in Victoria for the 1985-86 period. The present research focuses specifically upon the confrontational homicides and closely related forms of male-to-male violence, and extends the time frame to include data from 1987 to 1990.

The 1985–86 data reveal that, consistent with findings of other research (for example, Wallace 1986), a majority of homicides consist of male-to-male violence (Polk & Ranson 1991). Turning this around, women account for only a minority of victims of homicide and an even smaller proportion of homicide offenders. Wallace (1986), for example, found that women made up only 36 per cent of victims of homicide and 15 per cent of offenders.

What the previous research established, however, was that while masculinity was a major factor in most forms of homicide, there were significantly different patterns that male violence might take (Polk & Ranson

1991). First, there was homicide in situations of sexual intimacy where the violence represents an ultimate attempt of the male to control the life of his female sexual partner. In this instance, the major variation involves male partners reacting to the woman's attempt to move away from his control, while a minor variation involves exceptionally depressed male partners who have decided to end their lives through suicide, with the homicide of the woman being a part of the suicide plan.

Second, there were various forms of male-to-male violence. Among these are those homicides which were found to be a result of masculine confrontation which becomes a form of honour contest, leading to a fight which in turn resulted in the violence turning lethal. Such events were observed in public places such as pubs, discos, streets, train stations, parks or reserves, or perhaps at parties or barbeques. Most often they were closely tied to working class or underclass masculine scenes of leisure, with alcohol featuring in a great majority of the cases.

Male-to-male homicide was also observed to be a consequence of other criminal behaviour. A common scenario here was one where a robbery turned dangerously violent, and the robbery victim became a victim of homicide as well. These distinctively masculine events appeared to involve a willingness on the part of economically and socially marginal males to take exceptional risks regarding the lives of others, and often, in fact, their own lives.

Finally, male-to-male homicide was found to be a final act in a series of events which began with the intimate bond of friendship. Something happened over time and the friendship disintegrated to the point where it was terminated with lethal violence. These scenes again most often involved males who were highly marginal in an economic and social sense, and the violence could be seen as a form of ultimate conflict resolution.

It was this male-to-male violence, and confrontational homicide in particular, that provided the focus for the present research. While previous research has recognised that masculine confrontations may lead to lethal violence, in general it has not been identified as a separate and distinctive form of homicide in terms of the dynamics which link an offender and a victim. The purpose of the present research has been to expand a base of knowledge regarding this form of homicide, and the place that it occupies within more general patterns of male-to-male violence.

The Data

The data for the present investigation, as was the case for the initial research, are drawn from the files of the Office of the Coroner of Victoria. These files contain a number of reports which are collected for the purpose of carrying out the coronial inquest, and include an initial police report of the incident, an autopsy report regarding the cause of death, a toxicology report if such is relevant, a Police Prosecutor's brief, and the report of the inquest itself. The most helpful of these documents is the prosecutor's brief, which typically contains lengthy witness statements as well as transcripts of interview with defendants where these have been taken.

In the first phase, data on 121 homicides were extracted from these files for the years 1985 and 1986. For each homicide a lengthy case history was prepared drawing upon the material in the coronial files. These case studies were then subjected to a qualitative analysis of the themes which characterised the relationship between the victim and the offender. Included among these themes was that of masculine confrontational homicide, which accounted for twenty-six (or 21 per cent) of the total homicides.

In order to explore in greater detail the characteristics of male-to-male violence, the present study was conducted which extended the data collection in the files of the Office of the Coroner of Victoria for the additional years of 1987 through 1989. This resulted in the identification of an additional 255 homicides. As before, a working file for each was prepared which included the initial police report, the report of the autopsy, toxicology reports (where relevant), relevant witness statements from the Police Prosecutor's brief prepared for the inquest, and the report of the inquest itself prepared by the Coroner. From these working files, a short case history for each was prepared, this case history providing information on the social character of the homicide, especially in terms of the dynamics which linked the offender and victim. When the cases for 1987 to 1989 are added to the original 121 cases from the period between 1985 and 1986, a total of 376 homicide cases are available for analysis.

The Findings

A first observation is that these data support the general conclusion that there is a strong thread of masculinity which runs through homicide. Looking at all cases combined for the period from 1985 to 1989, males were the offenders in a great majority of all homicide cases, although it is important to be precise in the actual treatment of the data.

First, it is appropriate to remove from the analysis the thirty-one cases over the five year period where the gender of the offender could not be determined, reducing the base total to 345. Next, since the entry point for such data are victim files, some recognition must be given to the fact that there are accounts which involve multiple offenders, and in some of these one of the offenders is female. Of the 345 total victims where the gender is known, there were 287 which involved exclusively male offenders, which accounts for 83.2 per cent of cases. There were an additional twenty-three cases where there were multiple offenders involving both males and females, so that the total proportion involving male offenders is somewhat higher.

Slightly over half of the 345 cases where the gender is known involve situations where males play the roles of both offender and victim (178 accounts were male-to-male homicides, or 51.6 per cent). These findings are roughly consistent with the levels reported in other investigations. For homicides in the 1968 to 1981 period in New South Wales, for example, Wallace (1986) reported that 85 per cent of the offenders were male, and that 54 per cent involved a male accused and a male deceased.

For purposes of the present study, however, the general category of male offender/male victim is too broad, since it includes not only such homicides as those resulting from male confrontations, but also instances where step-fathers kill step-sons, where sons kill fathers, or brother kills brother, and a group of cases which involve odd behaviour where the fact that the victim and the offender are male says little about why the killing took place (as in cases where the offenders are driven to kill because they 'hear voices', or mass murderers who shower bullets in an indiscriminate pattern). Our interest instead is focused on those forms of homicide where the gender role plays a significant part of the homicide itself.

Specifically, our attention is directed to homicides involving males as both offenders and victims which derive from three general scenarios:

- 'confrontational' homicides which arise out of 'status contests' between males, whereby initial insults lead to fights which then spill over into lethal violence;
- 'conflict resolution on the margin', where the homicide represents a crude form of dispute resolution, most often involving highly marginal individuals; and
- 'homicides resulting from the course of other crime', where the killing can be viewed as an outcome which originates in other criminal activity.

These scenarios account for just under half (146 of the 345 cases where gender can be established, or 43 per cent) of all homicides.

The introduction of the additional data has resulted in some important modifications of the conception of these forms of masculine homicide from that suggested in the initial formulation (Polk & Ranson 1991). For one, it seems more appropriate to view these patterns as scenarios of violence, rather than as clear 'types' of homicide. What each represents is an idealised pattern of activity, with dominant elements which make up something akin to a script which can be found in the cases which fit the scenario. Within each of the groupings, some of the cases will fit the idealised scenario closely, whereas others will have fewer elements and thus fall more toward the outer boundaries of the scenario. In a few cases, as we shall see, the elements of one scenario blur into another, so that definitive boundaries for such accounts cannot be drawn.

The Confrontational Scenario

Nearly one in five (n = 74) of all homicides consisted of killings resulting from masculine confrontations. One central element of these killings is that homicide was not the initial intent of the encounter. This scenario typically begins in an argument, that dispute escalating to the point where a fight breaks out, and then the lethal violence follows. In its initial stages, then, the parties involved were not anticipating that a death would result. It is not uncommon, in fact, for many of the participants in such events to leave the scene unaware of the deadly consequences of the physical confrontation that has taken place.

A second feature of this violence is that it is fundamentally masculine in character, involving virtually only males in roles both of offender and victim. Only one account was found where a woman drew upon a confrontational script in carrying out her homicide (the victim was a woman as well).

A third feature which serves to exert virtually a definitional stamp on this violence is its class composition. Confrontational violence is fundamentally either underclass or working class behaviour. In only two cases were the participants drawn from professional or service occupations.

A fourth common feature of these killings is that they are most likely to occur in leisure scenes that are 'open' in character. These are settings where underclass or working class males congregate or at least come into contact with each other. One major venue is the pub or disco, where seventeen of these killings took place (23 per cent of the confrontational homicides). Somewhat more of the confrontations took place in streets, roads or laneways, often adjacent to pubs (n = 22, or 30 per cent). Other venues included parks or beaches (n = 4, or 6 per cent), at parties or barbeques (n = 4 or 6 per cent), in transport settings such as trains or buses (n = 2, or 3 per cent), or in such scattered settings as car parks, public toilets or pin ball parlours. There were, as well, sixteen cases (24 per cent) which occurred in the home or flat of either the victim or the offender, most often the location being the scene of a party.

In most instances, the events leading up to the homicide were played out with a backdrop of male peers. There was an audience of such peers in forty-four (65 per cent) of the confrontational homicides. Confronted with a challenge to their honour with an audience of male peers, the central actors feel pressured to show that they are not 'wimps', or persons who 'can be shoved around'. In some instances, of course, these peers became directly involved in the initial fight which led to the death, with a small number involving two groups which were in conflict.

A further aspect of these leisure scenes is the likelihood that alcohol will be involved. Alcohol use of the victim or the offender, or both, was noted in sixty-six (89 per cent) of these confrontational homicides. The involvement of alcohol, which in some cases resulted in extraordinary blood alcohol levels being observed, provides a further fix on the masculine recreational nature of the settings where the violence is likely to flare.

There are other aspects of confrontational violence that are more variable. One of these concerns the time frame over which the violence takes place. Some of the encounters are exceptionally brief and the lethal violence sudden. The male participants meet, words are exchanged, a fight starts, the violence escalates rapidly with the death being the result. Over half (n = 41, 55 per cent) of the confrontational homicides involved events that took place within one half of an hour, many of these within five or ten minutes.

Other confrontational encounters extend longer through time, often being interrupted. In some cases the interruption occurs because one of the participants leaves the scene to fetch a weapon (generally a knife, but in some accounts a gun): this took place in twenty-three (31 per cent) of these homicides. In other accounts, the conflict escalates over time, and takes many hours, or even days, to reach its lethal conclusion.

It is characteristic of some confrontational encounters that the roles of the participants may become confused. In about half of the cases, for example, the homicide falls into the category of what Wolfgang (1958) termed 'victim precipitated homicide', that is, the individual who first initiated the violence ultimately became the victim of the lethal violence. There are other examples of what are clearly confrontation violence, where the killing was a result of some form of honour contest between males, but where the specific victim of the violence was not part of the actual conflict that led to the taking of his life.

The specific provocation may be difficult to establish. At times, it is a simple and direct challenge to the masculinity of another male. Sometimes the provocation results from an insult to the woman friend of a male. A reasonably common scenario in the multicultural environment of Victoria is that ethnic tensions or slurs may provide the spark for the violence. In some cases where the conflict between the parties has extended through time, it may not be possible to isolate an initial provocation which has resulted in the chain of events which lead ultimately to the taking of the life of the victim. In general, then, while masculine 'reputation', 'status', or 'honour' is at the heart of most confrontations, the specific form of the provocation in individual cases may be difficult to determine.

In the previous research (Polk & Ranson 1991), a distinction was drawn between homicides which resulted from masculine confrontations and those which emerged from the intimate relationship of friendship. Additional data, however, have made it clear that such a differentiation cannot be maintained in all accounts. In some instances, the males caught up in situations where a status contest resulted in homicide were also friends (this occurred in fourteen of the seventy-four accounts, or 19 per cent of the confrontational homicides). Most commonly this might occur at a scene such as a party where a group of males are drinking together, where insults flare between victim and offender, and the confrontation ends in the death of the victim. While in general the interactional dynamics of these 'friendship/confrontational' killings were identical to other confrontational homicides, one difference of these was that they were more likely to occur in the home of one of the parties (seven of the fourteen, or 50 per cent, of the confrontations involving friends, compared with 26 per cent for all confrontational homicides).

Theoretical Accounts of Masculine Violence

Despite the fact that males dominate the statistics on homicide, relatively little attention has been paid to the issue of masculinity in much of the literature on homicide (with the exception of the work of Daly & Wilson 1988). One potentially useful line of inquiry, especially in terms of confrontational homicide, was that suggested in the work of Luckenbill (1977).

Luckenbill argued that homicide can be viewed as the outcome of a dynamic interaction involving a victim, an offender and the audience in front of whom these actors play. He observed that such interactions can be seen as moving through six stages. The first stage consists of an 'opening move' performed by the victim and defined by the offender as an offence to 'face'.

This opening move could be a direct, verbal expression by the victim: it might consist of the refusal of the victim to cooperate or comply with the requests of the offender, or it might consist of some physical or nonverbal gesture which the offender subsequently defines as offensive.

The second stage where murder was involved resulted when the offender interpreted the victim's opening move as offensive. Luckenbill makes clear that it may not be the victim's intention to be offensive. What is at issue is the interpretation on the part of the offender.

In the third stage the offender, rather than excusing or ignoring the provocation, or leaving the scene, responds with a 'retaliatory move aimed at restoring face and demonstrating strong character' (Luckenbill 1977, p. 181). In most cases, this consisted of a verbal or physical challenge being issued to the victim. In a small number of cases, the interaction ends at this stage, since the offender in issuing the challenge actually kills the victim.

In the fourth stage, the victim has been placed in a problematic position by the challenge laid down by the offender. A range of options potentially exist, an apology might be extended, the behaviour perceived by the offender as offensive might be discontinued, or the victim might leave the scene. Instead, the victim stands up to the challenge, and enters into an '. . . agreement with the proffered definition of the situation as one suited for violence' (Luckenbill 1977, p. 183).

In the fifth stage, the offender and victim are committed to battle. Fearful of 'displaying weakness in character and consequent loss of face', the two evolve a 'working agreement that violence was appropriate' (Luckenbill 1977, p. 184). In some cases, the parties seek out and secure weapons to support their verbal threats and challenges.

In the sixth stage, after the victim has fallen, there are three ways that the situation is terminated. Sometimes the offender flees the scene, sometimes the offender either voluntarily remains or is held for the police by members of the social audience.

There are many of the male-to-male homicides, especially the brief confrontational killings, which seem to fit particularly well with the model of conflict posed by Luckenbill. It is in these encounters where it is possible to trace the movement from the initial move by one of the actors, through the stages which result in the lethal violence. The case of Gabe is one such example:

> Gabe W. (32, soldier) boarded a train at Flinders Street Station after an evening of drinking with his friends (his blood alcohol level was subsequently established to be .224). When Gabe attempted to take a seat, Mike M. ordered him, 'offensively', to move on to another seat. Challenged, Gabe refused, and attempted to force his way onto the seat. Mike leaped up and struck Gabe, and the two fought. Although Gabe received a number of blows, and was kneed in the face, he finally managed to pin Mike down.
>
> Witnesses relate that at this point Gabe said: 'If you don't stop now, I'll break your neck'. Then, believing that Mike would stop, Gabe released him. Mike instead produced a knife, stabbing Gabe three times in the

> chest. One of the blows penetrated the heart. Gabe collapsed and died in the aisle. (Case No. 4714–86)

In this account, the opening move is made when Mike tells Gabe to find another seat. Stage two follows when Gabe interprets the move as offensive, and then stage three occurs when Gabe, rather than looking for a seat elsewhere, challenges Mike by attempting to take the seat. Mike in moving to stage four then 'must stand up to the challenge' which he does by springing up fists ready, which then leads to the actual fight (stage five), and then Gabe's fatal stabbing. Mike then left the scene, and was apprehended later by police (stage six).

It became clear as an attempt was made to apply the six-stage model to other homicides that there apparently were some differences between the Victorian data and those available to Luckenbill. Despite the fact that the records were reasonably extensive, at times it simply was not possible to trace all of the stages, even in confrontational homicides.

One persistent problem was that posed by the homicides whose events were extended in time. There was one account, for an example, where the only information available was that P.C., a male, walked up to P.K., another male, who was drinking in a pub, and shot him with a rifle (stages four and five of the model). P.C. then fled, and was apprehended later by the police (stage six). While P.C. alleged that P.K. and some of his friends had 'set him up' sometime in the past, the specific form of stages one, two and three—the opening moves—could not be determined from the Coroner's files.

In another account, two groups of young males had been feuding from many months. The death resulted when one group finally decided to corner a small number of members of the other group at a meeting hall where they were practising martial arts. When the group broke into the hall, a collective fight began. One of the members of the group being attacked broke out a rifle, firing a number of shots which wounded several members of the attacking group, one of whom was fatally hurt. Here the problems with the model are multiple. For one, the origins of the feud (the initial stages one, two, three) have been lost in time. For another, given the group character of the conflict, whatever the original stages were, they may not have involved those who played major roles in the final stages of the drama. While the groups could be seen as moving through a series of stages in building up to the lethal encounter, the specific individuals who became victim and offender may have had limited roles in the stages prior to the final lethal encounter.

There were other cases which moved through developmental phases, but the ultimate victim played no part in the evolving interactions. In one account, a young male spent an evening drinking in a pub, becoming drunk and abusive. The bartender and bouncer begin the specific train of events by ejecting the man from the pub. The man's honour was offended by this affront. To retaliate, he climbed in his van (he was by occupation a plumber) and proceeded to drive at great speed in circles around the pub parking lot, swerving first toward, then away from, patrons as they came out of the pub. On his final pass at a patron, piping material detached from the roof, and a patron who had just left the pub was struck and killed.

Here there was a complex interaction involving an offender and 'others' as events built up toward the homicide, but there was no evidence that the victim played any role other than to walk out of the pub at the wrong time. This was not a unique case. In another, males in two cars exchanged insults, and were in the process of chasing and harassing each other, when one of the cars spun off the road and killed a bystander who happened to be walking along the road.

These events involve interactions, the interactions may flow through stages, those stages may involve challenges and counter-challenges to masculine honour, but as events proceed to their final lethal conclusion, the roles of victim and offender may not be as neat and clear as implied in the model laid out by Luckenbill.

Finally, there is the claim by Luckenbill that these six stages characterised all homicide cases regardless of such factors as 'age, sex, race, time and place, use of alcohol, and proffered motive' (Luckenbill 1977, p. 186). In the present study the greatest applicability seems to be in the three forms of masculine violence which are the primary focus here. While possibly relevant in some accounts of intimate violence, these stages would not be found, for example, in cases involving sexual intimates where the extremely depressed male plans suicide, to be preceded by the homicide of his female partner; nor would it apply to cases of infanticide, where the offender is engaged in a complicated denial of the existence of the victim.

It is our general conclusion, therefore, that while of some heuristic value, the observation of Luckenbill that his model fits all homicides cannot be confirmed. While in general it seems that our data are rather deep and rich in comparison to some other data sets of homicide, there are a number of events where it simply is not possible to identify each of the six stages in the model. Furthermore, in several of the scenarios of homicide that we have found (especially involving intimates), the dynamics clearly do not unfold in the stages laid down by Luckenbill.

In many of the killings, however, especially those confrontations which move quickly to the point where it becomes lethal in its consequences, it is possible to identify a developing dynamic that has some correspondent to Luckenbill's model. In these situations, we can agree with Luckenbill when he asserts:

> . . . homicide does not appear as a one-sided event with an unwitting victim assuming a passive, non-contributory role. Rather, murder is the outcome of a dynamic interchange between an offender, victim, and, in many cases, bystanders (Luckenbill 1977, p. 185).

Issues of Class, Gender and Economic Marginality

Perhaps the most important failing of Luckenbill is that, while he describes an important pattern of interaction, and that both victim and offender may play significant roles in that interaction, the model does not provide any clues as to why the offender and victim become involved in what proves to be a homicide, nor does he address the question of why such killings involve virtually exclusively males. Luckenbill (1977, p. 186) comes closer when he underscores

the importance of the role of '. . . maintaining face and reputation and demonstrating character'—language which implies a masculine motivation for the violence. As his description stands, however, it provides a potentially helpful accounting of the interactive dynamics that make up a confrontational encounter, but it does not address either the gender characteristics or the economic marginality that feature so strongly in male-to-male violence.

It is the present contention that it is important to see confrontations as 'contests of honour' in which the maintenance of 'face' or reputation is a central matter. Further, these are seen as quintessential masculine matters. We agree, then, with Daly and Wilson (1988) who have argued that it is males who become involved in violence around the issue of reputation.

The theoretical account provided by Daly and Wilson is one of the few that recognises the diverse forms of masculine violence that make up contemporary homicide patterns. It is their argument that the general thread of masculinity that runs through homicide reflects forms of male aggressiveness can be accounted for by biological processes of adaptation. One problem with such a biological view is that, while it potentially moves us toward an understanding of the masculine character of violence, it is less satisfactory in its ability to account for the social class component of masculine violence.

The lethal violence being examined here is defined both by its class and gender characteristics. It is predominantly male and working/under-class behaviour. How is it that we can account for these two features of confrontational homicide?

A possible line of argument which might help here has been advanced recently by the anthropologist Gilmore (1990). In reviewing data on masculinity across a number of cultures, Gilmore concluded that there were three essential features to masculinity:

> To be man in most of the societies we have looked at, one must impregnate women, protect dependents from danger, and provision kith and kin (Gilmore 1990, p. 223).

In many societies, these 'male imperatives' involve risks, and masculinity can be both dangerous and competitive:

> In fulfilling their obligations, men stand to lose—a hovering threat that separates them from women and boys. They stand to lose their reputations or their lives; yet their prescribed tasks must be done if the group is to survive and prosper (Gilmore 1990, p. 223).

At this level, the argument is consistent with that of Daly and Wilson, and needs extension to encompass the class data we have observed regarding masculinity and violence. A possible line of reasoning is established in Gilmore's argument about the impact of differential social organisation on masculinity:

> The data show a strong connection between the social organisation of production and the intensity of the male image. That is, manhood ideologies are adaptations to social environments, not simply autonomous mental projections or psychic fantasies writ large. The

> harsher the environment and the scarcer the resources, the more manhood is stressed as inspiration and goal (Gilmore 1990, p. 224).

If Gilmore is correct, it would seem reasonable to argue by extension that the contemporary male who possesses economic advantages is able to provide for the base for the procreative, provisioning and protective functions through his economic resources, and these same resources provide the underpinning for his competition with other males for a mate. In other words, physical prowess and aggression no longer become necessary for the economically advantaged male to assure his competence in reproduction, provision or protection.

For males at the bottom of the economic heap, however, the lack of access to economic resources has the consequence of rendering these issues, and therefore their sense of masculinity, as problematic. For such males, the expression and defence of their masculinity may come through violence. Messerschmidt, for one, has argued along these lines:

> Some marginalised males adapt to their economic and racial powerlessness by engaging in, and hoping to succeed at, competition for personal power with rivals of their own class, race and gender. For these marginalised males, the personal power struggle with other marginalised males becomes a mechanism for exhibiting and confirming masculinity . . . The marginalised male expresses himself through a 'collective toughness, a masculine performance' observed and cheered by his 'buddies'. Members of the macho street culture have and maintain a strong sense of honour. As he must constantly prove his masculinity, an individual's reputation is always at stake. (Messerschmidt 1987, p. 70).

There are deeply-rooted aspects of culture which place men in a competition with other men in terms of their reputation or honour. Assuming that Gilmore (1990) is correct in his assertion that the bases of masculine rivalry derive from competition regarding mating, provisioning and protecting, males who are well-integrated into roles of economic success are able to ground their masculinity through methods other than physical confrontations and violence. For economically marginal males, however, physical toughness and violence become a major avenue by which they can assert their masculinity and defend themselves against what they see as challenges from other males.

It is the defence of honour that makes what another might consider a 'trivial' provocation for some to be the grounds for a confrontation which builds to homicide. It was Wolfgang who first observed the phenomenon of the apparent triviality of events which provokes some homicides:

> Despite diligent efforts to discern the exact and precise factors involved in an altercation or domestic quarrel, police officers are often unable to acquire information other than the fact that a trivial argument developed, or an insult was suffered by one or both of the parties (Wolfgang 1958, p. 188).

It seems clear, however, that what is trivial to a firmly respectable observer may be quite central to the marginal actor's sense of masculinity. Daly and Wilson (1988) have argued along similar lines:

> A seemingly minor affront is not merely a 'stimulus' to action, isolated in time and space. It must be understood within a larger social context of reputations, face, relative social status, and enduring relationships. Men are known by their fellows as 'the sort who can be pushed around' or 'the sort that won't take any . . . ', as people whose word means action and people who are full of hot air, as guys whose girlfriends you can chat up with impunity or guys you don't want to mess with. In most social milieus, a man's reputation depends in part upon the maintenance of a credible threat of violence (Daly & Wilson 1988, p. 128).

These comments are, in fact, not inconsistent with Wolfgang's observations. After the sentence noting the apparently 'trivial' character in some of the disputes leading to homicide, Wolfgang goes on to observe:

> Intensive reading of the police files and of verbatim reports of interrogations . . . suggest that the significance of a jostle, a slight derogatory remark, or the appearance of a weapon . . . are stimuli differentially perceived and interpreted . . . Quick resort to physical combat as a measure of daring, courage, or defence of status appears to be a cultural expectation, especially for lower class males . . . (Wolfgang 1958, p. 189).

Further, Wolfgang (1958, p. 189) is explicit in his statement that it is the observers in the criminal justice system who, drawing upon middle and upper class values which have influenced the shaping of legal norms, have seen the disputes which lead to homicide as trivial in origin. For the lower class players in the homicide drama, the challenge to manhood is far from a trivial matter.

The Issue of Gangs

The highly visible forms of gang conflict in the USA have raised questions about the possibility that this form of masculine violence may be spreading to Australia as well. In Victoria, the media have focused attention on the behaviour of groups such as the '3147 gang' (so-called because of the postal code of the neighbourhood), and one forensic specialist was quoted as being concerned that Victoria was ' . . . heading towards becoming a state of warring gangs' (Melbourne *Herald-Sun*, 7 August 1991, p. 2).

Answering the question of the degree to which there is a 'gang problem' requires some clarity and agreement regarding the use of the term 'gang'. There is nothing new, obviously, in collective crime in Australia. In the nineteenth century there was the 'Kelly gang' and the 'larrikin' problem in cities such as Sydney and Melbourne. In the USA, however, the gang problem tends to have a more specific meaning. One concise definition offered was:

> A youth gang is a self-formed association of peers, bound together by mutual interests, with identifiable leadership, well-developed lines of authority, and other organisational features, who act in concert to

> achieve a specific purpose of purposes which generally include the conduct of illegal activity and control over a particular territory, facility, or type of enterprise (Miller 1980, p. 121).

Some have argued that such a definition is too general, and somehow fails to capture some of the common features of the American street gang. As an alternative, Spergel has suggested the following as a description of gang activity:

> The gang, particularly the violent street gang, can be distinguished from the delinquent or criminal group. It usually has a primary commitment to achieving its interests through violence. It tends to be larger and better organised than most delinquent or criminal groups. It may comprise individuals of similar or varied ages, often aggregated or designated by age limits such as 'futures', peewees or midgets, juniors and seniors or 'old heads'. Its structure includes leaders, core or regular, and marginal or peripheral members. Its leadership may be individual or corporate . . . The gang usually has a name, an insignia, or colours; a tradition, sometimes extending over decades; and a turf or territory, or many turfs or territories, to which it establishes special claims and rights. It may engage in a wide range of activities, criminal and non-criminal. An underlying characteristic is not so much conflict as peer competition for status or notoriety through violent activities, as well as protection and maintenance of turf or income producing interests (Spergel 1984, p. 201).

A recent empirical study of gangs in the USA offered the following more complicated definition:

> . . . a gang is an organised social system that is both quasi-private (not fully open to the public) and quasi-secretive (much of the information concerning its business remains confined within the group) and one whose size and goals have necessitated that social interaction be governed by a leadership structure that has defined roles: where the authority associated with these roles has been legitimised to the extent that social codes are operational to regulate the behaviour of both the leadership and the rank and file; that plans and provides not only for the social and economic services of its members, but also for its own maintenance as an organisation; that pursues such goals irrespective of whether the action is legal or not; and that lacks a bureaucracy (that is, an administrative staff that is hierarchically organised and separate from leadership) (Sanchez-Jankowski 1991, p. 28-9).

While there is not complete agreement among these writers, it would seem that in the American scene the term 'gang' is likely to refer to a group that has a relatively high degree of organisation, with an explicit leadership structure, a defined territory which is part of the gang identity, and clear colours or other insignia which set them apart. Using these rough guidelines, it would appear that such formalised gangs are rarely encountered in Australian communities. While for a short time after the appearance of the movie *Colors* there was a bit of faddish copying of American gang characteristics (including the wearing of colours), in the Melbourne environment there is little that resembles American street gangs.

At the same time, there are groupings of young people, especially originating in lower and underclass environments, whose collective behaviour is seen by the wider community as 'troublesome'. The groupings tend to be loosely organised and lack a clear leadership structure. While they may emerge from a particular neighbourhood, their activities are spread over a reasonably wide geographical area. There may be some amount of activity in the neighbourhood, but it is highly likely that the group will be mobile, often flowing through the major spokes of the public transportation system (buses, trams and trains) into such readily available public scenes as train stations, shopping malls, pubs, parks or reserves, or even the streets and sidewalks.

There is some amount of masculine group behaviour which involves violence. What seems distinctive about the violence in Australia is that much of the conflict between groups seems to result from what can be seen as the 'social friction' that occurs as groups flow past each other in these public scenes. When conflict between two groups took place and led to a homicide, it often happened outside the neighbourhood of both groups. For examples, there was the account of a young Chinese lad who with his friends had come into the central Chinese district of Melbourne, and as he was walking down the street, he called out in Chinese insults aimed at Vietnamese. The lad and his friends stopped in at a pinball parlour and begin to play the games, when they were suddenly attacked by a group of young Vietnamese, and the Chinese teenager receives a fatal stab wound. In another account, a Vietnamese teenager became the victim of a homicide when he and his group of friends were assaulted by a group of youth 'Old Australians' on the Flinders Street Station steps, and the lad was felled by a punch and struck the back of his head on the steps when he collapsed.

Sometimes the frictional effects between groups occur closer to home, as in the case of a group of western suburbs young males who were sharing New Year's drinks at their local park when another young male came by in his car. Insults were exchanged, and the car was surrounded by the group in the park. They proceeded to kick at the car, and throw beer bottles at the driver. The driver sped off, but only to gather up reinforcements to return for a major brawl, in which one of the park group suffered fatal head injuries when bashed on the head by the driver.

Through these accounts it can be seen that there is a theme of collective violence involving competing groups of young males which runs through these accounts of homicide. Further, the violence is closely linked to the dynamics of the groups and the styles of conflict that develop between them. In this, there is much in common with data from the USA on violence, including probably a fair proportion of events which become classified as 'gang homicides'. Consider the following clash between two differentiated groups:

> Colin (age 17) was a member of a loosely organised group known as 'Bogans', while Charles (age 19) was part of the 'Headbangers'. Both were at a disco in a local tennis centre, when a group of the Bogan males became involved in an argument with a group of girls who were with the Headbangers. After a brief exchange of taunts and insults, one of the girls punched Colin, who retaliated with a punch in return. Charles came over and attempted to pull the girl away. Colin called Charles a coward

> and a wimp, and began to throw punches at Charles. At this point, a general fight began between the two groups, involving ten to twelve people. Charles then pulled out a knife, and stabbed Colin several times in the chest and abdomen. Colin died shortly after (his blood alcohol level was found to be .079). (Case No 1931-87)

While this narrative establishes that there are distinctive collective styles around which young people recognise and respond to, where such group identities exist—such as 'Bogans', 'Headbangers', 'Wogs', or 'Skips'—these appear to be loosely defined and derive more from the presence of general and widely spread lifestyles, rather than from the existence of and identification with territorial-based gangs. As indicated in the accounts above, group identities can nourish collective violence. The nature of that collective violence, however, seems tied more to issues having to do with conflicts around the common uses of public spaces, rather than in protection of home territory. As groups move through such public scenes as pubs, parties, streets, parks, or similar spaces, the frictional contact between individuals and groups may result in contests of honour between males. The conflict, as can be seen in the case studies, may involve individuals or perhaps even groups. Without question, the collectivity of males is a central feature of the conflict, with group members on both sides providing both participants and social audience for the contest as it emerges and erupts into violence. In this, it is suspected that there is much in common with a large proportion of male violence in the USA, including homicides which become identified as 'gang violence' in American cities.

At the same time, while there is group violence, what is not present in the current Australian scene are formally organised and structured gangs. These Australian groups do not have a formal leadership structure, they do not wear insignia which sets them apart from other gangs, and there is not a clear identification with and protection of their local territory. Homicide in Australia can be seen to be a frequent product of group activity, but not as a feature of the ritualised and formalised gang conflict found in the larger cities of the USA.

Some Policy Considerations

From the patterns observed in the present data, it has been suggested that the major sources of violence appear to reside in behaviour patterns closely identified with masculinity and economic marginality. These have to be seen as deep and enduring features of social life in Australia, and certainly they are not amenable to any quick fix. At the same time, there are some policy directions that are worth considering.

There are some educational directions that might be examined, especially in light of the implications of the notion of 'scenarios' of violence. Confronted with a situation which might follow a path toward violence, what are the available scenarios which might deflect the action along non-violent directions? An argument could be made that teenage males (and females) in the classroom setting of the school might be confronted with various situations which have a potential for violence. The educational task could

then be to create or demonstrate the various scripts by which the action might be played out, in particular those which serve to reduce conflict and violence. The young people could then role play these scenarios, and thus gain a form of direct experience both with potential scenes of violence, and then more importantly, with some of the alternative scripts that might deflect the collective action in non-violent directions.

The underlying premise is that, in general, young people have only the vaguest outlines of the rules that hold for scenes that are violent. While there is a general awareness of the need to defend one's honour, there is little opportunity to practise ways that an individual can move in and out of difficult scenes in such a way that the sense of honour is preserved, yet violence is avoided. Schools, in other words, might give specific attention to the teaching of personal techniques for conflict resolution and conflict avoidance.

At the same time, a persistent feature of extreme violence is that it appears to be tied closely to conditions of economic marginality. This implies that violence reduction may require policies that are directed at coming to grips with the exceptional levels of unemployment now being experienced by young people in Australia. Significant changes have occurred in the shape of the labour force in Australia so that a large percentage of young people find that after leaving school their transition to adulthood through finding a job is blocked. For such individuals, this presents a major problem in identity formation. The disruption of the transition means that the routine ways of gaining access to conventional adult identities are put out of reach. Unemployment for them, in short, is about much more than simply not finding a job. Those caught in this social limbo, disconnected from much of conventional community life, readily drift into the various forms of marginal masculine cultures which are supportive of violence.

Solving this emergent problem of disrupted transition requires that major effort be given to the development of strategies aimed at structural change of the labour force so that new entry portals are created allowing access to work for those who are young, inexperienced, with relatively little to offer in the way of skills or qualifications. If Australia fails to meet this challenge, it may face the major consequences in terms of various forms of troublesome behaviour posed by underclass youth. Certainly, from the data reviewed here, an expansion of the pool of underclass may increase pressures both to engage in exceptional risk taking—which in extreme circumstances result in armed robbery and homicide —and to force males into positions where they see violence as the available mechanism to define and preserve their sense of masculine honour.

At a much more direct policy level, these data serve to reinforce the need to maintain and increase controls on guns. What the various case histories demonstrate is that violence is a basic feature in the lifestyles of some young males, either in terms of drawing upon violence to defend their masculinity, or the willingness to risk violence in engaging in criminal behaviour. Given this propensity to resort to violence, it follows that if guns were more accessible, it could be expected that there would be a significant increase in fatalities among males resulting from gunshot wounds. While it is unrealistic to assume that illegal gun use could be completely eliminated, it can be argued that any steps that would decrease access to guns would save lives,

especially in those circumstances involving the rapid escalation of violence where there is a spontaneous use of whatever weapon is at hand.

In conclusion, this research has underscored the significance of masculinity in any understanding of homicide in Australia. What the investigation has outlined are particular scenarios within which male-to-male encounters lead to fatal consequences. Further research is needed to establish if the patterns found here are generalisable to other settings, both in Australia and overseas. Another goal of future research would be to examine how it is that males, having set themselves on a course which might lead to exceptional violence, then deflect their behaviour along a non-violent path. A better understanding of these restraining judgments might create some important avenues for interventions for the control of violence.

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HOT SPOTS FOR VIOLENCE: THE ENVIRONMENT OF PUBS AND CLUBS

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VIOLENCE HAS BECOME A MATTER OF MAJOR PUBLIC CONCERN IN AUSTRALIA in recent years. Two separate massacres in Melbourne in 1987 and one in Sydney in 1991—each by a lone gunman—horrified the nation and reinforced the view of many that Australia is becoming a more violent and lawless country. Anecdotal evidence and systematic survey data both confirm that fear of random, unprovoked violence from strangers now has a major effect on the lives of many ordinary Australians (van Dijk, Mayhew & Killias 1991).

However, criminological research (*see* Australia 1990) suggests that most acts of interpersonal violence are not the result of random attacks by madmen on complete strangers, but involve ordinary people as both attackers and victims who frequently know each other and who, for one reason or another, come into conflict in the home, street, workplace, or place of recreation. Indeed, even a quick perusal of the statistics on homicides and assaults leads one to a conclusion which may be banal but is of fundamental importance: the places in which most acts of interpersonal violence occur, and the times at which they occur, mirror, at least roughly, the rhythms and routines of daily

life (*see* Robb 1988). A substantial number of homicides involve intimates within the family home because those are the circumstances in which many people spend much of their lives. A higher proportion of non-fatal assaults than of homicides take place outside the home and involve strangers, but these events are also highly patterned, being more common late at night and on weekends, when social life and interaction is at its most intense. As Cohen and Felson put it:

> Rather than assuming that predatory crime is simply an indicator of social breakdown, one might take it as a byproduct of freedom and prosperity as they manifest themselves in the routine activities of everyday life. (1979, p. 605).

There are few activities as routine in Australian culture as the imbibing of alcoholic beverages. According to a 1988 survey of four Australian states (Berger et al. 1990), three-quarters of all adults drink at least occasionally and one in ten can be classified as a 'heavy drinker'. Half the population drink at least once or twice a week, and especially for men under the age of twenty-five, this drinking is often done at hotels or licensed clubs. It is perhaps not surprising, therefore, that assaults and homicides frequently involve the presence of alcohol in the offender, victim, or both.

Collins (1989) cites evidence that as many as 80 per cent of those arrested in the USA for cutting, concealed weapons, other assaults, murder, and shooting had measurable levels of alcohol in their urine, while Robb (1988)—in a study of serious assaults recorded by police in New South Wales—found that 40 per cent were nominated by police as involving alcohol. Moreover, assaults coming to police notice and recorded by them frequently occur after midnight around pub closing times, and at least 20 per cent take place in or around licensed premises (Victoria 1989; Robb 1988). Alcohol involvement in homicides occurring during peak entertainment periods seems to be even more pronounced than for non-fatal assaults: nearly half (48 per cent) of all homicides occurring on Saturdays in New South Wales in the years 1968 to 1986 involved suspects who had been drinking in the previous twelve hours (Bonney 1987).

However, police statistics may greatly understate the extent of alcohol-related violent crime because most assaults are not reported and because police often seem to be more reluctant to record reported alcohol-related assaults than reported non-alcohol-related assaults. Surveys of injured persons presenting at hospital for treatment permit a clearer picture of the true incidence of pub and club related violence, since assault victims are more likely to seek medical than police assistance. One recent hospital survey in Sydney suggests that each year in New South Wales many thousands of people, mostly young men, are injured (sometimes quite seriously) as a result of assaults occurring in or around licensed premises (Cuthbert 1990).

Statistical associations do not prove that alcohol consumption actually causes violence. After all, if drinking is common behaviour, and if violent incidents can be thought of as 'routine activities which share many attributes of, and are interdependent with, other routine activities' (Cohen & Felson 1979, p. 589), then it would be surprising *not* to find alcohol implicated in many instances of assault. The question is whether alcohol consumption itself

contributes in some way to the likelihood of violence, or whether aspects of the drinkers or of the drinking settings are the critical factors. It is quite possible, for example, that male attitudes which legitimise the physical maltreatment of women, or environmental factors like crowding, discomfort, and aggressive bouncers in pubs and clubs, are the real causes of much alcohol-related violence (McGregor 1990; Victorian Community Council Against Violence 1990).

The purpose of this paper is to report briefly the method, results, and implications of some observational research into pubs and clubs which were conducted in Sydney in 1989 (for further details of the study *see* Tomsen, Homel & Thommeny 1990; Homel & Tomsen 1991; Homel, Tomsen & Thommeny 1992). The study was the first systematic attempt in Australia to examine possible links between aspects of the environment of public drinking and the occurrence of violence. A key assumption was that there is a complex (but nevertheless real) relation between violence and public drinking (not the mere ingestion of ethanol) which is embedded in Australian history and culture and reproduced in institutional arrangements and regulatory and police practices regarding drinking. This research aimed to transcend the narrow debate about the effects of ethanol *the substance* by focusing on *the total environment* of drinking and its regulation (or lack of regulation) by management, police, and other public officials. Thus features of the external regulation of licensed premises were considered as well as more directly observable characteristics such as physical layout, patron mix, and social atmosphere.

Although not directly a study of homicide, the research has obvious relevance if one accepts the assumption that violence occurring in and around licensed premises forms a continuum, from acts of non-physical aggression through 'brawls' and 'fights' to acts of homicide. While obviously most incidents are relatively minor, occasionally people are killed in or around clubs and pubs. Indeed, more than one male homicide victim in ten is killed in these locations (although, interestingly, fewer than 2 per cent of female victims: Bonney 1987). On this view, a homicide is a serious assault which for some reason results in death rather than serious injury, but for which the situational factors are not qualitatively different from those applying to non-fatal incidents. This assumption is open to question, and should be empirically investigated. However, since no homicides were observed in the course of this study, little light can be thrown on the issue in the present paper, except to point out that some of the worst premises in Sydney were included in our observations.

Method

Studies of drinking in public places have been conducted for many years (Fisher 1985). A study by Graham and her colleagues (Graham et al. 1980) in Vancouver was especially valuable as a guide for this research, since data were obtained for a large number of situational variables as well as for instances of aggression and physical violence. Four observers (working in male-female pairs) noted 160 incidents of aggression (forty-seven involving physical violence) in 633 hours of observation in 185 drinking establishments. Many variables were positively

correlated with aggression, including the percentage of drunk patrons, the percentage of American Indians, poor ventilation, the amount of sexual body contact, lack of cleanliness, and a hostile atmosphere. The authors stressed, however, that the barroom environment is best viewed as 'an ecological system', and implied that the overall influence of this ecology on aggression may be greater than the sum of the effects of individual variables. Through factor analysis and qualitative analysis they identified one distinct type of bar—the Skid Row Aggressive Bar—which was characterised by high levels of aggression, extreme intoxication, down-and-out patrons not accepted anywhere else, and a 'bizarre atmosphere' in which deviant and unusual behaviours were tolerated, and even encouraged. The extent to which skid row bars constitute a major part of the problem of violence in other localities is a matter for further research.

Many of the variables and insights from the Vancouver research were used as a starting point for this study. Influence also came from these authors' suggestions that future research concentrate on places where alcohol-related aggression most often occurs, and that within this context more details be collected on the *processes* of aggression. This immediately raised two related questions: the method of sampling (how were 'high risk' venues to be identified?); and the method of data collection (how best could 'ecological processes' be studied?).

An early decision was taken to use qualitative rather than quantitative methods, relying heavily on unstructured observations in licensed premises and, to a lesser extent, on semi-structured interviews with licensing and general duties police, chamber magistrates, and security industry personnel. There were several reasons for the decision to use a qualitative approach. While the Vancouver research identified many potentially relevant situational factors, it was obvious reading the results that there were a large number of differences between drinking settings in Sydney in the late 1980s and in Vancouver in the late 1970s, and that many more variables would have to be generated. More importantly, it was judged that the reduction of the problem to 'variable analysis', even after extensive piloting, would hinder attempts to explore the complex interactions and subtle processes which, we hypothesised, led to violence. In addition, the absence of any objective database in New South Wales identifying licensed premises as more or less violent necessitated a 'theoretical sampling' strategy based on the best available qualitative judgements concerning premises' standings in terms of violence and/or poor management (Glaser & Strauss 1967). Being unable to stratify the population of premises, unweighted probability sampling would have yielded too few high risk premises to allow detailed analysis of the relevant environmental factors.

The aim was to contrast situational variables and management practices in a small number of premises known to have been regularly violent over a long period of time with the same factors in a sample of establishments noted for their lack of violence or for their ability to defuse violent incidents when they occurred. Using this design, even if little violence was actually observed in the study, it would be possible to explore aspects of drinking settings which were associated with violence. Eventually four high-risk and two low-risk premises were identified on the basis of first-hand knowledge, police

information and exploratory visits. Each of these premises was visited by pairs of observers at least five times, each observation period being between two and six hours in duration. A further sixteen sites were visited at least once, making a total of fifty-five visits to twenty-three sites in seventeen establishments. Total observation time was nearly 300 hours.

All the premises studied intensively were in suburban locations. This was not because it was thought that there is more drinking-related violence in the suburbs—police statistics and research suggest the contrary—but because the problems in city locations such as Kings Cross in Sydney or West End in Melbourne are often dispersed across a number of violent venues. It is easier to plausibly link public violence and the characteristics of particular premises in suburban locations. One consequence of this sampling strategy was that 'skid row' premises did not figure as prominently as in the Vancouver study, although some were visited, particularly during the exploratory phases.

One type of problem location studied intensively was licensed clubs. Licensed clubs have often been credited with being more orderly than hotels and having good control over their patrons, but it appears that financial pressures have led many to develop forms of entertainment, principally late-night discos or live music for young people, which create problems not anticipated by management. In fact, all the violent mainstream premises chosen for full study, whether in pubs or clubs, traded after midnight and were popular with young people because they provided live music or a disco.

The control sites were studied for the features which distinguish them from the violent. However, during field research it soon became apparent that the violent premises are for most of the time not violent. Violent occasions in these places seemed to have characteristics that clearly marked them out from non-violent times. In effect, these locations were acting as controls for themselves. This unexpectedly helped to refine ideas about the relevant situational variables and to some extent reduced the importance of comparisons with the premises selected as controls. Eventually it could be noted which variables regularly prevailed and linked up with each other during violent or peaceful periods.

This method was actually an extension of the theoretical sampling approach, from the choice of physical sites to the choice of times and days for observation. For example, one site was very violent on a night which had discount drinks and a punk band. The observers returned on a similar night with full-priced drinks and a similar band so as to discern any differences and hoping that other aspects of the drinking environment were essentially unchanged. By this, comparative means hypotheses about key variables and their relations were being tested out during observation and to some extent were directing its pattern.

In broad terms, the method of data collection and analysis was based on Miles and Huberman (1984). After leaving a site, notes were made and information written onto an observation sheet listing a large number of variables. The visits were then written up as separate narrative accounts by each observer. These narratives were cross-checked and later coded at group meetings. Early and often clumsy efforts to code narratives signalled whether or not various codes were meaningful and linked to the data. Indeed, the real

thinking about the research questions took the form of regularly revising the codes, a process which was more productive than premature speculation about the 'real' causes of violence. After at least a dozen revisions, almost 200 coded items were settled upon, grouped under a small number of broad headings: physical and social atmosphere, drinking, patrons, staff, and violence. To simplify analysis, summary sheets for each narrative were also prepared, classified according to the degree of violence observed.

Results

In total, thirty-two assaults involving some degree of physical violence were observed during the course of the study. Excluding nine rough ejections which were borderline assaults, the thirty-two incidents represent a rate of about 11 per 100 hours observation—50 per cent higher than the rate of 7.4 in the Vancouver study. The higher rate is not surprising, since violent premises were over-sampled and were also sampled late at night when violence is more likely. Graham et al. (1980) report that they witnessed no brawls and no incidents involving serious physical injury. By contrast, four of the thirty-two incidents in our study were 'brawls', and a number of assaults were rated as 'serious' by observers. For example, in one case an ejected patron was held by three bouncers who repeatedly bashed his head against a steel garbage crate, while on another occasion a floor manager apparently confused a young man with another patron who had been in a fight, lost his temper, and began to throttle this very small and young drinker who choked for several minutes.

In contrast to findings from the limited amount of anthropological research, such as Dyck's (1980) analysis of 'scrapping' in barrooms in the small western Canadian city of Parklund, most of the incidents in our study could not be characterised as 'fights' in the sense of being equal conflicts freely entered into by the participants. In at most one-quarter of cases could the victim be said to have actually or possibly invited the attack. Assailants—whether patrons or staff—who deliberately seek out a violent encounter appear to pick their mark, who are most often fewer in number, younger, and smaller. Assailants also appear to focus on victims who they see are quite drunk, or at least far more intoxicated than they are. When more than two parties are involved, pub assaults are often further trivialised as 'brawls', with the equal responsibility of all parties—assailants and victims—implied by this. By our reckoning, equal responsibility is usually not the case.

The data analysis suggests that much of the violence observed in this study was not due to anything inherent in public drinking or in the typical patrons of these venues. The key variables suggested by the 'constant comparative' and empirically grounded form of analysis were aspects of the patron type, the social atmosphere, drinking patterns, and the behaviour of doormen.

Patron type

The typical patrons in violent premises are young, working class men. However, the social class of patrons cannot explain the differences between these violent sites and more peaceful venues with patrons from a similar social background, nor can it explain why the violent venues are at other

times peaceful, although the patrons present are much the same. Moreover, there is no clear causal connection between the young age of regular patrons and levels of violence. The single venue with the greatest number of young drinkers was in fact one of the non-violent locations selected as a control.

The gender ratio in venues, together with the social links between the males present, seem more critical than age or class. The proportion of males and presence of male groups in any venue seem to exacerbate feelings of rivalry and group loyalty and can result in arguments and fights. Males in groups, especially as strangers to each other, were seen to come into conflict more readily. The venues we studied drew a larger number of these groups of strangers than others, attracting people from a fairly wide area.

Solo males and males with female partners or in mixed groups appear to be less inclined to enter into conflicts. However, it should not be assumed that the presence of women always has a pacifying effect on social atmosphere or that it is rare for women to become involved in conflict and violence. Women were victims of male violence in two incidents, and arguments, challenges, mock fights and fights between females were observed regularly at most of the violent locations—the worst of these involving women bouncers. A surprisingly high number of women patrons spoken to also followed the male path in being apparently indifferent to acts of violence, and several took pleasure in watching fights and brawls.

Social atmosphere

Although no direct connection between physical attractiveness and violence could be found, attractive, renovated, and well-designed surroundings commonly mean that a venue also has a responsible management and positive staff who relate well to patrons. Not surprisingly, unattractive, neglected, and dirty venues also tended to be among the least comfortable and to have poorly supervised, aggressive, and abrasive staff. However, despite all the myths, rough pubs with plenty of rowdy behaviour (which would include the local workingmen's pubs celebrated in Australian folklore) are not necessarily violent.

The two most relevant aspects of atmosphere seem to be *comfort* and *boredom.* Comfortable premises are not necessarily the most attractive, renovated places. The most important aspects seem to be roominess, ventilation, and, especially if it is from music of poor quality, only moderate noise. Big crowds in most sites usually mean discomfort for many patrons—a problem exacerbated by a lack of seating and by crowded corridors, stairs, and doorways. Patrons in these situations tend to alleviate their discomfort by more rapid drinking, which causes higher levels of drunkenness, and eventually aggressive reactions to discomfort directed at individuals or property. Overcrowding on dancefloors appeared to be linked to several arguments and at least one of the severe assaults observed.

Levels of comfort interact with levels of boredom. Entertained crowds are less hostile, drink more slowly, and seem to be less bothered by uncomfortable surroundings. In some venues, levels of boredom and aggression directed at other patrons were reduced by entertainment in such

forms as television, videos, and game and card machines. Stage entertainment including dancing and quizzes were also noted to reduce levels of boredom and aggression, sometimes at a critical point during the night when the form of patron interaction suggested that conflict was likely.

Of the many aspects of entertainment and boredom, bands and music are perhaps of greatest importance. While violent and non-violent occasions do not follow a simple bands/no bands dichotomy, quality bands that entertain an audience generate a positive social atmosphere that has been observed to counteract other negative variables. A smaller crowd with a bad band seems more likely to present trouble than a large crowd entertained by quality musicians.

Drinking patterns

High levels of intoxication are an obvious feature of many violent occasions. This is worsened by discount drinks, with prices in some venues being as low as ten or eleven cents. More commonly, discount drinks are set at around a dollar on specific discount nights. On these occasions many patrons who have paid a high cover charge (for example, $10) in order to see an inferior band or just to enter a disco, seem to decide that they should become quite drunk in order to get their 'money's worth'. In fact, the most violent visit of all, with very high levels of intoxication and seven assaults observed in a few hours, was an 11c discount night with an $11 cover charge. In some clubs, cheaper drink prices (for example, $1.30 for a strong mixed drink) can also serve to bring on very high levels of drunkenness and resulting violence. This was obviously the case in the licensed club included among our group of four most violent premises. As already noted, it is important that these rates of drinking can also be artificially raised by high discomfort and boredom.

Many patrons appear to pass through stages of drunkenness—with aggression coming later. Substantial amounts of food that can lower levels of drunkenness were generally not available in the violent premises we studied, especially later at night when patrons are more intoxicated. Some locations had a small range of hot food available, but more often snacks were limited to hotdogs. Hotdog stands often appear to have the adverse effect of encouraging patrons to mill around outside venues. Both of the non-violent control locations that were studied operated substantial restaurants.

Doormen

The behaviour of bar staff does not figure as highly as expected in the creation of an aggressive or violent atmosphere. Edgy and aggressive bouncers are another matter. They have been observed to initiate fights or further encourage them on several occasions. Some were even observed to leave premises while they were on duty in order to continue a fight with departing patrons. More often, they have been seen to show a good measure of indifference to violence. They regularly asked conflicting patrons to leave premises, and then virtually arranged a fight that they and departing patrons could watch immediately outside the location. The unprofessional view that

assaults occurring just outside the premises where they are employed are not their business, appears to be commonplace.

Many bouncers seem poorly trained, obsessed with their own machismo (relating badly to groups of male strangers), and some of them appear to regard their employment as giving them a licence to assault people. This may be encouraged by management adherence to a repressive model of supervision of patrons ('if they play up, thump 'em') which, despite their belief, does not reduce trouble and adds further to a hostile and aggressive atmosphere. In practice many bouncers are not well-managed in their work and appear to be given a job autonomy and discretion that they cannot handle well.

