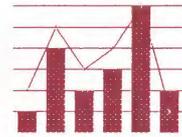


# Sentencing Trends

*An Analysis of New South Wales Sentencing Statistics*



Judicial Commission of New South Wales



Editor: Donna Spears, Research Director

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## FROM MURDER TO MANSLAUGHTER: Partial defences in New South Wales - 1990 to 1993

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### Introduction

The partial defence of diminished responsibility was introduced in NSW in 1974, modelled on s 2 of the English *Homicide Act 1957*. The defence is defined under s 23A of the *Crimes Act 1900* (NSW), as follows:-

23A. (1) 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.

The remaining sub-sections of s 23A state that once the defence is established the accused is liable to be convicted of manslaughter and provides that evidence may be offered by the Crown tending to disprove the defence (s 23A(5)).

The defence must be proved by the defendant on the balance of probabilities (see *Tumanako* (1992) 64 A Crim R 149 at p 159 per Badgery-Parker J). The jury has a duty to consider medical evidence and cannot reject unanimous medical evidence in the absence of other evidence displacing it or throwing doubt upon it (*Taylor* (1978) 22 ALR 599). A number of conditions have been recognised as amounting to an abnormality of mind including schizophrenia, epilepsy, depression

(reactive and endogenous) personality disorders and psychopathy (see NSW Law Reform Commission Discussion Paper No. 31 at p 82).

### Rationale

The purpose of this *Sentencing Trends* is to examine the characteristics and sentencing outcomes of those cases where diminished responsibility was accepted during the period January 1990 to September 1993.

A recent study of the defence, part of a national project, claimed that the defence is allowed to be used in a "somewhat random and indiscriminate manner" (Easteal (1993) *Killing The Beloved* at p 175).

The defence is currently under review by the NSW Law Reform Commission (see Chapter 4 Discussion Paper No. 31). The need for a review of the defence is partly due to the consequences of relatively recent legislative changes to the penalty for murder. Under the old s 19 provision the penalty for murder was a mandatory life sentence unless there were circumstances which significantly diminished a prisoner's culpability. The *Crimes (Life Sentences) Amendment Act 1989* radically changed the approach which a sentencing judge is required to take when sentencing for murder (see *Sentencing Trends* No. 7 - "Sentencing Homicide"). The amending Act

changed the maximum penalty for murder to natural life and granted judges a discretion to pass a sentence of less duration than the prescribed statutory maximum.

The Criminal Law Committee which proposed the introduction of the defence in NSW stated that their recommendation was chiefly influenced by the continuation of the mandatory life sentence for murder and the inflexibility of the McNaughten Rules (Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure Parliamentary Papers no. 54, 1973 at p 6). Some commentators have argued that the defence should not be a relevant consideration in a jurisdiction with a discretionary penalty for murder and that factors going to culpability could instead go in mitigation of sentence (see Law Reform Commission of Victoria (1990) Mental Malfunction and Criminal Responsibility Report No 34 at p49). In *Chayna*, (1993) 66 A Crim R 178 Gleeson CJ, while not expressing a concluded opinion, stated that s 23A is "ripe for reconsideration" in light of the fact that there is no longer a mandatory penalty of life for murder.

The abolition of the defence would leave a stark choice between guilty and not guilty on the ground of insanity. Opponents of abolition argue that mental abnormalities range along a continuum which the law should recognise at conviction. They also argue that there is a real stigma attached to a murder conviction and abolishing the defence would create problems for juries who may be reluctant to convict an accused person for murder where that person has acted under severe mental duress.

If the defence were abolished and mental abnormality was only taken into consideration at sentence, there may be unintended consequences. Given the present sensational and, at times, distorted reporting of homicide, judges may be open to unwarranted attacks due to the media's ignorance of sentencing law. The public, whose views are influenced by the media, are more likely to accept so called "lenient" sentences, when a jury or judge has returned a manslaughter verdict rather than a murder verdict.

It has also been argued that questions of criminal responsibility should be determined by a jury representing the community and that judges should receive guidance from the jury about the defendants culpability (see The Honourable Mr Justice Abadee's paper *The Criminal Jury - Quo Vadis*). This argument has less impetus due to the recent trend of accused persons opting to be tried by a judge alone pursuant to s 32 of the *Criminal*

*Procedure Act* in cases where diminished responsibility is an issue.

