'GUILTY BUT NOT SUBSTANTIALLY IMPAIRED'

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Introduction

The New Zealand criminal law provides two regimes for dealing with mentally impaired defendants. The first, insanity, provides an acquittal for defendants suffering a mental impairment rendering them incapable of understanding their actions, or knowing they were morally wrong. The second prevents defendants from standing trial because they are too mentally impaired. However, despite these regimes there is a grey area in the law. There exist in New Zealand a number of defendants who suffer mental impairment insufficient for either an insanity or 'unfit to stand trial' verdict, but who are nevertheless significantly mentally impaired. These defendants potentially face the full force of the law when it is inappropriate for them to do so.

This paper aims to rectify this discrepancy in the law by proposing a new regime which, in its suggested form, does not exist in the common law world. Many overseas jurisdictions use the partial defence of diminished responsibility to resolve a similar problem, but this has limited application and has been rejected in New Zealand as being too difficult to define. Infanticide is the closest equivalent in this country, but this too has limited application and an unsound medical validity. Instead, the underlying bases of these two regimes – fair labelling and reduced culpability for mental impairment short of insanity – provide the theoretical foundations for the new regime. In order to deal adequately with those mentally impaired defendants falling outside the insanity and 'unfit to stand trial' verdicts, it is submitted the new regime will apply to all offences. Conforming to insanity and

diminished responsibility, the defendant should bear the burden of proof. Finally, a definition of the regime is proposed which should overcome many of the difficulties inherent in wording diminished responsibility. It is hoped that the proposed regime can enable the New Zealand criminal law to advance towards a position which more satisfactorily and fairly deals with mentally impaired defendants.

A. Dealing with mentally impaired patients in New Zealand

To demonstrate the deficiencies in the law, the current regimes for dealing with mentally impaired defendants must be explained. The first regime is insanity, [1] where a defendant is entitled to an acquittal if s/he can show, on the balance of probabilities, that s/he was insane at the time of the offence.[2] However, a defendant acquitted on the grounds of insanity may be subject to special disposal orders, rather than being able to 'walk free'.[3] Insanity sets a high threshold, requiring proof of either 'natural imbecility'[4] or 'disease of the mind'.[5]

'Natural imbecility' (meaning 'subnormality' or 'mental retardation') is a legal concept, so it is a question of law for the trial judge whether a particular medical condition qualifies.[6] The term does not necessitate permanence, but connotes durability.[7] 'Natural imbecility' indicates that disorders developing later in life and congenital defects suffice.[8] There is little judicial guidance on the scope of 'natural imbecility' in

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[1] See s 23 *Crimes Act 1961*.
[2] See s 23(1) *Crimes Act 1961*.
[3] See *Criminal Procedure (Mentally Impaired Persons) Act 2003*.
[4] s 23(2) *Crimes Act 1961*.
[5] s 23(2), n 4.
[6] Simester AP and Brookbanks WJ, *Principles of Criminal Law* (3rd ed, Brookers Ltd, Wellington, 2007) at 301.
[7] Campbell, *Mental Disorder and Criminal Law in Australia and New Zealand* (Butterworths, Wellington, 1988) at 126.
[8] Robertson B (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at CA23.04.

New Zealand, perhaps because of the obvious nature of cases where this is a real issue, and court verdicts of 'unfit to stand trial'.[9]

'Disease of the mind' is also a question of law, but medical witness testimony will always be crucial.[10] The New Zealand courts have never precisely defined the term.[11] The law normally only accommodates disorders affecting the mind: the faculties of reasoning, memory and understanding, and is unconcerned with disorders merely causing disturbed *behaviour*.[12] The major mental disorders medically classified as 'psychoses' qualify.[13] A common feature of psychoses is a loss of appreciation of reality, often involving hallucinations or delusions.[14] Bodily or mental disorders endemic in the physical or psychological makeup of the defendant which affect the balance of the defendant's mind and/or produce a state of automatism also qualify.[15] Because a 'disease of the mind' must result from an internal condition arising from an 'underlying pathological infirmity of mind',[16] it can include physiological conditions impacting the mind's operation (e.g. epilepsy, hyperglycaemia and cerebral arteriosclerosis).[17] However, the term excludes self-induced intoxication from alcohol or drugs, transitory states (such as hysteria or concussion)[18] and psychological disturbances

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[9] "Part III Defences, Insanity" <http://www.lexisnexis.com.ezproxy.canterbury.ac.nz/nz/legal/search/runRemoteLink.do?bct=A&risb=21_T10334474248&homeCsi=273939&A=0.6178593236998488&urlEnc=ISO-8859-1&&dpsi=008E&remotekey1=REFPTID&refpt=475:B185:P35&service=DOC-ID&origdpsi=02IQ>

[10] Simester and Brookbanks, n 6 at 301.

[11] Robertson, n 8 at CA23.05. It has been said to be 'a term which defies precise definition and which can comprehend mental derangement in the widest sense': *R v Cottle* [1958] NZLR 999 (CA), at p 1011 per Gresson P.

[12] Simester and Brookbanks, n 6 at 303.

[13] Allen, *Textbook on Criminal Law* (Butterworths, London, 1991) at 106.

[14] Robertson, n 8 at CA23.06.

[15] Simester and Bookbanks, n 6 at 307.

[16] *R v Radford* (1985) 42 SASR 266, 247 (King CJ).

[17] Simester and Brookbanks, n 6 at 302.

[18] Ibid. at 304.

common in normal people (for example extreme anger or loss of self-control).[19]

A 'disease of the mind' or 'natural imbecility' must affect the defendant's responsibility by producing a relevant incapacity in one of the two ways specified in s 23 of the *Crimes Act 1961*: the defendant must prove s/he was 'incapable' *either* 'of understanding the nature and quality of the act or omission' *or* 'of knowing that the act was morally wrong, having regard to the commonly accepted standards of right and wrong.'[20] This limits the conditions sufficing for insanity. 'Incapable' imposes a high threshold of cognitive impairment, to a degree sufficient to eliminate a defendant's capacity to coherently reason about the circumstances of the offence.[21]

To establish the 'nature and quality' limb the defendant must show that s/he did not know what s/he was doing, or did not appreciate the consequences of his/her act, or did not appreciate the circumstances in which s/he was acting.[22] This includes cases where the defendant was not consciously acting and circumstances where conduct would not constitute the alleged offence if it was as the defendant believed it to be.[23] A traditional (albeit unlikely) example is a defendant strangling the victim thinking s/he is squeezing a lemon.[24]