The bad relations of many male bouncers with male patrons led some of our informants to suggest that women should be employed on pub and club doors. Although in one club the use of a well-spoken female on the door seemed to appease groups of males who were refused entry for non-membership, it is simplistic to suggest that these sorts of conciliatory skills are held by all females and no males. Some male door staff were observed to have these qualities and took the role of restraining other bouncers from excessive violence. The most relevant factors seem to be training and experience, rather than gender. Unfortunately, bouncing is still an occupation with a high rate of turnover. Younger bouncers may be leaving this sort of work just as they are beginning to acquire the sort of experience and work maturity that their job requires.

Summary

Violent incidents in public drinking locations do not occur simply because of the presence of young or rough patrons or because of rock bands, or any other single variable. Violent occasions are characterised by subtle interactions of several variables. Chief among these are groups of male strangers, low comfort, high boredom, high drunkenness, as well as aggressive and unreasonable bouncers and floor staff.

Discussion

This research confirms the work of Graham et al. (1979) and others in that a great deal of violence occurs in and around licensed premises. While some of the violence observed did not result in serious injury, many of the incidents would be classified as serious assaults by any reasonable criterion. In this respect, the research findings reflect everyday experience that violence is a routine aspect of interactions in many pubs and clubs.

However, it is important to recall that the sample of Sydney drinking places was biased towards times and places where prior knowledge indicated that violence was likely to occur and that, even in the worst places, many visits were 'uneventful' in the sense that no violence was observed. This is consistent with the finding of Graham and her colleagues (1979) that a small number of premises—chiefly of the 'skid row' variety—accounted for a high proportion of all observed instances of aggression. It is also consistent with the preliminary results of a recent observational study of a representative sample of thirty-four Sydney clubs and pubs which found that 16 per cent of

all premises accounted for three-quarters of all observed incidents of physical violence. (This study was supervised by Ross Homel and involved 147 visits and 300 hours of observation. It was carried out by twenty-two senior year students of Macquarie University in July and August 1991.)

The existence of 'hot spots' of predatory crime has been the subject of some recent criminological research. Sherman, Gartin and Buerger (1989) analysed calls to police in Minneapolis over one year and showed that all recorded domestic disturbances occurred at 9 per cent of all possible addresses, while all recorded assaults occurred in only 7 per cent of all possible locations in the city. These authors build on a popular sociological theory of crime, 'routine activities theory', which attempts to account for the non-random distribution of crime by proposing that the rate at which such events occur in collectivities is affected by:

> the convergence in space and time of the three minimal elements of direct-contact predatory violations: motivated offenders, suitable targets, and the absence of capable guardians against a violation (Cohen & Felson 1979, p. 589).

Sherman and his colleagues extend the ideas of routine activities theory from collectivity to 'place', arguing that places, like persons, can be seen to have routine activities subject to both formal and informal regulation.

One advantage of applying the routine activities perspective is that it becomes immediately apparent that single variable theories of violence (for example, 'he did it because he was drunk') are unlikely to have much explanatory power. This is because the critical factors are not those to do with offenders, victims, or guardians alone, but those affecting their *convergence* in time and space. Thus high rates of intoxication do not on their own guarantee that violence will break out, since it is not clear that intoxication will inevitably increase the supply of motivated offenders and suitable victims, or that it will have any effect on the presence of capable guardians. However, in interaction with other factors, intoxication may be a potent explanatory factor—as this analysis suggests.

Laboratory research has generally failed to find any direct connection between the ingestion of alcohol and the incidence of aggression (*see* Gustafson 1986a; Taylor & Gammon 1976), but has highlighted the importance of interactions of alcohol consumption with factors like frustration (Gustafson 1986b). Violence may therefore occur (as it did in this study) when some patrons are vulnerable to attack due to their extreme intoxication, when formal or informal controls are not sufficient to deter violence, and when potential offenders are drunk *and* frustrated—frustration perhaps being promoted by poor quality entertainment or by crowding.

In a well-managed club or pub employing skilled doormen and floor staff who can detect problem situations before they get out of hand, or who have good communication skills and can defuse aggression before it leads to violence, there may rarely be any connection between levels of intoxication and violence. Alternatively, aspects of patron mix may amplify or reduce the risk of violence when rates of intoxication are high by affecting the processes of informal guardianship or by influencing the motivations of offenders and

the supply of victims. Drunk males on their own often make good victims; informal controls on aggression may work far better in groups consisting of both men and women, even if everyone is drunk, than in all-male groups.

The emphasis on the interactions of several factors does not mean that the need for some direct controls on intoxication is rejected. One striking aspect of poor management is the way in which some licensees promote high levels of drunkenness by various kinds of drinks promotions, such as cheap drinks combined with high cover charges. For this reason, an immediate and direct legislative assault on all practices involving discount drinks, 'two-for-one' promotions, happy hours, and any other serving practices which have the effect of producing high levels of drunkenness in a short period is advocated. While one might debate the rights of individual patrons to choose to drink to intoxication, our findings concerning the destructive effects of mass binge drinking resulting from deliberate and irresponsible price discounting and drinks promotions leaves us in no doubt that such practices should be banned.

Other major policy recommendations also concern the responsibilities of management. A major flaw in the current form of the *Liquor Act 1982* (NSW) is that violence is mentioned in passing in only two places, with assaults on individual victims being seen as the responsibility of those victims, rather than being viewed as the outcome of management practices. There is an urgent need for amendments to this Act so that the continuous operation of a violent venue is an offence that will lead to the cancellation of a licence. Action to close down at least five regularly violent discos in the West End area of Melbourne has been taken in the past two years, on the initiative of the Liquor Licensing Commission and the Victorian Community Council Against Violence, but similar action appears never to have been contemplated in New South Wales and other states.

A further policy priority to emerge from this research was the need for better regulation and training of bouncers. Bouncers are required under the *Security Amendment Act 1985* (NSW) to hold both a valid and current security licence and to carry related identification on the job, such as a photo identification card. One aim of this legislative provision is to discourage aggressive and violent individuals from becoming bouncers. However, it is obvious from research that, despite the intentions of the legislators, a significant number of working (and licensed) doormen are still prone to violence. This suggests that there is a need to mandate training for security staff in human interaction skills, crowd control, and non-violent conflict resolution. In addition, it is essential that the existing legislation be enforced in line with the intentions of parliament. Without a greater overall police effort to implement the Security Amendment Act, it has little more than symbolic value and will do nothing to reduce actual levels of violence.

Conclusion

Regular violence in public drinking locations cannot simply be blamed on rowdy patrons or excused as something natural and unstoppable. Nor can it simply be blamed on the irresponsible ingestion of a legal drug. The drinking environment is an evolving historical and cultural product which can be left

unchanged or altered for the better. It is clear from our research that continuous patterns of violence in these locations are strongly related to local situational variables, which in turn reflect management practices and government legislation and regulation.

While it is difficult, and perhaps not even desirable, to attempt to modify the routine activities of pub and club goers, it is far easier, and surely consistent with broad considerations of the public good, to regulate the routine activities of the premises they frequent (Sherman et al. 1989). The most extreme way of doing this is to incapacitate the activities of the worst 'hot spots' by licence cancellation. Short of this, the other reforms in regulatory practices which have been outlined briefly in this paper have the potential to improve greatly the safety of licensed premises for the tens of thousands of young people who rely on these places to provide most of their entertainment.

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HOMICIDE: THE NORTHERN TERRITORY PERSPECTIVE

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THE NORTHERN TERRITORY COVERS AN AREA OF 1,346,200 SQUARE KILOMETRES (17 per cent of the continent) extending from the islands and the coast of the tropical Top End (12 degrees south) to the arid regions of the Centre (25 degrees south). The Northern Territory's population of approximately 157,300 is largely confined to the major centres with about 73,300 situated in Darwin and 24,000 in Alice Springs. The only other major population centres are Katherine (7,500), Tennant Creek (3,000) and Nhulunbuy (3,400). The remainder of the population (46,100) is scattered throughout the Northern Territory in small, isolated communities (Australian Bureau of Statistics 1990a, p. 1).

Almost one-quarter of the Northern Territory's population is made up of Aboriginal and Torres Strait Islander peoples (Australian Bureau of Statistics 1990b, p. 21). The median age for Aboriginal people at 30 June 1986 was nineteen years, compared to around twenty-six years for the Northern Territory as a whole: the national median age is 31.4 years (Australian Bureau of Statistics 1988, p. 15). Aboriginal males and females are fairly equally proportioned in all age groups although, overall, females make up 2.5 per cent more of the population. In the non-Aboriginal population of the Northern Territory, there are higher numbers of males in each age group and overall there are 4.5 per cent more males than females (Australian Bureau of Statistics 1986, p. 29).

Crime Rates—Interstate Comparisons

As at 30 June 1991 the Northern Territory was policed by 721 sworn officers or approximately 450 police officers per 100,000 population (Northern Territory. Police Fire and Emergency Services 1991, p. 63). This makes the Northern Territory the most policed jurisdiction in Australia. Nevertheless it continues to experience a far higher crime rate than other jurisdictions, particularly in relation to crimes of violence. For example, between July 1987 and June 1989, the average number of reported murders in the Northern Territory was five times the Australian average. However, it is not only the offence of murder in the Northern Territory which rates significantly in the national figures: the rate of motor

vehicle theft in the Northern Territory was only exceeded by New South Wales during that same period and reports of unlawful entry were over twice the national average, although problems with the definition of the 'unlawful entry' offence may account in part for this variation (Police Commissioners' Australian Crime Statistics Sub-Committee, various years).

Alcohol was a factor in the commission of over half the offences for which an offender was arrested or summonsed. For example, in 1988/89, 52 per cent of offenders were affected by alcohol, 57 per cent in 1989/90 and 59 per cent in 1990/91 (Northern Territory Police data). Indeed, the high rate of alcohol consumption (nearly double the national figure) is clearly one of the factors which contributes to our higher crime rate (Palmer & Murphy 1990). Various strategies are in place to reduce alcohol consumption in the Northern Territory, such as protective custody legislation, although this is primarily a means of affording protection to those who are found drunk in a public place. In 1989/90, there were just over 30,000 apprehensions for protective custody and in 1990/91 just over 31,000. Approximately 88 per cent of those taken into protective custody between 1981 and 1987 were Aboriginal (Northern Territory. Police, Fire and Emergency Services [various years]).

Unfortunately, in proportion to their population in the Northern Territory, Aboriginal people are also over-represented in crimes of violence. For example, from 1 January 1989 to 31 December 1991, of the seventy-two homicide victims, 65 per cent of the victims were Aboriginal and, of the known offenders, 68 per cent were Aboriginal (Northern Territory Police data).

Northern Territory Homicide Situation

Two analyses of Northern Territory homicides have been conducted. They relate to homicides reported to police or becoming known to police during 1988 and also during the financial year 1990/91.

During 1988 there were twenty-three incidents involving twenty-eight victims (five in one incident, two in one other) and twenty-three offenders. In 1990/91 there were twenty-seven incidents involving twenty-seven victims and forty-three offenders (eleven in one incident and five other incidents involving two or three offenders).

Alcohol-related incidents

Despite the small sample involved in these analyses, it appears that in the majority of homicides alcohol was a significant contributory factor. In 1988, 78 per cent of suspects were considered to be affected by alcohol at the time of the commission of the offence and a small percentage were affected by some other drug. In 1990/91, 70 per cent of offenders were affected by alcohol, none by other drugs.

Victims

A majority of victims were also affected by alcohol (61 per cent in 1988 and 74 per cent in 1990/91). The majority (61 per cent) of victims in 1988 were Aboriginal males, with 82 per cent of all victims being Aboriginal. Aboriginal

females outnumbered European females two to one. In 1990/91, 59 per cent of victims were Aboriginal (eight male and eight female). Again, there were twice as many Aboriginal female victims as European female victims. This time, however, 26 per cent of victims were European males.

Suspects

In relation to suspects, in 1988 the majority of suspects were Aboriginal males (83 per cent). Seventy-eight per cent of all suspects were aged between twenty and thirty-nine years. The majority were either unemployed or unskilled (35 per cent and 44 per cent respectively).

Again, in 1990/91 the majority of suspects were Aboriginal males (63 per cent) and, again, the majority of all suspects were aged between twenty and thirty-nine years (63 per cent). Fifty-four per cent were unemployed and a further 19 per cent were unskilled. No offenders were described as being in 'professional' employment.

Location of offences

Most incidents took place in the rural areas of the Northern Territory, including Aboriginal communities (75 per cent in 1988, 60 per cent in 1990/91) with the majority occurring either within the victim's home or in a public place.

Weapon used

Weapons used in the commission of offences varied considerably. They included firearms, knives, sticks, rocks and motor vehicles. In 1990/91 there were several strangulations. In 1988, firearms were used most frequently (36 per cent). In 1990/91, knives featured in 37 per cent of the cases with firearms being used in only four incidents (15 per cent).

Relationship of suspect to victim

In 1988, the majority (87 per cent) of suspects and victims were known to each other.

In 1990/91, 93 per cent were known to each other. One in four of the suspects were married to or de factos of the victim. Another 30 per cent were 'family' members who were related by blood or through cultural ties.

Motive/Cause

In 1990/91, 89 per cent of homicides resulted from arguments, generally of a domestic nature. Many were described as either resulting from sexual jealousy/rivalry or because of some trivial matter. One death resulted from a robbery and two from unlawful sexual assaults.

Certainly the Northern Territory experiences its share of bizarre, cruel and perplexing homicides, but most of them occur apparently as a result of a spur of the moment decision. The loss of life is rendered even more tragic because of the apparently trivial nature of the precipitating factors in most incidents.

Strategies In Place

Domestic Violence Legislation

In the 1990/91 survey, 23 per cent of homicides involved offenders who were married to, or in a de facto relationship with, the victim. In all but one incident, the victims were female, and in all but one both the victim and suspect were Aboriginal. In another three incidents, the thirteen offenders were closely related to or formed part of the extended family of the victim. It is often the case that domestic violence resulting in death for one partner is the culmination of many years of abuse by the man on the woman, such abuse becoming more and more violent.

It is not clear whether this cumulative effect of violence is such a factor of homicide within the Aboriginal population. Audrey Bolger, in her report on Aboriginal women and violence, cited various writers when commenting on the level of violence in Aboriginal communities. They have noted that physical force is used for both punishing wrongdoers and as a means of resolving disputes. Studies showed that women were almost as likely to become involved in fighting as males and in approximately 50 per cent of incidents, women initiated fights. Nevertheless, a woman was more likely to be injured or to suffer greater injury than a man. Almost half the fighting occurred between husband and wife (Bolger 1991, p. 1).

As a result of continued requests by certain sectors within the community and research conducted into the extent of family violence within the Northern Territory (*see* d'Abbs 1983), legislative amendments were made to the existing rather ineffective law.

Commonly referred to as the Domestic Violence legislation (*Justices Act* [NT], ss. 100AB–100AK), which commenced on 1 October 1989, the amendments have provided police with the power to remove perpetrators of violence from their family home where there are reasonable grounds to believe that the spouse is in imminent danger of suffering personal injury or an aggravation of personal injuries already sustained. Amendments have also provided for applications made by police for restraint orders to be made by telephone, more effective methods of serving summonses, increased powers of entry and further considerations to be taken into account in granting bail.

Government alcohol policy

Earlier in this paper, it was acknowledged that the Northern Territory alcohol consumption rate for the year 1986/87 was almost twice that of the national average. In order to combat the problems associated with such high consumption, the Northern Territory Government has recently implemented an alcohol strategy designed to reduce the length of trading hours and the number of liquor outlets. Government has called for an increase in the retail price of liquor which contains 3 per cent or more alcohol, targeting wine, spirits and full strength beer. The rationale is that increases in price and a reduction in outlets and trading hours will encourage the vast majority to consume less alcohol and less high alcohol content beverages. Flow-on advantages presumably will include less alcohol-related deaths on the road,

more 'take home' pay for the benefit of the family, and less alcohol-related violent offences. The results of this strategy are yet to be seen.

Firearms Bill and gun control

In February 1990 the National Committee on Violence published its final report (Australia 1990) and included several recommendations relating to firearms control. The Northern Territory Government agreed to examine those recommendations and, if appropriate, to incorporate them into the existing *Firearms Act* (NT). In fact, in October 1991 a Northern Territory Firearms Bill was introduced into the Legislative Assembly. It included some of the National Committee on Violence's recommendations.

There are several features which quite dramatically alter the existing legislation. They relate to:

- the issuing of corporate and employee's licences to enable an employee to use a pistol in the course of duty. These licences will include a photograph of the licensee and will be in a small durable format;

- clauses controlling the manner in which sporting shooters hold competitions or other events and clauses governing the inspection, design and control of standards of shooting ranges;

- the exemption of interstate licensed sporting shooters taking part in Northern Territory competitions from complying with Northern Territory registration and licensing laws;

- making it an offence for any person to play military-type war games;

- empowering a senior sergeant of police or officer-in-charge of a police station to suspend a person's licence where there are reasonable grounds to believe that the person is suffering from a physical or mental infirmity or incapacity and, as a result of the person's possession of a firearm, may be likely to cause a danger to the safety of the person or to another person or to property;

- an increase in police powers of entry, search and seizure; and

- enabling a medical practitioner, without fear of breach of confidence, to report in good faith to police a belief that a person is not a fit and proper person to have a firearm in possession or under control.

This Bill establishes a three-member Firearms Appeal Tribunal. Currently, all appeals are dealt with in the Court of Summary Jurisdiction before a magistrate. The proposed amendments will provide for representatives from police and the sporting shooters associations in the Northern Territory with a magistrate as Chair to rule on questions of law.

Further, the Commissioner of Police is now empowered to declare amnesties therefore allowing persons to surrender unauthorised firearms and silencers.

Aboriginal Wardens and the Police Aide Scheme

The Northern Territory Police Aide Scheme was established in 1980. Its focus has expanded from what was initially a coastal watch scheme and now aides are empowered with certain police powers enabling them to undertake conventional policing duties. Police aides also provide an important liaison function between the police and the community they reside in. The scheme has received national acclaim.

Northern Territory Police recognise that not only are the needs of society, in general, changing in relation to policing but also that the aspirations of the Aboriginal community towards self-determination affect the approach police need to take, particularly in the Aboriginal communities scattered throughout the Northern Territory.

In 1992, research is being undertaken, through combined Northern Territory and Federal funding, into the effectiveness of the scheme in today's policing environment with the aim of making recommendations which will meet the needs of the Aboriginal community in the twenty-first century. A new and, at this stage, informal program operating in several Aboriginal communities is also being researched. This is the Warden Scheme which provides Aboriginal people with the opportunity to reinforce traditional systems of control within their own communities.

Wardens, as with police aides, are selected by the members of the community in which they reside. By virtue of the respect they hold within their community, they are in a position to encourage peaceful resolution to an assortment of problems. Wardens take on the responsibility of enforcing the community's rules, as opposed to the strict letter of the law. The warden's role is one primarily of negotiation and mediation. Generally, the scheme has been very effective in controlling and reducing anti-social behaviour such as fighting and drunkenness.

However, these schemes, in conjunction with other police/Aboriginal strategies implemented specifically to reduce public drunkenness and violence, can only be successful if they form part of a larger initiative which must focus on education and attitude changes towards violence generally and the destructiveness of alcohol abuse.

Section 137 of the Police Administration Act 1991 (NT)

With regard to post-arrest detention, the Northern Territory has, at least from a police perspective, the most appropriate and practical power of all Australian jurisdictions. The *Police Administration Act* (NT) section 137 detention power— which allows police to detain a person following arrest for a 'reasonable period' —recognises the exigencies of criminal investigation/interrogation while still requiring strict accountability. As a result of this power, police in the Northern Territory are able to operate consistently and ethically without having to go through the legal fiction of suspects 'assisting' with inquiries.

The section 137 power has significantly increased the professionalism and integrity of police investigation and has equipped police with the necessary tools to properly serve the community interest. An example of the usefulness of the section 137 power was seen in September 1988 where, in a remote outstation in

the heart of Arnhem Land, a young man shot five people. He was arrested and kept in custody for seventy hours prior to being charged with murder. The unusually long time spent in custody was caused primarily because of the difficulties associated with the remoteness of the scene and, without the section 137 provision, the investigation would have been severely hampered.

Electronic recording of interviews

Another strategy which has been implemented informally for several years but which is now receiving legislative backing is the electronic recording of interviews with suspects of crime. The requirement to electronically record interviews encourages increased professionalism on the part of the investigating police officers and provides the court with an accurate account of the interview process. As a result, there are fewer allegations made by suspects of police malpractice and fewer not-guilty pleas entered.

Future Strategies

The role of DNA

Early in 1992, Northern Territory Police purchased Polymerase Chain Reaction (PCR) equipment to be used specifically for DNA analysis in the Northern Territory Biology Laboratory of the Forensic Science Section at Police Headquarters, Berrimah. Significantly, this process works on very small, even badly degraded, samples. The whole process can be completed in two days and is an extension of a well-known and well-researched grouping system, thus eliminating the need for suspect statistical assumptions.

The potential of this process is that hairs, saliva, nasal secretions and skin scrapings will be appropriate sources for testing and, in all respects, on a par with blood samples and semen stains.

A great deal of research is being undertaken worldwide into new portions of DNA which can be analysed by the PCR technique. The typing of these new portions will significantly increase the scope of identifying criteria, thus foreseeably resulting in a limitless ability to positively identify any one individual from another. Such technology will be useful in the investigation of homicide incidents.

National Exchange of Police Information (NEPI)

The National Exchange of Police Information (NEPI)—a national Common Police Service—was established by way of an agreement signed by the Commonwealth, states and territories of Australia in March 1990. This initiative harnesses modern information technology techniques so that information and resources throughout the various jurisdictions can be shared and utilised in a cooperative and cost-effective manner.

The enormous potential of the NEPI approach was seen prior to 1990 with the establishment of the National Automated Fingerprint Identification System (NAFIS) in 1985. In fact, NAFIS is currently the major application managed and controlled by NEPI. It represents the most significant individual investment in information technology made by the Australian law enforcement community

($20 million). Through the use of the system, fingerprint experts throughout Australia have been able to achieve very impressive results.

Searches are only made on those individuals who could not be positively identified through other indexes. For example, in 1990/91, of the 122,000 searches made, over 25,000 positive identifications were made and over 20,000 of those could not have been achieved without the system (National Exchange of Police Information 1991).

NEPI is currently developing two further information systems. They are a Missing Persons User Requirements to be incorporated into an overall Persons of Interest system; and a National Data Model which will enable access to and exchange of information relating to a variety of areas such as persons, vehicles, property.

Violent Criminal Apprehension Program in Australia (VICAP)

In 1989, the National Police Research Unit (NPRU) conducted a feasibility study for the establishment of a Violent Criminal Apprehension Program (VICAP) in Australia. As a result of the study, the Unit recommended that such a program be established within the Australian Bureau of Criminal Intelligence (ABCI) together with a Criminal Profiling Service (also known as Criminal Investigative Analysis (CIA)). In its *Final Report*, the NPRU highlighted the strong demand which exists in Australia for a unit to collate information about certain categories of serial crime (Byrne 1990, pp. 11–25).

Such a program has been operating in the USA under the auspices of the Federal Bureau of Investigation (FBI) since 1985. It is a nationwide data information centre designed to collect, collate and analyse specific crimes of violence with a view to determining whether similar pattern characteristics exist among individual cases recorded in the system (NPRU 1990).

In 1990/91, two Australian police officers attended the FBI Academy to undertake a ten-month course in Criminal Investigative Analysis (CIA). On their return to Australia, they briefed the Australasian Crime Conference in 1991 on VICAP, CIA and the National Centre for the Analysis of Violent Crime (NCAVC). In the USA, VICAP and CIA functions are performed by the NCAVC at the FBI Academy.

As a result of its briefing, the Crime Conference resolved that a working party be formed to examine all options available to the development of a National Centre for the Analysis of Violent Crime in Australia. In their subsequent report (in February 1992) to delegates to the 1991 Australasian Crime Conference, the working party—comprising of senior police officers from three States (New South Wales, Victoria and South Australia)—discussed the USA VICAP and observed that, by using VICAP, it is possible to identify offences committed in different jurisdictions by the same offender(s). This is a real problem in the USA, where there are approximately 17,000 police agencies. Although jurisdictional problems regularly confronting the various police forces in the USA are not as significant in Australia, there still exists a serious concern among Australian investigators that criminals are using state, territory and national borders to escape detection and avoid apprehension (Australasian Crime Conference 1992).

The working party recommended that the NPRU's recommendations to only include robbery and rape in VICAP should be expanded to include all homicides or attempts and, depending if certain circumstances exist:

- missing persons;
- unidentified bodies;
- rape or serious sexual assault;
- armed robbery;
- arson; and
- extortion.

The working party also recommended that a NCAVC be established in Australia at the ABCI and that future development of the national system should be a joint project of the ABCI and NEPI. The working party's proposal was considered by the Conference of Commissioners of Police of Australasia and South West Pacific Region in 1992.

Conclusion

It is the case that the Northern Territory continues to experience a far higher crime rate than other jurisdictions. This is particularly so in relation to crimes of violence, especially murders. Through the Northern Territory Government's Alcohol Strategy, firearms legislation, domestic violence legislation, Police Aides and Aboriginal Wardens Schemes and various national strategies such as NEPI and VICAP, it is hoped that the incidence of homicide and other violence-related crime in the Northern Territory will begin to decrease.

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HOMICIDE BETWEEN SEXUAL INTIMATES IN AUSTRALIA: A PRELIMINARY REPORT

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WHEN A HOMICIDE OR A HOMICIDE/SUICIDE TAKES PLACE WITHIN THE HOME, it is not uncommon for concern to be aired from government, media, and other concerned agencies. Prevention models which stress the role of domestic violence as an antecedent and the importance of appropriate legislation and police enforcement are often suggested.

Yet, there has been little research done in Australia that has focused upon marital murder or killings between sexual intimates. Studies have been limited either by the broad scope of the topic (all homicides, *see* Strang 1991), sample selection (for example, only prosecuted cases: *see* Law Reform Commission of Victoria 1991a, 1991b), or the narrow scope of the topic (for example only women who kill their husbands: *see* Bacon & Lansdowne 1982), or the location (one state: *see* Rod 1979), or a combination of the above (*see* Wallace 1986, Bonney 1987, Polk & Ranson 1991a, 1991b). The works just cited do give an indication that many of these killing may be preceded by histories of battering, however more empirical data is needed prior to generating prevention programs.

The following paper represents the preliminary findings of a major research project conducted to provide more information about homicide between adult sexual intimates in Australia. Two data sets are being used in the year-long study:

- information on the sexual intimate homicide sub-set (all offenders/victims who were married, de facto, estranged or divorced) from the National Homicide Monitoring Program (1989-1991) housed at the Australian Institute of Criminology; and

- data collected on about 110 cases (1988–1990) in New South Wales and Victoria from coronial, court and Department of Public Prosecutions files. These cases do not represent all incidents of such homicides in those two states during the three-year period; therefore the findings may not be reflective of the total in the two states, or of the entire nation. For example, the nation-wide data indicate that *both* genders of Aboriginal people are disproportionately present as perpetrators in homicides between adult sexual intimates. Also, several offenders/victims described as current or former non-cohabiting boyfriends/girlfriends were included, since sexual intimacy had been part of the relationships.

Aside from the section immediately following, the material in this paper comes from these 110 homicides. There will be little if any theorising concerning the findings since these data are preliminary. A full discussion of the findings of both data sets will appear in another Australian Institute of Criminology publication. It must be stressed that these findings are both preliminary and based upon a limited sample size and time depth. All data should be interpreted in that light.

Homicide between Adult Sexual Intimates, Australia-Wide

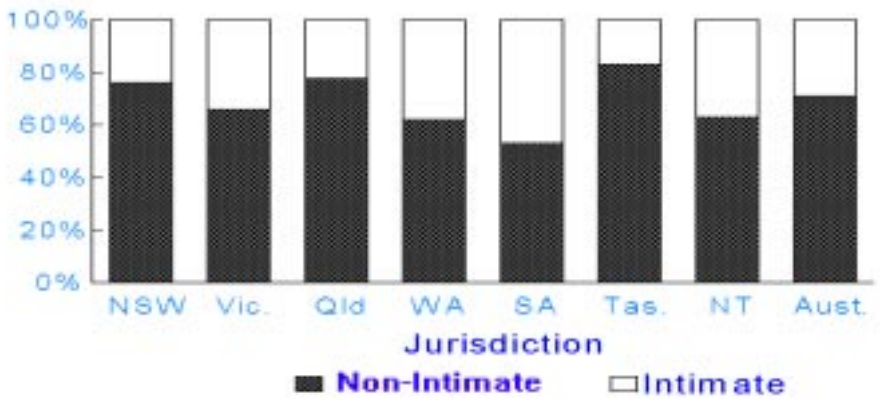
Of those incidents which occurred from July 1989 through June 1991 where the relationship between victim and offender was known, more than one-quarter (150 killings representing 29 per cent of the total) were between adult sexual intimates. However, the proportion of homicides which falls into this category varies by state, as shown in Figure 1.

A relatively low proportion of New South Wales' homicides appears to take place in the adult intimate context in comparison to most of the other states. However, as Figure 2 illustrates, almost one-quarter of killings between sexual intimates do take place in New South Wales. The highest number over the two year period (forty) occurred in Victoria.

The perpetrators of all homicides in Australia are overwhelmingly male: 9 per cent of the non-intimate perpetrators and 19 per cent of the killers in the intimate type are female. This represents distinct variation with studies in the USA which found near gender parity in 'marital murders' (Wolfgang 1956, 1958; Daly & Wilson 1988a, 1988b; Goetting 1987). Figure 3 illustrates the distribution by gender and by state.

Figure 1

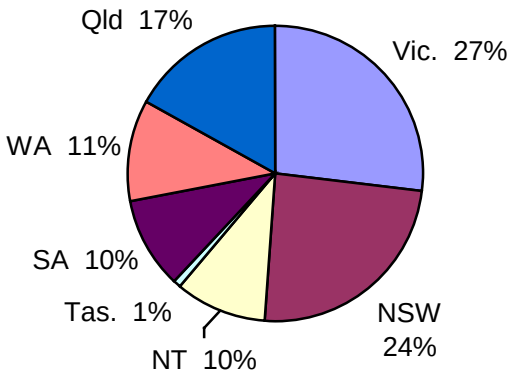
Homicides in Australia 1989–91, % Intimate/Non-Intimate



Note: 116 incidents are excluded since relationship was unknown.
Source: National Homicide Monitoring Program, Australian Institute of Criminology, Canberra.

Figure 2

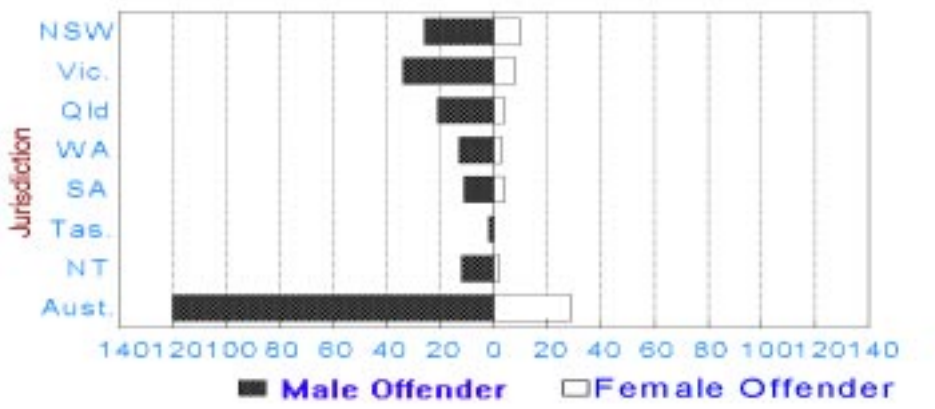
Homicide Between Adult Sexual Intimates 1989–91, % by State



Note: 116 cases are excluded since intimacy/non-intimacy was unknown.
Source: National Homicide Monitoring Program, Australian Institute of Criminology, Canberra.

Figure 3

Homicides Between Adult Sexual Intimates in Australia 1989–91
Number by Gender and State



Source: National Homicide Monitoring Program, Australian Institute of Criminology, Canberra.

Gender, Age and Ethnicity

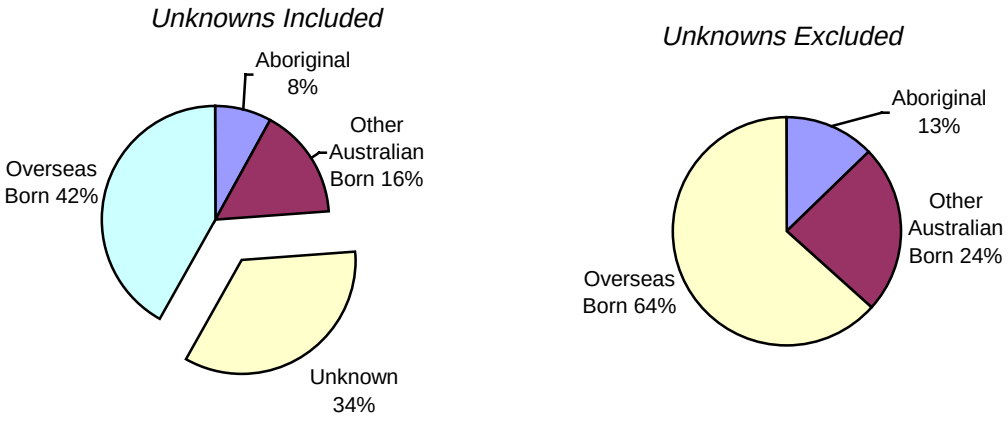
In the 110 New South Wales and Victorian incident sample, twenty-three of the perpetrators were female; however, two-thirds of the Aboriginal perpetrators were women. The mean age of offenders was forty years. For Aboriginal people the mean age was lower—thirty-two years—while migrants tended to be older at an average age of forty-four years. The ethnicity of the sample is shown in Figure 4.

Migrants represent a higher proportion than would be expected since, among twenty to sixty-year-olds in the population of the two states, 28 per cent were born overseas. In Victoria, 48 per cent of offenders were migrants (30 per cent of population at large) while 37 per cent of the perpetrators in New South Wales had been born overseas (27 per cent of population at large).

Unfortunately, coronial and court records do not consistently record ethnicity nor the date of the individuals' arrival in Australia. For those cases where the latter was recorded, most of the offenders had arrived in this country as adults. Of the forty-six migrant perpetrators, seven came from Italy, six from Poland, four from Yugoslavia, three each from Malta, Hungary, Greece, and England. Other countries were represented by one or two offenders; however, none of the sample was born in an Asian or Southeast Asian country. The ethnicity of the victims in these cases is depicted in Figure 5. Most came from the same countries as the perpetrator: however, three of the victims were Filipino women who were killed by non-Filipino males.

Figure 4

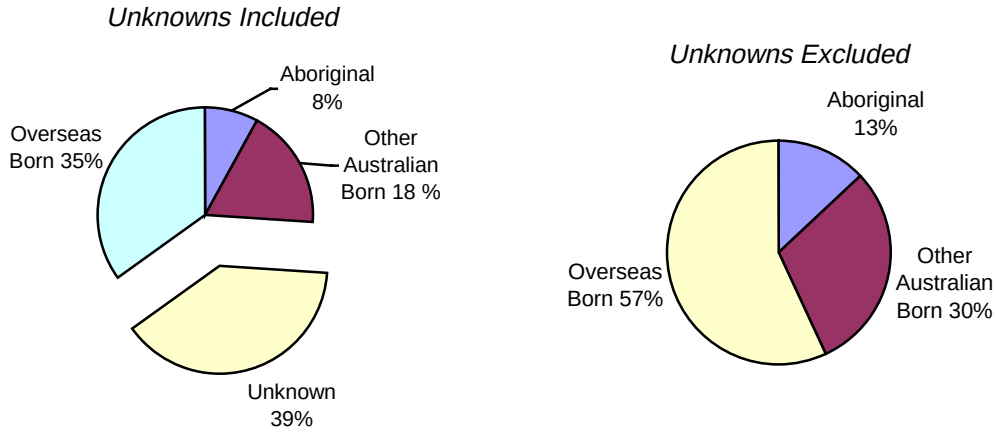
Ethnicity of Adult Sexual Intimate Homicide Offenders
New South Wales and Victoria, 1988–90



Note: In thirty-eight incidents (34 per cent of the total), ethnicity was unknown.
Source: Coronial and court files.

Figure 5

Ethnicity of Adult Sexual Intimate Homicide Victims
New South Wales and Victoria, 1988–90



Note: In forty-four cases (39 per cent of the total), the ethnicity of victims was unknown.
Source: Coronial and court records.

Occupation

As expected from previous studies (Wallace 1986; Bonney 1987), a significant proportion of the offenders (41 per cent) were unemployed at the time of the killing. However, as Figure 6 shows, there was a high proportion of 'unknowns' for this variable. Migrants were more likely to be employed (60 per cent) in comparison with Aboriginal people (33 per cent).

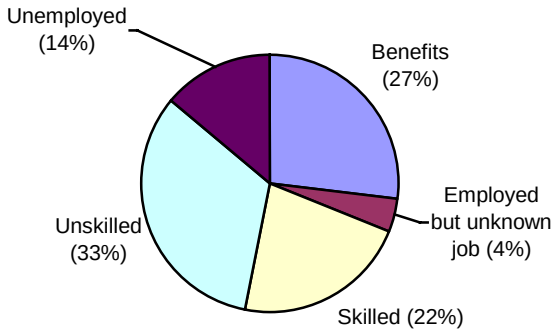
Relationship between Offenders and Victims

More than half of the offenders (61 per cent) were still in a relationship with their victim. There were gender and ethnic variations however; male perpetrators and migrants were more likely to be estranged from their victims than were the other offenders. As Figure 7 illustrates, the bulk of offenders were husbands (n = 28) or estranged husbands (n = 23).

Figure 8 illustrates that for those who were no longer in an intact relationship, the time between estrangement and killing was quite variable.

Figure 6

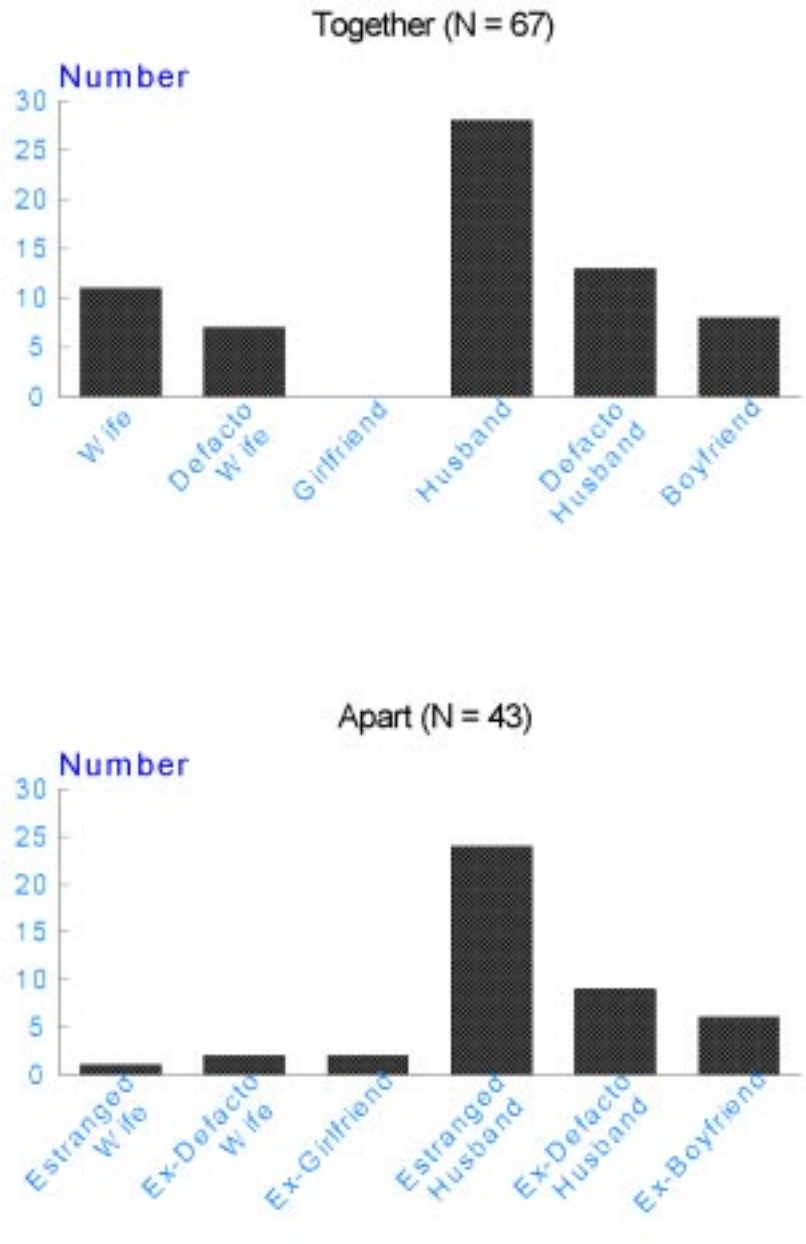
Occupation of Adult Sexual Intimate Homicide Offenders
New South Wales and Victoria, 1988–90



Note: In thirty-seven cases (34 per cent of total), the employment status of the offender was not known.
Source: Coronial and court records.

Figure 7

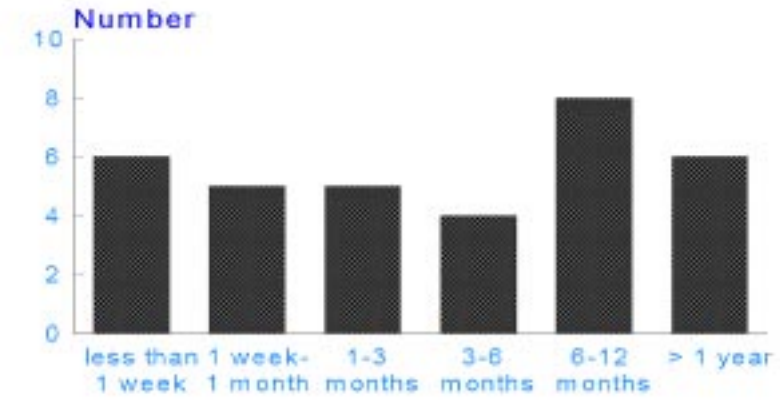
Relationship of Offender to Victim in Homicides Between Adult Sexual Intimates New South Wales and Victoria, 1988–90



Source: Coronial and court records.

Figure 8

Length of Separation Prior to Homicide Between Adult Sexual Intimates
New South Wales and Victoria, 1988–90



Source: Coronial and court records.

Contributory Variables

Were these homicides preceded by histories of domestic violence in the relationship? The information conveyed in Figure 9 affirms that perspective. However, it should be read with some caution since there was a significant proportion of unknowns.

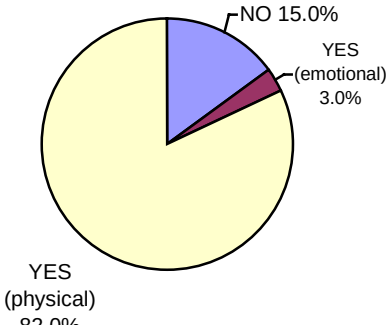
Where the offender was female and information was available, in every case but one, the homicide had been preceded by a history of battering toward the perpetrator, whilst in three-quarters of the cases perpetrated by males, the victim had previously been physically assaulted.

Alcohol abuse and, to a lesser degree, drugs, also may play a role in the relationship dynamics and the homicide. Figure 10 shows that more than half of the perpetrators were chronic alcohol users and had imbibed immediately before the killing.

Both alcohol and prior domestic violence do appear as major factors in Figure 11, which illustrates the major motives that were found in this sample of homicides. Motive varied somewhat dependant upon gender and ethnicity. For over two-thirds of the female offenders (69 per cent), prior domestic violence was a contributory factor while for almost one-half of the males (47 per cent), separation was a motive. Alcohol was most common in cases involving Aboriginal people (77 per cent).

Figure 9

Prior Battering in Relationship (where known)
Between Adult Sexual Intimate Homicide Offender and Victim
New South Wales and Victoria, 1988–90



Note: In thirty-seven cases (34 per cent of the total), the presence or absence of battering was unknown.
Source: Coronial and court records.

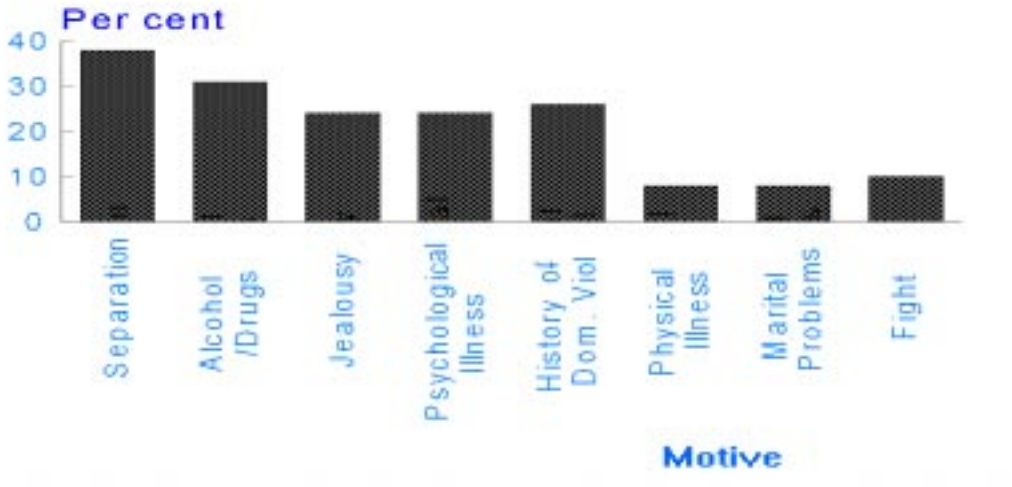
Figure 10

Drug and Alcohol Histories of Adult Sexual Intimate Homicide Victims and Offenders, New South Wales and Victoria, 1988–90

Notes: VCD: 27 per cent VRD: 11 per cent VCA: 34 per cent VRA: 24 per cent
OCD: 37 per cent ORD: 29 per cent OCA: 34 per cent ORA: 24 per cent
Source: Coronial and court records.

Figure 11

Motive(s) for the Homicides Between Adult Sexual Intimates
New South Wales and Victoria, 1988–90



Note: In four incidents the motive was unknown. Vagueness of some categories (Marital Status, for example) is a reflection of the police 'cause' given in that case and the lack of more qualitative material.
Source: Coronial and court records.

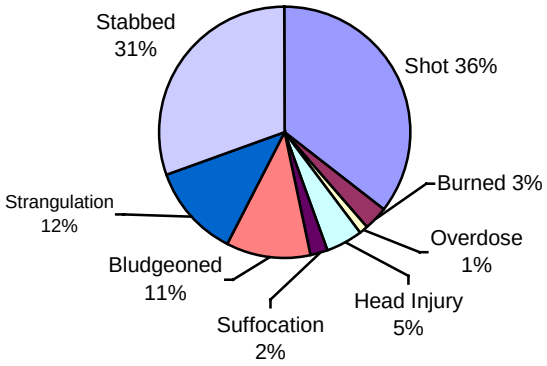
The Homicides

Gun shots were the most common cause of death in homicides between sexual intimates, followed closely by stab wounds (*see* Figure 12). The latter were frequently multiple in nature with over fifty cuts or lacerations inflicted. Stabbing was the most common method used by women and migrants whilst guns were the principal weapon of non-migrant males.

More than half of the killings (53 per cent) occurred within the communal home of the perpetrator and victim; while 22 per cent occurred in the victims' home and 6 per cent at the offenders'. Figure 13 shows the time of the incidents; they more commonly took place during the evening and late night hours although no hour was inviolate.

Figure 12

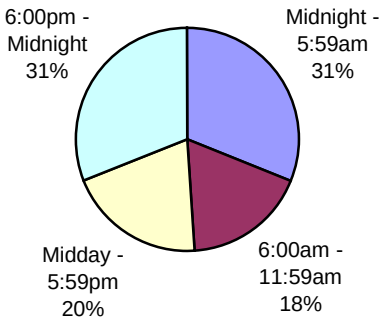
Cause of Death in Adult Sexual Intimate Homicides
New South Wales and Victoria, 1988–90



Note: In three cases (3 per cent of the total), the cause of death was unknown.
Source: Coronial and court records.

Figure 13

Time of the Adult Sexual Intimate Homicides
New South Wales and Victoria, 1988–90



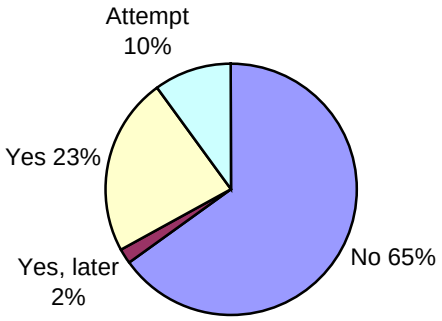
Note: In sixteen incidents (15 per cent of the total), the time was unknown.
Source: Coronial and court records.

Case Outcome

The National Homicide Monitoring Program data for 1989–91 indicate that one-fifth of the perpetrators in sexual intimate homicides committed suicide. Some state variation appears in these findings with Victoria having a higher proportion of sexual intimate offenders suiciding (32 per cent). Figure 14, drawn from the coronial and court data set, also includes attempted suicides. Those who killed themselves (or tried to) after the offence tended to be older and male. Only one suicider was female. An older mean age results from the seven in the sample who were aged over sixty-five and had killed a physically ill and aged partner.

Figure 14

Suicide of Offenders in Sexual Intimate Homicides
New South Wales and Victoria, 1988–90



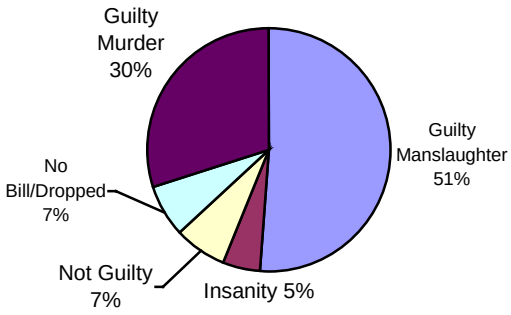
Source: Coronial and court records.

Perpetrators who went to court waited an average of sixteen months from the offence to the trial. Their court dispositions are depicted in Figures 15 and 16. Males were more likely to be found guilty of murder than females (24 per cent compared to 4 per cent), whilst the opposite was true for no bills (3 per cent of males and 15 per cent of females).

The actual sentences were quite diverse, ranging from community-based orders to life. It is not clear at this stage of analysis what variables are impacting on sentence.

Figure 15

Disposition in Seventy-three Sexual Adult Intimate Homicides
New South Wales and Victoria, 1988–90



Note: Pending—3 N/A—27 Unknown—7
Source: Coronial and court records.

Figure 16

Bottom Sentences for Adult Sexual Intimate
Homicide Offenders Found Guilty
New South Wales and Victoria, 1988–90

Source: Court and coronial records.

Conclusion

A number of thought provoking findings have emerged in this preliminary analysis of homicide between adult sexual intimates. These include:

- the relatively high proportion of migrant males and Aboriginal women in the offender sample;
- the high incidence of prior battering and alcohol abuse histories;
- the role of separation and the time between estrangement and homicide;
- the frequency of perpetrator suicide; and
- the diversity of disposition and sentences.

Each of these results merit further inquiry and analysis, which, as stated earlier, will be done in a subsequent publication.

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THE LAW REFORM COMMISSION OF VICTORIA HOMICIDE PROSECUTION STUDY: THE IMPORTANCE OF CONTEXT

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ANYONE DEVELOPING STRATEGIES FOR PREVENTION OF HOMICIDE MUST begin with an understanding of how homicides occur: hence 'the importance of context'. In this paper, the author will discuss the two main contexts in which homicides occur: the domestic killing, and the killing arising out of a (non-domestic) argument. Two-thirds of female victims of homicide died in a domestic killing, and over two-thirds of women accused of a homicide killed in this context. The single largest group of homicides involving males, on the other hand, was the non-domestic argument; 40 per cent of male victims were killed in the course of such a dispute, and it provided the setting for one-third of all prosecutions of men charged with a homicide (compared with the one-quarter of prosecutions of males for a domestic homicide).

It is the author's argument that gender is central to an analysis of how these homicides occur. It provides the fundamental context within which other significant factors operate—social, emotional, socio-economic. Recognition of the importance of gender has a number of implications for preventive strategies, which will be referred to later in this paper.

This paper will draw on statistical data collected by the author for the Law Reform Commission of Victoria's (LRCV) recently published study of homicide prosecutions (LRCV 1991a). The author hopes to provide a picture

of how such killings are occurring in Victoria, and then to refer to some possible prevention strategies. The tables appear at the end of this paper. Tables 1 to 15 can also be found in the LRCV *Homicide Prosecution Study* (1991a). Tables 16 to 19 were compiled from the LRCV data but have not previously been published.

The Law Reform Commission of Victoria Homicide Prosecution Study: An Overview

The Victorian Director of Public Prosecutions' (DPP) files of all homicides prosecuted between 1981 and 1987 (other than those for culpable driving causing death) were examined. The study thus involved 302 accused people and 259 victims, or 319 accused-victim pairs. Most of the analysis involved these pairs.

The factors recorded (wherever possible) included gender, age, ethnicity, marital status, occupation, prior criminal history of accused and victim, and features of the homicide itself such as the context in which it arose, relationship of accused and victim, and the method and location of killing.

Gender

It should come as no surprise to hear that most accused and most victims were male (85.8 per cent of accused (pairs data), n = 271; and 72.2 per cent of victims, n = 228). The predominance of males is found in most violent crime (*see* Wallace 1986; Connell 1987). Males killed a male victim in 62 per cent of cases—the largest category. The smallest category was females killing a female victim (4 per cent) (*see* Table 1).

Age

Again, it was not unexpected to find that most accused were young—aged between seventeen and thirty (62.4 per cent). The modal age for male accused was the early twenties. The pattern for women was more irregular, with the largest group aged between twenty-six and thirty (*see* Figure 1).

About half of the victims were aged between sixteen and thirty-five, but 12.3 per cent were children aged under sixteen, and almost two-thirds of this group was aged five years or less.