A study of the use of the defence of diminished responsibility is long overdue in this State. This paper is intended to provide an empirical analysis of the defence which will assist judicial officers and contribute to the current debate.

## **The data**

The data for the study was obtained from an audit of all Supreme Court Registry files and DPP files for homicide offenders sentenced between January 1990 and September 1993. Variables collected included information about each offender (including any defences relied upon), each victim and the circumstances of each offence together with first instance and appeal outcomes. In most cases information was obtained from the "Remarks on Sentence" of the court. Where that document was not available researchers relied upon judgments of the Court of Criminal Appeal. In the absence of these judgments (approximately 5% of cases) information was obtained from Psychological and/or Psychiatric Reports and Pre-sentence Reports. This data will form the basis of a wider study of homicide to be published in 1995.

The total data set was comprised of 256 offenders, 239 victims and 225 offences. For the purposes of the present study offenders were separated by defence type as follows:-

(a) Diminished Responsibility - this includes all cases where this defence was the sole defence and two cases where the Court of Criminal Appeal substituted a verdict of manslaughter in lieu of a jury verdict of murder.

(b) Provocation - this includes all cases where provocation was the sole defence and three cases where provocation and self defence were run, the latter being unsuccessful.

(c) Diminished Responsibility and Provocation (the combination defence) - this includes all cases where both partial defences were relied upon.

(d) Other - all other cases in the study

Homicide offences were separated into two main categories, murder and manslaughter. The manslaughter category includes one case of infanticide.

### The frequency of partial defences

	Manslaughter Outcome	Murder Outcome	Totals
Diminished Responsibility	22	14	36
Provocation	14	6	20
Diminished & Provocation	5	1	6
Other cases	87	107	194
Totals	128	128	256

Table 1

Table 1 shows that exactly half of offenders were sentenced for murder and half for manslaughter. This is despite the fact that 86.7% of offenders were originally charged and indicted for murder. The defence of diminished responsibility was argued more often than the defence of provocation (14.1% and 7.8% respectively). However, the acceptance rate for diminished responsibility was lower than the acceptance rate for provocation (61.1% and 70.0% respectively), while the combination defence had the highest acceptance rate (83.3%).

### The defences by gender

	Males - Manslaughter Outcome	Males - Murder Outcome	Females - Manslaughter Outcome	Females - Murder Outcome	Totals
Diminished Resp	20	13	2	1	36
Provocation	9	6	5	0	20
Diminished & Prov	2	1	3	0	6
Other cases	79	103	8	4	194
Totals	110	123	18	5	256

Table 2

Male offenders vastly outnumbered females (91.0% and 9.0% respectively). Given the relatively small number of female offenders (ie 23) conclusions drawn from the female population should be treated with caution. Overall, more than half the males were sentenced for murder whereas less than a quarter of females were sentenced for that offence (52.8% and 21.7% respectively).

For males the acceptance rates for diminished responsibility and provocation were almost equal (60.6% and 60.0% respectively). For females the corresponding acceptance rates were 66.7% and 100.0% respectively. When a combination defence was relied upon, males had an acceptance rate of 66.67% and females 100.0%.

### Offenders relationship to victim

	Males - Related	Males - Unrelated	Females - Related	Females - Unrelated	Totals
Diminished Resp	15	18	2	1	36
Provocation	7	8	3	2	20
Diminished & Prov	2	1	3	0	6
Other cases	38	144	5	7	194
Totals	62	171	13	10	256

Table 3

Table 3 shows the relationship of the offender to the victim(s). "Related" is defined as any family member, lover or former lover, cohabitant or former cohabitant. Where there were multiple victims and at least 80% of those victims were "related" to the offender, then those offenders were included in the related category.

Overall female offenders were twice as likely to have been related to their victims than males (56.5% and 26.6% respectively). In cases where partial defences were argued 72.7% of females were related to their victims compared with 47.1% of males. That is, when the offender is related to the victim they are more likely to rely on diminished responsibility, provocation or a combination defence.

Diminished responsibility is more likely to be accepted when the male offender is related to the victim than when he is not (66.7% and 55.6% respectively). There were two cases where female offenders were related to the victim and relied on the defence. In both of these cases the defence was accepted. There was only one case where the female offender was unrelated to the victim. In that case the defence was not accepted.