Alternatively, the defendant must establish that s/he did not know the act was morally wrong 'having regard to the commonly accepted standards of right and wrong.' In *R v Windle* it was held that 'wrong' meant 'contrary to law',[25] but the High Court of Australia rejected this

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[19] *R v Porter* (1933) 55 CLR 182, per Dixon J at p 188.
[20] See ss 23(2)(a), (b) *Crimes Act 1961*.
[21] Simester and Brookbanks, n 6 at 314. See also *R v Cheatham* [2000] NSWCCA 282.
[22] Ibid.
[23] Robertson, n 8 at CA23.14.
[24] Simester and Brookbanks, n 6 at 314.
[25] *R v Windle* [1952] 2 QB 826; [1952] 2 All ER 1 (CA)

in *Stapleton v R* by holding that insanity may succeed even though the defendant realised the conduct was illegal.[26] This approach was endorsed by the New Zealand Court of Appeal in *R v Macmillan*,[27] and the use of 'morally' in s 23(2)(b) clearly rejects the *Windle* verdict.[28] From *Macmillan*, it seems that insanity will be established in New Zealand even where the accused perceived that the act was 'morally wrong in the eyes of other people', if s/he thought him/herself that the act was right, or thought that his/her own acts were 'above judgement on moral standards'.[29] Insanity can thus be established where the defendant believes s/he is morally justified in his/her behaviour, even though s/he may have known his/her acts were illegal or contrary to public standards of morality.[30]

The second regime is under the *Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)A)*. Under s 4, a defendant may be 'unfit to stand trial' where, as a result of mental impairment, s/he is unable to instruct counsel or conduct a defence, so as to be incapable of pleading, understanding the nature or purpose and possible consequences of the proceedings, or of communicating adequately with counsel for the purposes of conducting a defence.[31] The evidence of two health assessors is required.[32] In *P v Police*, Baragwanath J

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[26] *Stapleton v R* (1952) 86 CLR 358; [1952] ALR 929

[27] *R v Macmillan* [1966] NZLR 616 (CA), at 622.

[28] Robertson, n 8 at CA23.15.

[29] *R v Macmillian*, n 27 at 622.

[30] Simester and Brookbanks, n 6 at 317. For example, in *R v Macmillan* [1966] NZLR 616 (CA) the defendant, who suffered from paranoid schizophrenia, pleaded insanity to a charge of attempting to break out of Mt. Eden jail. He did not regard the act as wrong, but knew that people generally would regard it as wrong.

[31] Section 4(1) *Criminal Procedure (Mentally Impaired Persons) Act 2003*.

[32] See s 14 *Criminal Procedure (Mentally Impaired Persons) Act 2003*. Note that the health assessors' evidence must address the legal criteria for s 14 which requires a finding that the defendant is 'mentally impaired'. The court must then decide if the impairment is such so as to prevent the defendant's effective participation in the trial. See *R v Duval* [1995] 3 NZLR 202; (1995) 13 CRNZ 215.

considered relevant questions to be whether the defendant could: understand the charge; understand the proceedings; give instructions to counsel; understand the substantial effect of the prosecution's evidence; and make his/her version of facts known to the court and counsel.[33]

The *CP(MIP)A* does not define a 'mentally impaired defendant'. This was so the term would be widely interpreted so it would apply equally to persons who may be mentally ill or intellectually disabled.[34] 'Mentally disordered' persons under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* are probably covered, where a 'mental disorder' is defined as an 'abnormal state of mind' to such a degree that the defendant poses a serious threat to others or themselves, or seriously diminishes the defendant's capacity to take care of him/herself.[35] 'Intellectually disabled' defendants under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID(CCR)A)* are also probably covered, and are similar to defendant's suffering natural imbecility under insanity. 'Intellectual disability' means 'permanent impairments' which became apparent in the developmental period of the defendant, and which result in significantly sub-average intelligence (e.g. I.Q. less than 70) and significant deficits in adaptive functioning in skills like communication, social skills, reading, writing and arithmetic.[36]

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[33] *P v Police* [2007] 2 NZLR 528, at [43]. For example, in *R v Codd* [2006] 3 NZLR 562 at [9], [10] the defendant was held unfit to stand trial because of his inability to instruct counsel and follow the processes of the court. The defendant was 80 years old and suffered from Parkinson's disease and post-traumatic stress disorder. His affected functions included memory, ability to think and reason, ability to organise and articulate thoughts and slower processing.

[34] "Guide to the Criminal Procedure (Mentally Impaired Persons) Act 2003, <www.courts.govt.nz/publications/publications-archived/2003/guide-to-the-criminal-procedure-mentally-impaired-persons-act-2003>

[35] s 2(1) *Mental Health (Compulsory Assessment and Treatment) Act 1992.*

[36] See s 7 *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.*

Section 24 *CP(MIP)A* provides orders for detaining defendants found unfit to stand trial or insane as 'special patients' under the 1992 Act, or as 'special care patients' under the *ID(CCR)A*.[37] Alternatively, if the court is satisfied that it is safe and in the interests of public safety to do so, it may order, under s 25 *CP(MIP)A*, a defendant's detention as a 'patient' under mental health legislation or as a 'care recipient' under the *ID(CCR)A*.[38]

A. The 'neither nor' defendants

Unfortunately, these two regimes fail to deal with *all* mentally impaired defendants. There exist in New Zealand a number of defendants who offend whilst under some mental impairment, but who are nevertheless 'neither' legally insane, 'nor' unfit to stand trial. These are the 'neither nor' defendants. Instead of receiving an acquittal and treatment under the other two regimes, 'neither nor' defendants face a potential full verdict and sentence, and must rely on their mental impairment as a mitigating factor at sentencing.[39] This paper will show that this is inappropriate, so the law must introduce a new regime providing for these defendants.