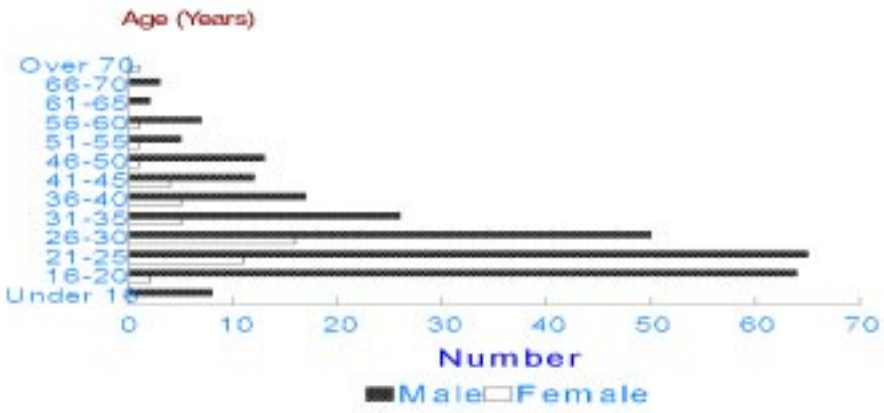
Comparison of killings by age and gender shows interesting differences: the picture is one of young males killing similar-aged victims (males aged seventeen to thirty-nine killed victims in the same age group in around half of all male killings) and of females killing children (40 per cent of victims were aged nine or under) or adults (usually men) (*see* Tables 2 and 3).

Charges and results

Most accused were charged with murder (at least 75.5 per cent). At the end of the day just under one-quarter (18.3 per cent) received murder convictions: 42.9 per cent were convicted of manslaughter and 17.2 per cent were acquitted.

Figure 1

Age of Male and Female Accused



Relationships

By now it is well-known that stranger-homicides are relatively rare. In the LRCV study (1991a) around one-third of victims and accused had a family or sexual relationship, one-quarter were acquaintances or friends, and one-quarter were strangers (*see* Table 4).

As Table 4 shows, men were more likely to kill an acquaintance or friend or stranger (59.9 per cent compared with 17.1 per cent of women's killings). Women were most likely to kill a family member (68.2 per cent compared with 21 per cent of males' killings).

For male accused, 12.5 per cent of the incidents involved a spouse or former spouse. For females, however, the figure was around one-quarter—23.4 per cent. The victim was a child of the accused in one-third (36.2 per cent) of killings by women, but only 2.6 per cent of male killings.

From the victim perspective, if a woman is to be the victim of a homicide, she is most likely to be killed by her spouse or former spouse. One in three women killed were the victim of a spouse or former spouse (36.3 per cent; 44.3 per cent if killings by sexual partners are included) (*see* Table 5), compared with 5.7 per cent (or 8.8 per cent) of men. Women were, however, considerably less likely than men to be killed by an acquaintance or by a stranger.

Context

In the LRCV research a 'context' classification was assigned to each case. This represented the significant circumstances which were interpreted as motivating or underlying the offence and depended very much on the information available on the DPP file. The context might be different from that suggested at first by the parties' relationship. For instance, a man might

kill a family member in their home—this might be a 'domestic' killing, or might be found to have occurred in a dispute over drug dealing or robbery.

Most homicides occurred either in a domestic context ('domestic'—31.3 per cent) or in the course of an argument ('argument'—30.7 per cent) (*see* Table 6). The domestic context here means arising out of a domestic relationship, that is between people living together as a family or between people relating as a family although living apart. The domestic context therefore includes spouses, children, brothers and sisters, and estranged spouses/lovers, provided the domestic relationship was the context of the homicide. The 'argument' context was used where the dispute was not considered to be domestic or to have arisen from sex-rivalry (*see* LRCV 1991a).

Again there are striking differences depending on the gender of the accused. Women were accused of domestic homicides in 70.2 per cent of all cases involving a female offender compared with 24.6 per cent of men, whilst men were accused of killing in the context of a (non-domestic) argument in 34.2 per cent of cases, compared with 10.6 per cent of women (*see* Table 7). 'Domestic' and 'argument' were thus the two significant context categories for men. Domestic was far and away the most prominent category for female accused.

It should be noted that about 20 per cent of all homicide offenders commit suicide before coming to trial. These are obviously not included in the LRCV statistics, but most of these murder-suicides occurred in a 'domestic' context, and most of the offenders were male (LRCV 1991b).

It is instructive to look then at the context in which victims died. Women were most likely to be victims of a domestic homicide. Of the eighty-eight female victims, fifty-seven (64.8 per cent) were killed in a domestic context. Of the 228 male victims, only forty (17.5 per cent) died in a domestic homicide, whilst ninety-three (40.8 per cent) died after an argument, and thirty (13.2 per cent) in the course of a robbery (*see* Table 8).

Location

For the whole group studied, just over half (n = 167; 52.4 per cent) of the killings took place at the victim's and/or accused's premises (*see* Table 9). And where this was the location, the homicide most frequently took place in the bedroom (n = 53; 31.7 per cent) or the loungeroom (n = 31; 18.6 per cent). For female accused, 80.9 per cent of their killings took place in such private premises—not surprisingly, given the high proportion of homicides falling in the domestic and family categories. Women also fell victim to homicide in private premises (70.5 per cent). This may be compared with 47.4 per cent of males accused and 44.7 per cent of male victims—again not surprisingly, given the contexts in which it has been found that males commit homicide.

In fact, in 60.2 per cent of cases, women victims were killed in their own home (including a home they shared with the accused). Breaking this down further, 44.3 per cent of women victims were killed in the home they shared with the accused. The reality that women have most to fear from their own intimates is further emphasised by the finding that only 18.2 per cent of women victims were killed in public spaces, compared with 31.1 per cent of male victims.

Men were likely to kill at the victim's premises (20.2 per cent), at premises they shared with the victim (19.1 per cent) or in the street (14.3 per cent). Women, however, most commonly killed in premises they shared with the victim (53.2 per cent) (usually in the bedroom). In 14.9 per cent of cases, women killed in their own home, and in 12.8 per cent of cases at the victim's premises, again usually in the bedroom. These differences reflect the higher proportion of killings by women which involve a close family member as victim. No female accused killed her victim in the street, in contrast with the significant proportion of men who did.

Men were almost invariably the perpetrators of killings in public open spaces—streets, bushland, parks, vacant lots—and in public toilets. Victims at these locations were also predominantly male (n = 69; 81.2 per cent of victims killed in these locations).

The two major groups of homicide—those occurring in a domestic context and those arising out of an argument—can now be examined in more detail.

Domestic Homicides

How domestic homicides can arise — some case examples

V = victim, A = accused

Case 1: V and A (husband, aged 41) were having a domestic argument in the kitchen. V threw coffee over A and threatened him with a knife. A became angry and strangled her. Self-defence was not an issue as A did not believe V was capable of hurting him with a knife.
Result: manslaughter conviction.

Case 2: V (aged 38) and A (husband, aged 47) had had a troubled marriage and did not live together all the time. They were known to have been involved previously in violent exchanges. The disputes increased when V allegedly told A that she had been having an affair and wanted to separate. On the morning in question, V ordered A to leave their home and allegedly insulted him. A then shot her, although he denied intending to kill her.
Result: Murder conviction.

Case 3: Incident occurred after a domestic argument over the television and stereo being played. A (boyfriend, aged 24) grabbed V (18) by the hair and punched her in the head. A then realised he had seriously injured her and took V to hospital, where she died.
Result: A was acquitted of homicide.

Case 4: A and his wife wanted to bring up their children in strict Moslem manner. However V, their eldest daughter, rebelled against this. She left home several times, and then told her parents she was going to live in a country town near her boyfriend. However, her parents discovered she was in fact living with her boyfriend in Melbourne. They went to the house and, after a heated argument, A stabbed V

with his pocket knife. A said that V had dishonoured the family.
Result: A was convicted of manslaughter.

Case 5: V and A had been married in Turkey—it was an arranged marriage. The couple came to Australia to live with V's parents. The wife, V (aged 16), was unhappy with the marriage and tried to leave home. She went to a friend's home. A came after her; they had a dispute and A stabbed her. V's family had felt dishonoured by her wanting to leave; they had ceased contact with friends next door when they suggested that V was unhappy and might leave. A originally denied the killing; however provocation was raised at the trial.
Result: A was convicted of manslaughter.

Case 6: V (husband) and A had been married a short time. Their relationship had always been very violent, both being known to have engaged in violent exchanges. On this night, another fight began. V and A were alone in their kitchen, and V sustained a stab wound to the throat. The Crown alleged that A inflicted the wound during a fight; she was unable to remember, but believed that V slipped and wounded himself. At the trial A said she used the knife in self-defence.
Result: A was acquitted.

Relationships

One hundred of the 319 homicides included in this study were categorised as domestic—almost one-third. Fifty-four of these were between spouses or sexual partners (including former spouse/partners) and twenty-four involved the offender's child. A man who committed a domestic homicide was most likely to have killed a spouse/partner, while a woman was almost equally likely to have killed her partner or her child (*see* Table 10). These differences clearly warrant further examination. Different dynamics are presumably operating when a partner is killed and when a child is killed.

History of violence

It is not always going to be the primary concern of an investigating officer to inquire into the background of a domestic killing. Identifying the offender is not usually a problem, and it will not necessarily be seen as relevant to ask whether the offender was known to have been violent before. *Absence* of such evidence is therefore not conclusive of the state of the parties' relationship. Nonetheless, in 55 per cent of the domestic homicides in this study it was known that there had been violence in the past, by one or both parties (*see* Table 11). It was known that 38.8 per cent of male accused and 18.2 per cent of female accused were previously violent to their victim. It was also known that for 12.1 per cent (n = 4) of female accused, the victim had previously been violent towards her, as was the case for 10.4 per cent of male accused.

Looking at the victims, the gender differences are important. Almost half (47.4 per cent) of all female victims of domestic homicide had previously suffered violence from the accused. Of the male victims, 12.5 per cent had previously been

victimised, but 22.5 per cent were known to have been violent towards the offender, and in 20 per cent of cases both parties had previously been violent, compared with 7 per cent of female victims (*see* Table 12).

Women

Women accused of a domestic homicide killed their child in 51.5 per cent of cases (n = 17), and a spouse/partner in 42.4 per cent of cases (n = 14). The numbers are small but in all but four of the cases involving a spouse/partner there was a known background of violence, mostly involving either the victim's violence or violence between the parties. In three cases where violence had occurred the victim was known to have been violent to the accused (LRCV 1991a, Table 39).

None of the women prosecuted for the homicide of a spouse/partner was convicted of murder; six were convicted for manslaughter. Five of these argued provocation and/or self-defence at their trial. Indeed, it is likely that some cases where a female offender has clearly acted in self-defence are filtered at an earlier stage and not prosecuted at all, as found by Polk (1991).

Where the victim was the woman's child, the accused was known to have been violent in the past in three out of seventeen cases (17.6 per cent). This is a small proportion of cases but illustrates the importance of ascertaining the involvement, if any, of police or Community Services Victoria. A study by Goddard (LRCV 1991b, p. 36) found significantly more violence between parents of abused children presenting at the Children's Hospital than occurred between parents of non-abused children, suggesting that protective services should be alert to the risk of child abuse where there is violence between adults in the home.

The seventeen cases of children killed by their mothers involved children aged nine years and under. Three cases involved women killing a new-born baby after an unplanned and unwanted pregnancy.

Case 7: A, aged 19, was pregnant, but concealed the fact from everyone but the natural father. She thought of getting an abortion, but never managed to arrange it. A delivered the baby herself in her bedroom, in the early hours of the morning, and then suffocated it. At no stage had A planned to kill it.
Result: conviction for infanticide.

These cases all resulted in infanticide convictions and a non-custodial sentence. Of the remainder, four were convicted of manslaughter, and the rest were either acquitted, not proceeded with, or found not guilty on the grounds of insanity (one involving the deaths of the three children of the accused). Women convicted of infanticide (for which the child must be under twelve months) would almost invariably receive a non-custodial sentence.

Men

Of the domestic killings by men, 59.7 per cent involved a spouse/partner (forty out of sixty-seven) (*see* LRCV 1991a, Table 40). In 50 per cent of these

cases there was a known history of prior violence by the accused against his victim. The accused killed his own child/step-child in seven cases (10.4 per cent). In four of these cases it was known that the accused had previously been violent to the child.

Jealousy, or a proprietary attitude to the victim, is a common theme in domestic killings by men. The statement found in so many police files is, 'if I can't have her, then no one else will'. Polk and Ranson (1991), in their study of coronial files, identified two types of cases: the man who kills the younger female partner who has rejected him, and the older man who kills his partner as part of his own suicide plan. In each instance the woman is regarded as property—in the first case to be killed when she threatens to assert her autonomy, and in the second to be 'taken with him' in death. The latter category is not likely to appear in prosecution files and did not in the LRCV study. However, the former is a well-recognised pattern. In many cases the accused states that his wife said she was having an affair or that she taunted him with her lovers (*see* Case 2 above). In some instances an affair will be independently confirmed but in others, with the woman dead, there is only the accused's assertion (*see* Wallace 1986, p. 100). Although combined with a religious motivation, Case 4 also illustrates such proprietariness in attitude to a daughter, particularly in relation to her sexuality.

Methods

In the general homicide group, guns (36.4 per cent) and knives ('sharp instrument'—25.7 per cent) were the most common methods of killing for both men and women. (This data tends to understate the gun usage—almost two-thirds of murder-suicides involved a gun.) Men used guns in preference to knives and women preferred knives to guns. In domestic killings this preference is also seen (*see* Table 13).

Women accused of killing a spouse/partner mostly used a knife or gun (92.9 per cent; thirteen out of fourteen cases). Women always used some sort of weapon. This may suggest either that women choose their method to take account of the greater strength of the intended victim, or that women's assaults by (say) fists are generally not fatal. It may also reflect in some instances a greater determination on the part of the woman to kill. This may of course indicate either premeditation, or an apparently excessive use of force, which may make it difficult for the woman to rely on defences such as provocation or self-defence (*see* Polk 1991, p. 18).

Women who killed their children used sharp instruments, fists/feet and drowning. The largest single category here, however, was the miscellaneous group which included smothering of new-born babies and over-medication.

Men accused of killing their spouse/partner in a domestic homicide most commonly used a firearm (42.5 per cent; seventeen out of forty) or sharp instrument (25 per cent; ten out of forty), but fists and feet ('bashing' n = 6) and strangulation (n = 5) were also used.

Employment

As other studies have found, both victims and accused involved in homicide were largely drawn from the lower socio-economic groups (*see* LRCV 1991a p. 18; Wallace 1986, p. 38). For the cases where current employment status was known, 40.1 per cent of both victims and accused were employed, and 37.2 per cent of accused and 17.7 per cent of victims were unemployed. This is an extremely high rate of unemployment. In 1986, 4.8 per cent of the Victorian male population over fifteen years was unemployed. The remainder (22.7 per cent of accused; 42.1 per cent of victims) were not in the paid workforce, being students, on pensions, home duties and so on (*see* Tables 14 and 15).

The higher unemployment rate for accused, compared with the high 'not in paid employment' for victims presumably partly reflects the proportion of women and children being killed. Most victims and accused whose usual occupation was given were in unskilled work or skilled trade/clerical work.

Much the same proportion of accused in the general homicide group and the domestic homicide group were found to be specifically unemployed (LRCV 1991a, Table 14). However more received pensions or benefits or were involved in 'domestic duties', presumably in part reflecting the higher proportion of women charged with domestic homicides.

In domestic homicides the percentage of unemployed among accused was around seven times the national average (LRCV 1991b, p. 19). The percentage of people accused of domestic homicide who were either unemployed or not in the paid workforce was more than double (70 per cent compared with 29.7 per cent).

It could therefore be useful to examine the extent to which sex roles and domestic stresses leading to physical violence might be exacerbated by greater daily proximity of family members and/or tensions generated by financial difficulties of unemployment. Economic pressure and social isolation may also limit options such as leaving a relationship, and may restrict access to counselling services.

Fatal Arguments: Homicides Arising out of Non-Domestic Disputes

Around one-third of killings in the LRCV study (1991a) occurred in the context of a non-domestic argument.

Relationship with victim

Ninety-three men killed in the 'argument' context and almost all their victims were also male (eighty-nine victims or 95.7 per cent male victims). Most of these male victims were acquaintances or friends (43.8 per cent) or strangers (37.1 per cent) (*see* Table 16).

Few women responded with fatal violence in the context of a non-domestic argument. The five who did killed a male known to them in three instances, and a stranger in two cases (one male and one female). The author will discuss the male offenders only in the following section.

Methods

Where the relationship between the (male) accused and the victim was one of acquaintance/friend, the homicide usually involved either a firearm or a sharp instrument (usually knife) (n = 14; 35 per cent each). Where the victim was a stranger, the methods most commonly used were sharp instrument (n = 12; 35.3 per cent), fists and feet ('bashing' n = 11; 32.4 per cent) and firearm (n = 8; 23.5 per cent) (*see* Tables 18 and 19).

The overall numbers are small but the significance of bashing, or brawling, in relation to stranger killings may raise questions about the intentionality of the killing and about a possible correlation with alcohol consumption on both sides.

Alcohol

Alcohol was known to have been consumed within the previous twelve hours—by either accused or victim or both—in at least two-thirds of cases where men were prosecuted for killing in the course of a dispute (*see* Table 17). This is considerably higher than in the total homicide group, where 47.6 per cent of accused and 39.5 per cent of victims were known to have been drinking (LRCV 1991a, Table 22).

Where the victim was an acquaintance/friend alcohol was known to have been taken by the accused during the last twelve hours in 65 per cent of cases. Where the victim was a stranger the proportion was 67.6 per cent. Where the victim was an acquaintance, alcohol consumption appears to have been most relevant for knife killings (twelve out of fourteen cases). Where the victim was a stranger, alcohol consumption appears relevant where a weapon was used, but not as obviously so for bashings (*see* Tables 18 and 19). The significance of alcohol consumption and violence calls for further examination.

Location

It will be recalled that for the total group studied, just over half (52.4 per cent) of the killings (47.4 per cent of killings by male accused) took place at the victim's and/or accused's premises. Just under half of the killings by men of an acquaintance/friend in the course of a non-domestic argument occurred in the accused or victim's premises (n = 17; 42.5 per cent). In fifteen out of these seventeen cases it was known that the accused had been drinking. However, of the stranger-killings, only 5.9 per cent occurred in such premises: 26.5 per cent (n = 9) occurred in licensed premises and 29.4 per cent (n = 10) in the street. In most of the cases where alcohol consumption was known, the accused was known to have been drinking in the previous twelve hours.

The patterns can be seen by looking at some of the scenarios as they actually arose.

Case 8: The prosecution case was that an argument developed (in A's loungeroom) which resulted in V kicking A in the groin. Both men had been drinking. A then retaliated by stabbing V. A alleged that V lunged

on the knife with which A meant only to scare him. V was a karate expert so there was also a question of self-defence.
Result: The judge directed the jury to find A not guilty of murder for want of evidence of intent. A was acquitted.

Case 9: A believed V, a friend, was responsible for the theft of his money. A borrowed a rifle and intended to take V on a short car ride during which he would intimidate him with the gun. A's brother accompanied them. When A held the gun at V's head it went off, killing V. The two brothers initially fabricated a story but then insisted it was an accident.
Result: Convicted of manslaughter.

Case 10: A and V were previously unknown to each other and had an argument in a hotel about dogs. A invited V outside to settle it. V pulled a knife on A. A disarmed him and stabbed V four times. Both were affected by liquor. V had a number of prior convictions involving violence.
Result: A was convicted of manslaughter.

Case 11: V and his nephew were drinking in the town hotel. Nephew (N) allegedly made a racist remark to A (an Aboriginal). A's brother then hit N several times. V and N left the hotel but were followed by a group of Aboriginal people. A's brother attempted to hit N again, while A allegedly landed one blow to V's head. V fell heavily to the ground and was fatally injured. Several witnesses identified A.

Result: A was acquitted.

The cases examined here seem to fall into two main groups:

- the killing of a friend, or at least someone known, at home, after a few drinks, over a trivial disagreement, or in the context of the breakdown of a friendship; and

- the killing of someone met for the first time, perhaps in a pub, the killing occurring in the pub or out in the street after a challenge.

Understanding Homicide

Gender relations clearly provide the setting in which most homicides occur. Prevention strategies must begin by taking account of the strikingly disproportionate number of males prosecuted for homicide. They must take account of the ways in which male offenders are seen to have behaved faced with domestic relations and with confrontation with their peers. Masculinity and violence is as yet little researched. Why men respond with fatal physical aggression in these contexts calls for urgent examination.

Structural factors such as unemployment, poverty and inequality, which impose severe stresses on people and their relationships, may lead to violent behaviour and must obviously be addressed. However, both men and women are subjected to these factors, whilst it is primarily men who in fact commit homicide. Nonetheless, the high levels of unemployment and generally low

socioeconomic status of most accused and victims found in this study make it clear that they must be included in any proposal for preventive strategies.

There are aspects of masculinity which contribute significantly to the problems of violence by men. For example, the importance placed on the control and ownership of a spouse or partner is clearly seen in many male spousal homicides (*see* Wallace 1986, p. 98). The woman who decides the relationship is over or who is believed to have taken a lover is a common victim in the homicide files. In Wallace's (1986) New South Wales study almost half of all spouse killings by men occurred when the woman was leaving or had already left. This does not appear at all as a factor in killings by women. Wallace (1986, p. 100) also found around 12 per cent of spouse-killings (virtually always with the wife as victim) to have been motivated by sexual jealously—frequently without any evidence of infidelity. Why this male possessiveness produces such lethal violence must, as Polk and Ranson (1991) argue, 'constitute a major focal point for future research and theory on the issue of homicide'.

Then there is the use of violence to solve conflict. Many studies have found this to be a primarily masculine trait (*see* National Committee on Violence 1990). The resort to violence in disputes, even over trivial matters, is clearly seen in the 'argument' group of cases discussed earlier. It is also an element in the domestic killings by men faced with a dispute in the home.

Whilst women make up a very small proportion of offenders, there are clear differences in the contexts in which they kill. Around one-third of their killings involved a spouse or partner, and one-third their own child. In the killing of a spouse or partner, there is likely to be a background of violence by the victim—again calling, in such cases, for further examination of this male violence. Where a child has been killed, one issue may be social isolation and lack of family support, a factor which has been identified in other studies. This underlines the importance of providing adequate counselling and support services which are accessible and cater for both English and non-English speaking women.

A starting point in an examination of gender relations should be the understanding that personal life and collective social arrangements are fundamentally linked (discussed by Connell 1987, p. 17). The gender relations operating in the wider society are functions of the gender relations in the family, which are in turn responses to those social structures. As the LRCV noted in its report, reducing violence in the home is inextricably linked with reducing violence in society:

> a violent society reflects the structure of relationships acted out in the hidden world of many homes (LRCV 1991b, p. 21).

Any attempt to deal with violence, in the home and in the wider community, must involve a challenge to the present meaning of masculinity—its apparent reliance on control and its connection with violence. Proposals have included education programs, parent training and so on (*see* National Committee on Violence 1990). This is obviously a long-term project and will involve changing role models of men and of women in the family, in schools and so on. More

fundamentally, it will require change to the actual status of men and women in society, and a challenge to patriarchy.

More immediate strategies should probably be aimed at homicides where there are predictors—warning signals—and at weapons. Strategies should also take into account that women are most at risk of being killed by members of their own household.

The LRCV made a number of recommendations for preventing or reducing the number of domestic homicides.

- *The police response*: Men who kill their partner in a domestic context have, in a significant number of cases, done so in what appears to be the culmination of a history of violent assaults on her. Strategies aimed at identifying assault when it first occurs, and stopping it, are therefore crucial. These include:
  - developing police protocols which ensure police attendance, and that police treat assaults in the home as serious crime. North American studies such as that of Sherman and Berk (1984) suggested that early and decisive police intervention reduced the risk of further assaults and prevented the escalation of violence. More recent replication studies have revealed more complex scenarios, and their findings must be carefully examined.
  - training police in the patterns of domestic violence and its connection with homicide.

- *The weapon*: Firearms were used in around 40 per cent of domestic killings by men, and around 38 per cent of all homicides by men. Similar patterns have been found in other studies of homicide. The LRCV found an initial reluctance on the part of police to confiscate weapons found in relation to domestic assaults. This is despite the fact that police have the power to seize any weapon used in the commission of an offence. Since 1988 police have had specific power to seize any firearm found once an intervention order has been granted. The LRCV recommended in its Report that removal of any gun found should be mandatory.

Other recommendations dealt with follow-up by police of domestic assault incidents, clarification of police powers of entry, development of police information systems, services for victims and for offenders, and availability of personal alarm systems for women at risk of continuing domestic violence.

It is clear that, where a gun is used by an assailant, it is considerably more likely to kill than other weapons (LRCV 1991b, p. 16). The gun's capacity to cause serious injury is greater, it has a greater range than, for instance, a knife or fist, it requires little physical strength, is less easily warded off, and can be used at a distance. The circumstances of a number of killings occurring in the course of an argument, and some domestic killings, suggest assaults which went further than intended—that death itself was not necessarily in contemplation. Where a gun is the weapon at hand, death is so

much more likely to result from an angry, thoughtless reaction. Any moves to the greater control of guns must be a step towards reduction in the homicide rate. The motivation behind the trigger finger must nonetheless continue to be a primary target for research.

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Appendix A

Table 1

Gender of Victim and Accused
(*see* LRCV Table 6)

Victim	Accused Male	Accused Female	Total
Male	196	32	228
	(86.0)	(14.0)	
	(72.3)	(71.1)	(72.2)
Female	75	13	88
	(85.2)	(14.8)	(27.8)
	(27.7)	(28.9)	
Total	271	45	316
	(85.8)	(14.2)	(100.0)

Note: Gender of victims in three victim-offender pairs was not known.

Table 2

Age of Male Accused by Age of Victim
(*see* LRCV Table 3)

	Age of Accused					
Age of Victim	16 and under	17–25	26–39	40–60	Over 60	Total
Infant 0–1	—	3	1	—	—	4 (1.5)
Child 2–9	—	2	—	—	—	2 (0.7)
10 to 16	6	8	2	3	—	19 (7.0)
17 to 25	4	39	17	2	—	62 (22.8)
26 to 39	—	35	46	9	1	91 (33.5)
40 to 60	3	22	17	18	2	62 (22.8)
Over 60	2	13	8	7	2	32 (11.8)
Total	15	122	91	39	5	272
	(2.2)	(44.9)	(33.5)	(14.3)	(1.8)	(100.0)

Table 3

Age of Female Accused by Age of Victim (*see* LRCV Table 4)

	Age of Accused				
Age of Victim	17–25	26–39	40–60	Over 60	Total
Infant 0–1	4	3	1	1	9 (19.1)
Child 2–9	—	10	—	—	10 (21.3)
17 to 25	2	3	—	—	5 (10.6)
26 to 39	4	5	2	—	11 (23.4)
40 to 60	2	5	3	—	10 (21.3)
Over 60	1	—	1	—	2 (4.3)
Total	13 (27.7)	26 (55.3)	7 (14.9)	1 (2.1)	47 (100.0)

Table 4

Relationship of Victim to Accused, by Accused's Gender (*see* LRCV Table 8)

	Accused				
Relationship of Victim to Accused	Male		Female		Total
Spouse (inc. former spouse)	34	(12.5)	11	(23.4)	45 (14.1)
Parent	7	(2.6)	2	(4.3)	9 (2.8)
Child	7	(2.6)	17	(36.2)	24 (7.5)
Other family	9	(3.3)	2	(4.3)	11 (3.5)
Sexual partner (inc. former sexual partner)	9	(3.3)	5	(10.7)	14 (4.4)
Sexual rival	5	(1.8)	—		5 (1.6)
Work	6	(2.2)	—		6 (1.9)
Residential	18	(6.6)	1	(2.1)	19 (6.0)
Criminal associates	4	(1.5)	—		4 (1.3)
Police officer while arresting accused	1	(0.4)	—		1 (0.3)
Acquaintance/Friend	76	(27.9)	2	(4.3)	78 (24.5)
Stranger	87	(32.0)	6	(12.8)	93 (29.2)
Other/Not known	9	(3.3)	1	(2.1)	10 (3.1)
Total	272	(85.5)	47	(14.5)	319 (100.0)

Table 5

Relationship of Victim to Accused, by Victim's Gender
(*see* LRCV Table 9)

Relationship of Victim to Accused	Victim: Male		Victim: Female		Total	
Spouse/Former spouse-separated (inc. de-facto)	13	(5.7)	32	(36.3)	45	(14.3)
Parent	8	(3.5)	1	(1.1)	9	(2.9)
Child	8	(3.5)	14	(15.9)	22	(7.0)
Other family	8	(3.5)	2	(2.3)	10	(3.2)
Sexual partner/Former sexual partner	7	(3.1)	7	(8.0)	14	(4.5)
Sexual rival	5	(2.2)	—		5	(1.6)
Work relationships	5	(2.2)	1	(1.1)	6	(1.9)
Residential	17	(7.5)	2	(2.3)	19	(6.0)
Criminal associates	4	(1.8)	—		4	(1.3)
Police officer while arresting accused	1	(0.4)	—		1	(0.3)
Acquaintance/Friend	64	(28.2)	14	(15.9)	78	(24.8)
Stranger	81	(35.7)	12	(13.6)	93	(29.5)
Other/Not known	7	(2.7)	3	(3.4)	10	(2.8)
Total	228	(72.1)	88	(27.9)	316	(100.0)

Number of missing observations = 3.
Note: The gender of the victim was not known in two cases involving children and in one 'other family' case.

Table 6

Primary Offence Context
(*see* LRCV Table 34)

Context	No.	%
Domestic	100	31.3
Sex-rivalry	7	2.2
Argument	98	30.7
Drug related	4	1.3
Robbery	36	11.3
Sexual assault	4	1.3
Other violent crime	5	1.6
Contract killing	5	1.6
Police in course of duty	1	0.3
Other	59	18.5
Total	319	100.0

Table 7

Primary Context of Offence by Gender of Accused (*see* LRCV Table 36)

Context	Male		Female		Total	
Domestic	67	(24.6)	33	(70.2)	100	(31.3)
Sex rivalry	7	(2.6)	—		7	(2.2)
Argument	93	(34.2)	5	(10.6)	98	(30.7)
Drug related	4	(1.5)	—		4	(1.3)
Robbery	33	(12.1)	3	(6.4)	36	(11.3)
Sexual assault	3	(1.1)	1	(2.1)	4	(1.3)
Other violent crime	4	(1.5)	1	(2.1)	5	(1.6)
Contract killing	3	(1.1)	2	(4.3)	5	(1.6)
Police in course of duty	1	(0.4)	—		1	(0.3)
Other	57	(21.0)	2	(4.3)	59	(18.5)
Total	272	(85.3)	47	(14.7)	319	(100.0)

Note: Use of data from victim-offender pairs may affect small cells, for example the four drug 'pairs' represent three separate cases. Two cases involved one accused and one victim each, while the third involved two accused and one victim.

Table 8

Primary Context of Offence by Gender of Victim (*see* LRCV Table 37)

Context	Male		Female		Total	
Domestic	40	(17.5)	57	(64.8)	97	(30.7)
Sex rivalry	5	(2.2)	2	(2.3)	7	(2.2)
Argument	93	(40.8)	5	(5.7)	98	(31.0)
Drug related	4	(1.8)	—		4	(1.3)
Robbery	30	(13.2)	6	(6.8)	36	(11.4)
Sexual assault	1	(0.4)	3	(3.4)	4	(1.3)
Other violent crime	5	(2.2)	—		5	(1.6)
Contract killing	4	(1.8)	1	(1.1)	5	(1.6)
Police in course of duty	1	(0.4)	—		1	(0.3)
Other	45	(19.7)	14	(15.9)	59	(18.7)
Total	228	(72.2)	88	(27.8)	316	(100.0)

Table 9

Location of Offence by Gender of Accused (*see* LRCV Table 27)

Location	Male		Female		Total	
Victim's and/or Accused's Premises						
Bedroom	34	(12.5)	19	(40.4)	53	(16.6)
Lounge	27	(9.9)	4	(8.5)	31	(9.7)
Kitchen	12	(4.4)	4	(8.5)	16	(5.0)
Bathroom	7	(2.6)	2	(4.3)	9	(2.8)
Hallway	6	(2.2)	—		6	(1.9)
Verandah	1	(0.4)	—		1	(0.3)
Garden/grounds	14	(5.2)	1	(2.1)	15	(4.7)
Garage	5	(1.8)	—		5	(1.6)
Street	2	(0.7)	2	(4.3)	4	(1.3)
Other premises (unspecified)	10	(3.7)	6	(12.8)	16	(5.0)
Tent/hut/shed	4	(0.7)	—		4	(1.3)
Door/window	7	(2.6)	—		7	(2.2)
Sub-Total	129	(47.4)	38	(80.9)	167	(52.4)
Other						
Home of other	7	(2.6)	2	(4.3)	9	(2.8)
Place of work of victim and/or accused	13	(4.8)	1	(2.1)	14	(4.4)
Licensed premises	17	(6.3)	2	(4.3)	19	(6.0)
Unlicensed premises	1	(0.4)	—		1	(0.3)
Prison/police cell	2	(0.7)	—		2	(0.6)
Psych. inst/other hospital	1	(0.4)	—		1	(0.3)
Premises robbed	2	(0.7)	—		2	(0.6)
Street	39	(14.3)	—		39	(12.2)
Car/truck	2	(0.7)	—		2	(0.6)
Other public open space	37	(13.6)	2	(4.3)	39	(12.2)
Public toilets	7	(2.6)	—		7	(2.2)
Other building	4	(1.5)	—		4	(1.3)
Other	11	(4.1)	2	(4.3)	13	(4.1)
Sub-Total	143	(37.9)	9	(19.3)	152	(47.6)
Total	272	(85.3)	47	(100.0)	319	(100.0)

Table 10

Relationship of Victim to Accused in Domestic Killings by Gender of Accused (*see* LRCV Table 35)

	Accused		
Victim	Male	Female	Total
Spouse/former spouse/spouse-separated	34	11	45
	(75.6)	(24.4)	
	(50.7)	(33.3)	(45.0)
Sexual partner/former sexual partner	6	3	9
	(66.7)	(33.3)	
	(9.0)	(9.1)	(9.0)
Parent	6	—	6
	(100.0)		
	(9.0)		(6.0)
Child	7	17	24
	(29.2)	(70.8)	
	(10.4)	(51.5)	(24.0)
Other family	7	2	9
	(77.8)	(22.2)	
	(10.4)	(6.1)	(9.0)
Residential	6	—	6
	(100.0)		
	(9.0)		(6.0)
Acquaintance/friend	1	—	1
	(100.0)		
	(1.5)		(1.0)
Total	67	33	100
	(67.0)	(33.0)	(100.0)

Table 11

History of Domestic Violence by Gender of Accused (*see* LRCV Table 38)

History	Male Accused	Female Accused	Total
Previous domestic violence or threats by accused against victim	26 (81.3) (38.8)	6 (18.7) (18.2)	32 (32.0)
Previous domestic violence or threats by victim against accused	7 (63.6) (10.4)	4 (36.4) (12.1)	11 (11.0)
Both parties previously involved in domestic violence exchanges	8 (66.7) (11.9)	4 (33.3) (12.1)	12 (12.0)
Accused violent towards others	2 (100.0) (3.0)	—	2 (2.0)
No known history of violence	24 (55.8) (35.8)	19 (44.2) (57.6)	43 (43.0)
Total	67 (67.0)	33 (33.0)	100 (100.0)

Table 12

History of Violence in Domestic Killings by Gender of Victim
(*see* LRCV Table 41)

History	Male victim	Female victim	Total
Previous domestic violence by accused against victim	5 (12.5)	27 (47.4)	32 (33.0)
Previous domestic violence by victim against accused	9 (22.5)	1 (1.0)	10 (10.3)
Both parties previously violent	8 (20.0)	4 (7.0)	12 (12.4)
Accused violent towards others	1 (2.5)	1 (1.8)	2 (2.1)
No known history of violence	17 (42.5)	24 (42.1)	41 (42.3)
Total	40 (41.2)	57 (58.8)	97 (100.0)

Note: In three cases, the sex of the victim was not known.

Table 13

Method of Killing in Domestic Cases by Gender of Accused (*see* LRCV Table 33)

Method	Male	Female	Total
Firearm	26	6	32
	(81.3)	(18.8)	
	(38.8)	(18.2)	(32.0)
Sharp instrument	21	11	32
	(65.6)	(34.4)	
	(31.3)	(33.3)	(32.0)
Blunt instrument	5	1	6
	(83.3)	(16.7)	
	(7.5)	(3.0)	(6.0)
Fist/feet	9	1	10
	(90.0)	(10.0)	
	(13.4)	(3.0)	(10.0)
Strangulation	5	—	5
	(100.0)		
	(7.5)		(5.0)
Drowning	—	3	3
		(100.0)	
		(9.1)	(3.0)
Other	1	11	12
	(8.3)	(91.7)	
	(1.5)	(33.3)	(12.0)
Total	67	33	100
	(67.0)	(33.0)	(100.0)

Table 14

Current Employment Status of Victims
(*see* LRCV Table 10)

Status	No.	%
Employed	97	40.1
Unemployed	43	17.7
Not in paid workforce (pensioner, retired, student, etc)	102	42.1
Not known	77	—
Total	319	100.0

Note: the 'not known' cases have not been included in the calculation of percentages.

Table 15

Current Employment Status of Accused
(*see* LRCV Table 12)

Status	No.	%
Employed	108	40.1
Unemployed	100	37.2
Not in paid workforce (pensioner, retired, student, etc)	61	22.7
Not known	50	—
Total	319	100.0

Note: the 'not known' cases have not been included in the calculation of percentages.

Table 16

Context of Homicide: Arguments
Male Accused: Relationship to Victim

	Victim Sex		
Relationship	Male	Female	Total
Acquaintance/Friend	39 (43.8%)	1 (0.25%)	40 (43%)
Stranger	33 (37.1%)	1 (0.25%)	34 (36.6%)
Residential	9 (10.1%)	1 (0.25%)	10 (10.8%)
Non-immediate family	2 (2.3%)	—	2 (2.2%)
Criminal associate	3 (3.4%)	—	3 (3.2%)
Other	1 (1.1%)	1 (0.25%)	2 (2.2%)
Not known	2 (2.3%)	—	2 (2.2%)
Total	89 (95.7%)	4 (4.3%)	93 (100%)

Table 17

Context: Argument
Male Accused
Use of Alcohol in Last Twelve Hours by Victim and Accused

	Victim			
Accused	Yes	No	Not known	Total
Yes	47 (74.6)	8 (12.7)	8 (12.7)	63 (67.7)
No	9 (69.2)	2 (15.4)	2 (15.4)	13 (14.0)
Not known	4 (23.5)	4 (23.5)	9 (52.9)	17 (18.3)
Total	60 (64.5)	14 (15.1)	19 (47.4)	93 (100.0)

Table 18

Context: Argument
Male Accused
Victim Relationship: Acquaintance/Friend
Alcohol Use in Last Twelve Hours

Method of Killing	Yes	No	Not known	Total
Firearm	5	3	6	14 (35%)
Sharp instruments	12	—	2	14 (35%)
Blunt instrument	3	—	—	3 (7.5%)
Fists/Feet	4	—	—	4 (10%)
Other	2	2	1	5 (12.5%)
Total	26 (65%)	5 (12.5%)	9 (22.5%)	40

Table 19

Context: Argument
Male Accused
Victim Relationship: Stranger
Alcohol Use in Last Twelve Hours

Method of Killing	Yes	No	Not known	Total
Firearm	7	1	—	8 (23.5%)
Sharp instruments	8	1	3	12 (35.3%)
Blunt instrument	2	—	—	2 (5.9%)
Fists/Feet	6	3	2	11 (32.4%)
Burning	—	—	1	1 (2.9%)
Total	23 (67.6%)	5 (14.7%)	6 (17.6%)	34

KILLED BY A STRANGER IN VICTORIA, JANUARY 1990–APRIL 1992: LOCATION, VICTIMS' AGE AND RISK

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DURING THE LAST FEW YEARS VIOLENCE IN AUSTRALIAN SOCIETY HAS BECOME a social issue of great concern. Homicide, however, is the least frequent violent offence and accounts for only a small percentage (0.2 per cent) of deaths in any year (Law Reform Commission of Victoria 1991b, p. 3). Seven times more people commit suicide and nine times more die in traffic accidents (Mukherjee & Dagger 1990). With the exception of the Northern Territory, the homicide rate for the rest of Australia is relatively low compared to the USA, for example.

Of course, while homicide statistics tell us many things about the state of our society, they leave out the human suffering of those directly affected by the death of a loved one and statistics cannot convey the shock and despair of many a citizen at the high level of serious violence in our society. Irrespective of whether we are concerned with 'domestic' or 'stranger' homicide, the statistics do not paint the picture of brutal callousness within our community.

Whilst little systematic change in homicide rates is noticeable in most Australian jurisdictions during the period 1973–1989 (Mukherjee & Dagger

[1] The author is grateful to the Victoria Police Homicide Squad for their cooperation in this study.

1990, p. 8), the rate per 100,000 of the population for the following crimes during the same period has increased as follows: burglary (244 per cent); robbery (221 per cent); serious assault (481 per cent) and drugs (389 per cent). It is well-established in criminological research that the offender is a stranger to the victim in the majority of burglaries, robberies and serious assaults.

It was not until the late-1970s that researchers in Australia (for example, Burgoyne 1979) began to look closely at homicide. Since then there has been a proliferation of homicide studies and reports (*see* South Australia, Office of Crime Statistics 1981; Wallace 1986; Bonney 1987; Law Reform Commission of Victoria 1985, 1988, 1991; Kapardis & Cole 1988; Kapardis 1990; National Committee on Violence 1990; Strang 1991). While such studies provide a useful window into the social relations of violence, they have focused almost exclusively on 'domestic' homicide. One of the generally accepted findings of the homicide literature is that men figure disproportionately both as offenders and victims overall, with masculine 'proprietary' a central theme (*see* Daly & Wilson 1988; Polk & Ranson 1991). It is worth also noting, however, from the available evidence (for example, Wallace 1986; Law Reform Commission of Victoria 1991) that the risk of homicide varies across subgroups of the population.

A small number of serial killings receiving national publicity in Australia in recent years have been instrumental in generating interest into stranger homicide. Homicides in general, and stranger killings in particular, in our community are, fortunately, rather rare. Nevertheless, 'stranger violence represents one of the most frightening forms of crime victimisation' (Riedel 1987, p. 227). Furthermore:

> stranger violence is a problem which, relative to the numbers involved, is disproportionate in its effect . . . stranger crime generates fear through its violent and unpredictable attacks. The fear also has the more generalised effect of degrading the quality of urban life (Riedel 1987, p. 257).

As the Australian crime figures cited above show, there seems some justification for the fear of violent victimisation by strangers. Despite the extent and seriousness of stranger violence, this type of violence has been neglected by Australian criminologists.

Stranger Killings: Incidence

Stranger killings need to be viewed in the context of stranger violence in general. According to the *Victoria Police Statistical Review of Crime*, in 1989-90, 813 robberies with a weapon, 3,920 serious assaults and 50,385 residential burglaries were reported to them. While it is armed robberies of financial institutions that attract media attention, it should not be forgotten that—according to Victoria Police figures for 1989-90—one-third of robberies are not against commercial or financial institutions. Furthermore, it is in such robberies that victims are more likely to sustain injuries (*see* Kapardis 1989b). Similarly, the majority of serious assaults involve strangers (Ministry of Police and Emergency Services, Victoria Police 1989; Robb 1988).

As far as homicide is concerned, estimates of the incidence of offenders who are strangers to their victims have ranged from 22 per cent among convicted killers in Victoria (Burgoyne 1979), 18 per cent in urban but 11 per cent in rural homicides in New South Wales (Wallace 1986), 21 per cent among homicide incidents reported to the Victoria Police Homicide Squad (Kapardis & Cole 1988), 32 per cent of male killings (excluding culpable driving) prosecuted in Victoria (Law Reform Commission of Victoria 1991a) and 30 per cent utilising national homicide data (Strang 1991). However, none of the studies mentioned have defined the term 'stranger'.

In estimating the incidence of stranger homicide in our society we need to remember that studies in the USA strongly suggest that estimates based on official data under-estimate the volume of such killings for the following reasons:

- It can be assumed that homicides do take place every year which are not listed by the police as homicides. For example, incidents in which the circumstances and cause of death (such as a drug overdose) are not apparent to those making the decision as to classification of the death.

- A number of skeletons are found every year that cannot be identified.

- A number of persons who go missing are not reported to the police and their bodies are never found (*see* Swanton & Wilson 1989). Young persons who are killed but have not been reported as missing may well include throwaway children and children abducted after they ran away from home. Hotaling and Fingelhor (1990) suggest that the prime target of stranger abduction murders in the USA are teenagers, especially those aged between fourteen and seventeen.

- A proportion of persons reported to the police as missing are never found. On the basis of statistical information provided to the author by the Victoria Police Missing Persons Bureau, in 1988-89 215 cases (3 per cent) of the 6,150 reported to them are outstanding; for 1989-90 thirty-four cases representing 4.8 per cent are also outstanding and for 1990-91 the corresponding figure is 463 persons (6.3 per cent). Information supplied by the Bureau also indicates that during the period 1980–June 1989, a total of 146 missing persons (an average of about fifteen a year) disappeared under suspicious circumstances, have not been seen or heard of since and are presumed dead. The number of such persons who fall victim to stranger killers is impossible to know. It should be noted in this context that in 1990-91 in Victoria there was a 10 per cent increase on the previous year in the number of persons reported as missing.

Research Into Stranger Killings

Regarding the context in which stranger killings take place, it is interesting to note that the main concern internationally has been with serial killings (*see* Holmes & Du Berger 1988; Masters 1986; Gee 1988; Fowler 1990; Jenkins 1989;

Wilson & Seamann 1990), with law enforcement personnel as victims of homicide (*see* Swanton 1985; Young 1990; Moorman et al 1990; Major 1991) or with mono-episodic mass murderers (*see* Levin & Fox 1985; Harnschmacher 1988; Kapardis 1989a). Available Australian research shows, for example, that a number of child victims of homicide are killed by a stranger—nine out of twenty-five in the Law Reform Commission of Victoria (1991) study—and about one in seven or eight stranger killings is committed in the context of another crime (Law Reform Commission of Victoria 1991; Strang 1991). Research also shows that assault is the most common cause of death in stranger killings irrespective of whether victims meet their death at home or in a public place.

Kapardis (1990) examined ninety stranger homicides reported to the Victoria Police Homicide Squad during the period 1984-89. It was found that:

- stranger killings include a significant proportion (21 per cent) that remain undetected;
- aggregate homicide data are misleading with reference to patterns of stranger killings;
- assault is the most common cause of death;
- stranger killings are, in the main, one-victim-only cases;
- stranger killings usually occur in the street, at work, on or close to licensed premises or in association with other crime such as robbery;
- stranger killings are significantly less likely to involve a prior dispute between the suspect and the victim;
- suspects are predominantly young men with criminal records; while
- a significant number of their victims are 45-years-old or more.

The study showed that stranger killings are heterogeneous and can be differentiated by such variables as the sex and age of the suspect and the victim, the location and method of the crime and, also, the number of assailants. On the basis of the findings obtained, ten categories of stranger homicide were identified, including battery/manslaughter in a public place, predatory/opportunist, fleeting chance encounters in public places, cases when the predator becomes the victim, contract killings and multiple murder cases. To the list can be added police shootings and police members as victims of stranger homicide. In addition to identifying categories of stranger homicide, Kapardis (1990) proposed a positive definition of 'stranger' incorporating the heterogeneity of such killings. Earlier studies of homicide and victimisation surveys have defined a 'stranger' relationship residually, that is as one in which there was no prior relationship between the offender/suspect and the victim.

Perspectives on Stranger Killings: Identifying Those at Risk

American and Canadian researchers have made use of the concept of 'relational distance' (Silvermann & Kennedy 1987) and 'daily routine activities' (Cohen & Felson 1979) in defining the homicide situation (for a discussion of these two concepts *see* Kapardis 1990). Cohen and Felson, for example, have emphasised the importance of the convergence in time and space of offenders and victims as a major determinant of crime rates. Both the 'relational distance' and the 'daily routine activities' approach have shown that aggregate homicide data can be misleading with regard to patterns.

To illustrate, using aggregate homicide data it is found that persons aged forty-five or older in Victoria comprise 10 per cent of victims. However, using stranger homicide data yields a figure of 40 per cent for the same age-group (*see* Kapardis 1990, p. 249). It has been a doctrine in criminology that the elderly experience low rates of victimisation and high levels of fear of violent crime (Solicitor General of Canada 1985; National Committee on Violence 1990, p. 35). The explanation offered for the apparently low victimisation rate of the elderly is in terms of their lifestyles and self-protective tendencies (Felson & Cohen 1980). However, findings reported by Canadian (Silvermann & Kennedy 1987; Kennedy & Silvermann 1990) and American (Copeland 1986; Maxfield 1989) researchers contradict the predicted elderly victimisation pattern, reporting that the elderly are victims of felony-motivated homicide greater than expected on the basis of their representation in the general population. Kennedy and Silvermann (1990) examined all homicides (n = 9, 642) committed in Canada between 1961 and 1983. Considering only one offender and one victim from each incident, they found that 44.7 per cent of the victims aged sixty-five or older were killed by a stranger.

> The elderly are victims of homicide most often as a result of blunt force in their own homes. Although the location is as expected, beating rather than shooting or stabbing is the most prevalent means of homicide commission against the elderly. Further, they are victims of theft-based murder more often than anticipated. Proportionately, they suffer this kind of homicide far more than any age group at the hands of a younger stranger (Kennedy & Silverman 1990, pp. 313-16).

Kennedy and Silverman concluded that the home is as dangerous as a public place with regard to theft-based homicide by strangers. Kennedy and Silverman explain their findings by pointing out that the elderly person is not the target of the crime but the dwelling and its contents. The authors' explanation of elderly homicide fits a modified version of the 'routine activities' theory. Drawing on overseas research and Kapardis (1990), the main aim of the study reported in this paper has been to test the hypothesis that the elderly are victimised more than expected in their own homes by much younger offenders in the context of another crime and are killed as a result of being assaulted.

Homicide by Location and Victims' Age

The data for the present study are derived exclusively from Victoria Police Homicide Squad records for the period January 1990 to April 1992, supplemented as necessary by information provided by detectives involved in individual homicide investigations. One limitation of such data (*see also* Strang 1991) is the inevitable subjectivity in such information. Another limitation is the relatively small number of cases. The analysis draws on fifty-six stranger homicides (excluding police shootings and death due to culpable driving) representing 38 per cent of a total of 149 homicides during the period concerned. At the time of writing (beginning of May 1992), 43 per cent of the stranger homicides remain unsolved. The fifty-six incidents involved sixty-three victims and fifty-seven suspects.

Incident Characteristics

Twenty-one per cent of the cases involved more than one suspect but only seven (11 per cent) involved more than one victim. Seventy-one per cent took place at night (no information on time of incident was available in 20 per cent of the cases); almost half (47 per cent) of the incidents took place during Monday to Thursday. As far as location is concerned, over half (55 per cent) took place in the victim's dwelling and 25 per cent on or in the vicinity of licensed premises. Assault was the cause of death in half of the incidents, stabbing in 29 per cent and firearms in 17 per cent (information on cause of death was available on 93 per cent of the cases). The homicide was committed in the context of another crime, especially burglary, in 46 per cent of the cases. Such homicides tended to be drug-related.

Victim and Suspect Characteristics

Sixty-five per cent of the victims were males, 41 per cent were aged thirty or less, and 25 per cent were aged sixty or older. Representation of the elderly was higher than would have been expected. According to the Australian Bureau of Statistics (1991), 15.6 per cent of Victoria's population is aged 60 or older. Fourteen per cent of the victims had been reported as 'missing persons'. In support of overseas trends, victims aged 60 or more comprised more than half (55 per cent) of those killed in their home. Of the sixteen elderly, fifteen were killed in the context of another crime, fourteen were killed at home and eleven in the evening.

As expected, 88 per cent of the suspects were males, 61 per cent had a criminal record, 75 per cent were aged thirty or younger and, finally, more than one suspect were involved in 21 per cent of the homicide events.

Discussion

The findings reported supplement those reported by Kapardis (1990) and suggest that more stranger killings remain undetected than was the case in the past and, also, that such killings could well be increasing in Victoria. It must not be forgotten that a number of the 43 per cent of those cases that

remain unsolved may have been perpetrated by a stranger. Drawing on Kapardis (1990) and the present study, it can be stated that stranger homicides take place in five broad contexts:

- gangland killings;
- arising out of altercations on or close to licensed premises;
- in the context of another crime at the victim's place of residence or in a public location;
- single victim sexual/thrill/abduction killings; and
- serial/mass murder.

The present study provides a disturbing picture of the interaction between alcohol, violence and masculinity in killings arising out of altercations on or in the vicinity of licensed premises. In such cases, males—often at the edge of society, aggressively masculine and incessantly fearful of 'put downs'—tragically try to maintain their machismo in what Savitz, Kumar & Zahn (1991) has termed 'contests of character'. The issue of proving one's masculinity through conflict and violence needs to be addressed more meaningfully and effectively in schools, in families and in the media. To acknowledge that Australians have a corrosive pro-violence trait—a malignant cancer that eats away at our basic right to live our lives in safety at home and in public—is an important step towards halting our obsession with violence in our society.

There is no doubt that drug-addiction is a major contributory factor in the burglary rate, in gangland killings and those committed in the context of another crime. It is high time Australians bit the bullet and adopted policies that will tackle the 'drug problem' effectively (for example, decriminalising illicit drug-abuse under strict legal controls combined with comprehensive treatment programs)—law-enforcement is not the answer in the long run. Meanwhile, as this country's criminal justice system continues to be a failure, as the incidence of illegal drug-use, serious assaults and burglaries continues to increase and, finally, as the proportion of elderly in our society also continues to increase (*see* Department of Immigration and Ethnic Affairs 1985), it is to be expected that fatal attacks against elderly people in their own homes by young offenders with criminal records will also increase as they have done in the USA (*see* Cheatwood & Block 1990), in Denmark (*see* Gottlieb & Gorm 1988) and in Sweden (*see* Lindquist 1991), for example.