### Cause and forms of abnormalities

Traditionally the law has made a separation between the *cause* of an abnormality of mind and its *diagnostic form*. This dichotomy of cause and effect has in recent times become less important. What the law regards as a legitimate cause was defined by the Court of Criminal Appeal in *Purdy* [1982] 2 NSWLR 964 which followed *Byrne* [1960] 2 QB 396 and held that in order to satisfy the requirements of s 23A(1) it must be shown that the abnormality of mind is of an aetiological category as set out in the parenthesis in the subsection. That is, the abnormality must arise from a condition of arrested or retarded development of mind, *or* any inherent causes, *or* induced by disease or injury. Glass JA in that case stated that "disabling passions of an ephemeral kind are not to

count" (at p 966). The Court reiterated that interpretation of s 23A(1) in *Jones* (1986) 22 A Crim R 42 per Street CJ at p 44. The first and third of these three generalised categories are considered to be readily identifiable using medical evidence. However, the concept of "any inherent causes" has been the subject of judicial scrutiny.

In *McGarvie* [1986] 5 NSWLR 270 the word "inherent" was defined to mean something of a permanent attribute. The Court held that the abnormality of mind must be a permanent condition and it is irrelevant whether it is due to inherited or environmental causes (at p 271-2). In *Tumanako* (cited earlier) the Court broadened the scope of "inherent causes" by allowing defendants the option to simply prove an "inherent abnormality of mind" which (by its nature) must be permanent or enduring. It was held that in some cases to establish that an abnormality of mind exists by way of a rigorous analysis of cause and effect may be inappropriate and unscientific (see Gleeson CJ at 152 endorsing Badgery-Parker J's comments at p 162). Such cases were considered to include personality disorders which are identifiable as abnormalities of mind, the causes of which are said to be immaterial.

To test the assertion cited earlier that the defence is allowed to be used in a "random and indiscriminate manner", the present study analysed both the *cause* and *diagnostic form* of the abnormality of mind in the 27 cases where the defence was accepted. The Remarks on Sentence and psychiatric reports were used to classify cases within the three generalised causal categories contained in s 23A(1). The results showed that the bulk of cases fell within the "any inherent causes" category (21 cases), the remainder were contained in the "disease or injury" category (5 cases) and "arrested or retarded development" category (1 case).

Where the form of abnormality of mind was in dispute the study relied upon the conclusion reached in the sentence judgment. Again, the results showed a clear pattern. Defendants were diagnosed as having major or severe depression (9 cases), some form of schizophrenia (6 cases), brain damage (consisting of frontal lobe, temporary, and organic, 3 cases), personality disorders (2 cases) and post-traumatic stress syndrome (2 cases). Other diagnosed conditions were a dissociative disorder, paranoid psychosis, transient psychosis and amnesic syndrome. In the remaining case the condition was unable to be identified because the information was not available.

When the *form* of mental abnormality was analysed by gender it was revealed that in cases

involving female offenders where the defence was accepted (5 cases) *all* were diagnosed as suffering from major or severe depression. The most predominantly diagnosed condition for males was some form of schizophrenia (6 cases) followed by major or severe depression (4 cases). The remainder suffered from one of the other conditions cited below.

## Verdicts

Jury verdicts accounted for 19 of the 36 cases (ie 53.8%) when the defence of diminished responsibility was relied upon. In the majority of these cases (57.9%) the defence was not accepted. There were 11 cases (30.6%) where the Crown accepted a plea of guilty to manslaughter on the basis of diminished responsibility. In one case the offender relied upon the defence but after receiving an unfavourable psychiatric report abandoned the defence and pleaded guilty to murder.

There were only five judge alone trials in the study and all involved the defence of diminished responsibility. They represented 13.9% of cases where diminished responsibility was *argued*. The defence was accepted in 3 of the 5 cases. It has been argued by some judges that it is inappropriate for judges to determine whether an offender is suffering an abnormality of mind. Finlay J stated in a judge alone trial, (*O'Bree* (Unreported) NSW Supreme Court 16 July 1992 at p 14) that diminished responsibility is an issue which is most suited to be answered by a jury of twelve selected at random.

Where the combination defence was relied upon (6 cases), three were determined by jury, two of which were accepted. In the remaining three cases the Crown accepted a plea of guilty to manslaughter on the basis of both partial defences.