This section only aims to illustrate the *types* of cases and classes of 'neither nor' defendants, without determining their exact parameters. It is difficult to comprehensively list the mental impairments constituting a 'neither nor' defendant, as this will depend on the facts of the case and the degree of the impairment. For example, a severe case of schizophrenia may suffice for insanity, but a mild form may comprise a 'neither nor' defendant. It is also in the interests of public policy to exclude those who commit offences whilst under a transient state or

[37] See s 24 *Criminal Procedure (Mentally Impaired Persons) Act 2003*.
[38] Simester and Brookbanks, n 6 at 289. See section 25 *Criminal Procedure (Mentally Impaired Persons) Act 2003*.
[39] See s 9(2)(e) *Sentencing Act 2002*.

the voluntary influence of drugs or alcohol.[40] It would be unacceptable if self-induced conditions were to improve a defendant's prospects of a successful defence.[41]

Insanity excludes impairments of volition or control, instead focussing on mental impairments of understanding and cognition.[42] Provided a defendant grasps the nature or wrongfulness of an act, a defendant's abnormal emotional and volitional capacities will not render the defendant insane.[43] This establishes a class of 'neither nor' defendants, who can appreciate the nature or wrongfulness of their conduct, but whose mental impairment is such that they cannot control their actions. Consider a defendant suffering from kleptomania who is accused of stealing property. ICD-10, the International Classificatory Coding of Diseases and Related Health Problems, as classified by the World Health Organisation, defines kleptomania (or 'pathological stealing') as characterised by 'repeated failure to resist impulses to steal objects'.[44] Alternatively, consider a defendant who, suffering from pyromania, is accused of setting fires to property. ICD-10 characterises

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[40] In New South Wales this is explicitly provided in legislation. Section 23A(3) *Crimes Act 1900* (NSW) provides: 'If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.'

[41] Simester and Sullivan *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, London, 2003) at 586. See *R v Dietschmann* [2003] UKHL 10; [2003] 1 AC 1209 (HL).

[42] Note that in the Commonwealth of Australia and most of its States, insanity legislation includes a 'volitional' arm which asks whether or not the accused lacked the capacity to control his or her conduct. See *Criminal Code 1995* (Cth) s 7.3; *Crimes Act 1900* (ACT), s 428N; *Criminal Code 2002* (ACT), s 28; *Criminal Code* (NT), s 43C; *Criminal Code* (QLD), s 27; *Criminal Law Consolidation Act 1935* (SA), s 269C; *Criminal Code Act 1924* (TAS), s 16; *Criminal Code* (WA), s 27.

[43] Simester and Brookbanks, n 6 at 317.

[44] World Health Organisation *Statistical Classification of Diseases and Related Health Problems* (10th Revision, WHO, Geneva, 2007) at F 63.2.

pyromania (or 'pathological fire-setting') with 'multiple acts of, or attempts at, setting fire to property or other objects' and with 'a persistent preoccupation with subjects related to fire'.[45] These 'neither nor' defendants cannot control their actions, but, under the current law, will not necessarily receive some benefit on the basis of their mental impairment when they probably should do.

Another class of 'neither nor' defendants are the 'deserving cases'. These are defendants suffering some mental impairment who, because of their circumstances, deserve reduced culpability in a way the law currently fails to provide. For example, in *R v W* the defendant, a loving father, learnt that his baby child had been born with the worst survivable brain dysfunction and would never have independent functioning.[46] Consequently, the defendant became mentally debilitated and developed acute stress disorder (recognised in ICD-10),[47] which was a causal factor in him killing the baby. He was held to be sane. As shall be discussed, infanticide is the only statutory form of reduced culpability for defendants suffering mental impairment short of insanity in New Zealand.[48] However, infanticide is only available to *mothers* who kill their children, so the defendant here was charged with murder.

An additional 'deserving' group is battered defendants, where encountering a long course of cruel and abusive behaviour may lead to distress and depression constituting a mental impairment. Indeed, studies suggest higher rates of post-traumatic stress disorder in battered women than in the general population.[49] In *R v Gordon*, the defendant was convicted of murder after arranging her husband's

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45 Ibid, at F63.1.

46 *R v W* (2004) 21 CRNZ 926

47 ICD-10, n 44 at F43.0.

48 See s 178 *Crimes Act 1961*. Discussion on this begins at Heading 6 'Infanticide: New Zealand's Closest Equivalent'.

49 New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at 20.

death.[50] However, the husband had often severely beaten her, and, consequently, at the time of the murder, the defendant, although not insane, suffered post-traumatic stress disorder, battered wife syndrome and depression (all recognised by ICD-10).[51] Ablett-Kerr argues that *Gordon* illustrates the inadequacies of the present regime because the defendant was precluded from being able to use any defence recognising mental impairment, despite her ability to reason being substantially impaired by the abuse from the deceased.[52]

A further class of 'neither nor' defendants are the 'nearly, but not quite, insane'. The contemplated defendant is one suffering a disease of the mind or natural imbecility sufficient for insanity, but who falls short of s 23 on some other ground. These defendants can be considered 'borderline insane'. However, caution should be exercised towards these defendants. The case law shows that they often commit serious offences and can pose a threat to society.[53] However, excluding them does not countenance the risk of preventing worthy cases. It would seem unfair to exclude these defendants because they are possibly the most deserving of appropriate recognition. Their mental impairments are often very serious, albeit insufficient for insanity. For example, in *R v Abraham* the defendant erratically drove a car, crashing

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[50] *R v Gordon* (1993) 10 CRNZ 430 (CA).

[51] ICD-10, n 44 at F43.1, T74.1 and F33.

[52] Ablett-Kerr J, "A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility" (1997) 9 Otago Law Review 1 at 4. Note that in *R v Gordon* (1993) 10 CRNZ 430 (CA) at 441, Hardie Boys J said that '[w]ere the defence of diminished responsibility available in this country, it may well have availed here'. Battered women overseas have been able to rely on the partial defence of diminished responsibility: see *R v Ahluwalia* [1992] 4 All ER 889; (1993) 96 Cr App R 133 (CA); *R v Humphreys* [1995] 4 All ER 1008; *R v Thornton (No. 2)* [1996] 1 WLR 1174; *R v Hobson* [1998] 1 Cr App R 31.

[53] See for example: *Police v C* (HC Auckland 49/03, 22 May 2003, Rodney Hansen J); [2003] BCL 613; *R v Lucas-Edmonds* [2009] 3 NZLR 493; *R v Mohamed* (CA330/06, 2 May 2007, Robertson, Baragwanath and Venning JJ); [2007] NZCA 170; *R v Carmichael* (CA521/94, 23 March 1995, Eichelbaum CJ, Gault and Williamson JJ).

into a motorcycle and killing a passenger.[54] Despite suffering a disease of the mind (schizophrenia), the condition was not quite serious enough to render him 'incapable' of understanding the nature of his actions. In *R v Craw* the defendant attacked and stabbed his mother.[55] The defendant, although not insane, suffered paranoid schizophrenia and obsessive compulsive disorder and was experiencing delusions and significant thought disorder, which Harrison J noted, was of such 'a nature to significantly diminish [his] responsibility'.[56]

B. The need for a new regime

The current criminal law inadequately deals with the 'neither nor' defendants. To satisfactorily provide for these defendants, it is submitted that a new regime should be created. This regime would operate with an intermediate status between a potential full conviction and sentence, and an acquittal on the grounds of insanity, or an 'unfit to stand trial' result.