On the basis of the 'daily routine activities' theory we can say that an elderly person living at home by themselves or with their spouse, is not detected by the burglar trespassing in their dwelling at night. In a confrontation, the elderly may or may not resist but are beaten. While a younger person might recover, the vulnerable elderly victim dies (*see* Grabosky 1989, pp. 18-19). In other words, the safety of the home is offset by the vulnerability to attack during a crime and the difficulty in recovery from a physical and psychological assault. In his discussion of rape and burglary, Warr (1988) suggests that one type of rape results from a

chance encounter between a burglar and the victim in the victim's home. This scenario is very similar to that suggested for elderly victims of stranger homicide. Fortunately, the incidence of such tragic encounters (sixteen in twenty-eight months) is very small indeed and should not be used by the media to fan old people's fear of violent victimisation. However, there is a need for a systematic campaign to help elderly people address their safety fears and develop strategies that would enhance their personal safety. Community seminar programs for this purpose are already in existence in parts of Melbourne (*see* 'Working to Help Aged Feel Safe', *Northcote Leader*, 6 May 1992, p. 4).

There are many overlapping and competing theoretical explanations for elder mistreatment in domestic violence (for example, situational, social exchange theory, symbolic interactionism, social learning theory, psychology of the abuser and privacy of the family (*see* Tomita 1990).

Applying the routine activities approach in an attempt to model the distribution of homicide rates and to place the incidence of elderly victimisation identified in the present study, it would be useful to incorporate three exogenous constructs—'social disintegration', 'resource deprivation' and 'violent cultural orientation' (*see* Williams & Flewelling 1988). In doing so, however, one needs to note that 'social conditions assumed to shape the control of homicide vary in their effects by type of homicide' (Gartner 1990). Without precluding a general model of stranger homicide victimisation, special attention needs to be paid to the heterogeneity of acts comprising the total homicide rate in general and stranger homicide in particular (*see* Fiala & La Free 1988).

The fact that assault is the most common cause of death in the stranger killings points to the need to rethink our concept of a 'weapon'. Two young, fit males can easily kill an elderly person who disturbs them as they are ransacking his/her dwelling—even one such offender requires no weapon to inflict fatal injuries because his kicks and punches are as effective.

Finally, the rather high percentage of stranger killings that remains unsolved should be a cause for concern and every effort should be made to reduce it. According to McDowell (1978, p. 110), the ancient Athenians believed that 'miasma'—a kind of moral pollution, a supernatural infection—would afflict a community in which a killer was not brought to justice. That ancient belief is reflected, for example, in Sophocles' tragedy *Oedipus Tyrannos*, at the beginning of which a plague afflicts the citizens because a killer is living among them unpunished. Our contemporary Australian society—also evidencing signs of 'miasma' while figuring out what to do about serious violence—is in dire need of 'purification' by apprehending and punishing those who kill.

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THE POLICE PERSPECTIVE

THE CHANGING FACE OF HOMICIDE

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TO EXAMINE CHANGING PATTERNS OF HOMICIDE, STATISTICAL DATA WHICH IS gathered by the investigators or through the judicial process is generally relied upon. Available statistics indicate little change in the number of reported homicides in Victoria in recent years. Likewise, it is generally recognised that 'domestic' murders account for a significant percentage of the annual homicide figures. No doubt these factors would be a consideration when analysing prevention and control measures.

But how accurate are these figures? Do they reflect the true situation? There are a number of ways in which distortions may occur.

- Annual figures more accurately record the number of bodies recovered in the twelve-month period where it has been determined that death resulted from a homicidal act. The solution rate refers to the number of homicides which are solved in each twelve-month period. A murder reported during this period and solved one day outside the relevant period is not included in the annual statistics, while a murder committed in 1988 and not discovered until 1992, is recorded in the 1992 statistics. Thus a distortion may occur in the overall figures.

- A murder is generally determined by the discovery of a body and the medical decision on the cause of death. Sometimes it is not scientifically possible to determine the cause of death although it is strongly suspected that murder has been committed. Likewise, there are a number of persons reported missing each year where the disappearance and the circumstances indicate murder, but this will not be reflected in the figures. There are a number of known occurrences where criminals have been murdered and the identity of the offender is known but the body cannot be located. Again these cases cannot be included in the statistics.

- It is very common to hear of the so called 'hot shot' which is the injection of adulterated heroin or an over-strength dose which is substituted into the victim's routine supply or forcibly administered. Again these deaths cannot be included in the statistics.

In total, the number of unidentified murders could be as much as 30 per cent above the official annual figure. Generally this type of murder would be restricted to the criminal elements within our society and would include very few, if any, domestic murders. If this is the case, the proportion of the total number of incidents represented by domestic murders committed each year would be substantially reduced.

Unreported incidents have been referred to as a preface to introducing the practical view of the changing pattern of homicide.

In Victoria and in some other states the following trends have emerged over the last two years:

- an increase in incidents involving multiple victims and/or multiple offenders;
- an increase in murders occurring in rural areas;
- an increase in random fatal attacks on the elderly;
- an increase in brutal murders by the young;
- fewer 'standard' domestic murders: a tendency for third parties to be employed to carry them out;
- an increase in the proportion of stabbings;
- more protracted investigations; and
- less public response.

While all trends may not be readily identifiable in the available statistical data, they are obvious to the investigator. No doubt community standards, self-discipline and the risk of detection have some bearing on the trends, but the reasons are many and varied. For example, gun control may be a significant factor in the reduction in the number of deaths by shooting and the increase in the number of stabbings, though this may only be a temporary phenomenon.

However, one of the aspects of greatest concern is public apathy. In the past murder was regarded as the ultimate crime and sent shock waves through all sections of the community, including much of the criminal element. When a murder was reported people wanted to assist, but now there is a reluctance to get involved. This may be due to concern for individual safety or alternatively a lack of faith in 'the system'.

In the past, very few murders occurred where the identity of the offender was unknown, even if there was insufficient evidence to launch a prosecution. This is not necessarily the case in 1992. Recently, two particularly nasty murders were the subject of appeals through the media for assistance from the public—not one response was received, although it has

since been established that a number of people had information but did not want to become involved.

The trends which have been mentioned, together with legislative and procedural changes, have placed greater demands on the homicide investigator. Investigations are protracted and generally more difficult. Greater reliance is placed on scientific evidence rather than admissions. Criminal profiling and advanced scientific techniques will be of assistance to the investigator in the future, but it is essential that the confidence and the cooperation of the public be regained if police are to properly respond to the changing face of homicide.

SPECIAL ISSUES IN SERIAL MURDER

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THE INVESTIGATION OF HOMICIDE IS THE MOST CHALLENGING AND EXACTING of all criminal investigation procedures. Homicide is a unique crime because of the seriousness with which it is regarded both by the law and the community. The community, it seems, has an almost insatiable appetite for, and weird fascination with, the details of individual murder cases. The manner in which the media report murder plays an essential part in moulding community attitudes to the crime and the perpetrators of it. The media tend to concentrate on publicising those cases which are rare, sensational or abnormal—in short, those that make a good story. Typically, it is unprovoked attacks by strangers and cases involving bizarre methods of killing that hit the headlines.

The phenomenon of serial murder has become one of increasing concern in homicide investigation in recent years because of the special problems it presents to criminal investigators. Serial murder is a phenomenon attracting increased attention from both the criminal justice system and the community. The serial murderer is especially frightening to the community, stalking and selecting victims at random, often travelling great distances to kill again, (Brooks et al. 1987, p. 37). In recent years there has been considerable discourse on the phenomenon and how the criminal justice system ought to respond to these killers. The kind of fear serial murder can generate was illustrated in Sydney in 1989/90 by the series of 'Granny Murders'. These murders of elderly women in Sydney's North Shore district generated great

anxiety in the community and resulted in many who perceived themselves as potential victims living in fear and isolation for many months.

Serial murder is the killing of three or more separate victims with emotional time breaks between killings. These breaks, or cooling-off periods, range from days to weeks or months between killings. Serial killers may be defined as psychopathic: they have a profound personality disorder but are aware of their criminality and certainly are not out of touch with reality. Serial killers have been described as intelligent, charismatic, street-wise and charming. They are usually mobile and capable of travelling any distance in search of a certain type of victim. Serial killers are extremely manipulative: frequently, they talk their victims into what may be described as a 'comfort zone'—a location where they feel comfortable or safe and can control their victims. In the mind of the serial killer, the experience of murder is one of great pleasure in exerting power and control over his victim, including the power of life and death. (Geberth 1990, pp. 72-4).

Serial murder nearly always involves some planning or stalking of the victims over a period of time. These killers are constantly in search of victims. The basic characteristics of serial murder are repetitive murder involving similar modus operandi and similar types of victims.

The Australian contemporary paradigm of a serial killer is that of John Wayne Glover who, during a period of twelve months between 1989 and 1990, murdered six elderly women, all but one over the age of eighty years. These murders occurred in a limited geographical area on weekdays between 3 pm and 6 pm, when frail, elderly female victims were walking to their homes carrying shopping bags and aided by walking sticks. All victims were attacked in the vicinity of their homes with a hammer and fists—four were strangled with their own pantyhose.

Serial murder had entered the northern suburbs of Sydney, setting in motion the most extensive police investigation of its type in Australian policing history. In November 1991, Glover was convicted of all the murders and sentenced to life imprisonment.

One of the problems experienced by homicide investigators in the 'Granny Murders' investigation was the interference with crime scenes. Due to the age of the victims and their association with other elderly people, persons acting in good faith, washed blood and forensic material away from crime scenes prior to the notification and arrival of police, so as to alleviate the anxiety that could be caused to other elderly people. Four of the crime scenes were interfered with in this manner. The preservation of the scene of a murder is essential to a thorough scientific and forensic examination. Training is given to police in crime scene preservation, but police are seldom the first people at the scene of a murder. Education and training need to be given to the community and relevant organisations in an endeavour to preserve murder scenes.

Mass murder is another form of homicide which is sometimes confused with serial murder. Mass murder characteristically involves the killing of several people, in the same general area, at roughly the same time, by a lone assailant. It is usually a one-time murderous act (Levin & Fox 1985). Mass murderers are not concerned with who the victims are—they kill anyone who

comes into contact with them. In contrast, a serial murderer premeditates his crimes and usually selects a type of victim.

Extensive media reporting given to serial murder may have the unintended consequence of encouraging others to commit similar crimes. Pinto and Wilson (1990, p. 5) cite research which suggests there could be a link between the degree of publicity attached to a murder and subsequent conduct of a similar nature. Wilson (1988, p. 273) comments that the influence of violent, sadistic pornographic material may be relevant to the incidence of serial murder. In the USA several serial killers were found to have had an obsessive interest in sexually-violent pornographic literature and videos.

During the 'Granny Murders' investigation, the media provided valuable assistance to the community and the investigation. Unfortunately, some sections of the media sensationalised the murders with the inference of the 'copycat' phenomenon which created a heightened atmosphere of alarm. Regular and controlled press conferences given by the Senior Investigating Officer is the most appropriate way to release information to the community.

Serial murder raises enormous challenges for police in regard to their resources and investigatory professionalism. Serial murderers are difficult to detect and apprehend, especially where there is no readily identifiable motive and no initial recognition that a serial killer is operating. It is incumbent upon police to be alert to the identifiable characteristics of a serial murderer and collect, collate, analyse and disseminate date to appropriate groups. Australia needs a National Centre for the Analysis of Violent Crime similar to the Violent Criminal Apprehension Program which is based at the FBI in Virginia, USA. This program provides a computerised clearinghouse for information on solved and unsolved murders, missing persons and unidentified bodies where homicide is suspected. The establishment of a data clearinghouse to analyse murders can provide an indication that one killer is responsible for a series of murders. Sharing investigative information can supply more pieces of the puzzle necessary to strengthen the investigative process and expedite the identification and apprehension of the subject (Brooks et al. 1987, p. 40).

Criminal profiling is a technique for identifying the major personality and behaviour characteristics of an offender. Profiling does not provide the specific identity of the offender, but is an investigative aid that should be considered with all other evidence gathered from the crime scene and witnesses.

The forming of a task force for serial murder investigation is the most appropriate way to effectively and efficiently approach this phenomenon. Task forces provide coordinated resources and the professional utilisation of homicide investigators. The North Shore Murder Task Force formed to investigate the 'Granny Murders' had seventy multi-skilled investigators to analyse all information in a coordinated manner.

Although serial murder currently represents only a small proportion of all murders, the question of whether this situation may change in the future should be considered. It is a real possibility that serial murder will increase in Australia based on the historical evidence of the increase of serial murder in the USA. The investigation of serial murder is the most demanding and challenging of all criminal investigations due to its complex and protracted

characteristics. Police investigators must be flexible in their attitude and approach to murder investigations in the early stages in an endeavour to identify the fact that a serial murderer is operating.

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HOMICIDE IN SOUTH AUSTRALIA

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THE INVESTIGATION OF HOMICIDES IN SOUTH AUSTRALIA IS HANDLED BY both suburban Criminal Investigation Branch (CIB) units and a specialist unit—the Major Crime Task Force. When a homicide occurs, it is the decision of the relevant Regional Commander as to whether he has the necessary resources to handle the particular incident. It is also a consideration as to whether the crime is part of a pattern or is likely to be a long, complicated and protracted inquiry.

If the homicide is relatively simple and straightforward, then in all probability the investigation will be undertaken by the local CIB. However, members of the Major Crime Task Force are able to provide an advisory service to these officers.

If the homicide is beyond the resources of the local CIB or forms part of a pattern of crime, then it will be formally declared a *major crime*. This will then invoke the provisions of the Task Force Policing Plan, which means that the entire investigation will be thoroughly documented. In practical terms what occurs is that an administrative officer is appointed to undertake control and guide the direction of the investigation, collate the information gathered and, on the basis of this information, issue inquiries. The administrative officer is supported by a primary team whose role is to interview any offender who is located and formulate the brief. These people are in turn supported by secondary teams, whose roles are to carry out all other inquiries concerning the investigation.

The complete inquiry is recorded on a computer-based case management system, which automatically indexes and sorts all significant people and events involved in the investigation. Each separate inquiry is recorded and each result gained is linked to that inquiry. In effect, this case management system provides an accurate and complete record of the whole investigation. The simple principle applied to this method is that *all* information gained is recorded, assessed by the administrative officer, and either investigated or recorded for information.

The advantages of the case management system are many and at all times there is an available and up-to-date manuscript of the status of the investigation. The system ensures that there is a logical and structured approach to the inquiry, and that all information gained becomes part of the inquiry. Furthermore, in circumstances where the inquiry takes several years, it ensures that, as original investigators transfer, or for one reason or another leave the inquiry, new investigators are able to thoroughly brief themselves with the documented information. In fact, this has occurred several times in South Australia, where old murder inquiries have been successfully concluded some years after the incident. A further advantage of the system is that, during subsequent court procedures, the file provides an accurate record.

This is a very brief overview of the system under which the South Australian Police Department operates. Steps are continually being taken to upgrade and improve this system and, in 1992, a new program is being devised which will enable suburban CIBs to operate under the same computer program, thereby enabling an electronic transfer of information when and if a matter is declared a major crime.

Types of Homicide

Homicides can be divided into several types and each has particular problems.

Domestic/intimate homicides

Domestic/intimate homicides are usually the simplest to investigate. The victim is usually known by the offender and there is, in most cases, a clear

motive. Most importantly, the offender is usually remorseful and truly regrets the action. However, experience has shown that this feeling of remorse lasts about forty-eight to seventy-two hours. If questioned within this time span, offenders will be cooperative but are less likely to be so outside that time frame.

Confrontational homicides

Confrontational homicides can be somewhat more difficult than the domestic murder. The classic example of this type of incident is the murder which arises as a result of a brawl in a hotel. The incident usually stems from an argument, alcohol is often a contributing factor and, in most cases, the action is usually stimulated by the need for the parties involved not to 'lose face'. Similar incidents have also occurred as a result of people becoming involved in arguments over minor traffic accidents. These homicides may be more difficult to solve than the domestic murder because sometimes the victim and the offender are unknown to each other. From an investigator's point of view, there is often the redeeming feature that these types of incidents are quite often witnessed by independent parties, thereby providing police with valuable evidence. Often these matters will revert to the offence of manslaughter.

Assassin type murder

The assassin type murder is perhaps one of the most difficult investigations which confront homicide investigators. These types of crimes are often premeditated well in advance, and deliberate steps are taken to thwart the efforts of investigators in the gaining of evidence. Certainly, investigators may become aware of a motive and, generally speaking, will have some idea of a suspect. However, there does exist a code of silence among criminals and it is difficult to break this code of silence. A classic example of this type of offence is the murder which occurs in a prison. For example, a prisoner was stabbed in a yard where another ninety prisoners were assembled. Two years later, only two people who are prepared to say anything about the offender have come forward from that group. Police information is that this particular offence was planned well in advance and was, in essence, an assassination.

Abduction/stranger type murder

The abduction/stranger type murder is perhaps the most difficult of all murders to investigate as there is usually no rhyme or reason to the incident. In most cases there is no relationship between the offender and the victim, there is usually no obvious motive, and in practical terms, investigators are usually left without a crime scene. Invariably in these cases, police rely very heavily on information from the public. If there is no information forthcoming, then the task of solving the crime becomes very difficult indeed.

Serial or pattern type murder

There is a further category: the serial or pattern type murder. Fortunately, these are not commonplace, though there has been a few such incidents in

South Australia. Serial murders are extremely difficult to investigate as there is no relationship between the victims and the offender/s. There are no tangible links which can guide an investigator to a particular person. In these matters, more than most others, police rely very heavily on information from the public. Usually the offender is mentally disturbed and extremely cunning in the way he commits crimes. Invariably these people will continue to offend until they are apprehended.

Problems for the Homicide Investigator

There is little doubt that the homicide investigator of today has a more difficult task than that of the homicide investigator of the past. The problems lie in two areas:

- the investigation and arrest of person/s for the offence; and
- the subsequent trial and court procedures.

In general terms the following are problems that are encountered in the investigation and arrest of homicide offenders:

- Modern day homicide investigators are required to be well-aware of the legal requirements in respect of the rights of an accused. Furthermore, they must be completely familiar and adept in the practical application of powers that they are able to invoke. Investigators are sometimes required to make decisions very quickly, with the knowledge that the decision will almost certainly become the topic of a lengthy legal argument in the ensuing court proceedings. They are required to keep abreast of decisions handed down in the Appeal Court, as the thrust of those decisions will very much influence the manner in which they handle an investigation.

- The media, while being a valuable tool to an investigation, can also place undue pressure on investigators. Investigators are well-advised to be particularly careful in their comments to the press, as it has happened in previous matters that certain statements made in the press have become the subject of debate during the course of a criminal trial. In particular, offences must not be described too graphically as it may be argued that jury members who read that article will be prejudiced against the accused. In fairness, it should be pointed out that the media provide a very valuable service to investigators in that they can convey police requests for information to the public. There is no doubt that on some occasions this has assisted inquiries. However, investigators would do well to remember that the media are very much a double-edged sword, and it is necessary during the course of investigations to keep very strict control over press releases.

- With the advance of technology, there is now more forensic evidence becoming available to police. However, it follows that investigators, in order to make use of these services, must have a rudimentary knowledge of the practical application of the information.

  Allied to these services is the problem of collating all the information and evidence which is gathered. Difficulties may arise in obtaining statements/declarations from other government bodies (such as the forensic science personnel), tests and procedures may take considerable time, and quite often the evidence/statement is not available in time for the committal proceedings.

  A further problem is the growing trend among some members of the community 'not to get involved'. People who have been witnesses are often heard to say that they will never become involved again. When one considers the length of time that witnesses spend sitting outside a court, one cannot blame them for their reluctance to come forward with information in the future. It is an unfortunate fact of life that no-one can accurately predict when a witness will be required. The investigator quite often has to bear the brunt of the complaints concerning time delays from these witnesses. Professional people can be particularly difficult, as their time is money and more often than not, they have well-defined schedules that have to be meet.

The following are some of the problems faced by investigators in respect to criminal trials:

- Except on very rare occasions, persons charged with murder plead not guilty. There is nothing wrong with this, but all homicide investigators know at the time of an arrest that at sometime in the future they will be involved in a strongly contested murder trial. These trials, in the main, are now becoming longer in duration. Some years ago murder trials would average about four weeks in duration but now it is common for trials to take between six and ten weeks. In most cases, the murder trial is preceded by a 'voir dire' hearing, which is in effect a trial within a trial.

- Recently in South Australia, procedures were adopted to invoke pre-trial conferences in an effort to speed up the court processes. The thrust behind this procedure was to eliminate any unnecessary argument from the actual trial but, to date, these procedures do not seem to have had any effect. Naturally, a side-effect of longer trials is a reduction in available investigational resources. It is not uncommon to have three or four investigators tied up on a criminal trial for six to ten weeks. This time period is for the actual trial and does not include the time spent by investigators in conveying, locating and briefing witnesses. All in all, a strongly contested criminal trial can be a very busy and stressful time for an investigator.

Conclusion

There are no easy answers to these problems. Modern day investigators are required to have a wide knowledge of both law and investigative techniques, and the responsibility for this knowledge rests with individual departments and their training techniques. The South Australian Police Department has addressed this need and accordingly has revamped its detective training course to keep pace with changing trends and requirements. Furthermore, experienced homicide investigators pass on their knowledge to junior members through lectures, and junior members are seconded to the Major Crime Task Force for six-month periods. The aim of the secondments is to give junior investigators on-the-job training, under the guidance of experienced homicide investigators.

In respect of the problem of lengthy criminal trials, each accused person has the right to a complete and thorough defence. However, some trials do take an inordinate length of time and contain days of argument over relatively minor points which may well have been resolved at a pre-trial conference.

ISSUES IN THE POLICING OF FAMILY VIOLENCE

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FAMILY VIOLENCE AFFECTS A LARGE PROPORTION OF OUR SOCIETY: FOR example, an estimated 50,000 calls were made to the Victoria Police in 1983 relating to domestic disputes (Barnes cited in Comley 1986, p. 534), and 25 per cent of offences against the person reported to New South Wales Police in 1986–87 were committed in the home (New South Wales Police Department 1987). In 1986–87 the cost of accommodating victims of domestic violence in Australia was $27.6 million (Australia 1990, p. 15), and in Victoria alone, over 28,000 women and children seek refuge accommodation each year (Victoria 1991b).

Evidence of this large community problem is also contained in statistics compiled by the Family Violence Project Office of the Victorian Police. For example, the Victoria Police Family Violence Project Office found that in a twelve

month period during 1990/91, police attended a minimum of 919 domestic disputes per month, totalling 11,087 for that year (Victoria Police. Family Violence Project Office 1991).

The potential for a lethal situation developing within the context of domestic/family violence is demonstrated by surveying available homicide data. For example, a survey of Victorian homicides occurring between 1989 and 1991 indicated that each year domestic homicides represented the largest category where motive was known (Victoria Police. Homicide Squad 1991). Wallace (1986) and Bonney (1987) found that a higher proportion of homicides (43 per cent) were committed by family members than any other category of relationship (Australia 1990, p. 21).

During the period 1989 to 1991 inclusive, there were sixty-seven domestic homicides in Victoria. The average cost per homicide in Australia is approximately $1 million. This cost includes victims' loss of income, prison costs for offender and so on, but does not include prosecution and trial costs (Law Reform Commission of Victoria 1992, p. 15).

Firearms are not the major cause of death in Australian homicides, but a firearm is the most lethal of weapons. It requires less physical strength and time than other weapons in its lethal capacity and may be considered as an impersonal weapon, capable of causing death without having to physically touch the victim. Therefore the gravity of firearms is clearly defined within the context of homicide in general. Now let us take a closer look at firearms and examine them within the confines of domestic violence and the current legislation.

The current state legislation pertaining to domestic/family violence in Victoria is the *Crimes (Family Violence) Act 1987*. Of the legal options available, this is the most accessible legislation regarding domestic/family violence with approximately 2,000 intervention orders being current at any one time.

This legislation could be viewed as an attempt to provide some form of 'people control' as well as 'gun control', having regard to magistrates granting orders which can be used to control people's behaviour and the use of firearms through section 18A of the legislation. Despite this process, the Act does have its limitations and problems. For example, during the twelve months from 1 July 1990, out of a total of 5,374 applications for Intervention Orders, 3,232 (60 per cent) were granted (Victoria 1991a). During this same period, from a total of 976 Family Incident Reports, there were nineteen cases where firearms were used at the incident and a total of forty-nine cases where firearms were threatened (Victoria Police 1991).

There was no procedure available to ensure distinct case tracking, which would have provided details of what happened to the firearms and/or licences in these cases, for example, whether the licences were cancelled or firearms seized. The *Crimes (Family Violence) Monitoring Report* (Victoria 1991a, p. 26), which was undertaken during the same period, indicates however that twenty-nine firearms licences were revoked during this period.

According to the Firearms Registrar, the current legislation is not clear concerning firearms licences in cases where firearms are seized. For example, how effective in the long term is the seizure of firearms if the licences are not also cancelled? The Registrar believes the legislation should be structured so that if a person commits an act of violence or an offence against the *Firearms Act 1971*

(Vic.) there should be an automatic cancellation of the licence by a magistrate. Such are the proposed amendments to New South Wales' firearms legislation specifically relating to domestic violence. These amendments will provide for automatic suspension of licences where Apprehended Violence Orders are granted. Persons will be unable to renew their licence for ten years.

A new procedure has now been adopted in Victoria which will rectify some of these problems. Any Family Incident Report received by the Family Violence Project Office involving a firearm is passed to the Firearms Registrar. Inquiries are made concerning licences, permits and firearms, and forwarded with the details of the incident to the District Firearms Officer for appropriate action. Such action can include the cancellation of firearms licences, processing for an offence and or forfeiture of firearms. The Family Violence Project Office is then advised of the action taken.

The current situation in Victoria highlights the vulnerable position that victims of domestic violence are often placed in. The victim's powerlessness is heightened where the violent partner has easy access to firearms. As the law stands, a person who has access to firearms and is violent can abuse their partner or family, make threats and/or use a firearm but there is no provision following such an incident for the automatic cancellation of firearms licences or seizure of firearms. It would appear that a victim in this situation is not adequately protected. Where violent behaviour exists, the risk of a serious injury or a more tragic event occurring is increased dramatically with the presence of, or easy access to, firearms. The following incident, in the words of the investigating police officer, illustrates the dangers which exist while there are limited gun controls operating within the precincts of violence:

> We had been called to this house on more than several occasions. It was an ongoing domestic dispute between a married couple with two children. When we attended, no legal action was taken because on our arrival the disputes had ceased. Things had settled down. Although we knew there was a firearm in the house, the owner was licensed and no firearm offence had occurred. On one occasion we assisted the woman and children to find other accommodation. I don't know what happened in between her leaving and our return visit, but the next time we were called, we arrived to see him stalking around, still with the shotgun in his hand. He had shot his wife dead and their two little children were present (Sergeant of Police, Victoria Police Force 1992).

Criminal justice systems in western countries have generally responded to legal and social issues separately, whilst mainly using a reactive approach. This means that offenders can be dealt with only after an offence has occurred. Support for victims is delivered in an ad hoc fashion, therefore any opportunity for empowerment is fragmented.

However, in the last decade some change has occurred towards an increase in the use of a proactive approach. Examples of this are: the Drink-Drive Campaign, Crime Stoppers, the Violence is Ugly Campaign, Break the Silence and Operation Noah. Police training in family violence also incorporates proactive/preventative strategies covering a multitude of issues.

The theme maintained is that criminal assault in the home is an offence and that violent behaviour is not acceptable.

The introduction of community policing strategies in the 1980s incorporated this proactive approach (Morgan 1984). Nevertheless, a large proportion of community policing squad duties are still reactive responses. This occurs because these squads are only one small sector of a large system which operates mainly with reactive responses. The successful nature of the proactive approach can be appreciated if attention is turned to some overseas models which have been operating at a more comprehensive level. Although the following examples relate specifically to domestic violence, some solutions may be become apparent from them and could assist in identifying patterns, prevention and control relating to homicide within the context of domestic/family violence.

In some parts of Canada, the USA and the United Kingdom, multi-faceted teams intervene in family violence situations. The strategies implemented give serious consideration to the victim's socio-legal needs using an integrated approach. The London Police in Ontario, Canada were the first police force in Canada to use this method. They are serviced by the Coordinating Committee to End Abuse on Women, which is made up of representatives from mental health organisations, advocacy centres, police, emergency service workers and refuge/shelter workers. The Committee members act as consultants and review policy and procedures. An evaluation study of this policy has found that there has been a large increase in the laying of charges relating to domestic violence by police and fewer charges have been withdrawn or dismissed (Canada. Ontario Police 1985).

A similar procedure is in use by the Duluth Police Force, Minnesota, USA. Immediately after the perpetrator is arrested, she/he is taken to the police station for arraignment to court and a Women's Shelter Advocate is notified. The advocate contacts the victim and provides information relating to protection orders and safety procedures. The perpetrator convicted for the first time is given a stayed sentence, ordered to receive counselling, and/or take part in a rehabilitation and educational program. Upon a second offence, the offender is gaoled but also receives treatment. A follow-up procedure is undertaken whereby the victim is contacted to see if further support and/or assistance is required.

The Metropolitan Police Force in London, England, also uses multi-agency domestic violence units. For example, the Tottenham unit is staffed by police women, and the referral agencies involved include social service, community and psychiatric services, a housing group and other action groups. There are thirty-two of these units throughout Metropolitan London.

These models reflect changes in criminal justice policy which lean toward a preventative treatment direction. The community based approach is anticipated to act as a social influence to others, reinforcing the message that certain behaviours are not acceptable. These types of treatment models have been recommended for use also in drug and alcohol rehabilitative programs (*Criminal Justice* 1987, pp. 285–88).

In Australia, preventative approach strategies are delivered in an ad hoc fashion. Little has been done to establish the team approaches described above. Some issues are given more attention than others, while some sectors of the

community are left in vulnerable positions. Generally speaking, Australia's criminal justice system is still fragmented, preferring the 'legal only' approach in preference to a system which administers the socio-legal method. Consolidation of the available facilities, knowledge/resources and appropriate staff is necessary. The cost of drawing them together would be much less than the expense incurred for each domestic homicide which has occurred.

To bring about a reduction in the incidence of domestic/family violence and homicides, appropriate intervention at the time of a crisis—followed by comprehensive support networks in both the social and legal environments—are crucial. Australia desperately needs a practical based network using an integrated, multi-faceted approach. It is time to work together and the following recommendations are made to bring this about:

- implementation of specialist, multi-agency (integrated) teams and programs to service domestic/family violence incidents;

- the *Crimes (Family Violence) Act 1987* (Vic.) to be amended to permit the automatic cancellation of firearms licences by a magistrate where a domestic/family violence incident has occurred and been reported to police—not renewable for set period; and

- the development of a variety of integrated, preventative community education programs concerning gun control and family violence.

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ABORIGINAL HOMICIDE: CUSTOMARY LAW DEFENCES OR CUSTOMARY LAWYERS' DEFENCES?

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THE ABORIGINAL COMMUNITY HAS A UNIQUE INTEREST AND PERSPECTIVE with respect to the conduct of the prosecution and defence to charges of homicide. It is overwhelmingly the case that, when an Aboriginal person is charged with homicide (murder or manslaughter), the deceased person was also Aboriginal. At all stages of the criminal process for such charges (the decision to lay the charge, the determination of guilt or innocence, and sentencing) there are likely to be issues and considerations upon which Aboriginal and non-Aboriginal perceptions will differ profoundly, reflecting the differences in the culture, history and lifestyles of the two groups as well as the conceptions of the role of the Australian legal system in guaranteeing law and order in society.

While a study of the legislation and the decisions of the courts demonstrates an awareness that such differences exist, it is equally apparent that the Australian legal system has been unable to provide a consistent and well-informed response to the fact that the differences in perceptions may well be one of the explanations for the increasing incidence of homicide in Aboriginal society and of the inability of the legal system to satisfy Aboriginal demands that the system meet their needs.

The difference in perceptions and, at times, outright conflict between Aboriginal and non-Aboriginal responses to the conduct of homicide cases operates at one level of the process but, of course, there may also be profound

differences as between Aboriginal people themselves on particular issues. There may well be different views on certain issues between particular communities of Aboriginal people and also within such communities. The attitude of those closest to the victim of homicide may well differ from those of people closest to the person accused. In this regard the Aboriginal perspective may be as diverse as that in the broader community.

The Aboriginal Legal Service (ALS) has, for the two decades prior to 1992, played an important role in the endeavour to inform the legal system as to these unique Aboriginal perspectives, but the ALS has, at times, its own unique dilemma since, as both a representative of an accused person and of the community from which that person comes, conflict of interest considerations are very real and very common. Yet the courts will first look to the ALS for advice regarding both cultural and social factors relevant to the accused and the circumstances of the offence, and also as to the attitude of the Aboriginal community towards the offender. The Pitjantjatjara Legal Service has endeavoured to overcome the conflict of interest problems by arranging for separate lawyers to represent the accused and the community, but most ALS offices are unable to afford the resources for such a commitment.

If the prosecution, conviction and sentencing of killers is a task undertaken by the legal authorities on behalf of the community as a means of both protecting the community and satisfying its sense of justice, then the question arises as to how those responsible for the system can understand and respond to the Aboriginal members of that community. This paper will examine some aspects of the system as it applies to homicide cases to illustrate the apparent confusion in approach which has been adopted to date.

Before examining the issues it is useful to place them into context by considering, by way of illustration, two cases which highlight the difficulties which can arise both for the courts and for those who, in representing the Aboriginal community and the offenders, find themselves called upon to provide advice to the courts.

Case 1[1]: Darwin, December 1991

The appellant was a twenty-nine-year-old Tiwi man from Bathurst Island with limited European education. The deceased was his wife and they lived together at Milikapiti with their two children, the eldest of whom was four.

Shortly prior to the killing the appellant had begun to suspect that his wife was being unfaithful to him. The day before her death the wife had been confronted by another woman with that accusation (involving the other woman's husband) and had denied the allegation. The following day the appellant challenged his wife again about the other man and she once again denied the allegation of impropriety. Later in the day the appellant confronted the 'other

[1] *Mungtatopi v. DPP*, Unreported decision of the Court of Criminal Appeal, Darwin 23 December 1991.

man' at the canteen but he also denied the accusation. At that time the appellant observed that the children were not with his wife at the canteen. The appellant left the canteen and went to his sister's house where he found his youngest child but not the other child.

The appellant went looking for his wife and found her at another person's home, playing cards. Before finding his wife, he located the eldest child at another house. It was apparent to the occupants that the appellant was angry. Having located his wife, he asked her to come home. She refused and the appellant punched his wife and kicked her. The wife was drunk and the appellant had been drinking, but was not drunk. When the assault began, others intervened and the appellant was knocked down and punched.

The appellant and his wife then left the scene and the appellant drove the wife to an out-of-the-way place. The appeal court accepted that there may have been a legitimate reason for the fact that the appellant drove where he did. Within a few minutes the wife jumped from the car and ran away. The appellant told police that he chased his wife and hit her a number of times to the head with a rock. At trial he denied any recollection of chasing his wife or of striking her. The police claimed that he had also told them that he had placed his wife in the back of his vehicle and had there continued to hit her.

The evidence from the pathologist (which was not disputed) disclosed that the wife (who weighed only thirty-nine kilograms) had multiple injuries to the head, neck, trunk, back, elbows and arms. There were also injuries to the legs. These injuries were all consistent with her having been assaulted with a weapon—a blunt instrument. Additionally, the wife had suffered the most dreadful series of injuries to the vagina, rectum and to internal organs. Some of these injuries had occurred after death, which was caused by shock and haemorrhaging resulting from these lower body injuries, which had also been caused by the blunt instrument.

The defence was that the appellant acted under provocation within the terms of the Criminal Code of the Northern Territory. If he succeeded in that defence, the accused would have been convicted of manslaughter and not murder. To succeed in that defence the accused had to show that he had been subjected to a 'wrongful act or insult' of such a nature as to be likely to deprive an 'ordinary person' of the power of self-control. Additionally, the accused had to show that 'an ordinary person, similarly circumstanced, would have acted in the same or a similar way' (Criminal Code, Northern Territory Section 34(2)(d)).

Before the question could be left to the jury, the accused had to first satisfy the trial judge that there was evidence which might be acted upon by the jury to support the defence of provocation. The trial judge ruled, however, that there was not such evidence because, whether or not there had been any actions by the victim which could be described as 'wrongful' or 'insulting', there was no basis on which it could be said that such acts could have been likely to cause an ordinary person to lose self-control in the way the accused had. The Court of Criminal Appeal upheld the trial Judge's ruling.

In considering these issues the trial judge had to consider submissions made and evidence led on behalf of the accused man. Counsel for the accused cross-examined three female Aboriginal witnesses in order to advance the argument that an ordinary member of the community might be provoked to do what the accused did in this case.

The appeal court set out the submissions made on behalf of the accused as follows:

> It was submitted by (counsel), that the deceased's behaviour, in refusing to come home and look after the children when called upon by her husband to do so, was an insult in the circumstances of the case. The refusal took place in front of three other female Aboriginals. There was evidence that under Aboriginal customary law an Aboriginal wife who fails to look after her children, by getting drunk and neglecting them, is liable to be punished by her husband, although the level of punishment admitted to by the Crown witnesses did not go beyond merely hitting such a wife (*Mungatopi* supra, at 7).

Case 2[2]: Brisbane, 28 August 1986

The appellant was convicted of murder of 'his woman' by stabbing her with a knife which penetrated 15 cm, passing through the liver, bladder and aorta. The defence was that the accused had not formed an intention to kill or to cause grievous bodily harm but intended to 'cut' the victim on the arm or on her side so as to make her go home with him, which she was refusing to do. The appeal was concerned with the refusal of the trial judge to allow an expert witness to be called to give evidence of what were said to be the cultural practices of Aboriginal people at Palm Island. It was said that an understanding of these practices would demonstrate that it was consistent with conduct on the Island for a person to use a knife in the way the accused did and yet not to be intending any serious harm.

In a statement supplied to the appeal court, it was noted that the evidence which the expert, a sociologist, would have given was to this effect:

> In general terms, the distinctions in our culture between discipline, punishment, violence and assault—including the use of weapons—have little impact on a very large section of the Palm Island community—male or female.

The witness said that, whereas a non-Aboriginal person brandishing a knife in Brisbane would be presumed by onlookers to have the intention of doing harm to someone, that would not be the perception of Palm Islanders if they saw such a scene on the Island. The witness said:

> Assuredly, some offences on the Island are motivated the same as the above example. However, a very large proportion of such uses have, as their motivation, a desire to discipline and punish a person for violation of a code

[2] *R v. Watson* 69 ALR 145, Court of Criminal Appeal, Queensland, 28 August 1986.

> of behaviour or conduct. And this code, as it applies to heterosexual relationships, is based upon a traditional sense of male superiority and feminine subservience. While not ritualistic, the men very often feel it is their 'right' to discipline 'their women' . . . Even the severity of the injuries is seen differently on the Island. 'I intended to cut her' is a phrase often heard and we may be mortified at the prospect of being 'cut' . However, this is very readily accepted by Palm Island people as attested to by the very large number of scars on these people.

In unanimously rejecting the appeal, the judges agreed that the proposed evidence was not such as to be admissible in evidence. The question of the acceptance by courts and qualification of expert witnesses will be returned to later in this paper. What is of present interest is that, in advancing a defence on behalf of the accused in this case, a proposition was put forward which, if accepted, could be said to have amounted to an attempt to legitimise male violence towards women on the basis that that was in accordance with Aboriginal tradition. Inferentially, it was being suggested that the use of violence by 'cutting' was regarded as acceptable by Palm Island women (and, presumably, by all of the men). Justice McPherson noted that if there was such a practice and custom then it was in contravention of the Racial Discrimination Act which incorporated the right to security of individuals from violence provided by Article V of the Covenant on Civil and Political Rights.

Issues Arising from the Cases

In both of the above cases the arguments advanced on behalf of the Aboriginal accused did not succeed in allowing a defence, or evidence relevant to a defence, which was said to reflect Aboriginal customary law. More often than not, this has been the case when such defences have been advanced. But similar arguments have been frequently successful when advanced during the sentencing process. Far from it being the case that Aboriginal people have been sentenced more harshly than non-Aboriginals, studies conducted on behalf of the Royal Commission into Aboriginal Deaths in Custody (Australia 1991, p. 216) confirmed, as a general principle, the accuracy of the observations of Chief Justice Campbell in one Queensland case in 1985:

> Crimes of violence by Aboriginals, when they occur on Aboriginal reserves and after the consumption of alcohol, have been dealt with by the courts in this State more leniently or sympathetically than has been the case of offences of a similar nature committed by Europeans and people of non-Aboriginal extraction (*Friday v. R*, [1985] 14A Crim R 471 at 472).

As a result of submissions made on behalf of accused people, similar comments to the following observations of Gallop J. have been repeated many times by sentencing tribunals:

> I cannot ignore the fact that whether the European society likes it or not, rape is not as seriously regarded in the Aboriginal community as it is in the European Community (*R v. Gus Forbes*, Northern Territory Supreme Court, Unreported, 29 August 1980. *See also R v. Burt Lane and others*, Northern Territory Supreme Court, Gallop J., Unreported 29 May 1980; and *R v. Mingkilli and others*, South Australian Supreme Court, Unreported, Millhouse J., 20 March 1991).

The first thing which can be said about the two cases which have been highlighted is that they have a very familiar ring to them for any lawyer who has handled Aboriginal cases in the two decades prior to 1992. It is tragic and commonplace for there to be so many homicide cases involving Aboriginal people as victims and for the person accused to also be Aboriginal and to be the male spouse of the deceased.

In commenting upon the two highlighted cases, and others, there is no intended criticism of the lawyers representing the accused in any instance nor of the expert whose evidence was proffered in the second case. A lawyer not only has a legitimate right to advance his or her client's interests—he/she has an obligation to do so. It is not at all uncommon to be instructed that a wound was inflicted as a punishment which was in accordance with Aboriginal custom and tradition. Notwithstanding that, the lawyer might have doubts about whether such an argument will gain much sympathy with the court—especially where the accused was drunk at the time of the offence. However, the lawyer may be obliged to put the matter to the court in accordance with his/her instructions, even if other members of the Aboriginal community would dispute the assertion.

Provocation of the 'Ordinary (Aboriginal) Person'

Reference to Aboriginal custom and tradition most frequently arises in homicide cases as a result of the accused seeking to rely on the defence of provocation. As noted earlier, this defence, if successful, reduces the charge from murder to manslaughter with consequential reductions in the sentence usually resulting. The defence of provocation can only arise where the jury is first satisfied that the accused intended to kill or to cause grievous bodily harm to his/her victim.

Before the defence of provocation may be considered by the jury, the trial judge must first be satisfied that there is evidence upon which a reasonable jury could find the defence established. Although there are important differences in the terms in which the defence is defined by the Criminal Codes of different states, it remains generally true that the defence applies where the accused has lost self-control as a result of the provocative actions or words of the deceased. The jury will be instructed by the trial judge that there are both objective and subjective factors which they must consider.

The jury must first consider whether the wrongful provocative acts were such as to cause an 'ordinary person' to lose self-control so as to do what the accused did. If the jury is not satisfied of that, then the defence has failed at this threshold point.

Having got beyond the threshold point, however, the jury then must consider whether this accused did in fact lose his self-control as a result of the provocation.

In making its objective evaluation as to whether the 'ordinary person' would be so provoked as to kill, the jury are entitled to take into account the age, sex, race, physical features, personal attributes, relationships and past history of the accused person. Thus the question really becomes: 'How seriously would the ordinary Aboriginal person, of the same attributes as this accused, view these provocative acts?'

Thus, to that point, the jury, while applying an objective assessment, is assessing the ordinary person from an Aboriginal perspective. Having thus tried to determine the gravity of the provocative acts from that perspective, the jury must then consider whether those acts could cause the ordinary person to lose self-control to such an extent as to kill as the accused did. But the power of self-control—the capacity to exercise control in response to that provocation—is judged not from the perspective of an Aboriginal person at all, let alone an Aboriginal person with all the history and characteristics of the particular accused. In deciding whether this ordinary person might lose self-control, the only characteristic with which he might be invested is the actual age of the accused. The High Court has recently explained the rationale for this as follows:

> No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test (*Stringel v. R* [1990] 97 ALR 1 at 12).

Very rarely is it the case, anywhere in Australia, that Aboriginal people are members of the jury before whom an Aboriginal person is tried and it would be almost unheard of for there to be a tribal Aboriginal person to be on a jury. So the jury (and the judge too, in considering the objective test in order to decide whether there is evidence fit for the jury to consider the defence of provocation) has to consider how provocative a particular act might be to an Aboriginal person, but must then require that the ordinary person react to that insult with a degree of self-control common to all people.

Clearly, one might be forgiven for thinking the non-Aboriginal jury might benefit from hearing some expert evidence so as to know what things would provoke an Aboriginal person and to know how he/she might react to the provocation, but at this point an anomaly arises. No evidence may be led to the

jury to inform them as to how Aboriginal people are, in fact, affected. The jury must work that out for themselves. This is not something which applies only to Aboriginal people. In a Victorian case where a Turkish Muslim was pleading provocation in defence to the charge of murdering his daughter who had disgraced him by losing her virginity, Lush J., after telling the jury that they could determine the severity of the provocation to a Turkish Muslim of the same attributes as the accused, then added:

> You may be asking yourselves, 'how are we to know what an ordinary conservative Turkish Moslem might have done in these circumstances?' There is no answer to that question . . . the law does not allow the calling of evidence to assist the judgement of the jury on a question like that. It is your problem (*R v. Dincer* [1983] VR 460 at 468).

While juries may be quick to recognise their ignorance about the customs and experience of a Turkish Moslem, they may well consider that they are experts when it comes to Aboriginal people—non-Aboriginals have held that opinion for a couple of hundred years! The blind refusal to acknowledge the fact that Aboriginal people rarely sit as jurors is one of the curiosities of Australian law. In considering the question of how a West African villager might react to provocation, the Privy Council was probably on safer ground when it said that expert evidence could not be called on the issue but that the issue would be resolved by 'the knowledge and common sense of a local jury' (*Kwaku Mensah v. R* [1946] AC 83).

The decision in Stingel's case, if applicable in those jurisdictions where the cross-cultural realities of Aboriginal cases most frequently intruded, would have made it even more difficult to relate European law to the aspirations and understanding of Aboriginal people when homicide occurred on Aboriginal communities. In the Northern Territory, where for many years the courts had adopted rules of practice which attempted to accommodate those cross-cultural realities within the common law, Stingel's case was regarded as having little or no application.

The Court of Criminal Appeal in the Northern Territory considered Stingel's case when deciding *Mungatopi* and noted that the High Court had said that its decision was confined only to an assessment of the Code in Tasmania and that that Code differed significantly from the Codes of Queensland and Western Australia. The Northern Territory Court noted that the Code of the Territory also differed from the Tasmanian Code, especially in its reference to the fact that the ordinary person was to be one 'similarly circumstanced' to the accused.

Therefore, in the Northern Territory, the approach which will continue to be applied to provocation cases will be that expounded by Kearney J. in *Jabarula v. Poore* (68 ALR 26), who said that the ordinary person was of the same race as the accused and in the same location and invested with the same characteristics. Kearney J. said that the ordinary person was one on the remote community where the killing occurred and was a person 'who possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have'.

While confining Stingel's case to the Tasmanian Code will lessen the difficulties experienced by those courts where provocation defences are most frequently relevant to Aboriginal people, the rule against calling evidence on the issues remains a nationally recognised prohibition. There are, however, ways around this restriction which many courts have adopted and which Kearney J. acknowledged when considering the Queensland case of Rankin, ([1966] QWN 10). Kearney J. observed of that case:

> It may be noted that in Rankin a cross-section of such Aboriginals appeared before the jury and gave evidence.
>
> Presumably, this afforded the jury a better opportunity to decide the question whether the provocation met this objective standard as to the loss of self-control. Direct evidence directed to establishing the standard is not, in my view, admissible (*Jabarula v. Poore*, 68 ALR 26 at 34).

Thus, while it is likely that Stingel's case will be of less significance in the Northern Territory, and probably also in Queensland and Western Australia, the decision nonetheless reaffirms the maintenance of objective standards as being critical determinators of the applicability of the defence of provocation. Where the objective standard allows consideration to be given to the situation from the viewpoint of an Aboriginal person then the determination is made, inevitably, by a non-Aboriginal fact-finder and, where the judgement is as to the self-control which could be expected to be exercised, then the question is determined from the perspective of a non-Aboriginal person. In all instances, in theory at least, evidence as to what actually might happen on an Aboriginal community when certain acts and behaviour takes place is not permissible.

Courts in the Northern Territory, Western Australia, Queensland and South Australia have the common experience of the need to attempt to relate the common law and their legislation to the expectations and understandings of Aboriginal people who, most often, are living a tribal lifestyle. This is particularly important when the event under examination is a killing, where passions are highest and where resort to pay-back responses are probable. In these circumstances, interpretations of the law which make the legal process even more irrelevant to the experience and understandings of the Aboriginal community are clearly not welcomed.

There is another factor which makes it even more unreasonable to maintain a rule which prohibits a jury from hearing evidence of what the actual life experience and cultural understanding are of Aboriginal people. Kearney J. noted the problems which the rule against direct evidence imposed at the broadest level and then noted how much more difficult it becomes when confronted by events which occurred at a particular community. As to the broader problem, he said:

> . . . The question (of the ordinary man) is particularly difficult when the fact finder is not a member of the 'community' in question, and that community

> consists of persons whose backgrounds and cultural values are different to his and are recognised by the law as being relevant matters. As I understand the law, the calling of evidence to assist the fact finder to determine community standards is not permitted (*Jabarula v. Poore*, supra at 28).

Kearney J. noted the justification for imposing an objective standard which was based on the understanding of the broader community in the following terms:

> . . . the question of the 'ordinary person' . . . now comes increasingly to the fore as presenting a general problem in Australia's pluralistic society: how to balance individualised justice and cultural pluralism with the need to create a broad sense of community common purpose, and commonly shared values. While Aboriginal communities in the Northern Territory remain as distinct communities possessing a separate culture and a degree of physical separation from the wider community, so the standard of the 'ordinary person' will vary in its application in the Territory (ibid. at 33-34).

It is this question of the cultural diversity of Aboriginal society which creates the second dilemma in applying a rule which prohibits the calling of evidence as to the actual cultural understanding of a community from which the offender comes. It is also an argument for the restriction, given that the greater the diversity of opinion the more difficult it may be for the courts to cope with application of any objective standard at all :

> . . . (The) standard is not 'fixed and unchanging'. The lifestyle of many of the Aboriginal inhabitants of the Territory has greatly changed over the last 30 years. However, there are still many Aboriginal communities such as Ali Curung, relatively isolated, oriented in part to traditional ways of life, and still possessing a distinct Aboriginal cultural identity (ibid. at 34).

As has been noted, Kearney J. held that the ordinary person is not only a person at Ali Curung but is one who 'possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have'.

In the end result, what appears to apply in the defence of provocation is an acceptance by the courts that an objective standard must be applied but that by devices which fall short of actually calling evidence—directed specifically to advising the jury of the reality of understanding of the events as Aboriginal people knew them to be—the blind ignorance of the jury can be partially overcome.

This rather unsatisfactory attempt at compromise is, again, not unique to cases involving Aboriginal people.

In the case of Yildiz, the Court of Criminal Appeal in Victoria (*Yildiz v. R* 11 A Crim R 115) considered whether it had been appropriate that evidence had been called from a Turkish interpreter to advise a jury as to the attitude of the Turkish community towards persons who had engaged in homosexual activities and, in particular, as to the attitude of the community towards a person who played the passive role in such acts. In this case it was the Crown which called the evidence

in order to establish a motive for the murder which took place. The court ruled that such evidence as to 'social attitudes' could be given. The court noted that the evidence did not stray into the prohibited category of evidence where the witness was purporting to give evidence as to the very issue which it was the role of the jury to determine (in fact what was the actual belief and intention of the person charged). It was said that it was a relevant issue to know whether there was a particular attitude held within the Turkish community. Whether the accused held that attitude was a matter to be separately determined.

It is interesting to note that the court in this case accepted that the evidence could have been given by an 'expert' who had made a study of Turkish attitudes on this issue but that it was not necessary for a person to be an expert to give such evidence. As Murray J. observed:

> An adult national can be well and expertly acquainted with the attitude of the population in which he lives towards social issues without having first-hand contact with the persons concerned (ibid. at 125).

The court recognised the dangers of such evidence and the limits of it. The Chief Justice said:

> But evidence of social attitudes is notoriously difficult and imprecise. Many members of the community in this country, in this State or in this city might have great difficulty in answering a question as to the attitude of this community to, for example, homosexual activities . . . The fact that a question is difficult to answer or to answer precisely does not however render the answer inadmissible. It may mean that the answer should be received with caution.

While recognising that the rules relating to the defence of provocation are of long standing and have traditionally maintained an objective overview, given that the defence is a merciful recognition of human frailty but nonetheless only applies when a person has otherwise been adjudged to be a murderer, it is difficult to understand why there would remain such a barrier to the reception of relevant evidence in such cases when there is not in other cases of murder. This is particularly anomalous when the issues could be expected to be outside the life experience of the average non-Aboriginal juror.

The Australian Law Reform Commission (1986, pars 416-27.), in its Customary Law reference, reported that the prohibitions against the calling of evidence on these issues should be removed by legislation. The ALRC noted that in many cases evidence had, in fact, been heard but said that on matters relevant both to provocation and also as to matters which might be relevant to the question of whether the accused had formed an intention to kill, the matter should be put beyond doubt. To date, no legislative response has occurred to that proposal.

Sentencing in Aboriginal Homicide Cases

On sentencing issues the courts have shown much less inhibition in seeking Aboriginal opinion as to the appropriate disposition of the cases. The problem here tends to relate more to the quality of the advice which the courts may receive and as to the extent to which the advice obtained reflects the diversity of opinion which might exist within the Aboriginal community on the relevant issues.

The courts have long recognised that the obtaining of Aboriginal opinion is by no means a simple task. As Muirhead J. observed:

> The court has for many years now considered it should, if practicable, inform itself of the attitude of the Aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on a consultation with Aboriginal communities in remote areas (*R v. William Davey*, Federal Court, Full Court, Unreported, 13 November 1980, pp. 5-6).