## The defence and sentencing

The Court of Criminal Appeal has stated a number of times that when an offender suffering from a mental disorder or abnormality is being sentenced, general deterrence is ordinarily a factor of less weight than usual because such an offender is not an appropriate medium for making examples to others (*Kecseski* NSW CCA (Unreported) 10 August 1993 per Finlay J at p 9; *Chayna* NSW CCA (Unreported sentence judgment) 8 June 1993 the Court at p 3; and *Scognamiglio* (1991) 56 A Crim R 81).

The approach that a sentencing judge should take where the defence of diminished responsibility has

been rejected by a jury under the new sentencing regime for murder was considered by the Court in *Twala* NSW CCA (Unreported) 4 November 1994. Badgery- Parker J (with whom Finlay and Carruthers JJ agreed) stated (at p 11) that whilst the offender had failed to establish a psychiatric disease to which the killing might be attributed, he was entitled to have the Court "look closely" at his distressed state before and at the time of the killing. It was held that the offender's mental state was "very relevant" in determining an appropriate sentence and in the circumstances afforded some mitigation of his criminality. In an earlier case, under the old sentencing regime for murder, (*Fameli* NSW CCA (Unreported) 4 June 1991), it was held that the rejection of the defence did not "automatically foreclose" issues of mitigation which may be capable of significantly diminishing a person's culpability.

Cases where diminished responsibility is accepted are undoubtedly among the most difficult for judges to determine an appropriate sentence. This is partly due to the fact that some mental abnormalities are not curable. Moreover, the behaviour of offenders who are convicted on the basis of diminished responsibility is sometimes very difficult to predict. The chilling facts in the Veen case are an ample illustration (Veen [No 1] (1979) 143 CLR 458 and Veen [No 2] (1987) 164 CLR 465). In *Veen* [No 1] the High Court allowed an appeal on the ground of severity of sentence following a conviction of manslaughter on the basis of diminished responsibility and fixed a determinant sentence. The offender was later released on licence pursuant to the now repealed s 463 of the *Crimes Act* and then killed another person in a similar fashion to the first crime.

The majority of the Court in *Veen* [No 2] affirmed the principle that, *prima facie*, a mental abnormality which exonerates an offender from liability to conviction for murder is regarded as a mitigating circumstance, affecting the appropriate level of punishment (at p 476). However, the matter does not end there.

The majority also held that in fixing an appropriate sentence a sentencing judge is entitled to "attach great weight" to the protection of society (at p 477). The majority addressed a criticism made by Baroness Wootton of Abinger that the notion of diminished responsibility is incompatible with the aims of sentencing. They argued that sentencing is not "a purely logical exercise" and that the purposes of punishment are "guideposts which sometimes point in different directions" (at p 476). The majority attempted to reconcile the problem of sentencing offenders suffering from a mental abnormality with the principal of proportionality:

...a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality. (at p 477)

The difficulty of applying the High Court decision in *Veen* [No 2] has been discussed by various legal commentators (see for eg Fox, R *The Killings of Bobby Veen* (1988) 12 *Crim L J* 339). The Victorian Law Reform Commission (Report No. 34 cited earlier) considered, *inter alia*, Fox's view and stated:-

The concept of diminished responsibility only has value if it is used to mitigate the severity of punishment otherwise thought appropriate. However, to sentence a mentally abnormal dangerous recidivist offender to a period of detention less than the norm would lead to the paradox that the more dangerous and disordered the defendant, the shorter the sentence has to be. The principle of proportionality, endorsed by the High Court in *Veen* (No.1) and *Veen* (No.2) means that an offender with diminished responsibility must get a lower sentence than a more culpable offender, even though the former may be dangerous, due to his or her reduced level of mental malfunctioning. (at p 52)

This sentencing paradox was considered by the Court of Criminal Appeal in *Ulgun* (NSW CCA (Unreported) 5 March 1991). In that case Enderby J (with whom Loveday J agreed) likened the judge's task of sentencing an offender suffering from paranoid schizophrenia as "attempting to reconcile the irreconcilable" (p 3). In a later case (*Falconetti* (Unreported) NSW CCA 24 March 1992) the Court described the task of sentencing an offender who had been convicted on the basis of diminished responsibility as a "sensitive and difficult task" (at p 3) especially in light of *Veen* [No 2]. In *Falconetti* the Court approved the approach by the sentencing judge of finding special circumstances under s 5(2) of the *Sentencing Act* 1989, thereby imposing a substantial additional term to allow prison medical authorities a large area of discretion as to when the prisoner should be released (at p 3). However it does not follow that special circumstances must automatically follow where diminished responsibility is relied upon.