A perceived advantage of an intermediate regime is that it offers more options to a judge and jury. If judges and/or jurors are only faced with a stark choice between acquitting or convicting, then in cases where there is sympathy for the defendant, they may (perversely) acquit, or be unable to decide, thus requiring a re-trial.[57] This could have negative implications on the public perception of the justice system.

One conceptual basis underpinning the proposed regime is that a defendant's responsibility for committing a serious crime should be assessed in light of any substantial mental impairment suffered by that

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[54] *R v Abraham* [1993] BCL 556.
[55] *R v Craw* [2006] BCL 556.
[56] Ibid, at [2].
[57] Hemming A, "It's Time to Abolish Diminished Responsibility, The Coach and Horses' Defence Through Criminal Responsibility for Murder" (2008) 10 *UNDALR* at 4.

defendant.[58] The rationale of insanity is that no-one should be convicted of a crime whose mind is so disordered that s/he cannot make the moral judgements which enable 'sane' people to live socially integrated lives and to choose conduct conforming to legal and moral norms. It is that capacity an 'insane' person lacks.[59] If total mental incapacity absolves all blame, then serious mental incapacity short of total impairment should reduce culpability.

Perhaps the most important justification for the new regime is the 'fair labelling' argument. Fair labelling seeks to ensure that distinctions between degrees of wrongdoing and levels of offences are respected and signalled by the law so that offences are labelled to fairly represent the nature and magnitude of the lawbreaking.[60] The criminal law speaks to society and wrongdoers alike in convicting offenders, and it should communicate its judgement with precision by accurately naming the crime committed or verdict reached.[61] Fair labelling is important for showing society the appropriate degree of condemnation to be attached to the defendant, so that the public may understand the nature of the defendant's transgression.[62] If the verdict or name of the crime inaccurately reflects the degree or nature of the wrongdoing, then the defendant may be unfairly stigmatised.[63] Not only should 'neither nor' defendants receive reduced culpability, they are not fully responsible for their conduct, and thus should not be labelled for the full offence as would a mentally 'normal' person. It is important in any justice system to measure culpability for offences according to the

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[58] *R v Tuia* (CA552/99, 27 July 2000, Thomas, Anderson and Panckhurst JJ) at [15]: 'criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend.'

[59] Simester and Brookbanks, n 6 at 317.

[60] Ashworth A, *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) at 88.

[61] Simester and Brookbanks, n 6 at 29, 30.

[62] Ibid at 30.

[63] Chalmers J and Leverick F, "Fair Labelling in Criminal Law" (2008) 71 Modern Law Review 217 at 228.

defendant's mental state in committing that offence.[64] The new regime would reduce murder to manslaughter. Manslaughter carries a lesser degree of blameworthiness and condemnation, reflecting the defendant's mental impairment in committing the offence. How this regime could operate in terms of other offences will be discussed later.[65]

The current law fails to provide fair labelling for 'neither nor' defendants; the pyromaniac may be (unfairly) labelled an 'arsonist', or the battered wife a 'murderer'. These labels carry stigma inaccurately reflecting the defendant's mental impairment. To fairly label 'neither nor' defendants, the best approach is to introduce a new verdict. A defendant who successfully fulfils the regime's requirements will be entitled to a new verdict of '*guilty but substantially mentally impaired*'. This attaches a label recognising the defendant's mental impairment in committing the offence, and enables the public to better understand how the defendant's reduced culpability arose. The label attached to this guilty verdict carries a lesser stigma than a 'guilty' of murder or arson conviction, as befitting a 'normal' defendant. Therefore, unlike insanity, the regime does not result in an acquittal. However, because the regime is to have an intermediate status, and since by definition 'neither nor' defendants are unable to attain the insanity threshold, a result not amounting to an acquittal is necessary.

C. Diminished responsibility: The overseas solution

A number of overseas jurisdictions[66] somewhat resolve the identified

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[64] New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) at 3.18.

[65] See Heading 7 'A Regime of General Application'.

[66] Including England: s 2 *Homicide Act 1957*; New South Wales: s 23A *Crimes Act 1900* (NSW); Australian Capital Territory: s 14 *Crimes Act 1900* (ACT); Queensland: s 304A *Criminal Code 1961* (QLD); Northern Territory: s 37 *Criminal Code* (NT); Singapore: Exception 7 to s 300 *Penal Code* (Singapore); Bahamas: s 2 *Bahama Islands (Special Defences) Act 1959* (Bahama Islands);

problem through the partial defence of diminished responsibility. Diminished responsibility operates as an intermediate regime of the kind required in that it *only* operates to reduce murder to manslaughter where the defendant's mental responsibility is substantially impaired by reason of mental abnormality short of insanity. However, diminished responsibility has never been part of New Zealand law,[67] and, as shall be shown, the closest variation is infanticide.[68] To compensate for a perceived deficiency of a regime like diminished responsibility, the New Zealand courts demonstrated a tendency to stretch the boundaries of provocation.[69]

In 2001, the Law Commission rejected the idea of introducing the

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Barbados: *Offences Against the Person Amendment Act 1973* (Barbados); Hong Kong: s 3 *Homicide Ordinance Act 1963* (HK); and 14 states in the United States of America: Hayes S, "Diminished Responsibility: The Expert Witness' Viewpoint" in Yeo (ed) *Partial Excuses to Murder* (Federation Press, Sydney, 1990) 145, 146. In Canada, the courts have developed and applied the defence: see Gannage "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19 Osgoode Hall LJ 301.

[67] There was a proposal to introduce it in the *Crimes Bill 1960*, but the abolition of the death penalty was seen to render the defence unnecessary. The Crimes Consultative Committee considered it in its report on the *Crimes Bill 1989*, but noted that the defence in England has attracted criticism, and also thought that matters relating to diminished responsibility could be better dealt with as mitigating factors in sentencing: Brookbanks W, "Status in New Zealand of the Defences of Provocation, Diminished Responsibility and Excessive Self-Defence with Regard to Domestic Violence" at 142, Appendix D in Law Commission of England and Wales *Partial Defences to Murder* (Consultation Paper 173, 31 October 2003). See also Brookbanks W, "Insanity in the Criminal Law: Reform in Australia and New Zealand" [2003] Jur Rev 81.