The courts have frequently relied upon statements from the Bar table as to community attitudes. When those statements come from the defence counsel, usually from an ALS lawyer or counsel instructed by the ALS, then the conflict of interest problems, earlier noted, can reduce the value of the advice received. The courts have been aware of this problem. Assertions that an accused person has or will suffer payback are frequently made and later evidence has sometimes suggested that the evidence given to the court in this regard was wrong. The case of *R v. Sydney Williams* (South Australia Supreme Court, 14 May 1976, Wells J.) was one illustration where it was claimed that the offender (who later committed a series of assaults on Aboriginal women and was twice imprisoned further) had not undergone the pay-back which the judge was told he would.

The courts have often expressed concern as to the reliability of advice which has been proffered to them. The Federal Court, which heard appeals for many years in the Northern Territory, was moved to observe:

> . . . If it is to be asserted that conduct of this sort should be seen as a reflection of the customary law of an Aboriginal community or tribal group, we are of the opinion that there should be evidence before the court to show that this was indeed the case and that what happened was not simply the angry reaction of friends of the deceased, particularly when the killing of the deceased and the injuries of the appellant occurred at a time when some, if not all, of those participating had been drinking (*Mamarika v. R* [1982] 63 FLR 202 at 206).

It has also been a recurring concern that what is asserted to be behaviour which has its foundation in customary law may in fact not have any legitimacy

in Aboriginal traditional life at all. This concern has been expressed often by the courts when dealing with cases in which an assault or killing of an Aboriginal woman has been the occasion of the charge. Such an assertion was put forward on behalf of a man who beat his wife with an iron pipe and the court observed:

> There was a suggestion made on behalf of the appellant, not by way of justification but by way of explanation, that in Aboriginal society it is not unusual for women to be beaten if they do not obey their husbands. In our opinion that answer goes no further than to describe something which may occur from time to time; it goes no distance towards establishing that such conduct is an accepted facet of Aboriginal society. The suggestion overlooks the fact that, at least in the experience of the courts, when such beatings take place it is usually after a great deal of alcohol has been consumed. It also ignores the very complex web of relationships between men and women in Aboriginal society (*Jadurin v. R*, 44 ALR 424 at 426 [Federal Court, Full Court]).

While the courts have continued to express their interest to learn what the Aboriginal community has to say with respect to the appropriate sentence, the judges have warned that the standard of sentences must meet a broader community standard and not just be determined by what the Aboriginal community asserts is appropriate. Sometimes the sentence will be harsher than that which, so it is asserted, the community considers reasonable. The Australian Law Reform Commission agreed that the courts should not disregard the values and views of the broader society (Australian Law Reform Commission 1986, chapter 21). It was invariably the case that when a sentencing judge announced (in a case involving violence against a spouse) that he would impose a sentence different to that which he had been told the community required, the offender received a heavier sentence as a result. In this respect it could be said that the judges have been more mindful of the rights and opinions of the victims than the lawyers representing the accused persons may have been.

The courts have also been subject, at times, to complaints that the broader interests of the community required that the judges ignore the reality of Aboriginal payback. Very recently (*R v. Minor*, Northern Territory Court of Criminal Appeal, Unreported, 13 January 1992) the Crown appealed against a sentence in a manslaughter case on the basis that, in taking into account the fact that payback was to be inflicted on the accused, the judge had sanctioned unlawful violence. The Court of Criminal Appeal rejected that suggestion. It is to be noted that in this case expert evidence was called during sentencing on this and other aspects relating to community attitudes to the offences.

A review of the cases suggests that there is no lack of willingness of the courts to learn Aboriginal attitudes as to sentence but there remains a continuing difficulty in guaranteeing that accurate evidence is provided and, especially, evidence of the attitudes of the victim and his/her family.

The Role of the Expert Witness

If the courts are to have greater regard to the realities of Aboriginal society and to the opinions of Aboriginal people as to the appropriate disposition of homicide cases, then the first requirement will be that the law is made sufficiently flexible so as to be capable of receiving direct evidence on relevant matters. The next issue is the method by which such evidence is provided to the court. Who should provide the evidence and how should it be evaluated?

As has been noted, many times evidence—directly or indirectly—has come from Aboriginal people themselves. This is clearly very valuable, but there are considerations which have to be taken into account even when the witnesses are Aboriginal. Opinions may be as varied in an Aboriginal community as in any other. Bias and vested interest are no less possible motivations for Aboriginal witnesses than for non-Aboriginal witnesses. Thus it is necessary that, if evidence of 'Aboriginal Opinion' is to be given to the court, efforts should be made to ensure that the court is getting the whole picture. This is a task which has usually fallen on the shoulders of the ALS lawyers and field officers. It is a task which is difficult, not only because of the limited resources available to those services (and time is the most limited of all resources), but is also difficult because of the conflicts of interest which can arise.

There is an important place for the expert witness to assist the court in gaining insight into these questions of Aboriginal opinion and custom. There are many continuing restrictions on the admission of expert testimony and they are well described by Freckelton (1985). While evidence from an anthropologist as to the behaviour of Aboriginal people in given situations might be very helpful to a jury in assessing the circumstances surrounding a homicide, the courts have shown considerable caution in allowing such evidence lest it be the case that the expert is really giving evidence on the very issue which it is the task of the jury to decide. It is this objection which is often decisive in causing the rejection of expert evidence which is directed to the question of the intention of the accused person at the time when a homicide occurs. The general rule has been stated by the High Court in these terms:

> But particular descriptions of persons may conceivably form the subject of study and of special knowledge. This may be because they are abnormal in mentality or abnormal in behaviour as a result of circumstances peculiar to their history or situation . . . But before opinion evidence may be given upon the characteristics, responses or behaviour of any special category of persons, it must be shown that they form a subject of special study or knowledge and only the opinions of one qualified by special training or experience may be received. Evidence of his opinion must be confined to matters which are the subject of his special study or knowledge. Beyond that his evidence must not go (*Transport Publishing Co Pty Ltd v. Literature Board of Review*, [1956] 99 CLR 111 at 119).

The restrictions on the reception of expert evidence are by no means precisely determined and, while there may be a continuing reluctance to expand the role of the expert evidence in areas such as the laws of provocation, the courts have shown a willingness to accept that, in more novel situations, the jury should not be denied the assistance of an expert's testimony.

The Court of Criminal Appeal in South Australia recently accepted that expert evidence could be called in a murder case in support of a defence of duress where the issue was the 'battered wife syndrome'. In this case, the Chief Justice noted the court's reluctance to allow evidence which went to the very question which the jury had to decide, and he commented that the mere fact that the jury would not have had any experience of the syndrome was not a justification for the reception of the evidence, since jurors are constantly asked to consider matters on which they have no life experience. His remarks reflected the traditional concerns of the courts about such evidence. He first noted that the defence of duress (like provocation) had both objective and subjective elements and that the evidence which was sought to be led related both to the likely state of mind of the accused as well as to the general response which women might have when placed in the particular situation. The Chief Justice observed:

> . . . the proffered evidence is concerned not so much with the particular responses of these appellants as with what would be expected of women generally . . . who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences (*Runjanjic and Kontinnen v. R* [1991] 53 A Crim R 362 at 368).

He then considered whether the evidence was in a category in which expert evidence was permissible at all:

> Not all knowledge, however, which is relevant to an issue and which forms part of an organised field of knowledge, may be imparted to a court by means of expert testimony. The law jealously guards the role of the jury . . . as the judge of human nature, of the behaviour of normal people and of situations which are within the experience of ordinary persons or are capable of being understood by them (ibid. at 368).

The issue was resolved in favour of allowing the evidence even though it sought to advise the jury of human behaviour in circumstances where juries had, in similar situations, been precluded from hearing such expert evidence because they were required to make their decision notwithstanding their personal ignorance of the situation which they were assessing:

> Nevertheless, some human situations or relations, or the attitudes or behaviour of some categories of persons, may be so special and so outside the experience of jurors . . . that evidence of methodical studies of behaviour or attitudes in such situations or relations, or of the attitudes or behaviour of those categories of persons, may be admissible. The fact that the accused

> person cannot be characterised as an abnormal person or that the evidence relates to the behaviour of normal persons in special situations is not necessarily a bar to the admission of such evidence (ibid. at 368).

As has been noted, the courts have accepted that expert evidence as to attitudes within the Turkish community could be accepted in some circumstances and not in others. The rules as to expert evidence are by no means certain, but on many occasions evidence from anthropologists, sociologists and historians, among other disciplines, has been of great value. It is certainly the case (and has been remarked upon, often with less than approval, by Aboriginal people) that in the Northern Territory there is hardly a community of Aboriginal people which has not been the source of the Ph.D study of at least one such person!

It is certainly not the case that such expert evidence, if available, is necessarily the sole answer to the court's needs. It may be very helpful evidence to complement the evidence obtained from members of the community. On the other hand, it is not axiomatic that such evidence is necessarily itself free from bias nor of subjective considerations which reduce its value. Anthropologists would also, no doubt, remark on their experiences of being called upon by 'defence' lawyers to provide evidence helpful to an accused person but then being unable to accommodate the lawyers because their experience would be more helpful to the prosecution. More often than not, such anthropologists are left to observe that their opinions are then not provided to the court at all.

There is little doubt that the Aboriginal communities want their opinions heard by the courts. They want those aspects of Aboriginal society which they believe are relevant to offences to be known by the courts. Such opinions were emphatically stated to the Royal Commission into Aboriginal Deaths in Custody as they had been years before to the Australian Law Reform Commission. The courts have stumbled along trying to find mechanisms which allow that expression of opinion to be heard. It will not adequately be heard until legislative change allows for evidence to be called on issues relevant to the defences in homicide charges and until the resources available to Aboriginal communities permit them the opportunity to present the diversity of Aboriginal opinion which arises after any homicide.

If there is legislative recognition given to the entitlement of the courts to hear evidence directly relevant to Aboriginal customs and behaviour—and to more precisely determine the manner in which Aboriginal opinion (and the diversity of such opinion as to sentence) may be provided to the courts—then it may well be that there will be pressure to incorporate into any such regime a mechanism to ensure that the diversity of non-Aboriginal opinion may also be heard more clearly. Roden J., in considering sentence of an Aboriginal man who had been convicted of the manslaughter of a non-Aboriginal, received much evidence relating to the difficult life of an Aboriginal person in Brewarrina, New South Wales. He found the evidence helpful but expressed concern that he did not then have the same amount of information from a non-Aboriginal perspective. He remarked:

> Of course I do not advocate that sentences be passed 'on behalf of' victims; nor should revenge be the object of sentencing. But so long as we respect community attitudes as a relevant consideration in the assessment of sentence, we should recognise the fact that one factor operating to mould those attitudes, is respect and regard for the violated rights of the victims of crime. They would better understand sentencing decisions, I believe, if they were given an opportunity of being heard before those decisions were made (*R v. Wise*, Supreme Court, New South Wales, Roden J., Unreported 19 October 1988).

Conclusion

While there is continuing evidence of Aboriginal dissatisfaction about the inability of the courts to fully take into account Aboriginal customs and experience in determining the guilt or innocence of offenders charged with homicide, and also as to the considerations which should be taken into account in sentencing such offenders, there is by no means a united Aboriginal opinion on these matters. Increasingly, there have been complaints by and on behalf of Aboriginal women that the legal system—and the Aboriginal Legal Services themselves—while providing a commendable service to Aboriginal men, have failed to represent the opinions of Aboriginal women, who are most often the victims of homicide in Aboriginal communities. There have been many complaints, not always publicly made, that submissions on behalf of Aboriginal men have mis-stated Aboriginal customary laws and traditions.

Before any moves are made to legislate so as to ensure that the courts are freed from restrictions in the reception of evidence as to Aboriginal customs and opinions, it will first be necessary for the Aboriginal Legal Services to seek the opinions of their constituents in reconciling the, at times, competing interests of those Aboriginal people whose civil liberties they must protect when they are accused of crimes and those Aboriginal people whose civil liberties have been violated when they have become the victims of crime.

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ABORIGINAL AND NON-ABORIGINAL HOMICIDE: 'SAME BUT DIFFERENT'

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THIS PAPER WILL ADDRESS THE QUESTIONS: 'IN WHAT WAY IS ABORIGINAL homicide different from that in mainstream society?', 'What are our perceptions of its character?', and 'What drives it?'. There are no unproblematic or uncompromised means of understanding such a complex and fraught area: rather, the 'searchlights' of different analytical and political perspectives can ultimately illuminate the overall picture, giving sense and depth to it even if many areas still lie in shadow. This paper offers the outline of a perspective that is grounded in some ten years of living and working at a close level with Aboriginal people in remote areas, but which, nonetheless, has to be seen as partial, contingent, and itself embedded within personal and wider social histories.

Aboriginal people with whom the author lived and worked, in explaining underlying structural differences in what appeared similar social phenomena, would say that they were 'same, but different'. Aboriginal homicide and that in the wider society are similar in many ways and yet are profoundly dissimilar in others.

Above all else, perhaps, a major difference lies in the reality that to discuss Aboriginal homicide in a forum such as this conference has to be seen in a *political* context. This is in no small part because of arguments (such as those of the criminologist Paul Wilson or of Black activists such as Bobbi Sykes) which see the appalling health, violence, homicide and other statistics

in some Aboriginal communities as directly and causally resulting from White Australian colonialism and continuing oppression. Black deaths, Paul Wilson (1982) argues, are ultimately caused by White hands, and from this perspective then they are *political* deaths.

It is not only the deaths which are constructed in political terms, however, but indeed their subsequent discussion. There is a pervasive and powerfully argued view amongst many Aboriginal people that fraught matters such as alcohol use, violence and homicide in Aboriginal societies should not be discussed in public forums. These are matters for Aboriginal people only, it is asserted, and their airing to non-Aboriginal audiences only adds to racist stereotypes of Aboriginal people. The strong adverse reactions from many Aboriginal people to David Bradbury's film *State of Shock*—which so powerfully and disquietingly portrays drinking and violence in a north Queensland settlement—is a case in point. Furthermore, it is contended that non-Aboriginal researchers, bureaucrats, media reporters and others make their professional careers by exploiting the misery of Aboriginal people, thus ultimately continuing the colonial enterprise of our own forebears under a different guise. The frontier thus becomes, in this argument, not so much a matter of physical but of social and political geography.

Careful attention should be given to these Aboriginal views. It is of immense importance that, whether we are researchers, administrators or indeed simply concerned individuals, a strong sense of accountability to Aboriginal people is maintained in what we undertake. This should include a keen awareness of the cultural, social and political systems within which we and Aboriginal people operate. At the same time, critical attention must be given to the question of exactly to whom we are accountable. Aboriginal people are no more a solidary and undifferentiated mass than are non-Aboriginal Australians. Within Aboriginal societies there are the dominators and the dominated, the exploiters and the exploited, the perpetrators and the victims. The film *State of Shock* (referred to earlier in this paper) paints a compelling and disturbing picture of the life history and circumstances of a young Aboriginal man who had been gaoled for the murder of his defacto wife, and who had been subsequently released after successful legal arguments that the murder was just one instance of the endemic violence in his community resulting from cultural disintegration under Queensland Government policies. Yet, powerful as the film was there were voices missing in it—those of the dead girl and of her family. In our work, whether as researchers, administrators or in other capacities, we should seek always to ensure that, along with Aboriginal people themselves, we are helping to strengthen the mechanisms *within* Aboriginal societies which allow those muted voices to be heard.

While being sensitive to concerns about the treatment of matters within Aboriginal societies, there is a need to examine some of the bases on which Aboriginal hostility to their discussion by others is predicated. One relates to an understandable resentment at the often cavalier, voyeuristic and exploitative manner in which sensitive and hurtful matters concerning Aboriginal people are dealt with by the media. Aboriginal people often complain they feel 'shamed' by such insensitive portrayals and quite rightly

observe that they reinforce racial stereotypes. Another arguably relates to a cultural view of knowledge which has common features across Aboriginal Australia—from remote to urban areas. In this view, even what might by researchers and others be seen as 'public' information is, as the Aboriginal people concerned see it, rightfully theirs and is not to be used by outsiders. Knowledge in this view cannot be objectified and detached from particular individuals and events but is intimately and necessarily bound up with them. There is a contrast, therefore, between a common Aboriginal construction of *knowledge*, as personalised and owned, with a western one of *data*, as objectified and public.

A third and critical dimension to both Aboriginal and non-Aboriginal views on questions such as discussions of sensitive matters within Aboriginal societies, is their grounding in and reflection of the fundamental racism of Australian society. It is the inculcation of racist ideology in non-Aboriginal Australians which allows us to unquestioningly accept the premise that 'Aboriginal' means 'other'—that our connections to this other are at best those of a sympathetic outsider, and that indeed this very 'otherness' is such that non-Aboriginal Australians have no legitimate basis upon which to interact with or comment upon features within Aboriginal society. Equally, it is a reflection of the insidious pervasiveness of racism in the wider society that much of Aboriginal rhetoric is predicated upon a denial of the nexus between their societies and the wider one. This is not to deny *difference*; rather, what is being argued is the philosophical and indeed political position that we are all necessarily connected—that individuals, events and forces within one sector are at a whole range of levels linked to those in others—and that to deny this is to unwittingly accept the tenets of the racism which underlies how White Australia deals with Aboriginal Australia.

Other similarities and differences between Aboriginal homicide and that in non-Aboriginal society will now be considered. Some of the statistics on homicide can provide a suggestive departure point. Their most striking feature, of course, is that Aboriginal people are massively over-represented as both victims of homicide and offenders. Figures from the Australian Institute of Criminology (Strang 1991) show that in the period 1989–90, Aboriginal and Torres Strait Islander people comprised at least 12 per cent of all homicide victims and 15 per cent of all offenders, while they made up only 1.5 per cent of the total Australian population. When the statistics for each state are examined, it is clear that in Western Australia and Queensland particularly, Aboriginal people are disproportionately represented in homicide statistics. In Queensland, for example, at least 18 per cent of victims and 22 per cent of offenders were Aboriginal or Torres Strait Islander people, who constituted only some 2.4 per cent of its population.

Within Queensland itself, anecdotal and other evidence suggests that it is the Aboriginal community settlements, above all else, where homicide occurs. Paul Wilson (1982), for example, found that across seventeen Queensland Aboriginal settlements between late 1978 and mid–1981, the homicide rate was 39.6 per 100,000—more than twelve times the Queensland average. The author's own figures for one remote settlement indicated a rate at one stage of over 400 per 100,000 (Martin 1988). Homicide, therefore, is not evenly

distributed across Aboriginal Australia but occurs disproportionately amongst the residents of Aboriginal settlements.

The Australian Institute of Criminology figures (Strang 1991, p. 31) also show that for the period 1989-90, of the cases where the primary relationship between the offender and victim was identified, only 12 per cent of victims had been killed by someone unknown to them. The figures further indicate that there was little inter-racial homicide in Australia. These facts are suggestive: the fact that, overwhelmingly, homicide takes place within racial groups and that, more generally, victims are killed by people from their family and social networks, is indicative of the discrete and separate social worlds within which many Aboriginal people move, and of how violence and anger is so often turned inwards rather than being directed at the wider society (*see also* Aboriginal Coordinating Council 1990, p. 25 which talks of 'rage turned inward').

For both White and Aboriginal people, alcohol influence is closely related to homicidal violence. Where the presence or otherwise of alcohol had been recorded, however, almost 50 per cent of White victims had been under the influence of alcohol compared with 80 per cent of Aboriginal victims, and 70 per cent of White offenders had been affected by alcohol compared with 86 per cent of Aboriginal offenders (Strang 1991, pp. 26, 30).

Given that it is often said that there are structural similarities between the position of women as dominated gender and Aboriginals as subjugated race, it is instructive to compare the statistics for homicide between the genders. While homicide is largely a male phenomenon, nearly 40 per cent of homicides in Australia 1989-90 were inter-gender (and of these, in over 25 per cent of cases the offenders were female) (Strang 1991, p. 24). If the homicide statistics are anything to go by, it would seem that the mutual exclusivity of the gender-based worlds in Australia as a whole is less marked than those based on race. Aboriginal women, it should be noted here, are at a far higher risk than are White women. The figures indicate that the risk of homicide for Australian women as a whole is half that for men—for Aboriginal women, it is over 70 per cent that of Aboriginal men.

To summarise to this point, the figures already discussed show us that Aboriginal people are far more vulnerable to homicide, both as offenders and victims, than are White Australians, and the figures suggest this vulnerability is even further increased for Aboriginal residents of community settlements. Alcohol is involved in the substantial majority of Aboriginal homicides—even more so than is the case for White Australians. The figures indicate that Aboriginal women are far more at risk than are White women and, further, that the violence culminating in homicide is overwhelmingly directed within Aboriginal societies rather than externally.

Homicide, whether for White or for Aboriginal societies, is not a phenomenon *sui generis*. Clearly, for both White and Aboriginal Australians, the statistics alone demonstrate that, as a social phenomenon, homicide can only be considered along with the related phenomenon of alcohol consumption. Clearly too, the violence that results in homicide in any society has to be considered in relation to all the other manifestations of violence in that society. Anecdotal and published evidence shows that in many areas of Aboriginal Australia,

particularly areas such as the settlement communities in Queensland, levels of assault and other violence are extremely high. For example, the study by Wilson (1982, pp. 4–5) reported a serious assault rate across the seventeen Queensland settlements that was over five times that in the wider community. Aboriginal researcher Judy Atkinson (1989, p. 11) quotes an estimate that domestic violence affects 90 per cent of Aboriginal families living in trust settlements, and Bolger (1991, p. 11) presents statistics which show Northern Territory Aboriginal women were 'grossly over-represented' in assault as well as homicide statistics.

These statistics would suggest that homicide is embedded within wider patterns of disproportionately high levels of violence in parts of Aboriginal Australia. These statistics can in turn be linked to others relating to suicide, health, life expectancy, alcohol consumption, indicators such as income, employment and educational levels and so forth, through arguments such as those advanced by Paul Wilson and by the Aboriginal Coordinating Council, among others. These all too common features of Aboriginal societies, it is argued, themselves result from the 'structural violence' perpetrated by White Australia on Aboriginal people—the dispossession, the institutionalisation, the oppression, the discrimination and the racism—which is a continuing feature of relations between Aboriginal people and the wider state. The bitterness and anger become directed, by and large, *internally* rather than against the White oppressors and reflect the overwhelming power differential between the two. The result is apathy, alienation, alcohol abuse, suicide and violence (Aboriginal Coordinating Council 1990, pp. 24–6).

These arguments, however, are but a partial truth, for they ultimately portray Aboriginal people simply as the passive victims of imposed forces, rather than as actively responding to them, and indeed, creating distinctively Aboriginal orders in the new, albeit often traumatic, circumstances (*see*, for instance, Reynolds 1981; Trigger 1992; Morris 1989). Aboriginal responses to White Australia are embedded in and arise from sets of particular perspectives, dispositions, emotional constructs, tastes, practices and so forth which might be broadly placed under the rubric of 'culture'. Culture, in this sense, is to be seen as dynamic, arising in part through the articulation between Aboriginal societies and the wider one, and at the same time structuring the nature of that articulation.

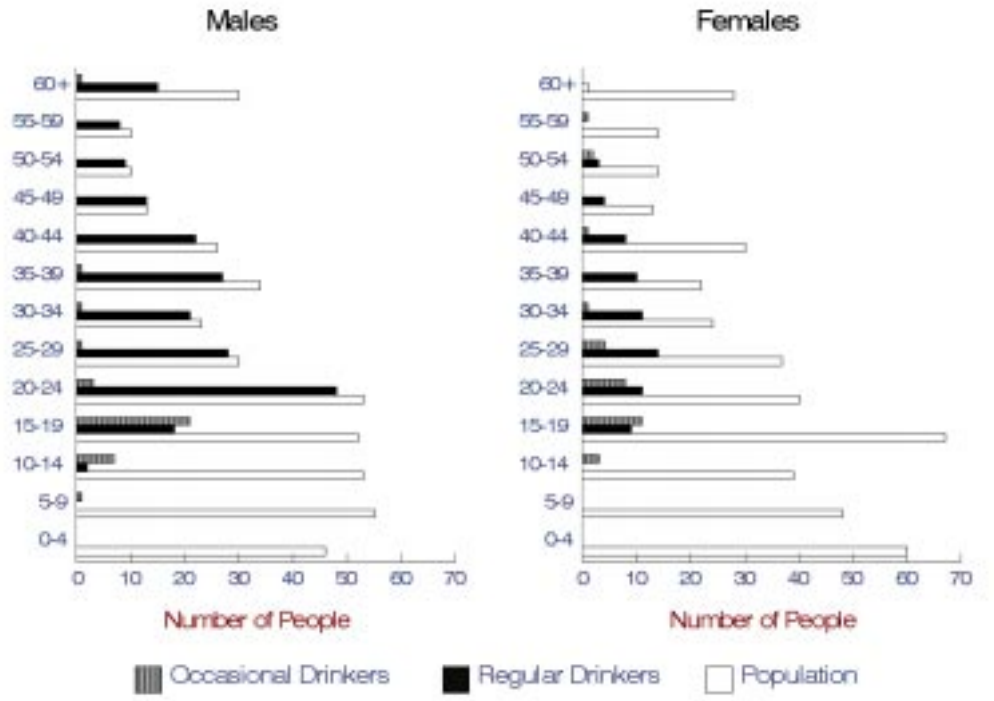
Such a perspective raises important questions when matters such as the abuse of alcohol within Aboriginal societies, the high levels of violence, or other instances of what might be labelled social pathology are considered. Firstly, the notion of 'culture' requires an allowance for differing perspectives and practices *within* Aboriginal societies and indeed between them. The author's own research in a remote Queensland area provides some suggestive data (Martin 1988). The data was gathered on drinking patterns and on various categories of offences for which arrests had been made over a number of sample years, and then plotted against the standard population pyramid for the area.

Figure 1 relates to patterns of alcohol consumption, primarily at the beer canteen but also from other sources including illicitly resold alcohol ('sly grog'). It can be seen that, while significant numbers of women drank, proportionately far more men drank for each age range. Proportionately more women were occasional drinkers than were men, although for both sexes over

the age of thirty years, regular (and often very heavy) rather than occasional alcohol consumption was the norm. (Note: while somewhat subjective in nature, the definitions used were that regular drinkers encompassed those who went to the beer canteen every night it was open, while occasional ones were those who were publicly known to drink, but did so intermittently or rarely. The ascription of being a 'regular', 'occasional' or 'non' drinker for each individual was given to the author by Aboriginal people.)

Figure 1

Male and Female Patterns of Alcohol Consumption



The relatively high proportion of occasional drinkers under the age of twenty resulted from the age limit of eighteen years usually enforced at the canteen—those under this age drank when other alcohol, such as 'sly grog', was available.

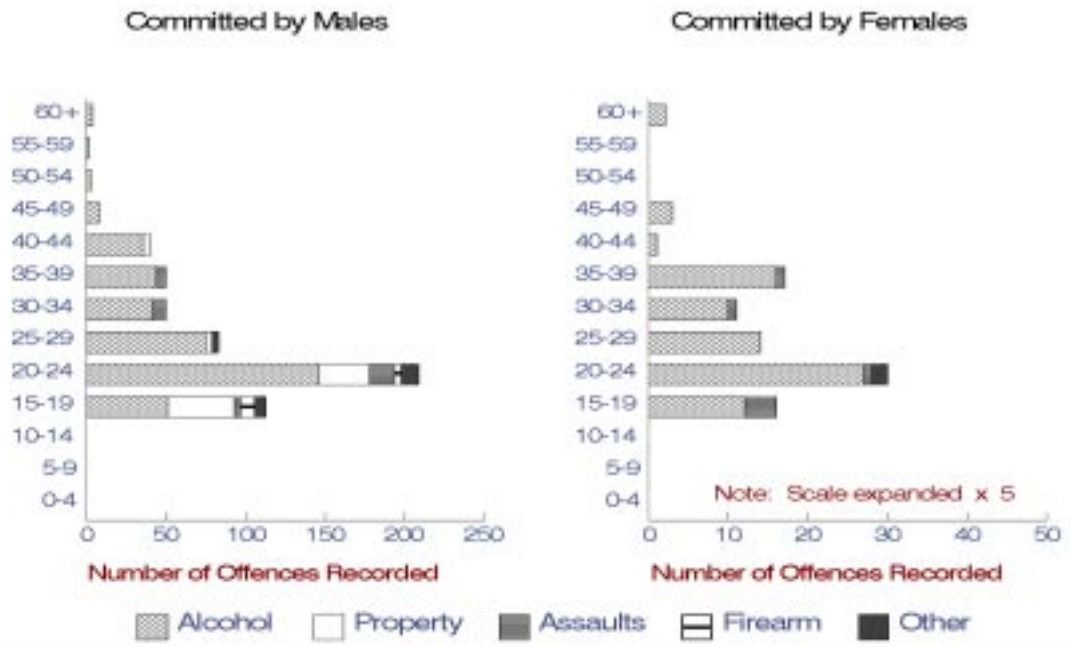
Significantly, by the time men reached adulthood, the overwhelming majority were regular or heavy drinkers, as were a smaller but nonetheless significant number of women in each age group. It should be noted that the generation of grandmothers—on whom the burden of child care was increasingly falling—were precisely those who rarely if ever drank, and that this has major implications for the type of society which will be reproduced in the future. Two points are to be noted: the first relates to the substantial

difference between the sexes in drinking patterns (reflected also in the violence and other statistics). Aboriginal men and women are *both* subject at a broad level to the institutions and forces of the wider society, and indeed to its oppression and racism. The ways in which Aboriginal women articulate with and respond to these imposed forms as opposed to men, however, depends precisely upon the differing dispositions, practices, emotional constructs and so forth which are seen within Aboriginal societies as appropriate to each gender.

The second and related point is that, while virtually all adult men of all ages drank regularly, and while field observations (Martin 1988) and evidence from elsewhere indicates that a whole range of offences are related (if in a complex fashion) to alcohol consumption, the offences for which men were arrested varied quite significantly across the generations—as did those between men and women. This can be seen in Figure 2, which aggregates offences for one sample year into five main categories. It should first be noted that these statistics relate to offences, not individuals—certain people were arrested on a number of occasions. Secondly, offence rates for women were less than one-fifth those for men, reflected in the different scales used in the figure for each.

Figure 2

Male and Female Aggregate Offences for One Sample Year



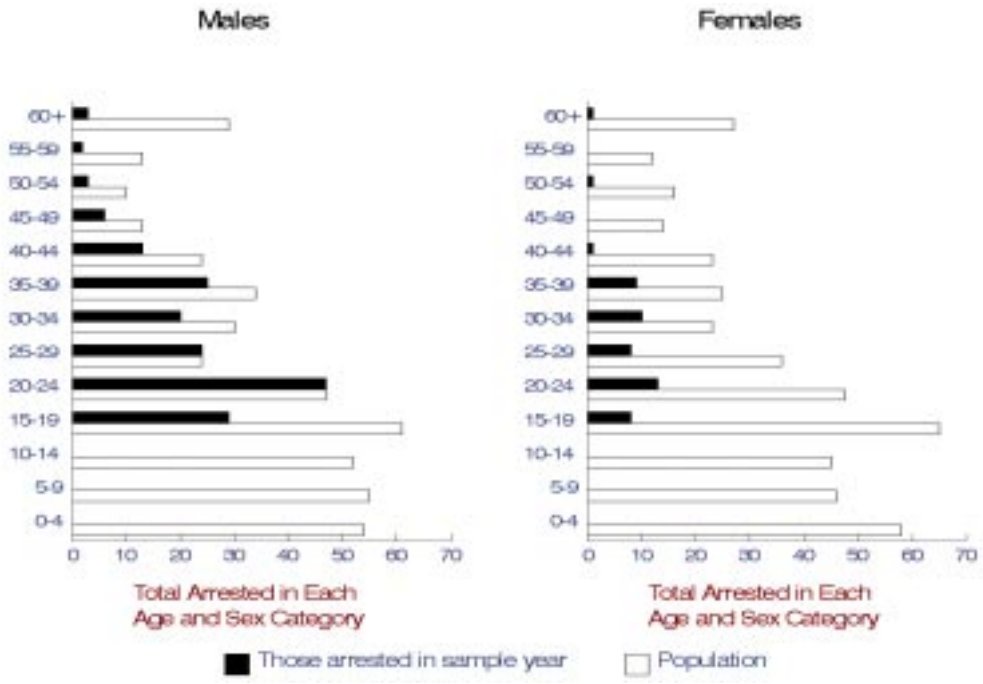
Thirdly, while arrests for alcohol-related offences predominated for all age ranges and for both genders, property-related offences (stealing cars, smashing windows and so on) were almost exclusively the province of males aged under twenty-five years and, to a much lesser extent, women aged

under twenty years. Firearms offences were almost always committed by young men aged under twenty years and to a lesser extent men aged between twenty and twenty-five years. No women were arrested for firearms offences, despite the fact that the weapons were usually accessible to anyone who wanted to get them, male or female. Assaults were also committed overwhelmingly by men—especially those aged between twenty and twenty-five years. While there is clearly the need for longitudinal studies, the explanation for these statistics lies, in part at least, in what constitutes appropriate and indeed meaningful behaviours for the different age ranges and for the sexes—that is, what could be called sub-sets of the emergent culture of the Aboriginal people of the area in question.

The data in Figure 2 has been aggregated and re-presented in Figure 3 in terms of the numbers of people arrested in the sample year by age and gender, shown against the population figures for each category. The data demonstrates clearly that, for this remote area, coming into contact with the Queensland justice system is normative rather than aberrant behaviour for certain categories of Aboriginal people, most particularly men. All men aged between twenty and thirty years were arrested at least once during this year, while far fewer women were arrested, almost none older than forty years.

Figure 3

Numbers of People Arrested in the Sample Year by Age and Gender



Such statistics should indeed be seen as signs of a society in deep distress and under severe pressure—but these statistics also suggest that many of the clues to understanding them lie within the society itself. It is important to make the point here that issues such as high levels of alcohol consumption

and violence are of immense concern to many Aboriginal people themselves, and that there is no single consensus about them. Aboriginal people have a range of strongly held views about these matters, as do White Australians in relation to the same phenomena within their own society. Nonetheless, ultimately analyses of such phenomena have to be grounded in Aboriginal cultural understandings and processes, as well as taking account of the complex articulation between them and the all-pervasive institutions and forces of White Australia.

The author's own research in one particular region of Aboriginal Australia has demonstrated that, while high levels of fighting and violence can be attributed in part to the effects of ever increasing intervention by the wider society, they are also deeply rooted in cultural values relating to such matters as the high stress on personal autonomy, on appropriate behaviours for each sex, on notions of morality, on how individuals are seen to be related to wider social groupings, on the appropriate expression of emotions such as anger, and on how individuals are expected to act upon the world in order to achieve their ends or redress wrongs done to them (Martin 1988, p. 16).

Reser (1990), in a comprehensive research paper prepared for the Royal Commission into Aboriginal Deaths in Custody, argues that in Aboriginal Australia there is a marked difference in the domain of the emotions in comparison with White Australia, particularly in the socialisation of affect, in modes of emotional coping, and in the centrality of emotional experience and expression. There is, in Reser's view, a substantial elaboration of the expression of anger in Aboriginal cultures, and he argues that to understand violence in them it is essential to appreciate the real cultural differences in the means of emotional expression and the functions that are served by such expressions of anger (Reser 1990, p. 30).

Patterns of alcohol consumption cannot be separated from such culturally based notions. Whatever the original motivations for its use, either individually or collectively, alcohol consumption takes on its own dynamic and meanings. Alcohol consumption is not an individual activity but a quintessentially social one, with socially-ascribed meanings. Aboriginal drinking, as the work of many researchers shows, has been widely assimilated to basic Aboriginal cultural notions such as those of sharing and reciprocity (Brady & Palmer 1984).

Aboriginal people with whom the author worked made it very clear that they thought people got drunk in order to release the feelings of anger and aggression towards others that they normally repressed while sober. Yet it is too simplistic to see alcohol consumption causally related to violence in any straightforward fashion. Rather, excessive alcohol consumption and violence together in some areas of Aboriginal Australia are becoming intrinsic dimensions of an emergent, if problematic, contemporary culture (*see*, for example, Reser 1990, p. 54).

Where do such arguments lead and, of course even more critically, where do they lead Aboriginal people? A concentration on the internal dynamics of Aboriginal societies to the exclusion of an analysis of the institutions and processes of the wider state could lead to justifiable charges of 'blaming the victims'. Yet, 'blame' is not a useful concept here. Rather, in understanding

something of the immense complexity of the manner in which the institutions of White society impinge upon and feed into Aboriginal lives at all levels, the full import and impact of the continuing history of colonialism in this country can be truly understood. In so doing, we will be better equipped to argue for the structural changes which will enable Aboriginal people themselves to address the problems within their societies.

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HOMICIDE AND INTELLECTUALLY DISABLED OFFENDERS

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THE ISSUES WHICH PERTAIN GENERALLY TO PERSONS ACCUSED OF MURDER but who may be suffering from a mental abnormality also pertain to the intellectually disabled accused. These issues include whether or not the person is entitled to a defence of insanity, or the defence of diminished responsibility—available in New South Wales, Queensland and the Northern Territory (Hayes 1991, pp. 145–57). The issues are complicated in the case of the intellectually disabled accused by the fact that the accused may be dually diagnosed, that is, in addition to the intellectual disability (which in itself may make a particular defence available) there may be a concomitant diagnosis of mental illness or behavioural disturbance.

Although the terminology 'insanity defence' or 'defence of mental illness' may be offensive to the person with the intellectual disability and his or her advocates, provided the disability affects the person in such a way that the elements of the *M'Naghten* Rules (1843 10 Clark and Fin.200:8 ER 718; per Lord Chief Justice Tindall at 722) are satisfied, this defence is available. The *M'Naghten* Rules state that:

> To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, so as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

In particular, the issues as identified by Ierace (1988) are whether intellectual disability could result in a defect of reason to the extent that the person did not know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong; and whether intellectual disability is a 'disease of the mind' for the purposes of the *M'Naghten* Rules. Ierace examines the cases which establish that this defence is open to the intellectually disabled accused, irrespective of the presence of psychiatric abnormality.

An example of the defence of diminished responsibility is that which is stated in Section 23A of the New South Wales *Crimes Act 1900* which states that:

> Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.

In *R v. Byrne*, Lord Parker CJ, distinguished the term 'abnormality of mind' from the *M'Naghten* Rules thus:

> 'Abnormality of mind', which has to be contrasted with the time-honoured expression in the *M'Naghten* Rules 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong; but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. (*R v. Byrne* [1960] 2 QB 396, and approved in *R v. Purdy* [1982] 2 NSW LR 964)

Therefore, the expert evidence to be presented in relation to a defence of diminished responsibility for an intellectually disabled offender is:

- that the accused has an abnormality of mind;
- that the abnormality has arisen from the causes mentioned in the statutes including a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury; and
- that there is substantial impairment.

The defence of diminished responsibility is a controversial one, partly because in some jurisdictions there is the necessity to establish a link between the accused's mental responsibility and the act of killing. The controversy, and the role of expert witnesses is canvassed elsewhere (*see* Hayes 1991).

Patterns of Homicide by the Accused with an Intellectual Disability

It would appear from the limited data available, particularly in Australian jurisdictions, that offences against persons, including the offence of murder is disproportionately over-represented amongst prisoners with an intellectual disability. A study in New South Wales prisons (Hayes & McIlwain 1988) found that amongst the intellectually disabled population (an IQ score of less than seventy and deficits in social and adaptive functioning) 22 per cent were charged with murder. When the borderline category (those with an IQ of between seventy and eighty, and serious deficits in social and adaptive functioning) were included, the prevalence dropped to 7.4 per cent, compared with the census of Australian prisoners at 6 per cent. These findings tend to be confirmed by a Western Australian study (Jones & Coombes 1990) which found 16.7 per cent of the intellectually disabled prisoner population were charged with murder compared with 6.3 per cent of the general prisoner population.

Research world-wide (Hayes & Craddock 1984, chapter 2) indicates that intellectually disabled offenders tend to commit offences against property and persons, including murder, assault, arson, break and enter, and car theft. Offences for drugs, false pretences, robbery, or escape—that is, offences which require a more sophisticated degree of intellectual ability and planning—are infrequent (Hayes & McIlwain 1988; Jones & Coombes 1990).

The offences committed by intellectually disabled forensic patients who are dually diagnosed as having a psychiatric abnormality in addition to their intellectual disability tend not to differ significantly from those who are not classified as forensic patients.

In terms of severity of crimes committed by intellectually disabled offenders, there tends to be a clustering of offenders who have committed repeated minor violations, and those who have committed a major offence such as murder, whereas the 'middle ground' of offences—particularly those involving planning ability and reasoning skills tends to be under-represented.

The profile of the intellectually disabled prisoner in Australia (Hayes & McIlwain 1988; Jones & Coombes 1990) is as follows: the average age tends to be in the twenties; unemployment is the norm, and those who are employed have low status jobs; very few have received schooling after the age of 16; most are single; Aboriginal people are over-represented; alcohol abuse is prevalent and is commonly related to the commission of the offence; severe deficits in social and adaptive skills are present, particularly in the areas of communication and social interaction skills; there is a high prevalence of multiple problems such as psychiatric abnormality, behaviour disorder, sensory deficit, or communication deficit in addition to the intellectual disability.

The pattern of the specific offence of homicide amongst intellectually disabled offenders has received scant attention, probably owing to the small numbers involved. Preliminary examination of client data assembled by the author indicates that there appears to be a tendency for the accused with an intellectual disability, when compared with the general offending population, to be more often involved in homicide against unknown persons, such as a

person encountered in the street, or the victim of a sexual assault by the accused. When the intellectually disabled accused murders a person known to him or her, it is likely to be a member of their family or a person resident in the same group home or institution. It is important to note that alcohol is implicated in the commission of the offence in many cases, whereas the abuse of other legal and illegal drugs appears to be rare. It also appears that homicides involving bizarre elements or mutilation of the victim tend to be rare. The pattern is more likely to be that of the individual lashing out aggressively, perhaps without even being fully aware that their actions could result in the death of another person. Some intellectually disabled offenders do not have a clear concept of death.

Prevention and Control

Ironically, attempts at prevention or control of homicidal behaviour by intellectually disabled persons usually only occurs after the commission of a violent and sometimes fatal offence. There is frequently a pattern of acts of violence against other people, such as the other residents of a group home or staff members or family members, against property perhaps involving arson or smashing possessions, or against the person him or herself, such as acts of self-mutilation. Typically, there have been ad hoc attempts at controlling the problem, usually with behaviour management techniques or tranquillising medication. The person may have been shifted to a number of different places of residence, owing to violent and unpredictable behaviour. This exacerbates the lack of continuity of any behavioural management programs and enhances the likelihood that new staff members will not be able to anticipate and deflect violent behaviour. The person may have been found to be unmanageable by their family. Their unmanageable and aggressive behaviour has often caused problems for years, in a number of situations, including at school and in the workplace. The work history may also be fragmented owing to violent and unpredictable behaviour causing termination of employment. Two case histories illustrate the irony of a situation where appropriate resources are allocated to the individual only after the commission of a violent offence.

Case 1 — Peter

At the age of sixteen, Peter resided in a group home in a country location. Despite a devoted and caring family he had been moved into a group home when his behaviour within the family context became unmanageable. As he grew in physical stature he posed a threat to other members of the family. After being resident in the group home for some period of time, he brutally murdered another resident, and mutilated the body. As far as could be determined, he did not suffer from any psychiatric abnormality. He was incarcerated in a series of juvenile institutions, following a finding of unfitness to be tried. He had received a limiting term at a special hearing, and was supervised by the Mental Health Review Tribunal. On the expiration of the limiting term, the supervision by the Tribunal also ceased. He was released from custody and sent back to the family. Within weeks, there was

turmoil within the family owing to his aggressive behaviour towards his mother in particular (he threatened her with a knife) and the strong suspicion that he had sexually molested his three year old sister. The family were assisted in their attempts to manage his behaviour and keep him at home by teams of intellectual disability professionals, but there were limitations on the time and availability of the professionals. Following the intervention of several agencies (the agencies will not be identified here, in order to preserve their confidentiality and the confidentiality of this case) the relevant government department was ordered to find an appropriate placement and to institute management procedures as a matter of urgency. Since being removed from his family, Peter has had a number of placements including a secure ward for very violent and seriously intellectually disabled people. This was felt to be inappropriate for Peter whose level of intellectual disability is mild to borderline. He was then placed in a ward environment which included patients with psychiatric illnesses and behavioural disturbances, most of whom required short-term intervention and supervision. During all of this time, the relevant government department allocated a special nurse to him on a one-to-one basis, twenty-four hours a day, seven days a week. With intense professional involvement, and the application of appropriate behaviour management techniques by extremely skilled professionals, as well as the one-to-one supervision, Peter's behaviour has improved to the point where there have been no violent outbursts for at least nine months. He is being considered for a work placement. He is not in a secure contained environment, but whenever he leaves the ward he is accompanied by his caregiver. When he goes on work placement, the caregiver will go also. There is no doubt that the financial and professional resource input into this case has been warranted in terms of the prevention of harm to others in the community and the improvement in Peter's behavioural disturbances. Nevertheless, had this level of resource application been available to Peter and his family a decade ago when his behaviour first began to be a problem, it is highly likely that the death of his co-resident in the group home could have been prevented. There is as yet no clear indication of how long Peter will require the intense one-to-one supervision.

Case 2 — Allen

Allen is a 31-year-old man who is functioning in the mild range of intellectual disability, on a percentile rank of three. He has serious social and adaptive skills deficits, his functional age equivalents being between five years and seven years. His intellectual disability was detected soon after birth. From the age of eleven he resided in a series of institutions for intellectually disabled young men, including being a boarder at a special school, and at one stage being moved to a group home in a remote country location. He has on occasions been admitted to psychiatric hospitals, and has lived on the streets, as well as having been resident in inner-city boarding houses. His mother died when he was twelve. His sister died when he was in his mid-twenties. His father cannot care for him owing to the father's psychiatric illness. Allen suffers from epilepsy. He has been described as manipulative and

unpredictable. It was not uncommon for Allen to be banned from or kicked out of places where he resided either because he did not pay his rent or because he used aggressive and intimidating behaviour towards others and caused damage to property. Despite maintaining contact with his community resource person, he lived a life characterised by dislocation, and the use of violent and aggressive behaviour in order to get his own way. He was unable to find and maintain employment, nor to become involved in educational opportunities. He was placed under the guardianship of the relevant Minister in November 1979. In 1989 Allen was charged with murder, following a night of violence during which he and two co-accused violently assaulted and robbed a number of people, mostly street dwellers. One of these assaults resulted in the death of the victim. Allen was found unfit to be tried and following a special hearing of the facts, he was given a limiting term of seven years. For some time he was in the protection wing of a maximum security gaol, and was also admitted to the prison hospital on several occasions. Eighteen months ago (approximately January 1991), Allen was transferred to a special unit for intellectually disabled offenders where he has received consistent behaviour management programs which have addressed his social and adaptive skills deficits, as well as his violent and aggressive behaviour. He has been gradually taken off all tranquillising medication except that which is necessary for the management of his epilepsy. During his fitness hearing, one expert witness expressed the opinion that Allen would be incapable of learning any new skills and that his behaviour in the future could only be managed by massive doses of tranquillising medication. This appears not to be the case. Allen engages in a number of activities in the special unit. He works at assembling the earphones used on aircraft. He cleans his cell, plays sport and participates in games of cards, assembles jig-saw puzzles, participates in literacy and numeracy programs, unit meetings, and personal relationships programs. His behaviour is stabilised and he has had no major outbursts of violence for some months. He is now able to articulate his problems and frustrations more clearly and has achieved the ability to empathise with other people. He shows insight into his own behaviour and is able to predict consequences, for example, that losing his temper is not worthwhile because he is moved out of the special unit to a segregation unit for a period of time. He has been reclassified from a maximum security prisoner to a medium security prisoner, and will shortly be transferred to a medium security special unit. It is unfortunate that, in order to obtain appropriate and consistent programs from motivated and professional staff in a secure residential environment, it was necessary for Allen's living conditions and social interactions to deteriorate to the point where he was virtually living on the streets and committing random violent assaults. Had he received appropriate resources when he was first institutionalised at the age of eleven, it is unlikely that he would currently be in prison.

Predicting and Preventing Violent Behaviour

The prediction of violent behaviour is an area which is notoriously unreliable (Litwack & Schlesinger 1987). Nevertheless, under certain circumstances it may be possible to predict violent behaviour accurately enough to justify certain types of intervention and preventative actions. More specifically:

1. There is no research that contradicts the common sense notion that when an individual has clearly exhibited a recent history of repeated violence, it is reasonable to assume that that individual is likely to act violently again in the foreseeable future unless there has been a significant change in the attitudes or circumstances that have repeatedly led to the violence in the recent past.

2. There is no research that contradicts the notion that even when an individual's 'history' of violence is a somewhat distant history of a single act of (serious) violence—which has led to a continuing confinement—it can reasonably be assumed that that individual will act violently again, if released from confinement, if it can be shown that he or she maintains the same complex of attitudes and personality traits (and physical abilities) that led to violence in the past and that, if released, the individual would confront the same circumstances that led to violence in the past.

3. There is no evidence regarding the validity of predictions of violence that are based upon threats, or statements of intention, to commit violence.

4. Even in the absence of a history or threats of violence, there may be occasions (for example, when an individual is clearly on the brink of violence) when preventative action is justified based on a prediction of violence.

5. Although mental health professionals have yet to demonstrate any special ability, not shared equally by lay persons, to predict violence, they may well yet demonstrate such an ability—at least in certain circumstances, or, at least they may well possess special techniques or understandings that can improve the accuracy of predictions of violence (Litwack & Schlesinger 1987, pp. 236–47).

When these principles are applied to the intellectually disabled person accused of homicide, a number of specific principles of preventative action emerge. The first is that if a person has committed a violent act, they are likely to do so again unless there has been a change in their attitudes or circumstances. Such a change seldom occurs with the intellectually disabled accused persons who commit homicide. The early acts of violence, as can be seen from the case histories described above, usually result in less rather than more supervision and intervention, and less likelihood of placement in an appropriate residential situation and involvement in appropriate programs to

change behaviour. Ultimately, when all community resources have been exhausted, including placement with a long-suffering family, the person usually ends up in some form of confinement in a psychiatric institution, an institution for intellectually disabled people, or prison. Unless the person receives appropriate programs within the institutional environment, they are likely to reoffend either whilst in the institution or upon release.

One research study (Cocozza & Steadman 1978) has found that 42 per cent of patients evaluated as dangerous committed an assaultive act immediately following hospitalisation. These findings have been confirmed by other studies (Rofman, Askinazi & Fant 1980). The situation emerges, therefore, of a person who, having been placed in an institution as a result of violent behaviour, has a nearly one-in-two chance of committing further violence once in the institution. The likely consequence of such an act within the institution is removal from programs which would be of benefit in learning to control behaviour and placement in an even more deprived environment. A cynical and iconoclastic definition of insanity states that insanity is repeating the same act over again but expecting a different result. Under this definition, systems which seek to prevent further violent behaviour by incarcerating offenders in institutional environments—wherein they receive no resources or appropriate programs—and expecting their violent behaviour to somehow cure itself are certainly insane.

A further principle which emerges from the points outlined above is that, in relation to the accused with an intellectual disability, it is highly likely that mental health professionals possess special techniques which *can* improve the accuracy of predictions of violence. The fact that the mental abnormality is long-standing in nature—unlike some acute psychiatric illnesses, for example—and that social and adaptive skills deficits—including deficits in coping behaviours and the abilities to control inappropriate aggressive outbursts—can be identified using standard adaptive behaviour scales means that experts in this area are probably in a better position to predict and, therefore, with appropriate resources, prevent further violent behaviour.

In many instances of homicide by an accused with an intellectual disability, the expert evaluation, the trial, and the subsequent imprisonment are a situation of 'shutting the stable door after the horse has bolted'. It appears that the government departments allocating resources are exhibiting an unwillingness to learn from past experience which they would consider decidedly abnormal if it were paralleled by the learning behaviour of the intellectually disabled accused.

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CURRENT LEGAL ISSUES IN FORENSIC PSYCHIATRY

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IT IS A CURIOUS IRONY THAT THE ROLE OF THE FORENSIC PSYCHIATRIST HAS become integral to the prosecution and defence of homicide charges but that so many fetters and limitations—legal, practical and pecuniary—circumscribe what can be offered by the expert witness in this role. The reduction of legal aid funding is reducing the use of mental health professionals in all contexts in the legal system. Australasian forensic psychiatrists still have no code of ethics specific to them as a branch of psychiatry, although the American Association of Psychiatry and Law formulated such a code some years ago. Training in legal issues for psychiatrists remains minimal in most jurisdictions in Australia and New Zealand and, on the other side of the coin, lawyers are disturbingly ignorant about the potentials and limitations of forensic psychiatry as a discipline (*see*, for similar comments, Kreiling 1990). At a legal level, the law on determination of fitness to plead remains shrouded in uncertainties, and the common law rules of expert evidence substantially reduce the testimony that may be given by psychiatrists.

This paper will concentrate upon the uncomfortable position occupied by forensic psychiatry in the anterooms of the courts and in the courts themselves as a result of the contemporary problems faced by psychiatrists who find themselves involved in the legal process. It suggests that the relationship between the law and psychiatry is one of host and unwelcome but obligatory guest. No expert witnesses are more mistrusted than those said to be unable to provide hard data, and yet lawyers have done little to educate themselves as to what forensic psychiatry can and cannot offer them.

The author will argue that reform of the restrictive common law rules of expert evidence has been unacceptably long in the coming but that these changes, when finally legislated for, will be no panacea for the fundamental tensions between the disciplines. The result of these tensions is that the service which might otherwise be provided by forensic psychiatrists in homicide and other cases is unsatisfactorily limited, depriving both Crown and defence of expert evidence which might have been extremely germane to the issues to be tried.

The Impact of the 1990s Depression

The most notable effect of the recession/depression of the 1990s for mental health professionals is that it has struck at the heart of the viability of private practice in the exclusive role as a forensic practitioner. Very few psychiatrists and psychologists continue to practise solely as consultant experts in the forensic setting—most have had to increase their clinical load, seek part-time work in universities or redirect their orientation entirely. A good part of this flows from the straitened circumstances of legal aid commissions whose requests for assessments and reports for sentencing hearings used to provide the 'bread and butter' work for the practitioner.