Cases where the defence of diminished responsibility is accepted are by their nature manslaughter cases. The Court of Criminal Appeal have stated on a number of occasions that the range of sentences available on a conviction of

manslaughter is greater than any other crime due to the multitude of circumstances under which the offence occurs. (see *Hill* (1981) 3 A Crim R 397 per Street CJ at p402, *Wise* NSW CCA (Unreported) 15 April 1989, and *Troja* NSW CCA (Unreported) 16 July 1991). Former Chief Justice Sir Lawrence Street stated in *Hill*:

The courts over the decades have gradually manifested a willingness to recognise the factual contexts which provide some basis for understanding the human tragedies that can lead to the taking of a human life. (at p 402)

It is difficult to draw any definite conclusions concerning sentence outcomes for diminished responsibility cases. It is possible to state that judges are particularly mindful of the protection of the community (*Fryer* NSW CCA (Unreported) 17 March 1992, *Evers* (Unreported) NSW CCA 16 June 1993), the nature and seriousness of the abnormality (*Ulgun* (Unreported) NSW CCA 5 March 1991, and *Chayna*) and the objective seriousness of the offence (*Barnett* NSW CCA (Unreported) 16 February 1994 and *Evers*).

In the present study there were 27 cases where diminished responsibility or a combination defence was accepted. These cases include two first instance murder cases which were appealed on the grounds of conviction and severity of sentence. As stated earlier both resulted in substituted verdicts of manslaughter on the basis of diminished responsibility. Excluding those two cases, there were 10 appeals to the Court of Criminal Appeal, nine were appealed on the ground of severity of sentence (one of which was successful), and the remaining case a Crown Appeal (which resulted in an increase in sentence from a bond to a custodial sentence).

Taking into consideration any variations by the Court of Criminal Appeal, the overall penalties imposed were: full-time custodial sentences (24 cases), s 558 recognisances (2 cases) and periodic detention (1 case). The cases which received a non-custodial sentence appeared to fall in the category of "exceptional cases" referred to by Maxwell J in *Bogunovich* (1985) 16 A Crim R 456, where the offender had been subjected to a prolonged period of physical and mental abuse.

A previous *Sentencing Trends* publication ("Sentencing Homicide" (No.7)) found that the average (median) sentence for manslaughter for the period 1990-3 (which is the same data period of the present study) was 5 years 3 months. That study also found that only 27% of manslaughter offenders received a full term custodial sentence of

8 years or more. In the present study over half (59.3% or 16 cases) received a full term of 8 years or more. This suggests that in the bulk of cases where diminished responsibility is accepted sentences fall at the upper end of the sentencing range for manslaughter. A finding of special circumstances was predominant among cases where the defence was accepted and a full time custodial sentence was imposed (16 of 23 cases). Where the defence was accepted full term custodial sentences ranged from 4 years to 25 years. Minimum terms ranged from 17 months to 18 years. The range of additional terms was from 2 years to 11 years 6 months.

Five of the 27 cases involved female offenders, three of which received full term custodial sentences of 4, 12 and 12 years. One offender received a s 558 recognisance and the other offender was sentenced to periodic detention. Of the male offenders, (22) one received a s 558 recognisance and the remainder (21) were sentenced to full-time custody.

When the combination defence was isolated, (5 cases), it was found that two of the defendants received a s 558 recognisance, one periodic detention, one a full term of 4 years and one a full term of 6 years two months.

## Conclusions

Several conclusions can be drawn from this study:

- Less than a quarter of homicide offenders argued either or both of the partial defences.
- Provocation had a higher acceptance rate than diminished responsibility.
- Females were more likely than males to have either partial defence or the combination defence accepted.
- Sentences for diminished responsibility cases fell at the upper end of the sentencing range for manslaughter.
- Juries rejected the defence of diminished responsibility in over half the cases where that defence was argued.
- Female offenders who established diminished responsibility were all diagnosed as suffering from either major or severe depression.
- The defence of diminished responsibility appears to arise from a very small set of diagnostic conditions.

### Disclaimer

This paper was prepared by officers of the Judicial Commission for the information of the Commission and for the information of judicial officers. The views expressed in the report do not necessarily reflect the views of the Judicial Commission itself but only the views of those officers of the Commission who have prepared this report for the Commission.