[68] See s 178 *Crimes Act 1961*. Discussion of Infanticide begins at Heading 6 'Infanticide: New Zealand's Closest Equivalent'.

[69] See *R v Aston* [1989] 2 NZLR 166; (1989) 4 CRNZ 241 (CA); *R v McCarthy* [1992] 2 NZLR 550; (1992) 8 CRNZ 58 (CA); *R v Rongonui* [2000] 2 NZLR 385 (CA). Provocation (s 169 *Crimes Act 1961*) was repealed on 8 December 2009 by section 4 of the *Crimes (Provocation Repeal) Amendment Act 2009*.

defence; a key reason being the difficulty in defining the concept.[70] This is the main criticism of diminished responsibility.[71] The defence is substantially the same in every jurisdiction and is based on the English defence requiring the defendant to prove on the balance of probabilities: [72]

> Abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease of injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

Firstly, the defendant must suffer an 'abnormality of mind'.[73] Unfortunately for medical and psychiatric experts the term 'mind' engenders disagreement. The term is not based on either legal or medical concepts, nor is it a psychiatric term, so it is unclear whether it is restricted to known mental illnesses, or whether the condition must be serious.[74] Consequently, the courts have incrementally developed its meaning far beyond the identification of the narrow range of permissible 'causes'.[75]

The abnormality of mind must also arise from one of three causes.[76] There is no agreed psychiatric meaning as to these terms, and they are

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[70] New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC PP73, 2001) at 47.

[71] Woodward K, "In Defence of Diminished Responsibility: Considering Diminished Responsibility in the New Zealand Context" (2009) 15 Auckland University Law Review 1 at 176, 177.

[72] s 2(1) *Homicide Act 1957* (UK).

[73] *R v Byrne* [1960] 2 QB 396 per Lord Parker at 403: 'abnormality of mind means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.'

[74] NSWLRC, n 64 at 3.35.

[75] Ibid, at 3.35

[76] s 2(1) *Homicide Act 1957* (UK): 'arrested or retarded development of mind or any inherent causes or induced by disease of injury'.

as much a hindrance as a help.[77] Identifying the cause of the impairment can lead to disagreement amongst expert witnesses, who may be unable to conclusively nominate the origin of a condition, or may disagree on a diagnosis. This causes complex and confusing technical debate in an attempt to define the listed causes and fit a specific condition into them.[78]

The abnormality of mind must 'substantially impair mental responsibility'. This wording is criticised for combining two different concepts: that of 'mind', which may be subject to expert psychiatric opinion, and 'responsibility', which is a matter of ethical judgement on which psychiatrists have no expertise.[79] Consequently, up to 70 percent of expert witnesses answer this 'ultimate issue'.[80]

These criticisms have been noted overseas and, in light of law reform proposals and legislative amendment,[81] in October 2010 s 52 of the *Coroners and Justice Act 2009* (UK) came into force in England. Whilst its effectiveness remains to be seen, section 52 is a legislative response to the criticisms of diminished responsibility, and attempts to redefine and modernise the defence.

In its current overseas form, diminished responsibility has correctly been left out of New Zealand law. However, its conceptual basis is analogous to that underpinning the proposed intermediate regime: those suffering mental impairment short of insanity should receive appropriate recognition through reduced culpability. Because of the

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[77] Law Commission of England and Wales *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide* (LAW COM No. 304, 2006) at 5.111.

[78] NSWLRC, n 59 at 3.39.

[79] Dawson J, "Diminished Responsibility: The Difference It Makes" (2003) 11 JLM 103 at 105.

[80] Law Commission of England and Wales *Partial Defences to Murder* (Final Report, 6 August 2004) at 5.51.

[81] See n 64; n 77; n 80; n 140; n 148.

concerns with adopting diminished responsibility, and its limited application, it should merely be used as a starting point for the development of a regime for the 'neither nor' defendants.

D. Infanticide: New Zealand's closet equivalent

The only form of diminished responsibility in New Zealand exists in some cases where a mother, who has not fully recovered from the effects of giving birth, kills a child. Section 178 *Crimes Act 1961* provides for infanticide,[82] which operates as both a substantive offence *and* defence to charges of murder and manslaughter.[83] In proposing a new intermediate regime, the future of infanticide must be concurrently considered. It is submitted below that the new regime would be broad enough to cover infanticide cases, and so the 'anachronistic'[84] s 178 should be repealed. This has been recommended overseas, where it is thought that diminished responsibility would suffice.[85]

Infanticide derives from English legislation,[86] where, by the end of the 19th century, attempts had been made to formulate a means of

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[82] s 178(1) *Crimes Act 1961* provides: 'Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation...to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder of manslaughter, and is liable to imprisonment for a term not exceeding 3 years.'

[83] Simester and Brookbanks, n 6 at 558.

[84] Law Commission of England and Wales, n 77 at 8.24.

[85] New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at 3.18. The Law Commission of Canada has also recommended the abolition of infanticide, although diminished responsibility is not legislatively provided for in Canada: see the Law Reform Commission of Canada *Homicide: Working Paper 33* (Law Reform Commission of Canada, 1984).

[86] *Infanticide Act 1938* (UK), replacing the *Infanticide Act 1922* (UK).

avoiding the death penalty in cases of child killing without requiring the prosecution, juries and judges to circumvent the law to exercise mercy. Infanticide allowed a judge to sentence a woman as if for manslaughter, which carried a discretionary penalty.[87] The underlying basis for infanticide, therefore, was to offer a humane means of dealing with women who killed whilst 'temporarily deranged' consequent to the effects of childbirth.[88]

Section 178 only applies to a 'woman' causing the death of 'any child of hers'. Although in *R v P* this was broadly interpreted to beyond any 'natural child',[89] infanticide is still gender specific and limited to *whom* it applies. Consequently, fathers, male partners or other child-carers cannot take advantage of s 178. An advantage of the proposed regime is that it would not be gender specific and therefore *not* limited to who it could apply, thus extending the availability beyond 'mothers' (e.g. *R v W*[90]). This accords with criticism from feminists, who argue the concept of biological vulnerability presents women as irrational and unable to take responsibility for their actions. The privileges infanticide affords women are said to be bought at the expense of making 'legal invalids of women, of excluding them from their full status as legal subjects and of perpetuating their social and legal subordination.'[91]

One argument favouring the retention of infanticide is that it operates as both an offence *and* a defence, whereas the intermediate regime would only operate as a defence. An advantage of infanticide as an offence is that it enables the defendant to avoid the trauma of a

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87 New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at 3.5.