This has the unsatisfactory consequence that the pool of experts thoroughly versed in the ways of the courts—able to communicate diagnoses, prognoses and assessments well, and accustomed to the rules of evidence and the role of the forensic expert—is very shallow. Judges and magistrates soon become aware of the philosophical inclination and the views of the experts who are available to testify on matters such as appropriateness for rehabilitation, retributive sentencing, victim impact, malingering and the possibility of false report in sexual abuse cases. Such familiarity has the potential to inure them to the testimony of such professionals.

Moreover, areas such as intellectual disability, paraphiliac sexual activity, assessment of capacity to plead, post-accident assessment and even pre-sentence reporting are being dominated by a very small number of individuals with some names being almost mandatory for certain kinds of assessments. The result is that the different schools of thought on controversial issues in forensic psychiatry, which ideally would be represented in the forensic marketplace, are often just not available. This is detrimental to the quality of argument that can be brought in homicide cases and all other areas in which forensic psychiatrists may be called as witnesses.

Training

The consequence in the reduction in numbers of psychiatrists and psychologists practising exclusively in the forensic area reinforces the argument that training for forensic practitioners is necessary, although it might lose some of its immediate appeal. If the future of forensic mental health practice is that fewer individuals will practise exclusively as forensic experts, the need for training of all psychiatrists and psychologists will increase as a more diverse group than has hitherto experienced the phenomenon will find itself summoned to court from time to time.

Consequently the role of organisations such as the Australian and New Zealand Association of Psychiatry and Law (ANZAPPL) is crucial as a bridge between the professions and a forum for interdisciplinary training and exchange of ideas.

Code of Ethics

Although forensic scientists have developed a code of ethics specific to their sub-branch of science (Freckelton & Selby 1993), this is an advance not yet matched in the fields of forensic psychiatry or psychology. In fact, the College of Psychiatry is only now in the process of drawing up a general code of ethics and one can only suspect that the drafting of provisions that relate to the many and quite different proprieties that should bind forensic psychiatrists is as yet a long way off in Australia and New Zealand. In the USA, the American Association of Psychiatry, Psychology and Law has formulated such a code—it may be that its broader based cousin ANZAPPL could attempt something similar for psychiatrists as well as for psychologists who also have no specifically forensic code of ethical practice.

Lawyers' Ignorance

Although practitioners in the criminal, family, personal injury and workers' compensation fields constantly come into contact with forensic psychiatrists, it is remarkable how few adequately understand the elements of psychiatric diagnosis and terminology. It is a rare lawyer indeed who is familiar with DSM–III–R in spite of the fact that the Manual (American Psychiatric Association 1987) is surprisingly accessible and a trove of information is in a form that can regularly be used by solicitors and barristers alike. Similarly, Ziskin and Faust's (1988) landmark work *Coping with Psychiatric and Psychological Testimony*—an essential for advocates examining or cross-examining mental health experts in the USA—is almost unknown in Australia.

The result of lawyers not adequately understanding forensic psychiatry, its warts, limitations and potentials, is that our usage of psychiatrists as expert witnesses leaves a great deal to be desired but also the quality of our cross-examination can be seriously deficient. Important 'parameter questions' may not be asked and the rigour which is regularly employed by counsel in cross-examination of other forms of witnesses is not often enough applied in the case of forensic psychiatrists, thereby providing an incentive for poor practice and creating inadequate accountability among such experts.

While trial lawyers in the USA view the acquisition of information which may assist in the quality of their cross-examination as an opportunity to gain 'the winning edge', such initiative is nowhere near as evident in Australia. The task of luring solicitors and barristers to educative sessions, training programs or forums for interdisciplinary meetings has proved a challenging one indeed for organisations such as ANZAPPL and the Australian and New Zealand Forensic Science Society. If a direct pecuniary benefit cannot be clearly demonstrated, it seems difficult to interest more than a handful of lawyers. Perhaps greater exposure to North American competitive legal practice and the development of under and post-graduate programs that have a cross-disciplinary character, such

as those in Forensic Psychiatry and Medicine and the Law, will gradually erode this unfortunate closed-mindedness.

Complexities of Forensic Mental Health Practice

Many anomalies continue to exist in the law as it relates to the practice of forensic psychiatry. Some of the complexities and quirks are of curiosity value; others are significant for the forensic practitioner on a day to day basis. The problems inherent in the defences of insanity and sane and insane automatism, as well as in their outcomes should they be established, have been discussed by many others (*see* McSherry 1992; Slovenko 1988; Halpern 1989; Myers 1989). This paper will now touch upon some of the more banal procedural and evidentiary conundra that beset forensic work for the mental health professional.

Fitness to Plead

From time to time forensic psychiatrists and others are called upon to determine whether a defendant is fit to be tried. The task of determining whether in a realistic sense a person is capable of understanding legal proceedings and of playing a role in them can pose its practical clinical difficulties. Not least among them, of course, is the fact that defendants' mental states can be constantly shifting and themselves are affected by the imminency of a homicide trial.

However, there are significant legal problems as well (see *R v. P* [1992] 57 A Crim R 211 per Nader J.; *R v. Donovan* [1989] 39 A Crim R 150; *R v. Podola* [1960] 1 QB 325). A recent County Court trial in Victoria demonstrated the many unresolved procedural complexities that attach to a psychiatrist's assessment of fitness to plead (*DPP v. Mark Dalton*, unreported, Warrnambool County Court, November 1991). The accused was charged with inflicting serious injury in bizarre circumstances on two elderly persons after he had become delusional subsequent to consuming very large amounts of marijuana. He was immediately involuntarily committed to a mental hospital after being arrested. He was diagnosed as exhibiting schizophreniform symptoms and his doctors waited to see whether the delusions would abate after cessation of drugs. That was to enable them to postulate an explanation for his behaviour such as cannabinoid psychosis or an acute onset of schizophrenia. Some symptoms persisted, so the latter diagnosis was tentatively made.

By the time of trial the accused was stabilised on medication, although showing signs of side effects. When asked how he wished to plead by the judge, he became very confused and said that he wanted to plead guilty when in fact the reverse was his intention. His anxiety was extreme and he lowered his shaved head for all the initial stages of the trial below the level of the dock. This was enough to concern the trial judge about whether he was fit to plead. The prosecution indicated that this may be an issue but did not adopt a position on their observation. Defence counsel assured the bench that full instructions had been taken, that the accused was lucid and capable of

understanding proceedings and participating in them as contemplated under the *Presser* rules (*R v. Presser* [1958] VR 45).

The trial judge remained anxious and determined that there was an issue to be tried so a separate trial before a jury on fitness to plead was ordered. The first problem encountered was a submission from defence counsel that the accused be able to exercise a right of challenge to potential jurors for fear that some of them may know him because the case was taking part in a country town with a large mental hospital in which the accused had previously resided for a time. The difficulty was, of course, that the fitness to plead trial was in part directed to determining whether in the trial proper the accused was capable of exercising rights such as challenging potential jurors. The judge allowed the accused the right. But who was to carry the burden of proof? Neither side had wished to take the point. The judge determined after lengthy argument that the prosecution had 'raised' the matter so they had the carriage of it (*see R v. Donovan* [1990] 39 A Crim R 159; *R v. P* [1991] 57 A Crim R 211). Relying on old authority, it was in due course held that the prosecution had to prove unfitness beyond reasonable doubt but that if the defence had raised the issue, they would have had to prove unfitness on the balance of probabilities.

After the prosecution failed to adduce any psychiatric evidence, the whole fitness to plead trial coming as a surprise to them, defence counsel put a no case submission to the judge at the end of the prosecution case asking for the matter to be removed from the jury on the basis that the prosecution had tendered no up-to-date information on the issue whatever. This made a mockery of proceedings because it was clear that the defence had had a forensic psychiatrist recently examine the accused and that the expert was in the best position of anyone available to provide an informed assessment of the accused's current mental state.

The prosecution submitted that the fitness to plead trial was not truly an adversarial proceeding but was to be correctly characterised as an inquiry. Thus a no-case submission was not appropriate. Lengthy examination of the authorities demonstrated that no binding cases governed the situation but that the proposition that the trial on fitness to plead was an inquisitorial inquiry conducted by the jury with the assistance of the trial judge was a novel, if plausible proposition. The trial judge elected to allow the no-case submission and in due course upheld it on the basis that no evidence on the accused's mental state at the time of the trial had been led which was sufficient to put the issue before the jury.

The case highlights the quaintness and unsatisfactory nature of the fitness to plead trial process (Comparo Criminal Procedure [Insanity and Unfitness to Plead] Act 1991 [UK]) and the ludicrous situation whereby the only person with a professional perspective on the issue at hand could quite properly be suppressed from giving evidence by defence counsel on instructions of undetermined capacity from the accused.

The Uncertainties of the Rules of Expert Evidence

It is the common law rules of evidence that determine the admissibility of expert witnesses' testimony. To all intents and purposes, the rules have been developed in the area of expert evidence over the past 150 years. With the exception of the 'field of expertise rule', the rules of expert evidence are relatively uniform in the common law world. They operate to confine within surprisingly tightly defined boundaries the evidence of opinion that may be given by expert witnesses. The rules can fairly be criticised as both arbitrary and unpredictable in their application, resulting in a difficult hurdle for even the experienced forensic psychiatrist to jump.

Each one of the following five rules of expert evidence is the subject of significant legal controversy and uncertainty, resulting in real practical difficulties for the forensic psychiatrist endeavouring to give opinion evidence employing the techniques and knowledge which are customarily used in a clinical setting.

- *The Expertise Rule* (*see* Freckelton & Selby 1993)

  Experts must be experts. A line of authority has recently developed that denies the right of the forensic psychologist to give evidence on the likelihood of a person's suffering from a mental illness (*see*, for example, *R v. MacKenney & Pinfold* [1983] 76 Cr App R 271 at 275; *Pesisley v. R* [1990] 54 A Crim R 42 at 52), this apparently being adjudged a line of demarcation between forensic psychiatry and forensic psychology. While the recent words of Wood J. are particularly directed to psychologists, they also have a message for forensic psychiatrists:

  > I consider it necessary to observe once again that it is important that clinical psychologists do not cross the barrier of their expertise. It is appropriate for persons trained in the field of clinical psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter into the field of psychiatry (*Pesisley v. R* [1990] 54 A Crim R 42 at 52)

  Psychiatrists also must not cross into areas such as psychopharmacology in which most are unlikely to have sufficient qualifications to match what might be said by those also possessing pharmacology qualifications. Many other areas of specialist work, such as with sex offenders, may be regarded by the courts as sufficiently specialised to demand of those purporting to give expert evidence in respect of them a history of relevant experience and study. The tendency toward such specialisation is likely to become more entrenched in the years to come with courts' adjudications on the adequacy of qualifications reflecting the phenomenon.

- *The Common Knowledge Rule* (*see* Freckelton & Selby 1993; Freckelton 1987)

  Expert witnesses may not give evidence on matters of common knowledge, these being defined as matters within the ordinary ken of the jury on which they do not need and would not profit from expert assistance. This stricture, which is the subject of considerable legal controversy, has been interpreted to mean that forensic psychiatrists may not give evidence which assesses the propensity of a person to tell the truth or which relates to the capacity of an 'ordinary' person to form the necessary intent to commit a crime. However, the arbitrariness of this prohibition was recently noted by the Australian High Court the majority of whose members in *Murphy v. R* (1989) 167 CLR 94 expressed reservations about the utility of the normal/abnormal dichotomy and to some degree opened the door to evidence relating to witnesses' credit. Nonetheless, though, on the basis of the common law's determination that ordinary persons are capable of understanding other ordinary persons, even when they are placed in far from ordinary circumstances, the diminished responsibility and insanity defences aside, forensic psychiatrists may not give evidence about a range of matters into which they would generally be regarded as having acquired a professional insight.

- *The Field of Expertise Rule* (*see* Freckelton & Selby 1993)

  An expert's evidence must have emerged from the experimental to the demonstrable, the test of this consisting in whether the bases of the technique or theory have been generally accepted within the relevant expert community. Recent caselaw from State Supreme Courts has gone further and further in the direction of adopting the United States Frye test (*Frye v. United States* 293 F1 1013 (1923)) as a criterion for the admissibility of evidence in new areas of expert endeavour (*Bonython v. R* (1984) 15 A Crim R 364 at 366; *R v. Tilley* [1985] VR 505 at 509; *Eagles v. Orth* [1976] Qd R 313 at 320; *R v. McHardie & Danielson* [1983] 2 NSWLR 733 at 763; *R v. Harris* [1990] VR 310 at 318; *Carroll v. R* (1985) 19 A Crim R 410; *R v. Lewis* [1987] 29 A Crim R 267), as far apart as voice analysis evidence, bite mark evidence and the evidence on the effects of wearing seatbelts. Thus, for example, in *Runjancic & Kontinnen v. R* ([1991] 53A Crim R 362) King CJ. employed the terminology of the *Frye* test to determine whether he should admit expert psychological evidence on the phenomenon known as 'battered woman syndrome' to assist the defence assertion that the accused had acted as she had under duress arising from her being the long-term victim of domestic violence.

  Evidence arising from recent advances in biochemical understanding of mental illness, the recognition of recurrent patterns of behaviour by victims of particular stressors (*see* analysis in Freckelton & Selby 1993) or even capacity to predict dangerousness

may henceforth be subjected to the criteria of the *Frye* test. Such an approach is inherently extremely conservative and will operate to restrict the categories of 'new wave' evidence that might otherwise be given by forensic psychiatrists.

- *The Basis Rule* (*see* Freckelton & Selby 1992)

  Expert witnesses must have, as the basis of their opinion, data that are already or will be admitted in evidence. Thus, information gained from psychiatric nurses, family members or police officers can only form part of the foundation for an assessment of mental state if such data are called in evidence by counsel. This can operate as a significant restriction upon the foundational material otherwise available for the formation of professional opinions.

  However, the basis rule is an emerging rule with its origin in a 1975 English case (*R v. Turner* [1975] 28 834; *see also R v. Abadom* [1983] 1 WRR 126 at 131) which is now receiving significant support from state decisions around Australia (*see*, for example, *R v. Perry* (1990) 49 A Crim R 243 at 249; *R v. Aldridge* (1990) 20 NSWLR 737 at 744; *R v. Gardiner* [1980] Qd R 531 at 535; *R v. Haidley & Alford* [1984] VR 229 at 234; *R v. Jeffrey* (1991) 60 A Crim R 384). Its status awaits High Court clarification. The consequence of whether an exclusionary rule of evidence exists to prevent the forensic psychiatrist functioning as a conduit for the views and impressions of others, or whether the issue is simply one of the weight properly to be accorded to such evidence, has a profound impact for the practising psychiatrist who is asked to undertake a forensic assessment.

- *The Ultimate Issue Rule* (*see* Freckelton & Selby 1993)

  Expert witnesses may not give evidence on the very issue to be decided by the court. The best interpretation of the current status of this rule is that expert witnesses such as forensic psychiatrists must not employ legal terminology to express views on 'insanity', 'diminished responsibility', 'testamentary capacity' or the like. In practice, forensic psychiatrists are given substantial latitude in relation to the operation of this rule but every now and again the rule is invoked to restrict the evidence given by mental health professionals.

The controversies which beset each one of the rules of expert evidence are thoroughgoing and affect the fundamentals of practice of the forensic psychiatrist and the psychiatrist in clinical practice called into court from time to time. Ironically, the only one of the rules to have received High Court scrutiny in the last twenty years is the most troubling—the common knowledge rule. After the decision in *Murphy v. R* ((1989) 167 CLR 94) the small amount of certainty that did exist—lacking in conceptual justification as it was—has now disappeared, and no substitute is immediately apparent for the determination of when expert psychiatric and psychological evidence

may be given on the accused person's mental state at the time of the commission of an offence.

The Australian Law Reform Commission (1985; 1987) proposed major changes to the technical rules of expert evidence. Its recommendations—which involve a refocussing of the expertise rule, the abolition of the common knowledge and ultimate issue rules and omission of the basis and area of expertise rules—have been adopted by the Federal and New South Wales governments in the Evidence Bill 1991 (Cwlth) and the Evidence Bill 1991 (NSW). However, even should the Bills pass both Houses of Parliament, the expert evidence provisions are sufficiently broad to leave the courts fundamental discretions in relation to the reception of expert evidence. In short, evidence law reform in the USA did not end the controversies in the expert evidence area; nor will it in Australia.

Conclusion

Forensic psychiatry in Australia is entering a new era with the establishment of professorial chairs in the various states. Unfortunately, lawyers are not as yet matching psychiatrists in preparedness to learn about their sister disciplines, but a new era of increasingly deregulated competitive legal practice may well change that. At the same time, however, a combination of the recession and what is likely to be an era of fiscal constraints for legal aid bodies is having the effect of forcing most forensic practitioners into part-time status. The onus on the clinical practitioner to be able to adapt to the courts thereby becomes the more pressing and the need for interdisciplinary understanding the more important. The formulation of a code of ethics for forensic psychiatrists has an important role to play in clarification of the role of the forensic practitioner and in establishing acceptable standards of practice.

Changes to the law have an important part to play in making the law more comprehensible and accessible for those who are subpoenaed as expert witnesses into its portals. Clarification of the law relating at least to automatism and fitness to plead is necessary, as is modernisation and codification of the rules of expert evidence. However, the fundamental issue that will continue to beset the relationship between the disciplines of law and forensic psychiatry remains one of fixing upon the criteria for deciding when expert psychiatric opinions about accused persons' mental states should be admitted as expert evidence—when ordinary persons in juries will be assisted by such opinions. In short, the issue to be resolved remains: how trusted and welcome a guest is the forensic psychiatrist at the legal table?

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FIREARMS LAW REFORM: THE LIMITATIONS OF THE NATIONAL APPROACH

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THE ONE DEFINITE CONCLUSION THAT CAN BE DRAWN FROM THE PROCEED-ings of this conference is that gun homicides will continue to occur in Australia. There will be another Strathfield, Surry Hills, Queen Street, or Hoddle Street—less sensational, everyday, domestic killings will continue; a few times a year entire families will be annihilated in different parts of Australia when one member of a family uses a firearm against other family members; as well as suicides. There is also substantial agreement that such homicides are preventable by the simple measure of restricting the access of these potential offenders to firearms. Unfortunately, consensus breaks down at this point. There are many who argue that the only effective measure for the reduction of gun homicides is to reduce the level of gun ownership in the entire community—to completely prohibit the possession of certain weapons, and to define and monitor closely the persons permitted to use firearms and the weapons owned by such people. Those who advocate such measures point to analogies with the regulation of other dangerous items and substances. For example, the purchase and use of fireworks is prohibited in many parts of Australia because of the risk of serious injury. The use of certain dangerous pesticides and herbicides is prohibited in the interest of public health or environmental protection, notwithstanding evidence that a particular substance is a very effective agent of control.

On the other hand, there are those who argue that regulation should not be directed at the firearm, but at the human agent. It is argued that particular

individuals identified as potential offenders should be labelled, placed on a prohibited persons register and denied access to firearms. The class of prohibited persons and the methods to be used to identify them is far from settled even amongst those advocating this position. The groups targeted at different times include criminals (variously defined), people who have undergone psychological or psychiatric counselling, and migrants in their first five years of residency.

These different perspectives have led to a fierce debate in the Australian community and considerable timidity on the part of political parties and governments in addressing the problem of the regulation of firearm use. The aims of this paper are to identify the policies that are likely to reduce the level of gun homicide in Australia, to debunk some of the myths, and to place gun law reform in a realistic political perspective.

The Issues

The gun debate in Australia quite properly revolves around several issues: whether there is evidence of a relationship between gun availability and gun deaths, what kinds of legal controls will reduce the pool of weapons in the community and prevent access to people likely to misuse firearms, and whether a national approach is a prerequisite for effective reform. Unfortunately, the gun debate is also confused by inappropriate parallels drawn with the situation in the USA and some rather dubious conclusions drawn from local experience: the constitutional right to bear arms, the possession of firearms as a fundamental freedom of expression, the political muscle of the pro-gun lobby, the assertion that the Unsworth Government lost the 1988 New South Wales state election because of its stand on guns, and the belief that a psychological register of disturbed persons will prevent firearm homicides and assaults.

The Size of the Problem

There are at least 3.5 million guns in private hands in Australia, outnumbering police weapons by ten to one. More than one-quarter of households has a gun (Chappell et al. 1988). About 700 Australians die each year from gunshot wounds. Most of these deaths are suicides, but about 100 are homicides. Guns are used in one-quarter of all homicides and half of all domestic killings (Strang 1991). The New South Wales Domestic Violence Advocacy Service reported that 15 per cent of their clients claim that their partner owns or has access to a firearm. Death threats are common.

According to medical and criminological opinion, the main factor behind gun-related crime is gun availability. Considerable academic effort has been expended on testing this hypothesis. Studies in the USA and Europe show that firearm homicide rates correlate with gun ownership or availability (*see*, for example, Lester 1991). This is hardly surprising, because most homicides are committed on the spur of the moment. If someone is very angry they will use whatever weapon they can get their hands on, and if that happens to be a gun rather than a knife, it 'substantially increases the probability that death,

rather than injury, will be the end result' (Chappell et al. 1988, p. 1). As the Australian Coalition for Gun Control noted:

> the use of a gun requires considerably less proximity, strength, agility, skill and squeamishness, and offers less opportunity for self-defence, than does the use of a knife or other weapon (Australian Coalition for Gun Control 1991, p. 2).

The contrast was clearly illustrated in Sydney a few days after the Strathfield shooting when a man wielding a knife went on a rampage in Ryde, causing serious injury to several people, but only one death.

Essentials for Gun Control

There is substantial agreement amongst those in favour of strict gun laws as to the reform agenda. Experts (for example Chappell, Grabosky, Wilson, Mukherjee, and so on), inquiries such as the National Committee Against Violence, and concerned organisations (Gun Control Australia, New South Wales Domestic Violence Committee and so on) all agree that the main aim of gun controls should be to reduce the number of firearms in Australian society. It is important to prevent access to firearms by people with a propensity for violent crime or other misuse. There is also considerable agreement that the minimum requirements include:

- the prohibition of certain weapons and ammunition—namely automatic and semi-automatic firearms;
- the registration of all firearms;
- the licensing of all gun owners and shooters, with restrictions based on age (over 18-years-old), character, and need or reason;
- a cooling-off period between applying for a gun licence and receiving the licence;
- bans on the importation of certain weapons;
- bans on the private sale of firearms; and
- minimum Australia-wide standards incorporating all of the above.

There is occasional disagreement as to the best method of ensuring appropriate safe-keeping for firearms and ammunition, but all agree that in most states and territories the existing requirements are inadequate to prevent accidental, impulsive or intentional misuse.

Debunking Some of the Myths

Despite the rhetoric of freedom and rights invoked by the gun lobby, there is no constitutional right in Australia to bear arms, and even constitutional right

in the USA is often misinterpreted and exaggerated. There is no common law right to possess firearms. The possession of firearms is conduct properly regulated by the parliaments of each state and territory in accordance with the wishes of the people. Legislative restrictions on freedom are common and are widely accepted in the public interest—compulsory roadside random breath tests are the norm across Australia in the interests of reducing the number of road accidents; the wearing of seat-belts is compulsory, and in some states the possession and use of fireworks is completely prohibited because they are so dangerous.

The list of substances and items prohibited or restricted from general use in Australian society is enormous. There is nothing special about firearms. As a society it is a legitimate and indeed desirable exercise for Australia to determine under what circumstances citizens should be allowed to have access to firearms and how those circumstances are to be legally defined, monitored and enforced.

There are no common law, constitutional or legal barriers to effective gun laws in Australia. According to some, however, there are significant political barriers to reform. The political strength of the Australian pro-gun lobby is sometimes compared to that of the National Rifle Association in the USA.

But who is the gun lobby in Australia? The Sporting Shooters Association of Australia (SSAA) is the most vocal group, but it is a relatively small organisation with a relatively small budget. What is the evidence that it is a powerful organised force, a well-oiled political fighting machine?

Despite the threat of political action the 'gun lobby' has not succeeded in electing a single member to a parliament anywhere in Australia. It is alleged that approximately $1 million was spent by the gun lobby in the 1988 New South Wales state election: a sizeable amount for a single issue group, but small in comparison to the electoral budgets of the minor independent parties, let alone the major parties.

The other main identified group within the so-called gun lobby, are the farmers. An analysis of farmers' views on gun controls fails to reveal a homogeneous position agreeing with the SSAA. Many farmers are strongly in favour of very restrictive gun laws. They are well-aware of the stock costs, personal danger and property damage suffered at the hands of irresponsible weekend shooters.

The 1988 New South Wales state election is often cited as an example of the political muscle of the gun lobby. It is often asserted that the Unsworth Government lost the election because of its stand on guns. However, there is no empirical evidence on the public record to support this assertion. Public opinion polls (Saulwick 1991) and the Australian Labor Party's private polls (ANOP 1988) in 1988 demonstrated overwhelming public support for the Unsworth Government's strong stand on guns. But this was not enough to overcome the many other issues running against this Government—Darling Harbour, time for a change, perceived corruption, perceived inability to deal with law and order, 'early release' schemes, the Jackson and Farquhar convictions, perceived mismanagement of government finances, the monorail, to name a few. It is often forgotten that the Cain Government in Victoria was re-elected in 1988 on a strong gun law platform, not very different from that

advocated by the Unsworth Government. It is both dangerous and misguided to accept uncritically the assumption that the pro-gun lobby in Australia is a powerful political force.

The Australian pro-gun lobby has borrowed a slogan from the USA: 'Guns don't kill people—people do'. It argues that gun controls should target certain groups of people, rather than firearms themselves.

The gun lobby insists that no amount of legislation will inhibit a determined criminal or crazed murderer. It argues that, rather than restricting the availability of guns generally, the solution is to deny gun licences to undesirable people. The SSAA has proposed a register of prohibited persons—that is those with criminal convictions, a history of domestic violence or psychological problems. It claims the Strathfield, Hoddle and Queen Street murderers would have been detected and stopped by such a register, because they all had some signs of psychological disturbance.

The idea of a register has several problems. One relates to privacy. Shooters are concerned about their privacy being violated by a register of lethal weapons. Do shooters expect the rest of the community to consent to their psychological conditions being listed on a police computer, on the off-chance that they might one day apply for a gun licence?

In any event the medical establishment rejects the proposition that only identified disturbed persons kill. Dr William Andrews, who chairs the New South Wales branch of the Royal Australian and New Zealand College of Psychiatrists pointed out that:

> the vast majority of homicides are carried out by people who are psychologically indistinguishable from the general population prior to the event (*Sydney Morning Herald*, 4 September 1991, p. 4).

And mass murderers are not typical killers. An indiscriminate massacre of innocents by a complete stranger serves to focus attention dramatically on the dangers of firearms. But the serious business of killing proceeds steadily, on a small scale, among families and acquaintances, in loungerooms and outside pubs. Men kill their wives and girlfriends. Men kill each other in drunken brawls. In Wallace's (1986) study of homicide in New South Wales, only 17 per cent of offenders had prior convictions for violent offences and 1 per cent had a history of mental disorder.

The Development of National Uniform Laws

Prompted by the Strathfield incident, the Australian Police Ministers' Council (APMC) held a special meeting in October 1991 to discuss gun control. The APMC considered the New South Wales Parliamentary Committee's report and came up with its own recommendations for uniform gun laws. The need for uniform laws was demonstrated by Joseph Schwab, the 'Top End Killer', in 1987. Schwab bought four guns over the counter, completely legally, in Queensland. He did not have to show he needed the guns or that he was a fit person to possess them—the ability to pay $4,000 was the only criterion. In the Northern Territory and Western Australia, where he killed his five victims, he would have found it much harder to obtain those weapons legitimately.

The Federal Government does not have the constitutional power to enact laws regulating possession, other than in the narrow federal and territorial jurisdiction and thus a cooperative state/federal arrangement is the only possible option. In December 1991, Senator Tate, Minister for Justice, used the Customs power to stop imports of automatic and semi-automatic weapons from overseas. But this does not restrict the sale or possession of weapons made here, or of those imported before the ban.

The Federal Government proposed at the APMC that all semi-automatics be declared prohibited weapons, with only a few categories of people entitled to possess them. This is essentially the position in Victoria since the Hoddle and Queen Streets massacres and is also the case in the Northern Territory. However, New South Wales, Queensland and Tasmania would not agree. Under these conditions, if uniformity becomes the overriding aim, the proregulation states are required to observe the lowest common denominator.

Australian Police Ministers' Council Resolution

The police ministers recommended:

- a ban on the sale of all military and military-style semi-automatic firearms, except for 'government and government approved' purposes;
- a special licence required for possession of other centre-fire semi-automatic and self-loading shotguns, for example, the more expensive (but equally deadly) weapons made for hunting. A 'stringent' (but totally undefined) test of 'need' was agreed to;
- a ban on sale of self-loading weapons with detachable magazines holding more than five rounds;
- licensing for other classes of long guns based on a genuine reason to own;
- national character checks on licence applications;
- licence based on 'appropriate qualifications and training';
- licences to last six years, except for the lowest class of licence in Queensland and Tasmania, which will still be issued for life;
- a 28-day cooling-off between application and licence;
- that guns and ammunition must be stored separately and securely;
- compulsory confiscation of guns on domestic violence call-outs or breach of licence conditions.

Deficiencies in the Proposed National Uniform Laws

The meeting failed to agree on one major provision—registration of guns themselves, as opposed to licensing their owners. Registration is favoured by police because it would allow them to keep track of individual weapons. This can be extremely useful in investigating crime. For example, New South Wales has registration for pistols, which meant that when heart surgeon Dr Victor Chang was murdered, police had a list of all legal owners of the type of gun used. By contrast, there is no such list for Ruger rifles as used in the murder of Federal Police Assistant Commissioner Colin Winchester. Registration would also mean police going on a domestic violence call-out would know what weapons were likely to be in the house.

The gun lobby opposes registration as an invasion of privacy. With the exception of New South Wales, Queensland and Tasmania, the police ministers agreed to compulsory and coordinated gun registration which will be effective across state borders. This means a murder weapon used in Victoria would be traceable if bought legally in South Australia but not if bought in New South Wales.

In some other key areas the resolutions are also inadequate. The minimal uniform standards are minimal indeed. Under these standards, the possession and ownership of semi-automatic rifles and shotguns—other than those described as 'military-style'—would still be permitted. Licences would be granted according to an undefined concept of 'strict criteria' (otherwise described in the resolutions as a 'stringent test'). It would be more appropriate to ban them completely.

The possession of other long guns would also be governed by a licensing scheme based on training, character and 'genuine reason'. The crux of the problem is in the definition of 'genuine reason'. As yet there are no resolutions as to what should constitute a 'genuine reason' nor any specific resolutions requiring it to be defined in the statutes. Such an important requirement cannot be left undefined, nor left to the discretion of the police. Should membership of a shooting club be sufficient as 'a genuine reason'? As pointed out by Gun Control Australia, some killers are given club membership.

The issue of gun storage is not addressed by the APMC resolution. Gun Control Australia argues that, with few exceptions, there are no legitimate reasons for keeping guns in an urban or suburban home. However, if guns are kept at home they should be stored in a locked gun safe to prevent theft. Preferably guns should have to be stored outside the home, for example, at local police stations or at shooting clubs.

One recommendation of the New South Wales Parliamentary Select Committee was that no guns should be sold privately or by mail order, but only by licensed and qualified dealers. The police ministers did not address this issue, nor the question of whether children should be allowed to have guns. In New South Wales, a junior licence is available at age ten—six years before they are licensed for that other deadly weapon, the car, and eight years before they are trusted to enter into a lease.

The APMC resolutions do not appear to go far enough to achieve the primary goals of effective gun laws: to reduce the number of guns in Australian society.

Finally, while national uniform gun laws are highly desirable and should remain on the reform agenda, they should not take absolute priority. The regulation of gun ownership is a matter for the states, and the responsibility cannot be sidestepped. The history of national uniform laws in our Federation is largely characterised by compromise, delay and occasionally, complete failure. The usual vehicle for the drafting of national uniform laws—the Standing Committee of Attorneys-General (SCAG)—is affectionately referred to within the state and federal bureaucracies as a black hole. Issues may disappear for inordinate amounts of time and emerge stripped of substance. Agreement between eight governments is often achieved at the cost of effective regulation. Uniformity is an important long-term goal, but state governments, such as New South Wales, should not be able to deflect their failings onto the national scene. The laws in the states of Victoria, Western Australia and the Northern Territory provide an effective, workable and immediate model for gun law reform in other parts of Australia. It is equally important that states like Victoria are not required to relinquish effective laws in the observation of the lowest common denominator of the national uniform approach.

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CRITICAL FACTORS IN FIREARMS CONTROL

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THE FIRST STEP IN PROBLEM SOLVING IS TO IDENTIFY THE PRECISE NATURE AND extent of the problem so that strategies can be devised. In firearms control, this means extensive and on-going data collection, analysis and manipulation. Trends and issues identified should be used to educate government departments and through them the community. Using education enhanced by legislation, the community and the government together can work towards a solution for mutual benefit.

So far, political parties, their factions and the shooting organisations are working against one another (Kopel 1992) causing a disturbing waste of scarce and ever dwindling resources that could be used to provide a solution.

Most of the literature on firearms control in Australia has only concentrated on the negative social aspects of firearm ownership. The literature has failed to mention, let alone discuss, the positive social, environmental, economic and national defence aspects of firearm ownership. It is a mistake to exclude these positive aspects from the firearms control debate. To do so could be to unwittingly cause more problems than are solved. This paper will attempt to rectify this imbalance.

Some people ask 'Why firearms control rather than people control, because people kill people?' —firearms are merely one of several weapons used in homicide, and thus authorities should be attempting to control people not firearms. However, lethality and availability are two important factors—irrespective of the weapon involved. Firearms have the potential to be significantly more lethal than knives and other weapons. The use of a firearm requires considerably less proximity, strength, agility, skill and squeamishness, and offers less opportunity for self-defence.

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[1] Disclaimer: The opinions expressed in this paper are those of the author and are not necessarily those of the Victoria Police.

People with firearms can kill people much more efficiently than those who only have knives and lesser weapons. And people who have semi-automatic firearms can kill people with even greater efficiency than those who only have repeaters, double-barrels or single-shots. However, whilst controlling weapons is important, the most important strategy in firearms control is preventing those people who should not have firearms from obtaining them—that is, controlling people.

The importance of national firearms control was highlighted by a recent case where several notorious criminals travelled from the mainland to Tasmania and purchased a large number of high-powered assault rifles for use in armed robberies and other crime on the mainland. Although these firearms were legal in Tasmania, they were illegal on the mainland where the criminals lived (Kent 1992, pers. comm.). This case also indicates that well-connected criminals cannot always obtain their weapons of choice, as is often claimed. Professional criminals need to obtain weapons and ammunition types most suited to the crime intended.

For effective national firearms control, each jurisdiction needs to enact uniform firearms legislation and be uniform in the application of it. This is slowly being achieved with all jurisdictions now requiring a licence to possess a firearm.

Will Firearms Control Minimise Firearm Misuse?

The use of handguns in crime in Australia is probably the best and most relevant study to use to answer the question: 'Does firearms control minimise firearm misuse?'.

Although firearm ownership is increasing, handguns remain rare. In Western Australia, for example, there are twenty-five times as many long guns as handguns (Kopel 1992). About 60 per cent of Australian firearms are rifles, 30 per cent shotguns, 6.5 per cent air rifles and only 3.5 per cent handguns (*see* Harding 1981, p. 54; Kopel 1992).

Handguns remain rare because, unlike long guns, Australia has had extremely stringent handgun legislation since the 1920s and early-1930s when all eight jurisdictions enacted pistol and revolver registration (Harding 1981, p. 167; Kopel 1992). As a consequence, handguns are rarely used in homicide, whilst .22 rimfire rifles and shotguns account for 80 per cent of all firearm-related homicides (Strang 1991, p. 18).

Firearms are the most common method used in suicide in New South Wales (Dudley et al. c.1991, p. 8). Unfortunately, this study does not provide a breakdown of weapon type but, in general, whilst suicide by long gun is very common, suicide by handgun is rare. Nationally, suicide by firearm is about five times the rate of homicide by firearm (Australian Bureau of Statistics 1991).

These data tend to show that Australians who commit homicide or suicide with a firearm do so with a shotgun or a rifle because these firearms are subject to the least stringent legislation and are consequently the most available. Many firearms used in domestic homicides, suicides and non-fatal assaults are owned legally, allegedly for sporting purposes, but in fact for a purpose that is not acceptable to

authorities. Handguns on the other hand are rarely used in such incidents due to stringent controls which make them the least available of the firearm types.

It was found that firearms were used in 25 per cent of homicides in Australia during the period 1989–90 and in 22 per cent of homicides for the period 1990–91. However, knives were used in 33 per cent of homicides in both 1989–90 and 1990–91, and assault was used in 36 per cent of homicides in both 1989–90 and 1990–91 (Strang 1991; 1992). These data make it obvious that the homicide problem is not specific to weapon type and that causes of homicides are more complex than weapon availability or weapon lethality, although both these factors appear to be important.

Government and Sporting Sector Cooperation

Firearms control is clearly an important strategy in reducing homicides, suicides and other firearm-related crime. Controlling the firearms owned by the sporting sector is particularly important because this sector owns the majority of legal firearms in society (Harding 1988; Mason 1991a, p. 9; Downes 1992, pers. comm.).

Firearms control requires the support and cooperation of the responsible members of the sporting sector. Once this is obtained there is far greater chance that strategies applied to the criminal sector can work. This is important because firearms owned by the sporting sector are easily obtained by criminals (Harding 1988).

The Hoddle Street (Julian Knight), Hungerford (Michael Ryan), Queen Street (Frank Vitkovic), Aromoana (David Gray), and Strathfield (Wade Frankum) massacres were all committed by licensed persons using firearms. The perpetrator of the Top End (Northern Territory and Western Australia) massacre, Josef Schwab, had held a firearms licence in South Australia between 1981 and 1984 for all legal classes of firearms including a handgun (Warren 1992, pers. comm.). When applying for licences, they all—with the possible exception of Ryan—stated they wanted a firearm for hunting (Kapardis 1989).

The potential of responsible members of the sporting sector to be a valuable partner with the government in the prevention of social and environmental misuse of firearms *must* be recognised. The large number of hunter initiated and administered wildlife research, habitat conservation and reclamation projects and hunter education programs in Australia are proof of the great impetus, expertise and goodwill that exists amongst its membership (for examples of these projects, *see* Bentley 1990; Cause 1990a; Harrison 1989; Slee & Young 1986; Stuart 1980; Mason 1991a).

Shooting organisations have a vested interest in strict firearms control, because it is the misuse of firearms which brings about pressure on governments to prohibit private ownership of them. On the other hand, if shooting organisations believe, as some do, that the aim of some current political parties is to eventually ban private firearm ownership irrespective of fact (Kopel 1992), then they are never likely to cooperate with governments to achieve strategies for proper firearms control.

Increases in firearm licences, game licences and firearm registration fees, apparently without benefit, are factors contributing to the widening of the gulf. Cumulatively, these events have convinced firearm owners—including the most responsible among them—that governments are hell bent on a plan to reduce the number of firearm owners and with it the political clout of the shooting organisations to a point that will allow the government to completely prohibit private firearm ownership. This distrust may cause shooting organisations to accept persons amongst their ranks who they would not otherwise.

Leaders of shooting organisations would be a great ally to any government in its fight against firearm-related crime, if they were convinced that cooperation would not lead to such prohibition. One of the greatest fears about firearm registration is that it is the first logical step for any government embarking on prohibition. This belief, plus the absence of a clear case for firearm registration (Greenwood 1972, p. 246; Fine 1988, p. 50), has further increased the mistrust between firearm owners and those governments who have implemented or wish to implement firearm registration.

A national firearms control forum could be established where all parties with a vested interest could be represented. Such a forum could be the cornerstone for the dissolution of mistrust and the development of a positive partnership between governments, criminologists, firearm owners and anti-firearm organisations.

Research and Education

Without creditable research, trends in these important issues can only be impressionistic, unprovable and therefore unable to provide a basis for action. There is a need for an organisation such as the Australian Institute of Criminology (AIC) to be given the responsibility and resources to conduct and coordinate national research into all aspects of firearms misuse—including suicides, armed robberies and aggravated burglaries.

An excellent example of research conducted by the AIC is *Homicides in Australia 1989–90* (Strang 1991). *Youth Suicide in NSW: Urban-Rural Trends—1964–1988* (Dudley et al. c.1991) is another excellent piece of research. Dudley et al. show that adolescent males residing in rural areas are at much greater risk of committing suicide by firearm than their urban counterparts. It is vital that this type of research reaches the relevant groups. Dudley et al.'s research is particularly important for farmers who would be far more likely to secure their firearms because of this knowledge than they would solely because of a legislative requirement.

Education can change or develop behavioural attitudes and, therefore, is a critical factor in firearms control. Costly research must be communicated to those whom it can assist. This was the reasoning behind the establishment of the Violence Prevention Unit (VPU) of the AIC. The VPU performs the function of a national clearinghouse for research and other information relevant to violence.

Timely, relevant and accurate information is important for cost-effective resourcing by governments and government departments of their programs.

Shooting organisations could include the results of research in their publications and education programs as an on-going firearm-owner education strategy. This information would be vital in educating firearm owners in the dangers of firearms—such as the rate of firearm-related suicide amongst rural male adolescents. A society informed of the reason for particular legislation is far more likely to comply.

Licensing of Firearm Owners

The most important step in preventing firearms misuse is to restrict firearm access to those people who have a genuine need and who can be entrusted with firearms. One million firearms in the hands of responsible people will never represent a threat to society but one firearm in irresponsible hands can. For example, thousands of military and sporting type high-powered semi-automatic rifles and shotguns have been used by hunters in Australia since the end of World War II—a period of over forty years—without one being used in a single massacre. However, in the four-year period June 1987–August 1991, four massacres occurred. In each massacre, a lone perpetrator used a high-powered semi-automatic military rifle as the primary weapon. Ten days after the Hoddle Street massacre there was the Hungerford (United Kingdom) massacre, and in November 1990 the Aramoana massacre (New Zealand). Again, high-powered semi-automatic military rifles were the primary weapon used. A total of fifty-four persons were murdered and approximately forty injured in these incidents.

Most of the perpetrators had abnormally violent attitudes which were allegedly influenced by violent pornography. The Hoddle, Hungerford and Aromoana perpetrators all read the *Soldier of Fortune* magazine and other literature on violence, and they all saw themselves as Rambo types. The coroner found that the Strathfield perpetrator was influenced by the Brett Easton Ellis book *American Psycho* and said 'the elimination of grossly violent pornography would surely offend nobody' (*The Age*, 23 November 1991, p. 1).

In each case, research into the lives of these perpetrators revealed that they were either not fit and proper persons for the issue of a shooter's licence, or the reason they gave was not the real reason, which may well have been to commit massacres. However, the interviewing police had no way of knowing this. For example, the Queen Street and Strathfield perpetrators were both issued with licences after giving pig hunting as the reason. Even if police questioned the applicants carefully regarding their attitudes, behaviour, mental condition, knowledge of and access for pig hunting, this may still not have amounted to a safeguard.

One way to educate those who already hold firearms licences would be to legislate compulsory membership of an approved firearm-owners organisation, regardless of the licence endorsement type held. Membership would entitle the firearm owner to receive the organisation's publications which could contain changes to legislation effecting firearms, wildlife and forests, appropriately written articles based on research into firearms misuse and other information of

education value. This material could be disseminated to the shooting organisations as a part of the firearms clearinghouse function of the VPU.

It would also provide badly needed finance for shooting organisations to conduct wildlife research and management and to develop shooting ranges. Currently, firearm owners who do not have a shooting range available within a reasonable distance of their homes are forced to use less safe and otherwise undesirable places such as state forests to conduct firearm testing and practice. In and around our major cities, shooting ranges for handguns are fairly common, whilst ranges for long guns are very scarce, yet long guns represent the biggest number of privately owned firearms. This is an unsatisfactory situation that is a possible cause of vandalism to road signs, wildlife, trees and so on, and unnecessary danger to other forest users.

Uniform National Firearms Licence

Licences to possess firearms should have the same title in each jurisdiction. *Firearms Licence* is the most appropriate title, for which there should be five categories endorsed as follows: collector only, farm use only, target shooting only, security guard, and hunting/shooting club use (Warren 1992, pers. comm.).

For reason of safety and uniform standards, security guards should qualify at a course designed and administered by the police in each state. For example, in Victoria all security guard instructors would be trained by the Victoria Police Firearms Operational Survival Training Unit (FOST Unit). Qualified security guard instructors would then train their personnel, oversighted by the FOST Unit (Stokes 1982, pers. comm.).

It is apparent that firearm owners need to be better educated in the social, environmental and other aspects of firearm ownership. New firearm licence applicants and those who have had their licence cancelled should be required to qualify at a firearm-owner education program. This program would provide information relating to firearm-related homicide (especially domestic homicide), suicide and the theft of privately-owned firearms for use by the criminal sector. The program would include theoretical and competency based modules on:

- social aspects—such as patterns in firearm related suicides, homicides, armed robberies, and accidents—to instil the importance of firearm security;
- the environmental aspects of firearms ownership—such as responsibility for the environment and wildlife;
- firearm safety;
- firearm competency in light rifle, heavy rifle and shotgun;
- firearm, wildlife and forest law;
- first aid for injuries likely to occur in the field;
- bushcraft and survival in the bush;

- principles of ecology;
- wildlife management;
- hunting ethics;
- hunting techniques;
- flora and fauna identification; and
- prevention of cruelty to wildlife.

Some of these modules, such as those relating to social aspects of firearm ownership, would be common to all firearm licences regardless of the endorsement required. An endorsement for a 'collecting only' would only require qualification at a few modules whilst an endorsement for hunting would involve qualifying at all.

Qualification for a firearms licence should not be intellectually demanding, but it must involve a degree of study over a fair length of time for it to become too onerous for the uncommitted firearm owner. This would ensure that the uncommitted, spur-of-the-moment, would-be firearm owners would not complete the course. The person who was really dedicated would complete the course and value his licence (McMillan 1992, pers. comm.).

Those who were not committed firearm owners but still completed the course would have been subjected to long-term scrutiny and been subjected to the education process and its inherent benefits (Williams 1992, pers. comm.).

Twelve months would be an appropriate duration for a part-time course which could be completed through current Victorian Secondary College courses on firearm safety and target shooting (Victoria 1991), through Technical and Further Education by combination of distance education, and through an accredited course administered by approved shooting organisations. Inspired by the writings of Leopold (1949; 1986), the Australian Deer Association (ADA) through the Victorian Hunter Education Committee has been administering a Deer Hunter Education Program since 1986.

Just as educational concepts can be applied to environmental aspects of firearm ownership they can be applied to solving the social problems associated with firearm ownership. Just as environmental managers in Australia and overseas accept hunters as partners to achieve common aims, social managers such as police, criminologists and sociologists should enlist the help of hunters and shooters when attempting to control the adverse social and environmental effects of firearms.

Governments would perform a supporting and advisory role and ensure that the shooting organisations are fully utilised to achieve joint objectives. Governments should also provide some initial funding and equipment. This concept is in fact an Integrated Anti-Crime Strategy which is a current initiative of the Ministry of Police and Emergency Services, Victoria (Brazendale et al. 1992, p. 3).

> Success of the Integrated Anti-Crime Strategy will involve the cooperation and assistance of all government departments, semi and local government, private enterprise, the community at large and the police. The cornerstone will be 'partnerships' and positive attitudes, and we must all realise there is no easy remedy, instant solution or 'quick fix' (Glare 1991, p. 3).

Firearm-owner education programs could easily be funded by the shooting organisations with little assistance from the government, provided the threat to shooting and hunting was removed. This would then allow these organisations to divert some of the $¾ million (approximately) that they have spent defending the sport over the past decade to firearm-owner education programs.

Benefits of Firearm Owner Education

In West Germany, for decades it has been a requirement to qualify at an extremely comprehensive firearm-owner education program as a prerequisite for obtaining a firearms licence (Mason 1992). Sweden introduced a less comprehensive course on a voluntary trial basis in 1981 and as a compulsory prerequisite for a firearms licence in 1985. Many countries have adopted similar programs, and it is worth noting that several international authorities on hunter education and wildlife management have attended the ADA hunter education program.

The firearm-owner education program as a pre-requisite for obtaining a firearms licence is a Total Quality Management (TQM) program which can provide immediate and long-term benefits for governments and firearm owners. Immediate benefits would be the screening out of unsuitable applicants. Long-term benefits would be performance enhancement and attitude conditioning of those approved as firearm owners. Achieving this is dependent upon a continuing cycle of consultation and examination of the process of inputs, transformations and outputs. In the context of firearms control, inputs would be the consultation, research and information management, and transformations in the education process. Outputs would be the enhanced attitudes and performance of firearm owners resulting in a reduction in firearms misuse.

Benefits would be monitored by institutes of criminology and measured by numerical differences in firearm-related homicides, suicides and accidents. Indicators of environmental benefits would be the number and quality of wildlife research projects, habitat reclamation and conservation, and greater concern for land health and wildlife.

Hunters have the potential to be an important partner with law enforcement agencies in countering the extremely lucrative and active trafficking in Australian wildlife which in 1985 was estimated to be worth $40 million dollars annually (Bottom 1985, pp. 32–6). Hunters are concerned about the effects of this activity on the environment and also their own game yield for which they are required to purchase game licences irrespective of whether or not they obtain a yield (Mason 1991a, p. 2).

In addition to these benefits, the Arthur D. Little Report to the United States Army of January 1966 noted that hunting and firearms training is of great value to the military. More importantly, it provides conclusive evidence that the volunteer or the conscript will be more likely to function as a soldier and survive if he has been a hunter and a shooter in civilian life (Whisker 1981, p. 129). Therefore, it would be beneficial to Australia, which has a weak national defence capability, to have a significant percentage of the population trained and competent in firearms use and hunting.

Firearm Education and Domestic Violence

> 'Domestic' homicides, that is, those occurring between family members, accounted for 46 per cent of all homicides where relationship was recorded . . . Firearms are more commonly used in 'domestic' homicides than any other category: about a third of spouses were killed by firearms, and nearly half of victims where the relationship was parent-child (this category includes child–parent and parent–adult child). This compares with 20 per cent of killings where the relationship was friend/long term acquaintance and only 13 per cent of stranger killings (Strang 1991, p. 22).

These data suggest that firearm misuse is worse in domestics than in any other area and that Australians are more likely to be murdered in a domestic situation with a firearm than in any other. Legislation such as the Victorian *Crimes (Family Violence) Act 1987,* is necessary and justifiable. Section 18A gives police the power to enter a home without warrant and seize firearms (without warrant) where they believe on reasonable grounds there to be actual or threatened violence.

This legislation is open for abuse by vexatious and vindictive spouses and other family members, but nevertheless, it is a critical strategy in preventing firearm misuse and thereby making Victoria a safer place to live. The potential advantage of lives saved easily outweighs the potential disadvantage of unjustified complaints, which in any event are adjudicated by a magistrate.

Shooting organisations need to realise that this legislation is in the best interests of responsible firearm owners as it is likely to reduce firearm-related homicide—any reduction in which should remove pressure from the government to impose further restrictions on them.

Unfortunately, current data collection practices do not enable the AIC's National Homicide Monitoring Program to determine what proportion of firearms used in homicides are registered, what proportion are owned by the offender, whether the offender held a firearms licence, and whether the weapon was stolen.

The domestic firearm homicide phenomenon can be partially solved by firearm-owner education programs. Firearm owners aware of the problem are more likely to comply with firearm security legislation out of self-interest, even if not because of fear of prosecution. Pressure from family members who have also been made aware of the problem could be significant in causing firearm owners to keep their weapons safe and secure in the home.

The VPU is a useful and neutral point, and a firearms unit could be responsible for administering a national media campaign to educate the community about the problem. Firearm safety in the home could be taught under the theme 'Keeping Ourselves and Others Safe' by the excellent Victoria Police Schools Involvement Program. A parent will often be responsive to suggestions made by his/her children regarding firearm safety in the home.

Conclusion

There are both positive and negative aspects to firearm ownership. The negative aspects need to be minimised, if not obliterated, whilst the positive aspects need to be developed. The tools for achieving this are research, education, legislation and enforcement. The strategy for their application should be one of partnership, positive attitudes and trust. Governments, police and the community have an obligation to work together to minimise misuse, even though no amount of safeguards can ensure against every possibility.

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GUN CONTROL AND HOMICIDE: THE SHOOTERS' PERSPECTIVE

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I SPEAK TODAY ON BEHALF OF FIREARMS OWNERS. I DO NOT APOLOGISE FOR being a firearm owner, nor do I ever conceal the fact that I am one. Why should I? There is nothing strange or unusual about being a firearm owner, a hunter, or a target shooter. Even those who have what, to me, is an unreasoning hatred of firearms admit that firearm ownership is nothing unusual. Figures show that in Victoria there are some 300,000 licensed firearm owners—and of course an unknown but quite sizeable number of unlicensed owners—out of a voting population of 2.74 million (persons aged over eighteen years, as at the last Victorian state election).

Except perhaps for a few extremists, even those ideologically opposed to firearm ownership, such as Harding (1981), concede that the vast majority of these firearm owners are normal, well-adjusted, law-abiding persons who will not in any way misuse their firearms.

The subject of firearms and firearm ownership will be addressed before firearm misuse in crime is looked at.

Firearms have been a part of human life for over 600 years. The earliest firearms—primitive, inaccurate, unreliable and not always safe to use—were one of the weapons of war of the fourteenth and fifteenth centuries, but as firearm design improved, they were introduced into hunting and, later, target shooting. For the last four centuries or more, firearms have played an important part in self-defence, the provision of food, and recreation for millions of people.

The percentage of citizens owning firearms privately varies throughout the world, depending on the nature of the country—whether mainly rural or urban—whether there is any opportunity to hunt, how popular target shooting is, and, of course, the nature of the government. Most totalitarian countries do not allow private citizens—except for those deemed of great importance—to own

firearms. On the other hand, in Switzerland, every male of military age has a military firearm in his home.