88 Ibid, at 3.5.

89 [1991] 2 NZLR 116; (1991) 7 CRNZ 48 (CA). At p 54, Heron J interpreted this as including any child 'who can, in fact and law and common sense, be said to be hers', not just her natural child.

90 *R v W*, n 46.

91 Allen H, 'Rendering Them Harmless' in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (1987).

murder charge and trial.[92] However, an accused may be charged with murder and then have a plea of guilty to infanticide or manslaughter accepted by the prosecution.[93] Furthermore, the prosecution may choose to exercise its discretion of laying an indictment for manslaughter, instead of murder, where it is clear the defendant suffered some mental impairment.[94] Therefore, it would not necessarily be disadvantageous to defendants to subsume infanticide into a new regime.

A strong argument favouring the abolition of infanticide is the unsound medical and psychiatric premises upon which it is based. Section 178(1) requires the mother to have a disturbed balance of mind 'by reason of not having fully recovered from the effect of giving birth, or by reason of effect of lactation, or by reason of any disorder consequent upon childbirth or lactation'.

Regarding 'the effect of giving birth' and disorders 'consequent upon childbirth', it is argued that there is rarely any direct biological link between childbirth and mental imbalance.[95] Indeed, infanticide provisions more often apply to women suffering conditions arising from psychological, environmental and social stresses of childbirth and child-raising, or from pre-existing mental conditions, rather than from dubious biological causes.[96] Furthermore, it has been suggested that as a result of the restrictions on the types of mental disturbances necessary for infanticide, medical experts have to distort their diagnoses to conform to legislation.[97]

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[92] NSWLRC, n 87 at 3.43.

[93] See for example *R v Metuatini* 18/11/03, Harrison J, HC Auckland T025795; *R v H* 19/3/04, Williams J, HC Auckland T023428; *R v Golovale-Siaosi* 11/12/07, John Hansen J, HC Dunedin CRI-2006-012-2533.

[94] NSWLRC, n 87 at 3.43.

[95] Law Commission of England and Wales, n 80 at 9.21.

[96] Mackay R D, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21 at 29-30

[97] R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 52.

It is also doubtful whether there is any medical basis for the notion of 'lactational insanity'.[98] Overseas jurisdictions have proposed reformulations of infanticide omitting reference to 'lactation', on the basis of its precarious validity.[99]

Nevertheless, some argue there *is* a medical basis. In 1987 Kendall found that mental illness was far more common in women after childbirth than at any previous time.[100] In 1995, Cooper and Murray identified a group of women who became depressed after childbirth, but after no other life events.[101] Furthermore, Marks' research suggests that lactation may increase dopamine sensitivity in women, which may trigger psychosis.[102]

A new intermediate regime could resolve this debate by subsuming infanticide's uncertain medical validity into a more internationally and professionally accepted model. As shall be shown, it is submitted that a defendant's mental impairment should arise from a 'recognised medical condition'.[103] Postpartum psychoses and disorders are referred to in ICD-10[104] and DSM-IV-TR,[105] indicating their medical

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[98] Ibid.

[99] See England and Wales Criminal Law Revision Committee *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at 47; Law Commission of England and Wales *Criminal Code of England and Wales* (Law Comm 177, 1989) cl 64(1); Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 28 at para 166. The Tasmanian infanticide provision makes no reference to lactation: see s 165A *Criminal Code* (TAS).

[100] Kendall R E, Chalmers J C and Platz C, 'Epidemiology of Puerperal Psychoses' (1987) 150 British J of Psychiatry 662.

[101] Cooper P J and Murray L, 'Course and Recurrence of Postnatal Depression. Evidence for the Specificity of the Diagnostic Concept' (1995) 166 British J of Psychiatry 191.

[102] Law Commission of England and Wales, n 80 at 8.26.

[103] For discussion on this see Heading 13 'Arising From a Recognised Medical Condition'.

[104] World Health Organisation, n 44.

recognition. Mackay's research into English infanticide cases between 1990 and 2003 found that the most common medical conditions were post-natal depression, depression, puerperal psychosis and dissociative disorder.[106] These are all recognised medical conditions.[107] An advantage of the new regime is that not only are those suffering from such conditions covered, but the impact of environmental and social causes on conditions can be recognised, meaning it would not depend on whether a condition was a direct result of childbirth.[108]

E. A regime of general application

The conceptual and theoretical bases underpinning diminished responsibility and infanticide provide the foundations for the new regime. However, a major drawback is that they are both limited in *what* they apply to: diminished responsibility to murder, and infanticide to the killing of a child. It is submitted that the new regime should apply to *all* offences. The United Kingdom Royal Commission on Capital Punishment favoured such an extension to diminished responsibility, claiming that forms of mental abnormality resulting in diminution of responsibility were of frequent occurrence and of importance to a wider range of offences.[109] Insanity is not restricted to certain offences. The new regime purports to provide for those falling short of insanity, so limiting the regime to certain offences fails to resolve the problems faced by the 'neither nor' defendants.

Restricting the regime would also not accord with the stated theoretical

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[105] See DSM-IV-TR: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, APA, Philadelphia, 2000).

[106] Law Commission of England and Wales, n 77 at p 202.

[107] World Health Organisation, n 44. See F53 (post-natal depression); F30-39 (depression); F53.1 (puerperal psychosis); F44 (dissociative disorders).

[108] NSWLRC, n 87 at 3.30.

[109] Report of the United Kingdom Royal Commission on Capital Punishment 1949-1953 (1953) Cmd 8932 at 84.

bases of the regime. Fair labelling heavily underpins the new regime.[110] Although murder and child killing are heinous crimes carrying great stigma, other offences are not immune to this. It is illogical to restrict the proposed regime when offenders who commit other offences may also be acting under mental impairment.[111] If a defendant who kills with the requisite *mens rea* for murder can, and should be, labelled as someone other than a murderer (as under diminished responsibility), then why not someone guilty of other offences? Restricting the regime to certain offences does not fulfil the fair labelling argument, and thus undermines part of the regime's intended purpose. Further, a defendant's criminal responsibility should be assessed in light of any mental impairment suffered by that defendant. A limited regime means a defendant suffering mental impairment who commits an offence not covered is not protected.