Most citizens in English-speaking countries who own firearms believe that they have a basic right to do so. However, many people who do not own firearms, have no wish to do so, and all too often cannot understand the attitude and interests of firearm owners, and argue that firearm ownership is a privilege, not a right. Such people are often aware the 'right to bear arms' is guaranteed by the American Constitution but that there is no corresponding wording in the Australian Constitution and, therefore, Australians have no such right. These people are saying, in effect, that a Constitution or Statement of Rights creates rights and that, unless a particular right is mentioned, it does not exist.

Firearm owners, in general, are not legal experts. They do not know the background of a Constitution or a Bill of Rights, but they are human beings, conscious of the dignity and rights inseparable from a human being. They believe that they have certain rights—including that of owning private property—and do not think they need any document to tell them so.

The question of the legal right to own a firearm is something that eminent legal figures might argue about indefinitely, but even if the right to own firearms—or for that matter, other types of 'arms'—is accepted, it would seem that the state can, and in fact must, legislate to prevent the possible misuse of firearms. There are some fairly general laws to which nobody could rightly object. One is a prohibition on discharging a firearm, and in some cases carrying a loaded firearm near a populous area. Again, a firearm is specially dangerous in the hands of children, and laws prohibiting children having access to firearms are fairly general. In addition, a person under the influence of alcohol or of unsound mind may be irresponsible or violent, and the law should prohibit him from having a firearm.

Many persons use firearms for hunting purposes and, over the centuries, the desire to provide more efficient firearms for hunting has contributed greatly to their development. Hunting dates back centuries before firearms, and its purposes have, in general, been the obtaining of meat for food, the control of vermin (or the culling of excess numbers), a test of skill, or a form of recreation. In the hunting of animals such as rabbits and deer or of birds such as duck, all or most of these factors are present.

A firearm is often an expensive item displaying considerable manufacturing skill and mechanical ingenuity. Older firearms in particular may have engraving and ornamentation which make them works of art. Their owners invariably have a pride of possession in them which makes those owners prepared to fight desperately to retain them in the face of police/government pressure.

Another aspect of firearm control is that of keeping firearms out of the hands of criminals. There is general agreement that this is impossible to achieve. Often a person hearing of a shooting or an armed hold-up will say 'the offender should not have had that gun'. In many cases the fact that the offender did have a gun is not the fault of the legislation, as the offender had obtained that firearm illegally.

Few persons—even those of the highest character—can legally own a pistol, since a pistol can only be possessed for a special purpose. Yet an investigation

carried out some years ago by police showed that over 38 per cent of robberies involving the use of firearms were committed with pistols (Millar & Milte 1978, p. 111). These robberies have occurred despite the controls on pistols and despite the fact that a person who has committed an offence and been sentenced to a gaol term of three months or more is prohibited by law from having a firearm for a stipulated period—sometimes five years. The great majority of armed hold-ups and many other crimes of violence are committed by persons who already have criminal records and are, therefore, prohibited by law from possessing firearms—yet these offenders nevertheless had firearms.

The system of supply of firearms to criminals operates outside the law. A criminal can obtain all the firearms so desired—including types not available to the law-abiding citizen, such as pistols and machine guns—and it seems that no law is able to stop this illegal trade. Apparently, there are places in Melbourne where, with the right sum of money, a specified pistol type can be obtained within hours.

Pistols are concealable and, except for special target shooting types, are intended for anti-personnel work. Accordingly, since the 1920s following the example of England, most countries in the British Commonwealth have restricted pistol ownership to those who have a special use for them. Whatever the situation regarding basic legal rights, the firearm owners of the day seem to have accepted these restrictions. The present generation also seems to have accepted these restrictions in principle, although, the administration of these controls has been the cause of much dissatisfaction. Yet it must be noted that this is an issue which affects only a few persons. Pistols are of little interest to the hunter, and the pistol target shooter, security guard or established firearm collector are usually allowed to possess pistols, but under strict conditions of use and custody.

There are persons who say 'no-one should have firearms'. These persons have a right to hold that view and to elect to parliament persons who will work towards that end. At the same time, the general right to hold an opinion and to try to impose it upon other persons is surely subject to the moral obligation to form that opinion in a spirit of justice and charity, and only after at least trying to find out something about the issues involved. The failure of far too many people to meet this moral obligation and the lack of technical knowledge of most persons who do not own firearms is one of the greatest problems a firearm owner has to face. This lack of knowledge produces uninformed criticism and unsatisfactory legislation.

It would seem that from the earliest days of settlement the percentage of Australians owning firearms has been high. It is only in recent years, however, that licensing systems have been introduced and surveys undertaken which have enabled more reliable estimates of firearm ownership to be made. For example, there was a nation-wide survey on firearm ownership carried out in 1975 by the Australian Bureau of Statistics (1979). It applied only to Australian capital cities and to towns with a population of over five hundred. Yet in these areas, the survey indicated that:

- there was, on average, a firearm in every fourth house;

- firearms owners came from all walks of life, all levels of income, and all age groups; and

- only a very few (an average of six per cent taken over all states) were members of gun clubs.

In Victoria, where there has been a Shooter's Licence system in force since 1973, there are some 300,000 licensed shooters plus an unknown number of persons owning firearms—thought to be in excess of 50,000—who hold an expired licence or who have never held a licence. The police estimate that each licensed shooter owns, on average, 2.8 firearms.

These figures make it quite clear that only a minute percentage of the firearms in Victoria are ever used in crime and, in any event, many firearms so used are possessed by unlicensed persons. The vast majority of law-abiding and responsible firearm owners should not be held responsible for the misdeeds, however serious, of a tiny minority, just as all motor car owners should not be held responsible for the misdeeds of a few irresponsible and perhaps culpable drivers.

Each Australian state has different legislation, although most essential items in the legislation are the same. The main differences between the states lie in the procedures involved in order to obtain a firearm. There are those persons—including some firearm owners—who seek an uncomplicated system and would favour a National Firearm Act, but those who have studied the problem recognise the historical differences between the states, the type of game available, the different shooting conditions, and so on. Those who have studied the idea of national firearms legislation believe that each state should continue to have its own Firearm Act, but that there should be as much uniformity between the Acts as possible. They also believe that each state should recognise a licence issued by another, as is the situation with motor car drivers' licences.

The firearm-owner bodies are as desirous as anyone else of having just and workable firearms laws which—as far as is reasonably possible—ensure that those persons owning firearms are fit and proper persons to have them. Over the years there has been considerable research carried out and discussions held with governments on the issue of firearm legislation, and it seems clear that the New Zealand Arms Act 1983 represents a proper approach. This Act is the result of several years of research by the New Zealand Government and the firearm-owning associations—conducted in an atmosphere in which party politics played no part. In general, the New Zealand legislation provides that:

- all firearm owners be licensed (all Australian states have or will soon have this), the licences being issued by the police;

- before a person obtains his first licence, he must attend a course in firearms law and safety practices conducted by a qualified instructor and then pass a written examination;

- the police thoroughly check the applicant as to character, record, and so on, and they are required to refuse the licence if the applicant does not appear to be a fit and proper person to have a firearm (there is a right of appeal to a court);

- there is no restriction on the number of firearms a person may own;

- firearms are not individually registered, except for pistols and restricted firearms (the system of registration of other firearms, which had existed since the 1920s, was abandoned, the police and Government having decided it served no useful purpose);

- the licence is issued for life (but the police and courts have wide powers of cancellation);

- an adult person may have an airgun without a licence, but a junior must be licensed. (This is reasonable when one considers that it is rare for an adult to commit an offence with an airgun, but that offences are often committed by juniors);

- there is provision for specially authorised persons with proper secure premises to collect restricted firearms (that is, firearms not available under the ordinary licence); and

- if a firearm is declared restricted, the owner may sell it to a person specially authorised to collect such firearms, but if the owner elects not to do this he may surrender the firearm to the state, which must pay market value for it, and the owner has the right of appeal to a District Court Judge if he is not satisfied with the amount offered.

Although certain aspects of the New Zealand legislation could be improved upon, the New Zealand Arms Act's approach to the matter is excellent and it could be regarded as a model for other legislation to follow. It is to be expected that any firearm owner, especially one familiar with the New Zealand Arms Act, would strongly oppose anything that departs from the spirit of that Arms Act. In particular, firearm owners can be expected to oppose:

- the banning of the possession of any type of firearm except for certain modern military type semi-automatic rifles and machine guns;

- any legislation which does not set up a licensing system under which, as in New Zealand, banned firearms may be held by authorised collectors and so preserved;

- any legislation that does not guarantee the owner of a banned firearm the right to obtain from the government full compensation based on the market value of the firearm;

- any restriction on the number of firearms a person may own;

- any system that forces a firearm owner (other than perhaps a pistol shooter) to join a shooting Association as a condition for obtaining a firearms licence;

- the individual registration of firearms;

- any legislation which directly or indirectly prohibits the average citizen from owning a firearm;

- any legislation which does not provide an informal and inexpensive means of appeal against decisions involving firearm licences; and

- any legislation which contains harsh or unreasonable penalties, or is unjust or unworkable by nature, and which does not pay due regard to the principles of natural justice and the principles of the United Nations Declaration on Human Rights.

Before leaving the subject of firearms control a brief reference must be made to the Canadian situation, which has been so misrepresented by anti-firearm followers in Australia.

Unfortunately, all the papers relating to the Canadian situation have not been found. However, the facts are that around 1980 the Criminal Code, under which firearms are controlled, was 'tightened up'. The more stringent controls seemed to be on pistols and certain 'restricted weapons'. As far as ordinary rifles and shotguns were concerned, a 'purchaser's permit' was introduced, but this purchasers permit is not like that in Victoria. The permit lasts for five years and allows its holder to buy as many firearms as desired! There was no shooters' licence or registration of 'ordinary' firearms.

Around the mid-1980s—some four or five years after these amendments—government officials discovered that, since the new legislation had come into force, the firearm crime rate had fallen and a booklet of figures and statistics to support these claims was produced. This booklet was seized upon by various anti-firearms bodies in Australia as a support for their arguments. What seems to have been overlooked, however, is that:

- the Canadian crime rate had started to fall before the new legislation came into force;

- the firearm crime rate fell in the USA over the same period (no-one knows why); and

- the controls on ordinary firearms were not likely to inconvenience anybody or have much effect.

In the 1980s and 1990s in Australia, firearm ownership has become very much a political issue. The degree of polarisation varies from state to state—largely dependent upon the extremity of the views of the state Labor Party—and

in some eastern states there have been political campaigns conducted by firearm-owner groups against the Labor Party in state elections.

Discussion of firearms issues is characterised by both strong pro- and anti- views. As in many hotly contested issues, truth is often one of the first casualties and some sections of the anti-firearms movement seem to have established a reputation for not letting facts get in the way of a good story or a particular ideology. Unfortunately too much of recent discussion on firearms has been driven by ideology and not by fact and commonsense. Inquiries into violence and similar issues have been conducted by people with a known anti-firearm ideology whom the government knows will make the recommendations ideologically acceptable to the government—whether or not these recommendations are practical or in the public interest.

Australia has major problems with increasing violence in society. This increase is occurring on our streets, on our sports fields and in our homes. The ultimate form of violence results in homicide—but Australia must be concerned with violence at all levels.

Recently, far too much attention has been given to the means of homicide, suicide and the infliction of serious injuries rather than to the causes of these phenomena, and reductions in absolute numbers and rates will only be achieved when the causes are removed.

If it were possible to remove every legally-owned firearm from every licensed shooter in the community, this would not stop homicides. The idea that a reduction in the number of firearms in the community would reduce homicide or, worse still, the idea that the presence of firearms is the cause of some homicides, is at best a theory, held by certain groups of so-called 'experts'. Firearm owners object to being the guinea-pigs on which this theory is being tested.

Unless attention is focussed on removing the causes of homicide, removing one means of homicide will only lead to another means being found. A firearm is not necessary to a person bent on mass murder. Two readily available substances mixed together form a powerful explosive which can destroy a whole building or vehicle and can cause great carnage. For example, *The Age*, 27 March 1990, carried the story of a man in New York who had quarrelled with his former girlfriend at a social club and had been ejected by a bouncer. This man later returned to the club with a quantity of petrol and set the building on fire resulting in the loss of eighty-seven lives.

There is also the difficulty of measuring the incidence of homicide or suicide where the motor car is used as the means. If the current top five means of committing homicide could be removed from society, what effect would this have on the overall homicide rate? It is reasonable to expect that there would simply be a change in the means of committing homicide.

Perhaps one of the reasons means of homicide rather than causes of homicide are concentrated on is because one can feel warm and good advocating the removal of a means which does not affect us as an individual. But the removal of the causes of homicide is a much harder task to accomplish and we might be personally affected. For example, there appears to be agreement that alcohol plays a large part in violence in clubs, pubs and the home, and some of this violence leads to homicide. Yet there has been no

call to ban alcohol and so reduce this cause of violence and potential homicide. But how many calls have been heard to ban firearms—one of the possible means used by the person affected by alcohol to inflict injury or death? Is the reason why there is no call for the banning of alcohol that too many of us like alcohol too much to consider any ban? If one were really cynical, one could also suspect that governments would also strongly oppose a ban on alcohol because of the taxation revenue loss.

I, in common with many firearm owners, am becoming increasingly cynical and disgusted with the media in Australia. A culture of violence is increasingly being pushed onto Australians by the media. I watch very little television now because I do not regard violence as entertainment and have given up watching most programs. I am even getting sick of watching news on television because so much of the news program is devoted to violence and confrontation. Increasingly, the media are not interested in a story unless it contains a confrontation. One of my friends was recently involved with an environmental issue where the media deliberately distorted the facts to make it a confrontation issue and not one where there was a balanced position, which was the aim of my friend's organisation. Another example of the media's inconsistent attitude toward violence was seen when the media conducted an intense campaign against firearms after the Strathfield killings in Sydney, Yet, at the same time, the media continued to earn advertising revenue by screening drama programs which showed firearms being misused and suggested that violence is the solution to all problems.

I am greatly concerned at the problems Australia is already facing and the problems we will undoubtedly face in the future, problems which arise from the changing way governments and the medical profession are handling people with serious mental disorders. In the past, such people were confined to an institution and treated until they were determined to be of no danger to themselves or the public. The current trend is to give people with serious mental disorders a supply of drugs, directions for their use, and then let these people return to the community. If the person takes the prescribed drugs as directed there should be no problem, but if the directions are not followed, the potential consequences are frightening.

Of course, there are those in the community who claim that people with serious mental disorders have civil rights and should not be detained. In the next breath, these same people will lobby that I and the other 300,000 law-abiding, responsible firearm owners in Victoria should not be allowed to own firearms because they may be misused by a mentally-deranged person. What about firearm-owners' civil rights? Apparently, because firearm owners interests are different from those of these 'do-gooder' individuals, firearm-owners' civil rights disappear.

There were howls of outrage from civil rights groups and sections of the medical profession after the Strathfield killings, when the Sporting Shooters Association advocated a register of persons with mental disorders so that police could check to ensure that persons on this list could not obtain or retain firearms. The Hoddle Street and Queen Street killers were known to have mental disorders or records of violence before the killings took place. If such a listing had existed, the police could have removed the firearms from the

offenders before the incidents occurred. Yet again the civil rights groups, at the same time as opposing the register of people with mental disorders, were calling for bans on firearm ownership. One must seriously question the true motivation of some of these groups.

In May 1992, a Labor Caucus committee in Victoria was opposing draft government legislation to empower courts to order continued detention of certain persons with multiple convictions for violent crime who were considered a threat to the community. One member of the committee was quoted as saying that such legislation would not have prevented the Hoddle or Queen Street killings (Victorian newspaper report). How many future crimes of violence and potential killings would be prevented is the real question? It would be interesting to know how many members of the committee would have readily supported increased firearms restrictions instead. It is important to note that the people at which the Bill was aimed would not be eligible to obtain a firearm legally under present legislation, but with their criminal background would have no trouble obtaining a firearm illegally.

Australia is seeing an increase in activity from various interest groups calling for action to reduce violence and improve their situation. While not knocking any of these many groups, I do wonder if the activities of the growing number of interest groups are distracting Australians from the problems of homicide as a whole. If each Australian were to find how to increase self-respect and respect for all human beings, and if the media began to serve us a diet against violence and promote respect for one another, and if governments began to repair the enormous economic damage they have wrought on Australia and its citizens in the last three years, Australia would see a reduction in violence and homicide. Oh, Utopia!

On behalf of firearm owners, the following suggestions aimed at cost-effective control of the use of firearms in homicide are put forward. It must be recognised that no controls will be effective in reducing the use of firearms by criminals. By definition, criminals do not obey laws and seventy years of rigid pistol licensing has not stopped the use of pistols by criminals.

- All persons seeking to own firearms be required to obtain a Shooters' Licence issued by the Police;

- before issue of a licence, the applicant be required to undertake a training course in firearms safety and firearm law and pass a written examination;

- all firearms owned by a licence holder to be securely stored when not in use;

- the licence of a firearm owner convicted for an indictable offence be cancelled;

- where domestic violence or threats of violence occur, all firearms be removed from the home and the firearms not restored until a magistrate rules they may be restored. We support the current

Victorian legislation on firearms in relation to domestic violence but have worries about proposed new legislation. We understand that under this proposal, police would be required to remove all firearms from a house if they were called to any domestic, even if there was no indication of violence whatever and if the report was made by any member of the family or neighbour. With firearms worth many thousands of dollars possibly involved and the possibility of one party using the call to 'get at' another party, we see the potential for creating greater problems;

- introduction of a notification system for persons with mental disorders so that police can take steps to remove firearms from the person if appropriate;

- mandatory heavy minimum penalties for carrying or use of a firearm during the commission of a crime;

- the scrapping of firearm registration as this is not cost effective. The only persons favouring registration of individual firearms are:

  (i) those persons who see it as a means of confiscation or restriction by taxation and other means;

  (ii) those in the police force who, perhaps in addition to the above motive, see it as a means of empire building. (Some years ago a South Australian police officer connected with the Firearms Registry there told one of our representatives that the South Australian system of registering firearms was the envy of the other states. However, a more recent report from the Deregulation Task Force in South Australia casts serious doubts on the need for and usefulness of the registration system);

  (iii) those who know nothing about the system anyway and cannot distinguish between shooter licensing and firearm registration.

There are no recorded instances in Australia where firearm registration has solved a crime which would not have been solved by normal police investigative techniques.

Firearm owners do not want to see firearms used in homicide or other crime. For years firearm owners have been advocating the introduction of heavy mandatory gaol sentences for people who use firearms in crime. Firearm owners will strongly support moves to crack down hard on crime, but we will fight like hell for the right of responsible, law-abiding people to own and use firearms.

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THE ROLE OF THE PATHOLOGIST IN HOMICIDE INVESTIGATIONS AND CORONIAL INQUIRIES

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IN ORDER TO EXAMINE THE ROLE OF THE PATHOLOGIST IN THE CORONIAL inquiry, it is necessary to make some attempt to determine what forensic pathology is. The *Report of the Committee on Death Certification and Coroners* (Great Britain 1971) distinguished between clinical pathologists and the smaller band of forensic pathologists who are specially experienced to help in the investigation of murder and other serious crimes against the person.

> According to the evidence received the basis of forensic pathology is the small amount of work which, although it is carried out on behalf of the coroner, is particularly the concern of the police . . . Every police force needs to be able to call on the services of a specially experienced pathologist to help in the investigation of murder and other serious crimes against the person. Ideally, this person should be a pathologist with a sound training in morbid anatomy who has added to this general knowledge some additional skills, most notably the ability to detect, and give authoritative testimony about, unusual features of a dead body and the surrounding circumstances which may well be of evidential value. He should be able to command the facilities of a well-equipped pathological laboratory, be readily available on call to police and courts, and be prepared to travel on short notice anywhere in the area which he serves (Great Britain. Committee on Death Certification and Coroners 1971, Cmnd. 4810 [22.18])

In April 1989, the Home Office in Great Britain published its *Report of the Working Party on Forensic Pathology*. In paragraph 1.1 the report stated:

> Forensic Pathologists play a vital role in the Criminal Justice system. Strictly speaking, their responsibility is simply to undertake the post

> mortem examination of bodies found in 'suspicious circumstances' in order to establish, as far as possible, the cause of death. ('Suspicious circumstances' are those in which there is suspicion of murder, manslaughter or infanticide.). In practice, however, it is often their professional judgement which determines whether a particular death is dealt with by the coroner by inquest as one due to accident, natural causes or suicide, or is investigated by the police as a preliminary to a criminal trial. To this extent theirs is the first step towards bringing to justice those responsible for the most serious crimes in our society (Great Britain 1989).

Clearly the specialist forensic pathologist has a screening role with regard to the apparently non-suspicious coronial autopsy. It is by no means rare for a specialist forensic pathologist to identify suspicious features in an otherwise non-suspicious death and to alert the investigating authorities to the fact that this particular death requires more detailed and specialised investigation by the coroner, police or other relevant agency. The experience of the full-time Forensic Pathologist—being based in clinical pathology, but with a wider and more varied case type with respect to traumatic death—is far better placed to take on the role of medico-legal watchdog. Indeed, were it not for this expertise, many largely legal coroners jurisdictions would lack the knowledge-base to maintain an effective screening system for suspicious deaths.

It follows that the organisation and administration of an efficient coronial autopsy service is greatly aided by its ability to call on a small, defined group of medical specialists in forensic pathology who are available for consultation 24-hours a day, 365 days a year.

The coronial system in Victoria is involved in a very close professional working relationship with its primary medical service provider—the Victorian Institute of Forensic Pathology. Each organisation has their own practices and procedures, which include both a combined response to the investigation of natural and unnatural hazards in the community, and an individual investigative role into deaths based on their respective skills and expertise.

Australia

The geography of Australia—with its population concentration around the major coastal cities and a smaller rural population distributed over vast inland areas of the continent—presents problems in the legal and medical administration of a coronial death investigation that the parent coroner's system in England and Wales would find difficult to appreciate. It is for this reason that we find full-time coroners in many of the major metropolitan centres and part-time coroners often linked with the magistracy in rural inland areas.

These same factors apply also to the forensic pathology service where, in the majority of the major metropolitan centres, full-time forensic pathologists are to be found. Conversely in the rural, sparsely populated inland areas, general practitioners and clinical pathologists provide the coroner with an autopsy service in association with full-time forensic pathologists who are called in on selected cases. The Royal Commissioner into Aboriginal Deaths in Custody

raised the issue of coroner's investigations where the autopsy was performed by a general medical practitioner with no formal pathology training or qualification.

> It is unfair to expect that general practitioners are qualified to produce reliable results (Muirhead in Australia 1988).

Indeed the Royal College of Pathologists of Australasia made their view clear to the Royal Commission when they stated that an autopsy should only be performed by a pathologist (or a medical practitioner under the supervision of a pathologist) and that, where the case was a homicide or suspicious death (including a death in custody), the autopsy should be performed by a forensic pathologist. Whilst this position remains the goal to strive for, both the medical and legal professions have recognised that the Australian geography causes severe service problems and places a substantial burden on investigative agencies and the relatively few trained specialists in forensic pathology.

In Victoria the vast majority of coroner's cases—whether suspicious or non-suspicious—are performed by full-time specialist forensic pathologists or their directly supervised trainees working from a purpose-built modern mortuary and laboratory facility.

There are many advantages to operating a statewide forensic pathology service from a single service point. The localisation of the required number of medical staff in the same centre provides for an increased efficiency of operation in terms of costs and ensures that each of the medical forensic specialists does not work in professional isolation. Such an establishment allows ease of professional consultation with one's peers and an opportunity to engage in research and teaching activities that ensure that the forensic pathology service providers remain up-to-date in their respective fields of expertise.

A further advantage of a centralised forensic pathology service is its ability to collect and collate data on a statewide, national and international basis in order to provide the community with research information that can lead to the prevention of avoidable deaths or to a decrease in disease specific morbidity and mortality. There are of course some disadvantages for such a centralised and, some would say, 'inbred' system, and these have been recognised in some of the investigations of the coronial and forensic pathology service in the United Kingdom. Such a centralised forensic pathology service has the potential to develop inbred ideas and idiosyncrasies with respect to medical opinions and service provision. It is vital, therefore, that such a central forensic pathology service be permitted to engage in forensic pathology work at an interstate and international level for agencies other than the Crown and also to take part in the international research meetings in the areas of forensic pathology and forensic science in order that the staff are fully aware of trends and new developments in their field of expertise.

Perhaps one of the most important features of any forensic pathology service is that not only should it be independent but that it should be clearly seen by the public to be independent from any organisation that might have an interest in the results of its operations. In particular, it should be seen as distinctly separate from all other forms of investigators including the Police, government inspectors, central and local government, and other emergency services. Its independence should be seen as being of a similar nature to that

of the courts. The *Coroners Act 1985* (Vic.) makes provision for this in that it establishes a Forensic Pathology Institute as a distinct body corporate with its own governing council including representatives of the relevant Royal Colleges, the Law Department, the judiciary and the local medical schools. The Council also includes the Coroner who has a particular interest in the Pathology Institute which provides him with his major medical input during an investigation. The Act also establishes that the Director of the Institute shall be the person who holds the Chair of Forensic Medicine at Monash University and this provides the academic link between the University system and the service work of the Forensic Pathology Institute.

Training

Both the Royal College of Pathologists of Australasia and the Royal College of Pathologists of the United Kingdom recognise forensic pathology as a sub-specialty of anatomical pathology and provide for membership and fellowship examinations in this sub-specialty. However, despite this recognition by the Royal Colleges, central coordination of training in both the United Kingdom and Australia has been either limited or nonexistent.

In Victoria, the trainee aspect for forensic pathology is covered by Section 64. (2) of the *Coroners Act 1985* (Vic.):

> The objects of the Institute are as follows:
>
> a. To promote, provide and assist in the postgraduate instruction and training of trainee specialist pathologists in the field of forensic pathology in Victoria;
>
> b. To promote, provide and assist in the post graduate instruction and training of persons qualified in biological sciences in the fields of toxicological and forensic science in Victoria;
>
> c. To provide training facilities for doctors, medical undergraduates and such other persons as may be considered appropriate by the Council to assist in the proper functioning of the Institute;
>
> d. To conduct research in the fields of forensic pathology, forensic science and associated fields as approved by the Council.

It can be seen that the training of forensic pathologists has now been recognised as requiring some degree of centralisation and uniformity. This has been achieved by the professional bodies examining pathologists in various jurisdictions and by governments who recognise the need for appropriately qualified specialists in this area.

It is important to remember that, whilst the examination and training periods in forensic pathology are now well-established, no centralised core of organised training program exists within the majority of states in Australia or, in fact, in the United Kingdom. It is up to candidates to obtain individual training posts throughout their training period in order to gain the experience that will enable them to pass the necessary professional examinations. Victoria has gone some way along the process of establishing a centralised

training scheme with the provision of formal training posts in forensic pathology based at the Victorian Institute of Forensic Pathology

Legal

Perhaps the greatest difficulty medical practitioners have in becoming involved with a legal system and work with the courts and legal profession is coming to terms with legal principles. Few fundamental legal principles are taught in either undergraduate or postgraduate medical education. However, it is clear from teaching forensic pathology and forensic medicine and observing the experience and skills of newly qualified forensic pathologists that an understanding of basic fundamental legal principles goes a long way to improving the service these medical professionals provide to the legal system.

Perhaps the hardest of the legal principles to come to terms with is that relating to the legal investigation process which differs both in structure and philosophy from the scientific investigation process. For the forensic practitioner, the ability to comprehend the nature of the legal investigation process and the practitioner's role within it—both prior to and during a judicial hearing—is essential for them to effectively play their part in a judicial process.

Forensic practitioners in their routine casework have really only one form of output that emerges from the work they do. This output is the act of communication of fact and opinion to a judicial or quasi-judicial body. A failure of communication will effectively negate scientific work whatever its level of technical excellence.

Medical Detective

The overall role in day-to-day function of a forensic medical service is intricately bound to the client organisations for which it provides services. In the case of the Victorian Institute of Forensic Pathology and most other forensic pathology services, these client organisations include the state Coroner's and state Government Departments. The departments include the Law or Attorney-General's Department, the Department of Health, the Department of Labour and others including emergency services such as the Police, the Ambulance Service, the Fire Brigades and the State Emergency Services. Most forensic pathology services are also involved with both education and research and, in addition, have a close working relationship with the officials and organisations within the criminal justice system.

The pathologist, in acting as an investigatory agent for the coroner, plays a far wider role than just the provider of an autopsy report. The pathologist's involvement in both death scene examination, dead body examination, and aspects of forensic science means that they form part of an investigation team in which their expertise is that of a medical detective. This is the role that is so often glorified in the media. Despite this media portrayal of the forensic pathologist as a high-profile medical sleuth, the reality is that the forensic pathologist takes his place on an equal basis with all other specialist investigators in the team assisting the coroner in his investigation.

The Diffuse Disaster Syndrome

The concept of the Diffuse Disaster Syndrome has been one that this author has been exploring for several years now. It is based on the author's experience of how society perceives death and injuries in different circumstances. Put simply, society recognises and responds actively to injuries, deaths and hazards in our community that present as mass disasters involving large loss of life and multiple injuries.

What separates the diffuse disaster from the mass disaster is its temporal and spatial distribution with deaths and injuries taking place as isolated events that are not easily recognised as being related. In the case of a mass disaster, the public and political demands for explanation, and action leads to detailed analysis of the causes of the disaster and proposals and implementation of the means to reduce the hazard. In a diffuse disaster, such social and political pressures are reduced or again applied only diffusely, resulting in a lack of effective coordinated hazard mitigation.

The diffuse disaster can be seen in a far wider range of circumstances than just traumatic injury and death. Simple medical conditions causing death every day, all around the world, year after year may amount to a diffuse epidemic involving hundreds of thousands of individuals over time and yet, because these deaths occur singly and as isolated events in any one community, they are not necessarily perceived as a major medical problem. It is only by bringing these cases together that the impact of such deaths on our community can be fully appreciated and the resources needed to research the mechanisms that result in these deaths be appropriately addressed.

Both the legal profession and the medical profession have at their roots a work practice that is related to the individual handling of matters on a case-by-case basis, dealing with each case as an isolated event. Over the years, however, the medical profession has reaped the benefits—in terms of research and understanding as to the basis of disease—by the analysis of groups of cases that show similar features. Not only does such grouping lead to increased understanding of disease processes and therapeutics, but it increases the efficiency in which medical professionals can undertake their work. Such an analysis of groups or collections of like cases is rare within coroners' systems. Yet, if those defects in society that result in death are to yield lessons, we need to be continually reminded of the risks and dangers around us. Similarly, those who have the responsibility and power to make our society safer need to have accurate information regarding these risks in order to address the relevant issues.

On a random case-by-case basis it is extremely difficult for a coroner's system to identify potentially significant fatal hazards in our society. At the same time, coroners and their supporting investigators are in a unique position of having access to a wide body of information relating to such deaths and the means to make public the issues and factors that have contributed to the death. There are many coroners, clinicians and pathologists who see this educational and preventative role of the coroners' service as one of its most important goals.

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THE ABOLITION OF MANDATORY LIFE IMPRISONMENT FOR MURDER: SOME JURISPRUDENTIAL ISSUES

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THIS PAPER CONCERNS SOME JURISPRUDENTIAL ISSUES RAISED BY THE abolition of the mandatory life sentence for murder, a step undertaken in New South Wales in 1982—*Crimes (Homicide) Amendment Act 1982*, *Crimes (Life Sentences) Amendment Act 1989*—and Victoria in 1986—*Crimes (Amendment) Act 1986*. It starts, however, with more general issues of sentencing philosophy.

The first main section of this paper examines the fundamental principle of sentencing in Australia—that of proportionality—together with an approach to sentencing which sees it as a matter of reaching an 'intuitive' or 'instinctive' synthesis of a number of elements. This approach has considerable support in some courts, in particular the Victorian Supreme Court. The paper rejects this approach and argues that the principle of proportionality requires clarification. It draws a distinction between two interpretations of proportionality—strict and broad. This paper examines the leading case in

[1] The author wishes to thank Arie Frieberg, Richard Fox, David Lanham and Vanessa Mitchell for useful comments on earlier drafts of this paper.

Australia on proportionality, namely *Veen vs. The Queen (No. 2)* (1987) 164 CLR 465, and argues that the majority confused the two interpretations and, furthermore, that this confusion was integral to its dismissing Veen's appeal while endorsing proportionality. Only broad proportionality, which on examination turns out to be quite vacuous, is consistent with upholding Veen's sentence of life imprisonment.

The following section examines the consequences of these relatively abstract considerations for the new area of sentencing discretion created by the abolition of mandatory life imprisonment for murder. It examines the issue of grading or ranking murders according to their relative moral seriousness. It argues that the task of morally grading murders is unavoidable. However, it is not as daunting as it is often portrayed as being. Even if we do not have a fully-developed moral theory for ranking the seriousness of crimes, we have the necessary moral intuitions to enable the task to be undertaken in a way which is not overly subjective or controversial.

The final section argues that the discretionary life sentence should be abolished along with the mandatory life sentence. As an indeterminate sentence, the life sentence—whether mandatory or discretionary—is inconsistent with the principle of proportionality. Also, the interpretation of the proportionality principle in *Veen (No. 2)* creates the danger that life sentences will continue to be used for protective purposes, as it was in the Veen cases. A further reason for abolishing indeterminate life sentences is that *lifers* almost invariably serve something less than life. For instance, in Victoria the average is thirteen or fourteen years and in New South Wales approximately fifteen years (Law Reform Commission of Victoria 1991), thus making the sentence inconsistent with the philosophy of *truth in sentencing*.

Sentencing Principles

Although there have been substantial developments in recent years, it is still a justifiable lament that sentencing is a seriously underdeveloped area of law. Given that it is in the realm of punishment that the power of the state over the individual is at its greatest, and given that it is to law above all that we look to control and guide this power, one would expect sentencing law to constitute one of our richest and best developed areas of law. On the contrary, however, sentencing law is still in a comparatively rudimentary state.

Various factors have contributed to this regrettable state of affairs. Sentencing has suffered the fate of falling between not just two, but three stools. Sentencing has traditionally been treated as an executive and legislative matter, rather than a judicial matter. Most felonies carried the death penalty at common law, and in the eighteenth century it was standard to attach the death sentence to new statutory property offences (Radzinowicz 1948). The judicial role consisted of nothing more—and nothing less—than the ritual of imposing this penalty. It was for the executive to exercise the prerogative of mercy.

Even with the nineteenth century development of statutory maximum sentences generally being reduced to penal servitude for life, sentencing was still treated by judges as a disagreeable and essentially non-legal task. Sentencing suffered, as it still does, from the general distaste of the legal

profession for criminal law. If accused persons were low on the legal agenda, convicted persons were even lower. As Nigel Walker aptly put it:

> if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby (Walker 1969, p. 15)

The introduction of sentencing appeals early in the twentieth century (for example, Criminal Appeal Act 1907 [UK], *Criminal Appeals Act* 1914 [Vic.]) made only a marginal difference. The reluctance of appeal courts to grant leave to appeal, and generally to interfere with the exercise by trial judges of their sentencing discretion was clear from the start (Fox & Freiberg 1985). Sentencing was treated as a practical matter rather than one of legal principle, as something best left to the trial judge, who was in possession of the relevant information, and had the convicted person before him.

Such historical and attitudinal considerations largely explain the single most important factor—the failure at the philosophical level to develop a sound body of sentencing principle. As Fox and Freiberg point out:

> Despite the voluminous philosophical, criminological, and jurisprudential literature on the purposes of punishment or the justifications for imposing criminal sanctions, the courts treat sentencing as essentially a pragmatic exercise (Fox & Freiberg 1985, p. 444).

There is no consensus on sentencing aims, standard lists including retribution, reduction, rehabilitation, denunciation, and education. Neither is there consensus on their interpretation, or how they are best pursued. For instance, in the case of crime reduction, consider specific deterrence, general deterrence, and incapacitation, as well as rehabilitation, denunciation and education as means to this end rather than ends in themselves. Furthermore, there is no agreement on the relative importance of these aims, and how conflict between them should be resolved.

The task for sentencing theory is to develop a coherent, workable and acceptable body of principle out of these disparate elements. This task is necessitated by the demands of what Ronald Dworkin (1978 p. 87, cf. 92–93, 105, 160, 162) calls *the doctrine of political responsibility*. This doctrine requires political officials, in particular judges:

> to make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make (Dworkin 1978, p. 87).

The doctrine rules out decision making that might pejoratively be described as 'intuitionistic' (Dworkin 1978, p. 87; cf. Rawls 1972; Feinberg 1975) That is, it rules out:

> the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right (Dworkin 1978, p. 87).

The doctrine of political responsibility requires that judges, and political officials generally, 'act on principle rather than on faith' (Dworkin 1978, p. 87). It:

> demands that decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice, even when such a theory must compromise some of his intuitions (Dworkin 1978, p. 162).

However, in the realm of sentencing, courts have generally not only ignored this task but sometimes explicitly rejected it, declaring that any attempt to mould the various sentencing aims into a general theory appears contrived and artificial, an exercise in 'mechanical' jurisprudence which tends to yield counter-intuitive results (for example, *R v. Young* [1991] VR 951 960).

In the courts' defence, it might be claimed that this is quite consistent with the common law approach which is, after all, to deal with individual cases rather than to develop general principles. Theory building is more part of the civil law than the common law tradition. However, given the immense experience in sentencing which the courts have developed over a very long period, this excuse looks thin to say the least. We can properly expect more progress than we have got. In any case, the contrast between individual cases and general principles is spurious. Deciding any case requires at least implicit appeal to general standards. What Dworkin's doctrine of political responsibility requires is that judges articulate the principles they appeal to, that they be made explicit, and be open to public examination.

Some judges have sought to evade their responsibilities to develop a body of sentencing principle by seeking haven in an idea of an 'intuitive' or 'instinctive synthesis', offering such pithy but scarcely helpful maxims as 'the only golden rule is that there is no golden rule' (*R v. Geddes* [1936] 36 SR NSW 554, per Jordan CJ.).

The *locus classicus* of this view, in Victoria as least, is *Williscroft's Case*, in which the majority stated that:

> ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process (*R v. Williscroft, Weston, Woodley and Robinson* [1975] VR 292, p. 300).

Fox and Freiberg refer to the Victorian Supreme Court's:

> emphatic statement and re-statement of its view that the process of sentencing cannot be dissected into its component parts (Supra, 444–5).

However, by the standards of Dworkin's doctrine of political responsibility, the intuitive or instinctive synthesis approach is grossly inadequate. Sentencing is not a matter private to the internal workings of the minds of judicial officials. On the contrary, it must be treated as governed by public principles, and subject to standards of public accountability. The responsibility of articulating those principles and resolving tensions and conflicts between them cannot be evaded. As Sallmann and Willis note:

> The adoption of an eclectic approach . . . does not solve the basic problem of spelling out the philosophies and principles which the overall system [of criminal justice], and particularly the sentencing component, is seeking to implement (Sallmann & Willis 1984, p. 100).

Contrary to what the term suggests, the myth of an 'intuitive synthesis' cannot be used to hide the fact that the various factors and elements in the sentencing question often pull in different directions, and that resolving the conflict in anything like a satisfactory way requires developing a theory of sentencing.

All factors are, in principle, capable of conflicting. The current topical issue is that between retribution and incapacitation—between those who hold that a sentence greater than one proportionate to the gravity of the crime can never be justified, and those who hold that such a sentence can be justified on the grounds of community protection.

The latter view is held in England, where the discretionary life sentence exists for a wide range of serious offences. This view, however, has found little support in Australia (at least, at common law) where the High Court in Veen (No. 2) (Supra. cf. *Veen vs The Queen (No. 1)* (1979) 143 CLR 458, 469; *Sentencing Act 1991* [Vic.] s. 5[3]–[7]) has recently reaffirmed the principle of proportionality (even if it has scarcely clarified it).

The question for present purposes is what the principle of proportionality requires of sentencing in murder cases. It will be argued below that this principle renders the moral grading or ranking of murders unavoidable. But to start with, it is necessary to consider the principle of proportionality in general.

The main issue concerns the assessment of crime seriousness. What factors are relevant, and more importantly, what factors are irrelevant? How is the comparative weight of relevant factors to be determined? How is the principle to be applied? In particular, how is it to be applied in contexts where community protection appears to require a disproportionate sentence? (*see*, generally, Ashworth 1991).

In *Veen (No. 2)*, however, the very case in which the High Court sought definitively to lay down the principle of proportionality as the fundamental common law principle of sentencing in Australia, it failed to offer any guidance regarding these questions. Indeed, it will be argued that the Court introduced a new interpretation of the proportionality principle. While it is going too far to say that it substituted this interpretation for the standard interpretation, it certainly vacillated between the two. On the new interpretation, instead of proportionality requiring that the severity of the sentence be proportionate to the gravity of the crime (or, at least, no greater than warranted by the gravity of the crime), the principle requires that the severity be 'appropriate' to the circumstances of the case, (143 CLR 483, per Jacobs J.) these circumstances including the offender's 'propensity to commit violent crimes' and 'the need to protect the community' (143 CLR 469, per Mason J.; 164 CLR 475, per Mason CJ., Brennan, Dawson and Toohey JJ.).

To provide the necessary background, in 1975, Robert Veen, a 20-year-old Aboriginal, homosexual prostitute killed his victim after he had refused payment for sexual services which had taken place in the victim's flat.

Following a verbal interchange in the kitchen, Veen took a knife and stabbed the victim over fifty times (164 CLR 466). Veen was charged with murder, but convicted of manslaughter, probably on grounds of diminished responsibility, but possibly on grounds of provocation, this question also being put to the jury (143 CLR 488, per Jacobs J.)

The trial judge, Rath J., sentenced Veen to life imprisonment on the basis of evidence regarding Veen's dangerousness. Rath J. concluded that, if released whilst suffering from what he accepted to be brain damage, Veen was 'likely sooner or later to kill or seriously injure one or more other human beings' (143 CLR 487). Furthermore, 'there is no suggestion that his condition is curable, or in any way responsive to treatment' (143 CLR 487).

Rath J. held that, in consequence, the ordinary principles of punishment (that is, proportionality) did not apply:

> the only principle of sentencing that I can apply is that the community is entitled to be protected from violence . . . [Veen had] to be imprisoned for the protection of the community from his own uncontrollable urges (143 CLR 487).

The sentence of life imprisonment was confirmed by the New South Wales Court of Criminal Appeal, and Veen sought leave to appeal to the High Court. A five-member bench unanimously granted leave to appeal and upheld the appeal. However, whereas Jacobs, Stephen and Murphy JJ. held that the life sentence should be reduced to one of twelve-years' imprisonment without parole eligibility, Mason and Aickin JJ. were of the view that the case should be remitted for resentencing.

The trial judge's view that the principle of proportionality did not apply in such a case was firmly rejected by the High Court. Jacobs J. referred to:

> the fundamental principle that a man must be given the sentence appropriate to his crime and no more . . . It needs to be emphasised that the protection of the public does not alone justify an increase in the length of sentence (143 CLR 478).

Stephen J. objected that the trial judge's:

> almost exclusive attention . . . to the notion of protection of the community against future danger from the applicant . . . sacrifices the important factor of proportionality in favour of this notion of protection (143 CLR 467).

According to Murphy J.:

> [i]t is a distortion of the criminal law to sentence people to longer terms because they are sick or have diminished responsibility . . .
>
> It is wrong for the courts to impose punishment or greater punishment than is merited because of the lack of non-punitive preventive detention . . . If the protection of society requires the applicant to be confined when his imprisonment ends, because he is dangerous, it should only be done (if it can be done lawfully) by methods outside the criminal justice system (143 CLR 495–496).

Mason J., however, denied any sharp conflict between proportionality and protection. He held that a life sentence specifically imposed for reasons of community protection is not necessarily disproportionate, that there need be:

> no opposition between the imposition of a sentence of life imprisonment with the object of protecting the community and the proportionality principle (143 CLR 469; 164 CLR 475).

Earlier he had observed:

> If it should appear that the propensities or predilections of the person convicted are such that the imposition of life imprisonment is necessary to protect the community from violent harm, then the court should impose that penalty (143 CLR 468).

Mason J., however, was not convinced on the evidence that Veen's was such a serious case, which is why he—together with Aickin J.—would have remitted it for resentencing.

Mason J.'s view on the relation between proportionality and protection cannot be ignored. Despite being in the minority, his judgment was accepted as the leading judgment by the New South Wales Court of Criminal Appeal in the second Veen case before that court, and Mason CJ. (as he by then was) was a member of the majority in *Veen (No. 2)*. However, this view is scarcely convincing. It can hardly be claimed that, coincidence aside, a sentence of life imprisonment for manslaughter explicitly imposed for reasons of community protection is not disproportionate to the gravity of the offence. To impose a protective life sentence for manslaughter, it must be conceded that the principle of proportionality is not a universal principle, that it is rather only a general principle to which exceptions can be made. But this was Rath J.'s position, which the majority in *Veen (No. 2)* was at pains to reject.

To turn to this case, the sequel to the High Court's decision in *Veen (No. 1)* was highly embarrassing. Veen was released on licence in January 1983 (admittedly contrary to the High Court's recommendation), and in October that year stabbed another client to death. Like Veen's earlier victim, he was killed after inviting Veen into his flat for the purpose of homosexual activity. As the trial judge, Hunt J. (164 CLR 469) observed the similarity between the two killings was 'a chilling one'.

Neither does the similarity end there. Again, Veen was charged with murder, and again convicted of manslaughter. The main difference between the two cases was that this time there was no question of provocation. Again, Veen was sentenced to life imprisonment, the trial judge Hunt J., using words reminiscent of Rath J.:

> I am satisfied that the prisoner is potentially or indeed, certainly, a continuing danger to society when released, in that he is likely to kill again or to inflict serious injury upon his release by reason of his brain damage should he be under the influence of alcohol and find himself in any situation of stress. I therefore feel unable to mitigate the severity of a life sentence by reason of the prisoner's abnormal mental condition (164 CLR 470).

Again, Veen appealed to the New South Wales Court of Criminal Appeal, and again his appeal was unsuccessful. Again, he sought special leave to appeal to the High Court. This time the application was heard by all seven members of the High Court.

The case certainly put the High Court into a quandary. Was it to maintain the principle of proportionality as a universal, exceptionless principle, or was it to acknowledge that Rath J. was right, and that proportionality is at most a general principle, to which exceptions can be made, that sometimes it must give way to protection?

In individual judgments, Wilson, Deane, and Gaudron JJ. took the former option. They granted special leave to appeal and would have upheld the appeal. However, in a joint judgment the majority of Mason CJ. and Brennan, Dawson and Toohey JJ. took neither of the above two options, but appeared to adopt a third—that suggested by Mason J. in *Veen (No. 1)*. They held that the apparently conflicting claims of protection and proportionality could be reconciled. They granted special leave to appeal but dismissed the appeal.

It seems that the majority were resolved that Veen's appeal should be dismissed. Presumably, the possibility of his killing a third time was too much for them. But they were equally convinced that the principle of proportionality should be upheld. How, then, were they to square the circle, and reconcile protection and proportionality?

The author suggests that they did so by in effect proposing a new notion of proportionality, even if they did not go so far as to expressly adopt this notion to the exclusion of the standard notion. Instead of sentences being proportionate to the gravity of the crime, as the notion is commonly understood, they were to be proportionate, in Jacobs J.'s phrase from *Veen (No. 1)* to 'the whole of the circumstances of the case',[2] including, as noted by Mason J. above, the offender's 'propensity to commit violent crimes' and 'the need to protect the community' (143 CLR 469, per Mason J.; 164 CLR 475, per Mason CJ., Brennan, Dawson and Toohey JJ.)

The majority in *Veen (No. 2)* declared that:

> [t]he principle of proportionality is now firmly established in this country (164 CLR 472).

They stated that the principle was endorsed by both the majority and minority in *Veen (No. 1)* (164 CLR 472). Disagreement in that case was over the meaning or interpretation of the principle. Or as they put it:

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[2] The question Jacobs J. sought to answer in *Veen (No. 1)* was whether `the sentence of life imprisonment was the proper punishment appropriate to the whole of the circumstances of the case' (143 CLR 483; cf. 164 CLR 472, *R v. Young, supra*, at 956). The vacillation between strict and broad proportionality in the majority's judgment in *Veen (No. 2)* is also evident in Jacob J.'s judgment in *Veen (No. 1)*, although Jacobs J. was a member of the majority in that case.

> [t]he basic difference between the majority and minority in *Veen (No. 1)* lay in the differing assessments of what was the appropriate proportionate sentence (164 CLR 474).

Two possible sources of disagreement could be distinguished. The first concerned the application of the principle, whether it was a universal principle, to be applied without exception, or whether it was only a general principle, to which exceptions could be made. The second source of disagreement concerned the content of the principle, whether sentences were to be proportionate to the gravity of the offence, or more broadly to 'the whole of the circumstances of the case', including the offender's 'propensity to commit violent crimes' and 'the need to protect the community'. These will be referred to as the 'strict' and 'broad' interpretations of the principle of proportionality respectively, or 'strict' and 'broad' proportionality for short.

The majority in *Veen (No. 2)* reconciled the conflict between proportionality and protection by holding that the principle was universal (in contrast with Rath J.), but conceding the broad interpretation of the principle.

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible (164 CLR 473).

With respect, this supposedly clear distinction is highly confusing. It is only clear if community protection is to function merely to cancel out mitigating factors, to rule out reductions to proportionate sentences. This is presumably what is 'permissible', extensions in proportionate sentences being 'impermissible'. Certainly, this is the interpretation which Professor Richard Fox advances. He also found this passage ambiguous (Fox 1988, p. 348), but tried to resolve the ambiguity by holding that what the majority intended was to endorse the 'limiting' notion of proportionality, according to which protective considerations could only operate within a ceiling set by proportionality, as opposed to 'broad' proportionality, according to which protection is a factor in determining the proportionate sentence:

> What the High Court has now done in *Veen (No. 2)*, is to allow the mitigating effect of disorder to be negatived by evidence of future dangerousness. Though denying that either disorder or future dangerousness is being promoted into a general aggravating factor, sufficient to carry the sentence beyond proportionate limits, the majority in that case were willing to permit the sentence to be brought back up to the limit in the interest of protecting the community from the offender's predicted future crimes. The existence of the disorder is not being denied in the way that proof of previous convictions nullifies alleged prior good character. The mitigating effect of the disorder is simply disallowed and the convicted person is precluded from enjoying any reduction of the full sentence which is proportionate to the facts of the crime (Fox 1988, p. 362).

Fox concludes that in *Veen (No. 2)*:

> The High Court has reaffirmed proportionality as a limiting principle in punishment. No sentencing measure may exceed the boundaries set by this principle. Community protection is relevant to, but cannot overshadow gravity (Fox 1988, p. 365).

However, it is not clear that this interpretation or conclusion can be accepted. To suggest that protective considerations only cancel out mitigating factors does not square with the decision of the majority, which was, after all, to dismiss Veen's appeal. Such a decision can only be justified if protection has a far greater role. When all is said and done, it cannot be denied that Veen's sentence was protective, and disproportionately so. With all due respect to Jacobs J., who held in *Veen (No. 1)* that there are 'many a case' of manslaughter serious enough to warrant life imprisonment, I suggest that the mere fact that Veen was acquitted of murder was sufficient to establish that his life sentence was disproportionate (143 CLR 493). In *Veen (No. 2)*, Deane J. similarly rejected Jacobs J.'s view, but still granted that there may be 'quite extraordinary' circumstances in which a life sentence for manslaughter is warranted (164 CLR 493).

Though there may be some manslaughters which are morally more serious than some murders, it is quite another matter to suppose that the proportionate sentence for even the most serious manslaughter can be identical with the proportionate sentence for the most serious murder. That in New South Wales murder and manslaughter carry the same maximum sentence is certainly incompatible with strict proportionality, and represents a breakdown in the structure of sentences. It is only if the life sentence for manslaughter is taken to be a protective sentence, and disproportionately so, that the anomaly is removed. It is this anomaly that the majority in *Veen (No. 2)* was able to exploit to let it off the hook, and to impose what was in fact a disproportionate protective sentence under the guise of imposing a proportionate protective sentence.

A further consideration is whether, limiting attention to the proportionality as measured against the existing scale, Veen's killing can be regarded as the most serious type of manslaughter—one which warrants the most severe penalty, whatever it is. The majority had no doubt that this was a manslaughter in the worst category (164 CLR 478). Wilson J. (164 CLR 489) was more circumspect, going no further than saying that the gravity of Veen's crime 'may' be sufficient 'to place it in the most serious category of manslaughter'. However, Deane and Gaudron JJ. thought otherwise. Deane J. (164 CLR 494) noted various mitigating facts: the lack of control which flowed from Veen's mental abnormality; he carried no knife or other weapon; he acted alone and not in concert; the crime was not premeditated, and it was not motivated by pecuniary gain.

Gaudron J. (164 CLR 499) held that Veen's killing could not count as a manslaughter of the most serious type because manslaughter on the grounds of diminished responsibility is an intrinsically less culpable form of manslaughter. Since the majority appeared to ignore these facts, one is led to ask whether it was not just convenient for them to hold that Veen's manslaughter was of the most serious type, in order to avail themselves of the

anomaly that manslaughter carried the same maximum penalty as murder. Note further that:

> in normal sentencing practice, unless the penalty is mandatory, the maximum is almost never awarded (Fox *supra*, 355; *Ibbs v. Queen*, 1987, 74 ALR 1, 5, *R v. Tait and Bartley* [1979] 24 ALR 473, 484.)

Indeed, in imposing a life sentence on Veen, Hunt J. recognised that such a sentence for manslaughter:

> is these days exceptionally rare and . . . in recent years . . . has been unknown (164 CLR 493, per Deane J.).

The majority stated that the life sentence in *Veen (No. 2)* was not disproportionate, that it did not amount to an 'impermissible' extension of proportionate sentence (164 CLR 473). They approved Mason J.'s claim in *Veen (No. 1)*, cited above, that there can be cases in which there is:

> no opposition between a sentence of life imprisonment with the object of protecting the community and the proportionality principle (164 CLR 474).

However, as also pointed out above—coincidences aside—this claim is simply not tenable. If anything is disproportionate, it is a life sentence imposed explicitly for protective purposes. It is mere happenstance that such a sentence would not have been lower if based on retributive grounds.

The broad interpretation of the proportionality principle makes it vacuous. To say that the sentence must be proportionate in all the circumstances of the case is to say nothing unless some ranking or weighting of those circumstances is provided. It is just to declare that the sentence is a function of those circumstances, without stating what the function is. Nothing more is asserted than that all the circumstances relevant to sentencing are relevant to sentencing.

No sentence is excluded by proportionality on this broad interpretation, no sentence rendered 'impermissible'. (After all, if any sentence were to be excluded, it would be life imprisonment.) The majority's distinction between what is permissible and impermissible is a distinction without a difference. In principle, any sentence of imprisonment—no matter how long—could be reconciled with the principle of proportionality on this interpretation.

In fact, to adopt this interpretation is to retreat to an 'intuitive synthesis' approach. Where one would expect some assistance in the application of the principle in the context of the need for community protection, all the majority in *Veen (No. 2)* advise is that:

> It must be acknowledged, however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment (164 CLR 474).

This seems to amount to tacit acceptance by the High Court that its supposedly clear distinction above is far from clear. It certainly does not

endorse Fox's interpretation of the majority's view on the relation between proportionality and protection, according to which protective considerations are restricted to cancelling out mitigating factors.

Further evidence of a retreat to an 'intuitive synthesis' approach is gained from the following passage:

> . . . sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions (164 CLR 476).

Indeed, a more typical statement of the 'intuitive synthesis' philosophy would be hard to find. To be advised, once more, that 'sentencing is not a purely logical exercise' is hardly any more instructive than to be informed that 'the only golden rule is that there is no golden rule'.

What does Proportionality Mean in Murder Cases?

The previous section was concerned with proportionality in general. This section examines proportionality in relation to murder. Following the criticisms of broad proportionality, it will restrict attention to strict proportionality, even though, as argued above, the majority of the High Court appeared to vacillate between broad and strict proportionality. A further reason for confining ourselves to strict proportionality is that this is how *Veen (No. 2)* is generally interpreted, even if, according to the argument above, mistakenly so.

This section will, therefore, be restricted to the question of how the moral seriousness of murders is to be assessed and will not be concerned with the question of how considerations relevant to strict proportionality are to be balanced against considerations not so relevant, such as the likelihood of rehabilitation and the need for community protection.

The two major issues are what could be referred to respectively as the problems of internal and external ranking.

The internal problem concerns the ranking of murders against each other. In particular, the question arises of how to distinguish between murders which warrant a sentence of life imprisonment from those for which a fixed term is sufficient. (As will be seen in the following section, the inability to satisfactorily answer this question is a good reason for abandoning the life sentence altogether.)

The external problem concerns the ranking of murder as against other serious crimes—such as robbery, rape, and manslaughter. Given that murderers, on average, spend somewhere between thirteen and fifteen years behind bars (Law Reform Commission of Victoria 1991), the question arises of the appropriate sentence for a particularly brutal or appalling robbery, rape, or killing which falls short of murder. Conservative commentators, in particular, object to what they

regard as a severely contracted sentencing range resulting from sentences for murder which they consider far too lenient.

It will be argued in this section that the problem of the limited sentencing range is not the problem it may at first appear to be. The sentencing range for each crime type is much greater than might be thought, because there is considerable 'overlap' in the moral seriousness of different crimes.

It is widely recognised in criminological circles, even if not always by the general public, that crimes come in widely differing degrees of moral seriousness. This is no less the case with murder, than with other serious crimes against the person. The British Royal Commission on Capital Punishment observed nearly forty years ago that:

> . . . there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder (Great Britain 1953, p. 6).

It will be argued in this section that, counter-intuitive though it may at first appear, the range in the moral seriousness of murders is such that there is no reason in principle why sentences for other serious crimes—such as robbery, rape and manslaughter—should not 'overlap' with murder sentences. There are good grounds for holding that, for instance, a particularly brutal rape or assault should not warrant a higher sentence than a murder which, by the moral standards of murder, is not a particularly serious one. Consider, for instance, mercy killings and battered wife syndrome killings. Furthermore—as will be argued in the following section—this reasoning supports the abolition of the discretionary life sentence for murder in favour of fixed terms.

It might be suggested that the task of morally grading murders is unnecessary because the relevant distinctions have been made at the level of the substantive criminal law, and so do not need to be made at the sentencing stage. A crude attempt to morally grade homicides is contained in the distinction between murder and manslaughter (and perhaps even more so in the distinction between manslaughter and fatal driving offences). Jurisdictions which distinguish between degrees of murder attempt slightly more sophisticated analyses.

There are, however, great dangers in trying to comprehensively move moral assessment back to the stage of the substantive criminal law. The substantive criminal law is an inappropriate instrument to undertake the fine tuning which is possible under a discretionary system of sentencing. There is the danger that cases will be misclassified with resulting injustice. Difficult moral judgments still have to be made, and judgments do not always point in the same direction. This is not altered by the fact that they are made at the level of the substantive criminal law, rather than the sentencing stage. Indeed, the consequences of making these judgments incorrectly is much greater, as they concern whole classes of cases and not just individual instances.

Indeed, some systematic distortion at the level of the substantive criminal law is only to be expected. Crimes are largely distinguished and defined at the level of their physical element. But as will become apparent later in this paper, in distinguishing and identifying a number of dimensions of moral

appraisal for the ranking or grading of crimes, the physical element accounts for only one such dimension.

It is only by permitting considerable discretion at the sentencing stage that sufficient flexibility can be provided to do justice to the other moral dimensions. Indeed, this is a major reason for retaining sentencing discretion and being wary of proposals for guideline or presumptive sentencing. They simply do not have the necessary flexibility to account for the moral complexity of most crimes.

The task of moral evaluation cannot, then, be shifted to the level of the substantive criminal law. But this is not a conclusion necessarily to be feared. This task is not as difficult as often thought. We have the necessary moral intuitions to assess murders along a variety of moral dimensions, even if they are not worked out into a fully-developed moral theory capable of resolving conflicts between dimensions.

Consider some of our reasonably established dimensions of moral assessment. First, starting with the dimension most easily accounted for at the level of the substantive criminal law, we distinguish between crimes on the grounds of the amount of harm or damage caused. Many of the judgments we make about the relative seriousness of different types of personal injury and different types of property damage are reasonably uncontroversial, and meet with a high degree of consensus. Personal injury is generally treated as more serious than property damage, and death as generally more serious than personal injury. Different ways in which a crime was committed can be distinguished and these can be ranked morally according to the amount of pain, suffering, fear, and physical and psychological harm they cause. Likewise, multiple killings—crimes with numerous victims—are treated as more serious than single killings—crimes with only one victim.

Secondly, crimes are distinguished between according to the moral status of the victim. Some victims are thought of as being relatively more morally (if not legally) innocent than others. The 'most' innocent victims are children, and, more generally, those who are unable to defend themselves, such as the sick and elderly. Crimes against such persons are seen to be particularly abhorrent.

The moral status of the victim also explains the general attitude towards gangland killings. However, the attitude 'they can do what they like to each other, so long as third parties do not get hurt' is short-sighted, as it ignores the social costs of their criminal activity. Changes in evaluations over time of the moral status of women in the home help to explain more realistic attitudes towards men who kill their wives. Consider conversely growing recognition of the 'battered-wife syndrome' and the increasingly sympathetic attitude towards women who kill their husbands following a history of violence and threats.

Thirdly, crimes are distinguished morally on the grounds of whether they are planned—premeditated—or instantaneous—committed in the heat of the moment. Furthermore, crimes are distinguished between on grounds of motive. Consider the following non-exhaustive lists. There are crimes perpetrated out of concern for material self-interest. There are crimes committed for altruistic reasons (for instance, the relief of pain or suffering in the case of the mercy killing) or, more generally, crimes which involve some element of social justification. In marked contrast, there are crimes undertaken for sadistic

reasons—out of the desire to cause pain and suffering for their own sake, or at least out of indifference to the pain and suffering it causes. There are crimes committed for a variety of motives, and finally there are apparently senseless crimes—crimes committed for no discernible reason at all.

A fourth dimension of moral evaluation is the degree of an individual's involvement in the crime. It is morally relevant whether a person committed the crime alone or in conjunction with others. In the latter case, the question arises of the relative role of the individual concerned, whether he or she was the main perpetrator, or the 'brains' behind the crime, or just a minor participant. It is similarly relevant whether the offender was coerced, or subjected to any undue pressure, or whether he or she was particularly weak-willed and unable to resist temptation. A further consideration is whether there is any breach of trust involved (Ashworth 1991, pp. 43–4).

This list of moral dimensions is not necessarily complete, but it is sufficient for the purposes of this paper. It is suggested that, within these moral dimensions, important moral assessments can be made reasonably soundly and with some degree of certainty. It is also suggested that these dimensions would explain and justify why different types of murder are reacted to so differently, and why murders at one extreme are quite abominable, and at the other extreme almost excusable.

It is beyond the scope of this paper to offer a detailed analysis of prominent types of murder along these dimensions. But a crude first attempt might go somewhat as follows. Take first the (perhaps atypical) domestic murder in which the killing is unpremeditated, occurring on the spur of the moment, in the heat of argument. There is no wish to kill, as may be evidenced by genuine remorse. The killing is not undertaken for personal gain, for instance, in order to benefit from the victim's life insurance policy. There may be provocation in the moral sense, rendering the victim less than totally morally innocent, even if not sufficient at law to reduce murder to manslaughter.

Consider next the battered-wife syndrome murder. A woman kills her husband following a long history of violence and threats—including death threats—either against the woman or members of her family. Even though premeditated, the killing may rank not particularly high on the moral scale, on the grounds that it amounts to self-defence in a moral sense, even if not according to the strict legal definition. The victim may be regarded as largely responsible for bringing on his own death. A further factor could be indifference and inaction on the part of the police and social welfare agencies, leaving the woman with little choice but to take the law into her own hands.

Consider, thirdly, the typical gangland retaliatory or revenge killing. The moral assessment of such a killing hinges largely on the moral status of the victim. We distinguish sharply between the case where the victim is a gang leader—responsible for numerous deaths—and where he is a minor figure—a junior member. In the former case, there is some justification in the retaliation and possibly an element of poetic justice about it. In the latter, there is not.

Take, fourthly, an abduction followed by rape and murder. Going through each dimension in turn explains why this type of crime (or sequence of crimes) is regarded as among the most abhorrent. The killing is

accompanied by pain, terror, and degradation. The victim is wholly innocent and the killing is motivated by the worst possible desires—to hurt and humiliate for its own sake.

This list is certainly not exhaustive. But it is not too modest to suggest that trying to classify or categorise murders according to prominent or relevant moral dimensions should, on the whole, assist in explaining why we morally assess different types of murders the way we do. We have the necessary moral intuitions to compare cases, even if not to provide universal ranking. There is the problem of cross-dimensional ranking. We need to develop a full moral theory. Indeed, we have a duty to confront and examine our moral intuitions (consider Dworkin's duty of political responsibility), to see how we can best build them into a coherent moral theory. It is possible to go much further than some vague intuitive synthesis, and we have a responsibility not to lapse into such a synthesis.

However, the intuitions themselves constitute a firm start. It is on their basis that new defences are argued for (for example, battered-wife syndrome), or it is argued that some forms of murder should be reclassified as manslaughter. (Consider the issue of whether intention to cause grievous bodily harm should be sufficient *mens rea* for murder.) The above dimensions can be used to ground guidelines for assessing crime seriousness, and hence for applying the principle of strict proportionality. These dimensions are relied upon equally in criticising the substantive law as it stands, and in recommending changes.

Indeed, taking them into account at the sentencing stage can be a forerunner to reforming the substantive law. Considerations which are thought at first only important enough to feature at the sentencing stage can later be deemed important enough to justify changes to the substantive law. There are, however, as pointed out above, dangers in this. Concepts which are interpreted narrowly at the level of substantive law can be used much more broadly at the sentencing stage. (A good case in point is provocation.) It is doubtful whether the substantive law can ever be detailed enough to take all the necessary moral distinctions into account, and furthermore, the 'overlap' problem can only be solved at the level of sentencing. These constitute two major reasons for not restricting sentencing discretion.

Fixed Term Sentences for Murder?

This section argues that the next logical step in the reform of sentencing for murder is to abolish life sentences altogether and to replace them with fixed-term sentences. Abolition of the life sentence is the natural conclusion to the process of reforming sentencing for murder which started with the abolition of the mandatory death penalty, and continued with the abolition of the death penalty altogether, and then of mandatory life imprisonment.

A number of arguments support this proposition. First, life sentences have been generally rejected in fact if not by law (*see* references in Brown, Farrier, Neal & Weisbrot 1990). The introduction in New South Wales of 'natural life' sentences—*Crimes Act 1900* s. 19A(2)—can only be regarded as a retrograde step. The idea that a person should be literally incarcerated for life and that he should

never be released is properly regarded as totally inhumane. It is a *truth in sentencing* requirement that the fact that life sentences are never served in full be reflected in law by abolishing life sentences.

Secondly, life sentences are indeterminate sentences and, as such, cannot be reconciled with any genuine notion of proportionality—of the punishment matching the gravity of the crime. There is no satisfactory way of fitting life sentences on a sentencing severity scale. In reply, it may be contended that this is irrelevant, because murder, being qualitatively different from other crimes, similarly cannot be fitted on a scale of crime seriousness. However, there is no qualitative difference between murder and other serious crimes sufficient to support the qualitative difference between life sentences and terms of years. As argued previously, murders, just like other crimes, come in varying degrees of moral seriousness.

This point also tells against any claim that, even if not served in full, life sentences still play an important symbolic role in that they represent the seriousness of the crime of murder. However, if there is no qualitative difference between murder and other serious crimes to justify the life sentence for murder, there is no relevant symbolic point to be made. Furthermore, even if there were, to maintain the penalty of life imprisonment for symbolic reasons runs counter to the philosophy of *truth in sentencing*. One cannot both have such symbolism and sentences that mean what they say.

A third point is that life sentences by nature are protective rather than retributive. This, for instance, is how they have generally been used in the United Kingdom. Life sentences have their natural home in jurisdictions which reject proportionality as a universal principle, which grant that community protection can justify disproportionate sentences.

This leads to the final point. Given, as argued previously, the High Court's confusion regarding the notion of proportionality, the danger exists of protective life sentences that are in fact disproportionate being imposed under the guise of proportionality. Indeed, according to the above argument, the Veen cases were graphic instances of this. Even if this happens only infrequently, it is still preferable to eliminate the possibility by abolishing life sentences altogether.

Conclusion

This paper has canvassed a number of issues. The first main section examined the principle of proportionality as laid down by the High Court. It distinguished between two versions of this principle—the strict and the broad—and argued that in *Veen (No 2.)* the Court vacillated between the two. It contended that the broad interpretation is vacuous, and represents a retreat to an 'intuitive synthesis' approach to sentencing.

There is, however, no excuse for such a retreat. It was argued in the next section that we have the necessary moral intuitions to determine the relative moral seriousness of offences. There are a number of reasonably well-established, clear dimensions of moral assessment—even if we do not have a fully-worked-out moral theory to resolve issues of conflict between different dimensions. There is no need to retreat into the false haven of intuitive synthesis.

The final section presented a brief case, drawing upon a number of considerations, for the abolition of the life sentence for murder.

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ARE THERE TOO MANY MURDER TRIALS?

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TWO FEATURES OF CRIMINAL JUSTICE IN THE 1980S HAVE BEEN THE greatly increased emphasis on pre-trial prosecution decision-making and the quest for a more efficient use of scarce resources of time, money and personnel. The publication for the first time of the *Prosecution Policy of the Commonwealth,* in 1982 was subtitled 'Guidelines for the making of decisions in the prosecution process and the considerations upon which these decisions are made' (Australia. Attorney-General's Department 1982). And quite recently, the Directors of Public Prosecutions and senior Crown Prosecutors of the various Australian jurisdictions have agreed upon a common set of prosecutorial guidelines setting out the criteria to be employed when deciding whether or not to prosecute (Victoria. Office of the Director of Public Prosecutions 1991). These guidelines now provide a yardstick against which the operation of a prosecution authority may be evaluated. The continued need for efficiency is more than amply demonstrated by the existence of a deep and long-lasting recession, the growth in the number of lengthy criminal trials and financial pressures on government and legal aid bodies.

The task of a prosecution authority is the preparation and prosecution of criminal cases. Central to that task is the decision whether or not to charge and the choice of charge. As the national Prosecutorial Guidelines state:

> The decision whether or not to prosecute is the most important step in the prosecution process (Victoria. Office of the Director of Public Prosecutions 1991, p. 59).

This paper presents some Victorian data on homicide prosecutions and discusses the implications of the data in evaluating prosecution decisions and

prosecution policy. It also considers the potential of such data in guiding prosecution decision-makers. The paper is not intended as a complete critique; its aim is essentially to ask questions and raise issues.

The Data

The Law Reform Commission of Victoria (1991a) conducted a study of all homicide cases handled by the state prosecution authority in Victoria between 1981 and 1987 (hereafter called the *Homicide Prosecutions Study*). The study did not include cases prosecuted under s. 318 of the *Crimes Act 1958* (Vic.) for 'culpable driving causing death'. The key source of information for this study was the files of the Director of Public Prosecutions.

Over the period surveyed there were 259 homicide victims and 302 accused. A number of cases involved multiple accused and/or multiple victims. In the study, these cases are classified by what are called 'accused-victim pairs'. Thus, if a homicide event involved two accused and three victims, there would be six accused-victim pairs - each such pair linking a separate accused and victim. In a case involving one accused and one victim there is one accused-victim pair. In this study there were 319 accused-victim pairs.

Table 1 sets out the presentment decisions made by the prosecution authority in these 319 cases.

Table 1

Presentment

Offence	Number	Per cent
Murder	206	64.6
Manslaughter	89	27.9
Infanticide	6	1.9
Nolle prosequi	16	5.0
Other	2	0.6
Total	319	100.0

Source: *Homicide Prosecutions Study*, Table 44, p. 61.

It will be seen that nearly two thirds of all cases were presented on murder, and a little over one-quarter of the sample was presented on manslaughter.

Table 2 sets out the results of the 206 cases presented on murder.

Table 2

Results of Cases where Accused Presented on Murder

Result	Number	Per cent
Murder	58	28.1
Manslaughter	92	44.7
Acquitted	33	16.0
Not Guilty but insane	12	5.8
Nolle prosequi	2	1.0
Other	9	4.4
Total	206	100

Note: Adopted from *Homicide Prosecutions Study*, Table 47, p. 68.

These data need some further comment. Of the thirty-three acquittals, ten were directed acquittals ordered by the judge. The most common outcome of these murder presentments was manslaughter: in ninety-two (or about 45 per cent) of the 206 cases. Of these ninety-two cases, seventeen were guilty pleas before the trial day, fifteen were guilty pleas accepted at the start of, or during, the murder trial, and the remaining sixty cases were jury verdicts.

If one defines success rate for murder presentments in terms of achieving a murder conviction then, on the face of it, fifty-eight murder convictions for 206 murder presentments is not a high success rate—less than 30 per cent. Even if the seventeen guilty pleas to manslaughter entered before the trial day are excluded, the success rate is still only around 30 per cent. If, however, the measure of success is the total of murder and manslaughter convictions, then the success rate is nearly 75 per cent. This paper adopts as its success rate the number of murder convictions obtained, in part because persons can in fact be presented for manslaughter.

Some comparisons at this point are instructive. Unlike Western Australia, Queensland and Tasmania, which have a criminal code, the law in New South Wales and South Australia, as in Victoria, is still essentially common law murder and manslaughter. Hence comparisons between jurisdictions in the area of homicide are best made with New South Wales and South Australia.

Unfortunately in New South Wales, data on higher courts criminal cases are not available for the years 1983 to 1987, and some of the 1988 data has proved unreliable. Table 3 sets out the results of cases in New South Wales for the period 1989–90 where persons were indicted for murder.

The success role in terms of murder convictions is substantially higher than for Victoria. However, this sample is over a different and shorter period when the penalty for murder had been changed and in a jurisdiction where the maximum penalty for manslaughter is life imprisonment.

Table 3

Results of Cases in New South Wales where Accused was Indicted for Murder 1989–90

Result	Number	Per cent
Murder	60	39.5
Manslaughter	40	26.3
Acquitted	47	30.9
Other	5	3.3
Total	152	100.0

Note: Information provided by I. Crettenden, New South Wales Bureau of Crime Statistics and Research.

Table 4 sets out the result for the period 1982–90 of cases in South Australia where the accused was indicted on murder.

Table 4

Result of Cases in South Australia for Period 1982–90 where Accused was Indicted for Murder

Result	Number	Per cent
Murder	56	44.1
Other offence	39	30.7
Acquitted	12	9.4
Not guilty but insane	11	8.7
Nolle prosequi	9	7.1
Total	127	100.0

These South Australian figures cover a slightly longer period (1982–90) than the Victorian period of 1981–87, but the periods substantially overlap. On these data, fifty-six (or just under 45 per cent) of the 127 cases resulted in a murder conviction. Moreover, of the thirty-nine cases resulting in a conviction for a lesser offence (generally manslaughter), at least nine were guilty pleas. If these cases were excluded, then the success rate would be approaching 50 per cent (fifty-six murder convictions in 118 cases).

Of course, comparisons such as these must always be treated with caution, being based on different jurisdictions and legal cultures with perhaps different pressures and expectations. Nevertheless, the differences are sufficiently substantial to raise some concerns about the Victorian results.

A further comparison, this time of other offences in Victoria, is worth considering. Rape offences are offences where traditionally there has been a higher than average acquittal rate. The following data based on the files of the Office of the Victorian Director of Public Prosecutions cover all accused charged with a rape offence in 1989 and proceeded with on presentment (unpublished data provided by the Victorian Bureau of Crime Statistics and Research). Tables 5 and 6 set out the results of persons presented on aggravated rape and rape respectively whose case came to the Office of the Director of Public Prosecutions in 1989. Some of these persons were presented in 1989 and some in 1990. The data is person-based—provided a person is convicted of at least one count of rape, this is recorded as 'convicted-rape'.

Table 5

Results of 1989 Cases where Persons Presented for Aggravated Rape

Result	Number	Per cent
Convicted – aggravated rape	24	63.1
Convicted – rape	3	7.9
Convicted – other offence	3	7.9
Acquitted	8	21.1
Total	38	100.0

Table 6

Results of 1989 Cases where Persons Presented for Rape

Result	Number	Per cent
Convicted – rape	28	59.6
Convicted – other offence	6	12.8
Acquitted	13	27.6
Total	47	100.0

The success rate is quite high compared with the success rate for murder presentments—around 60 per cent of persons are convicted of the offence on

which they were presented. However, a word of caution is necessary. Of the twenty-four persons convicted of aggravated rape, sixteen pleaded guilty, and eight only out of twenty-two were convicted after a trial. Of the twenty-eight persons convicted of rape, eighteen pleaded guilty and ten only out of twenty-nine were convicted after a trial. In the *Homicide Prosecutions Study*, for most of the period (1981–June 1986) there was a mandatory life sentence for murder and virtually no guilty pleas. Nevertheless, this data on rape offences does provide a useful point of comparison.

The Victorian data also enables further refinement. The researchers in the study classified homicides according to the 'context' of the killing. 'Context' here means more than simply the relationship between the accused and the victim. Context relates to the situational factors which led to the offence. The *Homicide Prosecutions Study* explains this categorisation in the following way:

> The context is the set of significant circumstances interpreted as motivating or underlying the offence. Information as to relationship does not necessarily give the full picture. For example, a person who killed their sexual partner might have done so in a 'domestic' context, but the offence might also have occurred in a dispute over drug dealing. The classification of context will therefore depend on which of these contexts could be identified, from the data on the DPP file, as the primary one.
>
> Most homicides occurred either in a domestic context or in the context of an argument. 'Domestic' here means arising out of a domestic relationship, that is, either between persons living together as a family, or between persons relating as a family although living apart. Thus it includes brothers and sisters, and estranged spouses/lovers, where the 'domestic' relationship was the context of the homicide, as distinct from, say, drug dealing or a robbery. An event was only recorded in the primary classification 'argument' if it was not otherwise considered as domestic or as arising out of sex-rivalry. 'Argument' might include, for instance, a killing in the course of a pub brawl. (Law Reform Commission of Victoria 1991a, p. 47).

These classifications depend, of course, on the materials on files and on the judgement and interpretation of the researchers. Doubtless, in some cases, there could be disputes about classification. However, this categorisation is based on an analysis of primary, relevant material and can reasonably be expected to present at the very least a broadly accurate picture. The three major, primary contexts for homicide in the study were:

- domestic — 100 cases out of 319, or 31.3 per cent;
- argument — 98 cases out of 319, or 30.7 per cent; and
- robbery — 36 cases out of 319, or 11.3 per cent.

There were also five cases classified as having a primary context of 'contract killing'. The processing and outcome of these cases is of some interest.

Choice of presentment

- For the 'domestic' category, about two thirds were presented on murder and just on one quarter for manslaughter;
- for the 'argument' category, about two thirds were presented on murder and just under one third presented on manslaughter.
- for the robbery cases, over 80 per cent were presented for murder; and
- for the 'contract killing' cases all five (or 100 per cent) were presented for murder.

Outcome

Table 7 sets out the presentments and outcomes of the 'domestic' homicides.

Table 7

Presentments and Outcomes in Domestic Homicides (n = 100)

	Presentment	Outcome
Murder	66	11
Manslaughter	24	49
Infanticide	5	5
Not proceeded with	5	5
Acquitted	na	16
Not guilty but insane	na	10
Other	na	4
Total	100	100

Note: Adopted from *Homicide Prosecutions Study*, Table 45, p 62.

Of those presented for murder in the 'domestic' category, only one in six (or 17 per cent) was convicted of murder, with a substantial number being convicted of manslaughter. The low proportion of murder convictions is striking and must raise questions about the choice of presentment in at least some of the cases.

The same pattern emerges with the 'argument' category of homicide with a low rate of conviction for murder and a rather higher acquittal rate with twenty-four (or nearly 25 per cent) of the group being acquitted. Here, too, similar concerns arise about the choice of murder presentments in light of the low murder conviction rate.

Predictably, in the robbery and contract killing categories, there was a higher proportion of murder convictions obtained—ten out of twenty-nine (or nearly 35 per cent) in robbery cases and three out of five (60 per cent) in the contract killing cases.

The Victorian study also examined various defences used in the homicide cases. This information was obtained from the files and especially from the transcript of the hearing. However, since the addresses of counsel and the trial judge's charge to the jury were often not available, it was not always possible to know whether defences which seemed relevant were actually put to the jury (Law Reform Commission of Victoria 1991a, p. 74) That having been said, however, this analysis represents a great advance on anecdote and impression, and provides a solid, empirical base for the analysis of defences in homicide cases. It is not relevant to this discussion to outline all, or even most, of the findings in the study with respect to defence issues raised. However, some general findings should be reported. Firstly, 'in most cases argument centred on the mental state of the accused rather than the physical circumstances of the event' (Law Reform Commission of Victoria 1991a, p. 74). Secondly, more than one line of defence was usually in issue. Not surprisingly, intention was in issue in over 60 per cent of cases (Law Reform Commission of Victoria 1991a, p. 74).

In the 319 cases, the incidence of the defences of provocation, self-defence and excessive self-defences was as follows:

- provocation was an issue in seventy-five cases (23.5 per cent);
- self-defence was an issue in sixty-six cases (20.7 per cent); and
- excessive self-defence was an issue in forty-nine cases (15.4 per cent).

Often, of course, these defences were argued together in cases. (Law Reform Commission of Victoria 1991a, p. 75).

Provocation

As stated above, provocation was an issue (not necessarily the dominant issue) in seventy-five cases. Of these cases, fifteen were presented for manslaughter and sixty presented for murder. Of the fifteen cases presented for manslaughter, eight had been committed for murder. Moreover, eleven of these cases were 'argument' homicides, and only four 'domestic' homicides.

Table 8 sets out the results by gender of accused of cases presented for murder where provocation was an issue.

It will be observed that for male accused, just over one-quarter were convicted of murder and thirty-two (or about 60 per cent) were convicted of manslaughter. While the numbers of female accused are small, the comparison is of interest: none was convicted of murder and four (or about 60 per cent) were convicted of manslaughter. The manslaughter conviction rate is approximately the same for both genders.

Table 8

Result by Gender of Accused in Murder Presentments where Provocation was an Issue

Result	Male	Female	Total
Convicted murder	13	—	13
Convicted manslaughter	32	4	36
Not guilty — insane	2	—	2
Guilty plea to manslaughter	1	—	1
Acquitted	2	2	4
Acquitted — self defence	1	—	1
Other	—	1	1
Nolle prosequi	2	—	2
Total	53	7	60

Note: Adopted from *Homicide Prosecutions Study*, Table 57, p. 79.

However, when the gender of the victim is taken into account, significant differences appear. Table 9 sets out the outcomes for murder presentments involving male accused where provocation was an issue according to gender of the victim.

Table 9

Outcomes According to Gender of Victim of Murder Presentments with Male Accused where Provocation was an Issue

Result	Male Victim	Female Victim
Murder	5	8
Manslaughter	20	12
Other	7	1
Total	32	21

In these cases, if there is a male victim, the murder conviction rate is quite low: five out of thirty-two cases, or about 16 per cent. However, when the victim is female, the murder conviction rate is much higher: eight out of twenty-one cases, or nearly 40 per cent. Over this period then, the prosecution

has had much greater success in cases involving provocation where there is a male accused and a female victim.

For the sake of completeness, of the seven murder presentments where provocation was an issue and the accused was female, one involved a female victim and six involved male victims. The case involving a female victim resulted in a manslaughter conviction and of the six cases involving male victims four resulted in manslaughter convictions. In three other cases where provocation was an issue, the female accused was presented for manslaughter.

Self-Defence

Self-defence was an issue in thirty-seven murder presentments and excessive self-defence in twenty-nine murder presentments. Since the decision in *Zecevic v. Director of Public Prosecutions* [1987] 162 CLR 645, excessive self-defence has ceased to be a defence and so will not be discussed in this paper. Table 10 sets out the result of murder presentments where self-defence was an issue.

Table 10

Result of Murder Presentments where Self-Defence Was An Issue

Result	Number	Per cent
Murder	8	21.6
Manslaughter	17	45.9
Acquittal	11	29.7
Nolle prosequi	1	2.7
Total	37	100.00

Note: Adopted from *Homicide Prosecutions Study*, Table 58, p. 81.

In these self-defence cases, there is a comparatively high acquittal rate, nearly 30 per cent, compared with the 16 per cent acquittal rate for all cases presented for murder.

Summary

These data show that in the study period 1981–87, the success rate defined as the proportion of murder presentments resulting in murder convictions was only around 30 per cent, a figure considerably lower than in South Australia where over the period 1982–90, the success rate was just under 45 per cent. Of the forty-seven females accused in this study, twenty-six were presented for

murder but none was convicted of murder. The fifty-eight persons convicted of murder were all male.

There are other findings of special note. In cases classified as 'domestic', for every six presented for murder, only one resulted in a murder conviction. A similar low success rate was found to exist in 'argument' cases. In cases where provocation was identified by the researchers as an issue (whether or not in connection with other defences), substantial differences emerge linked with gender. For male accused presented for murder, a murder conviction outcome was about two times more likely if the victim was female. For female accused presented for murder (there were only seven), none resulted in a murder conviction. In cases presented for murder where self-defence was an issue, the acquittal rate was nearly twice as high as the average of all cases presented for murder. These findings raise a number of important issues related to prosecution decision-making.

Discussion

Criticisms of prosecution decision-making

The low murder conviction rate may suggest that prosecution choice of charges is being made inappropriately. That criticism has been made on a number of occasions. Seifman (1982, p. 88) wrote that 23 per cent of a sample of judges who were interviewed with regard to plea negotiations had indicated that there should be less overcharging. The Legal and Constitutional Committee of the Victorian Parliament noted that a number of witnesses had considered that overcharging was a problem (Victoria. Parliament. Legal and Constitutional Committee 1984). In particular, Mr O'Brien of the Legal Aid Commission of Victoria claimed that frequently the prosecution overcharged and then refused to accept reasonable offers of guilty pleas. In its *Report on Criminal Trials*, the Shorter Trials Committee noted that it had received expressions of concern about overcharging from some Victorian judges and experienced criminal barristers (Australia. Shorter Trials Committee 1985). More recently, in its report on homicide, the Law Reform Commission of Victoria (1991b, p. 43) noted that senior members of the Legal Aid Commission argued that one explanation for the low success rate in murder cases of the prosecuting authority was overcharging. The Law Reform Commission of Victoria itself saw this low success rate as cause for concern and recommended a review of prosecution decision-making in respect of the laying of murder charges.

It should be noted that, apart from the response of the Legal Aid Commission in 1991 to the low murder conviction rates found in the 1981–87 study, none of the reported concerns and criticisms about overcharging related specifically to murder prosecutions. Moreover, the criticism was generally in terms of impressions and beliefs. As the Shorter Trials Committee stated:

> It needs to be mentioned at the outset that the Committee has before it no concrete, empirical evidence of overcharging and overloading of

> presentments. It is, of course, a difficult matter to gather firm evidence about. Whether presentments are overloaded is often very much a matter of opinion (Australia. Shorter Trials Committee 1985, p. 59).

Interestingly, Mr O'Brien of the Legal Aid Commission in part based his claim of overcharging on some 1982 data where in eight cases clients of the Legal Aid Commission were charged with attempted murder. In each case, an offer to plead to a lesser count was made but rejected by the prosecution, and only one of the eight was convicted of 'attempted murder', the rest being either acquitted or convicted of lesser counts. Commenting on these figures, Mr O'Brien stated:

> It has been said to me by prosecution representatives that the fact that a jury verdict is the same as we offered to plead to, or a lesser count, there is no indication that our original offer was a reasonable one. I concede that in an isolated case. But when you get a pattern over a period of years and a multiple number of cases where the pleas that we are offering are either accepted at the door of the court by the Crown or alternatively the jury verdict is a conviction on the count we have offered, that is a conviction on a lesser count, I say that pattern demonstrates that we are reasonable in our offers and that ... there ought to be more effective plea negotiation (Victoria. Parliament. Legal and Constitutional Committee 1984, p. 89).

Responding to Mr O'Brien's data and claims, Mr Hassett—then a Prosecutor for the Crown and now a County Court Judge—having noted that 'it could not be said in relation to any particular case that the [prosecution] decision was wrong', nevertheless continued:

> I do not mean thereby to suggest that the figures that Mr O'Brien has [put forward] ought to be disregarded. They are significant and I think it behoves the Director of Public Prosecutions to be aware of them (Victoria. Parliament. Legal and Constitutional Committee 1984, p. 93)

It is in the spirit of these remarks of Mr Hassett—as he then was—that the findings of the 1981-87 *Homicide Prosecutions Study* should be discussed.

The criteria for prosecution decision-making

The study period 1981–87 saw two different agencies responsible for prosecutions in Victoria. The conduct of prosecutions in the higher courts was taken over by the Office of the Director of Public Prosecutions in 1983. Before that time, the Criminal Law Branch of the Crown Solicitor's Office had been responsible for the preparation of those cases.

However, for most, if not all, of the study period, the major criterion used in making prosecution choices has been what is often referred to as the 'reasonable prospect of conviction' test. The discussion will be based on that test, since it is now the key element in the Prosecutorial Guidelines adopted by all Australian jurisdictions.

Under these Guidelines (Victoria. Office of the Director of Public Prosecutions 1991, par. 4), the existence of a bare prima facie case is not enough to 'justify the institution or continuation of a prosecution'; there should not be a

prosecution 'if there is no reasonable prospect of a conviction being secured'. There is no definition in the Guidelines of the term 'reasonable prospect of conviction'. However, the Guidelines do spell out the matters to be taken into account in determining whether there is a reasonable prospect of conviction:

> The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds. (Victoria. Office of the Director of Public Prosecutions 1991, par. 5)

Some more general remarks can be made about this statement. The last sentence of this quotation makes it clear that the Guidelines are concerned not only about justice but also about the efficient use of resources. The quotation also seems to imply that a reasonably high success rate is to be expected; the phrase 'Indeed it is inevitable that some will fail' does not suggest an expectation that most will. The determination of 'a reasonable prospect of conviction' requires an assessment of the strength of the case, including the credibility of witnesses and their likely impression on the arbiter of fact. This last requirement explicitly demands an assessment of how the jury will respond to prosecution witnesses and to the whole prosecution case. The Guidelines also state that the reasonable prospects test 'presupposes that the jury will act in an impartial manner in accordance with its instructions'. (Victoria. Office of the Director of Public Prosecutions 1991, par. 4)

The requirement that a decision-maker assess the likely impact of evidence and witnesses upon the jury (presupposed to be impartial) creates the probability that the quality of evidence required to satisfy the reasonable prospect of conviction standard will vary according to kinds of offenders and offences. Thus, to take an example by Mansfield and Peay in a discussion of similar prosecution guidelines in England and Wales:

> If a High Court judge were accused of trivial shoplifting the DPP would require very strong evidence of *mens rea*, because if a defence of absent-mindedness seemed likely, the prosecutor might legitimately believe that the jury would be unlikely to convict a person with such a status and financial standing (Mansfield & Peay 1987, p. 16).

Mansfield and Peay also pointed to the dilemma that can be faced by prosecution authorities in deciding whether to proceed against police officers alleged to have committed serious offences. It seems that juries are inclined to believe police officers when they are defendants, especially if the evidence

against them comes from persons with prior convictions. If prosecutions believe this they will be more ready to accept that there is no reasonable prospect of conviction and so not proceed. In England and Wales there have been criticisms of the Director of Public Prosecutions for failure on occasion to proceed against police officers and it has been suggested that in such cases the standard is not 'reasonable prospect of conviction' but 'very reasonable prospect of conviction', a suggestion strongly denied by the Director Of Public Prosecutions (Mansfield & Peay 1987, p. 15). The point for this discussion is that a prosecution decision requiring an assessment of how a jury will respond to the evidence may well require different prosecution decisions for different kinds of offenders. If the response of the jury is a factor to be considered, then data such as that contained in the *Homicide Prosecutions Study* can be of considerable relevance, by pointing to patterns in jury verdicts and suggesting factors which are affecting case outcomes—for example, the gender of accused and victim in certain cases.

The effect of gender on homicide outcomes raises important questions about the meaning and effect of par. 13 of the Guidelines which states in part:

> A decision whether or not to prosecute must clearly not be influenced by:
>
> (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved (Victoria. Office of the Director of Public Prosecutions 1991, p. 65, par. 13).

However, if a prosecutor reasonably believes (as the evidence of the *Homicide Prosecutions Study* would seem to suggest) that a jury is unlikely to bring in a murder conviction against a female accused, is a decision to proceed only on manslaughter a decision that is influenced by the sex of the alleged offender? On one view of par. 13 of the Guidelines it clearly is, but on another view the decision is being made not on gender grounds but on outcome prediction, where the gender of the accused is but one factor. Presumably, par. 13 of the Guidelines is directed against decisions where sex, race or religion is a dominant, and irrelevant, factor.

In the area of homicide, where—according to the Guidelines—the seriousness of the matter will generally demand prosecution, there has been a belief among many prosecutors that if there is in a case some evidence of provocation and the basic elements of murder—causation and requisite intent—are present, there should be a presentment for murder since the question of provocation is essentially a jury question. Support for that position is provided by *Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 630—a recent decision of the High Court. In that case, which involved an indictment for murder in New South Wales where provocation was an issue, the High Court made a number of comments about the role of prosecution authorities—comments which do not appear to be confined to New South Wales. The majority (Mason CJ, Deane Gaudron and McHugh JJ.) in a single judgement stated that:

> it [sc. provocation] is an issue which may properly be considered by prosecuting authorities. They may decide that, on that account, manslaughter should be charged rather than murder. And, as

> foreshadowed in a letter from the Director of Public Prosecutions to the applicant's solicitors, they may also decide that, on that account, a plea of guilty to manslaughter should be accepted in satisfaction of an indictment for murder (*Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 632).

The majority judgement then went on to express the view that where provocation is a live issue, the prosecution should normally proceed on a murder charge:

> There is, for example, much to be said for the view that the question whether the prosecution has established that what would otherwise be murder is not reduced to manslaughter by provocation is, except in an exceptional case, best left for the determination of a jury entrusted with deciding whether, absent such a defence of provocation, the accused is guilty of murder. For one thing, any defence evidence on the primary charge of murder, which is unlikely to be led on the committal hearing or to be available to the prosecuting authorities before the trial, may throw significant light on the issue of provocation, especially the subjective element of that defence. In that regard, it needs to be borne in mind that a denial of one or other of the elements of a defence of provocation may well turn out to be at least implicit in the substantive case for the defence on the primary charge at the trial (*Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 634).

Brennan J., in a separate judgement, agreed with the majority that, in a murder case where provocation was in issue, the prosecution could indict for manslaughter or accept a plea of guilty to manslaughter. He then continued, in agreement with the majority:

> But, I would add, it should be an exceptional case before any of these powers is exercised so as to withhold the issue of provocation from a jury when the evidence is otherwise sufficient to establish a killing with intent to kill (*Kolalich v. Director of Public Prosecutions (NSW)* [1991] 103 ALR 636).

These views, in what is effectively an unanimous decision of the High Court, command great weight. However, in many cases questions about the intent of the accused and issues of self-defence may well also be present. In the Victorian study, of the fifteen cases presented for manslaughter where provocation was an issue, there was only one where the provocation was the sole issue (Law Reform Commission of Victoria 1991a, par. 150, p. 75). In many of these other cases, where provocation is but one (and perhaps a minor one) of a number of defence issues, *Kolalich v. Director of Public Prosecutions (NSW)* [1991], it is submitted, should not prevent a choice of manslaughter by the prosecution authorities.

There are other perspectives which need consideration. For some, a manslaughter conviction on a murder presentment is a satisfactory outcome. No doubt in many cases this is the case. The question, however, is whether that outcome could not in a significant number of cases be achieved more expeditiously and cheaply by acceptance of a plea of guilty to manslaughter. Moreover, the choice of presentment may well influence decisions on bail. Under

the *Bail Act 1977* (Vic.) (s. 13), bail is not to be granted to a person charged with murder unless the person deciding on bail 'is satisfied that exceptional circumstances exist which justify the making of such an order'. The *Homicide Prosecutions Study*, having noted that a 'bail was granted in 40.3 per cent of cases where the accused was presented for murder and in 74.2 per cent of cases of manslaughter', commented that these figures were 'presumably reflecting the differential operation of the bail provisions' (Law Reform Commission of Victoria 1991a, par. 117, p. 63). It is likely, too, that the maximum penalty for manslaughter in Victoria—fifteen years imprisonment—can be a disincentive against proceeding on manslaughter. In other jurisdictions, where the maximum penalty for manslaughter is life imprisonment, proceeding on manslaughter is not such a large step down. This is not to recommend an increase in Victoria for the maximum penalty for manslaughter, but merely to note the possible impact of the maximum on prosecution practices.

The fact is that, in the study period, less than one-third of murder presentments resulted in murder convictions, and in certain areas the success rate was much lower. There must be considerable doubt as to whether decisions-makers were in a number of cases in fact making a realistic assessment of the likelihood of conviction on the charge chosen.

The Future

What are the implications of the *Homicide Prosecutions Study* for the present and the future? It is a study covering a period some five-years odd. Patterns may vary and jury attitudes may change.

What the study has done is present an account—an audit if you like—of the prosecution process over a six-year period. The audit is, to continue the accounting metaphor, qualified. The information provided suggests that there may be deficiencies, that improvements might be needed.

But the *Study* also suggests the kinds of data and analysis that might assist prosecution decision-makers. Since 1987 there has been no readily available statistical data on the outcome of cases according to the nature of the presentment. Information, for example, is available on the number of persons convicted of manslaughter but not on the charge on which they were presented. The success rate, as defined in this paper, is not therefore readily obtainable. Given that, as the Prosecutorial Guidelines state, 'the decision whether or not to prosecute is the most important step in the prosecution process' (Victoria. Office of the Director of Public Prosecutions 1991, p. 59, par. 2), such information should be available.

The *Homicide Prosecutions Study* also points to the kind of more detailed data which can assist prosecutors. Information about the success rates of categories of homicide could be of considerable assistance in assessing likely outcomes of cases. This is not, of course, a suggestion of presentment by statistics—each case will obviously need to be assessed individually; but it could assist in predictions about outcomes and perhaps assist in improving consistency in decision-making. Furthermore, such information could not only improve the quality of prosecution decision-making, it would also assist policy analysts in assessing the performance of the prosecution authorities.

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CONCLUDING DISCUSSION

Chair:
Associate Professor Kenneth Polk

Participants:
Professor Lawrence Sherman
Dr Sandra Egger
Dr Don Weatherburn
Deputy Commissioner Bill Goedegebuure

THE CHAIR INVITED PARTICIPANTS IN THE FINAL PANEL DISCUSSION TO express their views on the question: W*here do we go from here?*

Professor Sherman opened the discussion by referring to his keynote paper and, in particular, two areas for focus contained therein: hot spots of violence, that is public settings where violent behaviour was commonplace, and chronically violent families. He observed that computerised police data systems were essential for the identification of both these problem areas and strategies requiring such identification could not be pursued until these data systems were in place. The Victoria Police, through its Family Violence Project Office, already recorded in computerised form police call-outs to domestic violence incidents, but the situation in other jurisdictions was not known. Professor Sherman stressed the importance of the database recording calls for service, rather than offence reports, as the likelihood of such calls generating a report was likely to vary markedly from officer to officer and area to area. Additionally they gave a clearer indication of chronically violent families and places.

Having in place a means of identifying chronically violent families provided an opportunity to consider whether police should respond to them differently from one-off cases: it may be possible to structure a range of reactive police responses and test the effectiveness of each. It also allowed for the possibility of various proactive police strategies for prevention, in conjunction with community resources, neighbours and others close to these families, rather than simply waiting for the next incident to occur.

Such a database would also provide the means for identifying infants being born into chronically violent families. Strategies for the special protection of such infants could then be tested: for example, they could be

subject to more frequent home visits by community nurses or by a roster of community volunteers. These ideas could be tested via a small trial initially, and then by controlled experiment.

Professor Sherman then turned to the issue of hot spots, which might include, not only violent pubs and clubs, but also convenience stores, automatic teller machines and bus stations. In responding to the problems of hot spots, the same kind of data system was called for—that is, calls for service for violent incidents by address in a single data file. The most violent addresses could then be identified on a regular basis. Such locations may require particular police responses. In any case it was extremely useful for operational police to know whether there have been calls to these addresses before. In addition, identifying these troublesome locations could be very valuable in deciding on allocation of police resources.

Professor Sherman concluded his remarks by suggesting that what was required was a marriage between criminology and practitioners in the criminal justice system to enable available data to be put to better use. He saw enormous opportunities for the formulation of useable, practical strategies through the joint efforts of police and criminologists, by bringing to bear a criminological imagination on police data sets.

Dr Don Weatherburn then made the following remarks concerning future strategies aimed at homicide prevention and control.

- The aim of such strategies in the Australian context was not so much that of reducing absolute numbers of homicides, but rather of reducing the risk where risk was greatest. Risk was very unevenly distributed, even within the single jurisdiction of New South Wales, and varied markedly by geographical location. Dr Weatherburn observed that it was of little comfort, for example, to Aborigines in the north-west to know that the overall homicide rate for New South Wales as a whole was only 2 per 100,000, when the risk that they faced personally was many times higher. He strongly urged that efforts for prevention and control be concentrated in those regions which historically had experienced high homicide rates.

- It was unrealistic to expect gun control measures to be effective in actually reducing Australian homicide rates. For example, to reduce the number of gun homicides in New South Wales by 25 per cent would require a theoretical reduction in the number of licensed gun owners by some 48,000 in that state alone: this is based on the assumption that all such homicides were committed by licensed gun owners, which was obviously not the case. It was evident that gun control was all about preventing a growth in the homicide rate rather than effecting a reduction. It was essential that this point be clear because otherwise there was a danger of misleading the political process and thwarting efforts directed at ensuring that firearms did not become any more accessible than they already were.

- Choices between policy options in the control of homicide depended on the type of homicide being dealt with. For example, vital though gun

control measures were for limiting an increase in homicides, they offered little prospect for reducing risk in Aboriginal communities, for example, where gun homicides were relatively uncommon, and where other options were needed.

- Domestic homicide should not be quarantined from other forms of homicide. Areas with high rates of domestic violence and domestic homicide also had high rates of violence between men, and there was good evidence that men who assaulted women also assaulted other men. There was a great need to look at the issue in a more general way. What was it that disposed some men towards violence, not only towards women but towards each other?

- Prevention strategies in non-fatal domestic violence were needed to address the issue of limiting repetition rates among offenders. The most recent Australian Bureau of Statistics Crime Survey showed that there were 10,000–11,000 households where female members of the household indicated that they had been assaulted at least once in the preceding twelve months (Australian Bureau of Statistics 1991, p. 2). The Australian Bureau of Statistics question regarding frequency of assault—notwithstanding every response over three being grouped into a three-plus category—revealed an absolute minimum of 19,000 assaults suffered by these victims. These data revealed that the need to understand the cycle of violence in some families, and thereby devise strategies by which it could be broken, was just as important as trying to limit the 'migration' of new recruits into violent behaviour.

Dr Sandra Egger, in her remarks, took the opportunity to remind participants that there was a responsibility to respond to changes in our society with changes in policies and in legislation. Australian society was now highly urbanised, but firearms remained highly available. It was imperative to avoid the situation which had developed over the past decade in the USA. Effective controls were needed on gun availability, and the question of access to semi-automatic weapons especially needed to be addressed as a matter of urgency.

In conclusion, Deputy Commissioner Goedegebuure said that he agreed with the remarks of the other panel participants. He wished to add only that, from the police practitioner's point of view, the underlying causes of homicide appeared to be closely linked to the level of acceptance of violent behaviour within our society, together with the effects of alcohol. He believed that it was necessary to effect changes at an early age if these attitudes were to be changed, and cited the effective work being done at the school level by police and others.

The Chair thanked the Panel and suggested that as a way of focussing further debate, the Panel and audience might adopt the suggestion of Dr Egger that a Conference communique be devised, setting out the agreed recommendations of the Conference.

After discussion, the following recommendations were agreed:

1. All Australian police agencies should move as quickly as possible to computerise their databases on both calls for service and criminal offence reports, in order to make possible the identification of sites of chronic violence.

2. The Australian Institute of Criminology (AIC) should be funded to assist in developing the software and analytic programs necessary for accomplishing Recommendation 1.

3. The AIC should be commended for its implementation of the National Homicide Monitoring Program, which further demonstrated the necessity for maintaining and strengthening the AIC in its fight against violent crime.

4. The recommendations of the National Committee on Violence with respect to firearms should be endorsed by Australian governments as soon as possible. (Representatives of shooting organisations present abstained from voting on this recommendation).

In his summing up, Professor Polk observed that one of the most valuable aspects of the Conference was the opportunity it had provided for bringing together both practitioners and researchers in the criminal justice field, so that a number of views could be put concerning patterns and trends in Australian homicide and opportunities for prevention and control.

Professor Polk commented that the systematic gathering of reliable data on the characteristics of homicide was essential to the understanding of its dynamics and to the development of successful intervention strategies. It could only be achieved through the cooperative effort of both practitioners and researchers: a clear example of the success of such cooperation was the AIC's National Homicide Monitoring Program, whose work the Conference warmly endorsed. Furthermore, this Program provided the means for discerning emerging patterns and trends in homicide. For example, is robbery of elderly people increasing? Are different weapons, such as pistols or semiautomatic weapons becoming more prevalent? Is fatal child abuse on the rise? Heather Strang's paper outlining the Program's findings to date had provided a useful framework for subsequent discussion; more detail had been provided by a number of researchers investigating particular kinds of homicides. Papers by police officers from several jurisdictions had also helped to complete the picture of the character of Australian homicide.

Professor Polk observed that it was important to remember that there was no such thing as 'homicide in general', that different dynamics operated in different circumstances, and each required quite different strategies. Even the category of 'domestic' homicide was too broad to encompass the variations which existed in domestic incidents and the wide range of possible dynamics at work therein. Here, as in every other class of homicide, successful strategies in terms of prevention and control would vary with different scenarios. Research was clearly needed to find out what worked and in what situations.

The Conference was not able to address all categories of homicide. For example, there were many issues concerning child homicide which needed urgently to be addressed; predatory crime, especially robbery, needed further research; and homicides resulting from negligent work practices were an important area for investigation. However, Professor Polk stressed the need to avoid moral panics about homicide—it must be placed in the context both of other offences and other kinds of violent death.

Professor Polk then reviewed the ways in which Professor Sherman and Professor Homel had tackled the question of prevention and control strategies. Both had discussed policing strategies for dealing with hot spots, and Professor Sherman had also addressed particular issues in the policing of domestic violence. Practical opportunities for intervention described in these two presentations should be high on the agenda for implementation, for when fatal violence occurred it was so often in these two settings.

Important questions had been addressed in the segments of the Conference dealing with Aboriginal issues and with psychiatric issues: the latter had included discussion both of the mentally-ill and intellectually-disabled offenders. There had also been a comprehensive discussion of issues of gun control throughout the course of the Conference.

Valuable papers had been presented on aspects of the prosecutorial process in homicide cases, coronial issues and the question of mandatory life imprisonment. However, Professor Polk observed that there were limitations in the criminal justice approach for preventing homicide: the motivations involved frequently were not susceptible to the deterrent aspect of sentencing and penalties generally. However, gun control was an important policy issue—a complete ban on the availability of firearms would result in reduced numbers of homicides, but such a move was not a realistic, nor even necessarily a desirable, objective even though the American situation was clearly one to be avoided at all costs.

Finally, Professor Polk stressed that masculinity, and perceptions of what masculinity means, remained a central issue in homicide, though little was being done to address it. There was a level of acceptance and condonation of violence in some sectors of our society, both as a manifestation of masculinity and as a legitimate means of solving problems, which ensured the continuance of violent behaviour, including fatal violence. Associated with this was the growing problem of people permanently on the margin—people with little stake in society who might well become responsible for increasing numbers of predatory crimes, including homicide.

Professor Polk concluded by congratulating all participants on the high quality of the papers presented, and expressed appreciation for the AIC's role in contributing to knowledge and debate on these important issues.

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