F. Sentencing: The current approach

In rejecting the introduction of diminished responsibility into New Zealand, the Law Commission preferred matters to be dealt with under a sentencing discretion.[112] This is the current approach. Section 9(2) of the *Sentencing Act 2002* provides a list of mitigating factors which the court *must* consider in sentencing, but only section 9(2)(e) makes reference to mental health considerations, providing for a defendant's 'diminished intellectual capacity or understanding'.[113]

Unfortunately, this sentencing discretion is not the best approach because it creates the risk of inappropriate results and 'neither nor' defendants are not always adequately dealt with. The wording of s

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[110] For introductory discussion on 'Fair Labelling', see Heading 4 'The Need For a New Regime'.

[111] NSWLRC, n 87 at 3.76.

[112] NZLC, n 70 at 45.

[113] In *R v Nilsson* [2003] NZLJ 24 at [10] it was noted that a 'mental disorder falling short of exculpating insanity may nevertheless be capable of mitigating a sentence.'

9(2)(e) may be insufficient to cover all 'neither nor' defendants. Whilst a court can consider other mitigating factors it 'thinks fit',[114] these factors are not protected by legislative mandate. A judge may choose not to exercise his/her discretion to consider other forms of mental impairment beyond s 9(2)(e), like volitional impairments.[115] In some cases where sentencing judges have considered diminished responsibility due to mental impairment as a mitigating factor, it has often only been considered in passing without expansion.[116]

Furthermore, although the court must consider factors which may make the sentence disproportionately severe,[117] other factors also need to be considered, such as the need to protect the public.[118] Therefore, whilst a defendant's mental impairment would *suggest* a lesser sentence, it is not always so. In *R v Taueki*, the Court of Appeal noted that a defendant's mental illness or disorder (such as an obsessive disorder manifesting in violence) will *not always* be a mitigating factor.[119] So, whilst the legislation provides for the potential of a reduced sentence due to mental impairment, a 'neither nor' defendant is not *guaranteed* one.

G. Sentencing: How to deal with 'neither nor' defendants

So, if a pure sentencing discretion is not the answer, what is? The proposed regime is of general application so the issue becomes how it would operate towards other offences. Murder can logically be downgraded to manslaughter, but what about other offences like kidnapping[120] or robbery?[121] The problem of attempting to downgrade

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114 s 9(4)(a) *Sentencing Act 2002*.
115 Woodward, n 71 at 197.
116 See for example *R v Smail* [2007] 1 NZLR 411; *R v Mayes* [2004] 1 NZLR 71 (CA).
117 s 8(h) *Sentencing Act 2002*.
118 s 7(1)(g) *Sentencing Act 2002*.
119 *R v Taueki* [2005] 3 NZLR 372, at [45].
120 s 209 *Crimes Act 1961*.

offences with no logical second tier might be avoided by a sentencing limitation, either in choice or severity.[122] However, sentencing 'neither nor' defendants is a complex and demanding task.[123] Not only does it 'occupy an uncertain ground between a judicial finding of full responsibility and exculpatory non-responsibility',[124] but the process is also permeated by tension between proportionality of sentence and community protection.[125] Although not insolvable, the mechanics of sentencing 'neither nor' defendants, and how such an approach would interact with the *Sentencing Act 2002*, including the newly enacted 'Three Strikes' legislation',[126] requires detailed discussion beyond the scope of this paper.

H. Burden of proof

It is submitted the defendant should bear the burden of proof. This implies the defendant has both an evidential burden to point to direct evidence to bring the regime 'into play', and the legal burden of establishing the regime.[127] The defendant must persuade the court on the balance of probabilities, which will normally mean adducing medical evidence regarding the defendant's mental state at the time of the offence.[128] However, the new regime will only be an issue after the prosecution proves the *actus reus* and *mens rea* of the relevant offence

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121 s 234 *Crimes Act 1961*.

122 Walker, "Butler v The CLRC and Others" [1981] Crim LR 596, 597. Note that a similar process occurs in Italy, where the maximum prison sentence is reduced if a partial defect of mind is found, and in the Netherlands, where punishments are varied according to a defendant's mental disorder - above n 71 at 194.

123 Woodward, n 71 at 195.

124 Brookbanks W, "The Sentencing and Disposition of Mentally Disordered Defendants" in Brookbanks W, (ed), *Psychiatry and the Law* (2007) at 199.

125 Woodward, n 71 at 195.

126 See *Sentencing Act 2002* ss 86A – 86I.

127 See *R v Fontaine* (2004) 183 CCC (3d) 1 (SCC) at [68] (Fish J).

128 Simester and Brookbanks, n 6 at 298.

beyond reasonable doubt.[129]

Arguably the defendant should merely bear an evidential burden. Putting the burden on the defendant defies general principles that it is up to the prosecution to establish all elements of the offence.[130] The United Kingdom Criminal Law Revision Committee said it is unusual for the burden to be on the defendant in serious charges, such as manslaughter or murder. It was thought that juries are likely to be confused between being sure and satisfied on the balance of probabilities, and by different requirements for different outcomes.[131] However, this argument was in the context of diminished responsibility which only applies to murder, and thus always requires a jury. The proposed regime applies to all offences, and some (serious) offences are tried without a jury.[132]

It has also been argued that when the burden is on the defendant, there exists the likelihood of a conviction despite the presence of evidence favouring the defendant, because the evidence did not meet the standard of the balance of probabilities.[133] However, having an evidential burden may make it near impossible for the prosecution to get a conviction. Once the defendant discharges an evidentiary burden, the prosecution must prove *beyond reasonable doubt* the defendant did not fulfil the new regime.[134] Because medical evidence is vital under this regime, where there is conflicting evidence (as there is bound to be), the defendant receives the benefit because the prosecution cannot disprove to the requisite standard.

Nevertheless, the defendant should bear the burden of proof. This

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129 Ibid at 37.
130 *Woolmington v DPP* [1935] AC 462; [1935] All ER 1 (HL).
131 Criminal Law Revision Committee *Offences Against the Person* (14th Report, Cmnd 7844, London, HMSO, 1980) at 6.54.
132 See ss 361B-E of the *Crimes Act 1961*.
133NSWLRC, n 64 at 3.108.
134 Simester and Brookbanks, n 6 at 35.

conforms to insanity and diminished responsibility. The main argument in favour of such a burden is that the new regime is a special matter calling for expert evidence wholly known to the defendant.[135] The regime depends not on external factors which can be investigated and challenged independent of the defendant, but on the defendant's state of mind. This can only be properly investigated with the defendant's co-operation.[136] The defendant should appropriately bear the burden because, with an evidential burden, a defendant may improperly co-operate with the prosecution's attempts to disprove the regime beyond reasonable doubt. This could mean the prosecution cannot meet the requisite standard, and the defendant may take advantage of the regime, perhaps in unwarranted cases.

Furthermore, society may not accept the imposition of lesser sentences and verdicts if defendants can only point to a small amount of evidence (i.e. to discharge an evidential burden), but, because of conflicting medical testimony, the prosecution cannot disprove the regime beyond reasonable doubt. Society would more likely accept the new regime and its consequences where the defendant can point to sufficient evidence (i.e. on the balance of probabilities), which can best be achieved where the defendant bears the burden.

I. Defending the regime

Despite the definitional issues with diminished responsibility, it may be possible to create a definition for the proposed regime which is more readily understood and accepted than that currently of diminished responsibility. It is submitted the regime could be drafted along the following lines:

> A person (D) who commits, or is a party to the commission of any offence, is entitled to a verdict of 'guilty but substantially mentally

[135] Law Commission of England and Wales, n 80 at 5.90.
[136] Ibid.

impaired' and be sentenced accordingly if, at the time of the acts or omissions in committing the offence, D was suffering from an abnormality of mental functioning arising from a recognised medical condition which substantially impaired D's capacity to:

(i) understand the nature of D's conduct; or[137]
(ii) form a rational judgement; or[138]
(iii) exercise self-control.[139]

J. 'Abnormality of mental functioning'

The defendant must show an 'abnormality of mental functioning', not an 'abnormality of mind'. 'Abnormality of mental functioning' is a term endorsed by the United Kingdom[140] and New South Wales Law Commissions,[141] and enacted in s 52 *Coroners and Justice Act 2009* (UK). The term was developed with assistance from forensic psychiatrists and psychologists.[142] This suggests it will be a more readily understood term than 'mind' amongst expert witnesses, which is crucial, for they must deal with this issue.

K. 'Arising from a recognised medical condition'

The criticisms of specifically listed causes under diminished

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137 s 23A(1) *Crimes Act 1900* (NSW) provides for capacity to 'understand events'. S 52(1A) *Coroners and Justice Act 2009* (UK) provides 'to understand the nature of D's conduct'.

138 s 23A(1) *Crimes Act 1900* (NSW) provides for capacity to 'judge whether the persons actions were right or wrong'. Section 52(1A) *Coroners and Justice Act 2009* (UK) provides for the defendant's ability 'to form a rational judgement'.

139 S 23A(1) *Crimes Act 1900* (NSW) provides for a person's capacity to 'control him or herself'. Section 52(1A) *Coroners and Justice Act 2009* provides for a defendant's ability to 'exercise self-control'.

140 Law Commission of England and Wales *A New Homicide Act for England and Wales?* (LCCP177, 20 December 2005) at 6.51 – 6.52.

141 NSWLRC, n 64 at 3.40 – 3.49.

142 Mackay R D, "The New Diminished Responsibility Plea" [2010] 4 Criminal Law Review 290, 293.

responsibility and infanticide have been noted. The term 'arising from a recognised medical condition' ensures the law is no longer constrained by an out-of-date and fixed set of causes from which an abnormality of mental functioning must stem. Instead, up-to-date medical knowledge can be applied, which also enables the law to evolve alongside medical science. The United Kingdom Royal College of Psychiatrists supported this term, saying it is 'consistent with the general nature and purpose' of a regime of this type.[143] The term is tied to the need for the regime to be supported by medical evidence, insofar as a condition must be recognised by medical science in a diagnosable way. It encourages reference within expert evidence to diagnose in terms of the internationally accepted classificatory systems of medical conditions (e.g. ICD-10, DSM-IV), which encompass the recognised physical, psychological and psychiatric conditions.[144] This would abolish the uncertainty surrounding lactational insanity. The condition need not be permanent, but must be more than ephemeral or of a transitory nature. A severe depressive illness which is curable would still suffice, notwithstanding that it is not permanent, and a transitory disturbance of mental functioning caused by heightened emotions would be excluded.[145]

This wording would cover 'neither nor' defendants. The medical conditions sufficing for insanity are limited by the 'incapable' threshold. However, requiring a recognised medical condition extends the reach of the regime beyond insanity, for example to include volitional disorders.

L. 'Substantially impaired defendant's capacity'

Under the proposed definition, an abnormality of mental functioning must 'substantially impair' the capacity of the defendant as listed in the

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143 Law Commission of England and Wales, n 80 at 5.114.
144 Ibid.
145 Mackay, n 142 at 295.

provision.[146] The advantage this wording has over infanticide and diminished responsibility is that it is no longer necessary to show a specific cause of the defendant's condition. The regime only applies where the *capacity* of the defendant is impaired in one of three respects and arising from a recognised medical condition.

It should be noted that whilst it may seem that some of these limbs are very similar to insanity, the standard required is different. For insanity, the mental impairment must render the defendant 'incapable' (a high threshold), whereas here the defendant must be 'substantially impaired', a lesser threshold. It is submitted that for a condition to 'substantially impair' it must be 'less than total, but more than trivial'.[147]

Importantly, if a defendant suffers a mild 'recognised medical condition', s/he must still convince the jury that an abnormality of mental functioning arising from this condition substantially impaired his/her ability to understand the nature of his/her conduct, form a rational judgement or exercise self-control.[148] This acts as a gate-keeper for undeserving cases.

The first capacity is the defendant's ability to 'understand the nature' of his/her conduct. This would cover those who would qualify for the comparable limb under insanity, but otherwise fall short of fulfilling the defence. For example, this would cover *R v Abraham*, where the defendant's schizophrenia led him to have an impaired understanding of the nature of his actions, but not to such an extent as to render him

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146 'Understand nature of D's conduct; form a rational judgement; exercise self-control'.

147 *R v Lloyd* [1967] 1 QB 175.

148 United Kingdom Ministry of Justice *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position* (CP(R) 19/08, 14 January 2009) at 22.

'incapable'.[149]

Many 'neither nor' defendants could also come under the substantial impairment to 'form a rational judgement' limb. This might cover those defendants who cannot fulfil to the requisite standard the 'knowing the act was morally wrong' part of insanity. Their mental impairments are such that, even though they may know the acts are wrong, their judgement is impaired compared with a 'normal' person. Defendants here cannot form a rational judgement as to whether or not the act was wrong. It may also cover, for example, battered defendants (like *R v Gordon*[150]), who may be able to show a mental impairment consequential to the abuse impaired their judgement.

Some overseas concern has been expressed over capacity to 'exercise self-control' in that it may be difficult for experts to definitively state whether or not the defendant was incapable of controlling actions, or simply chose not to.[151] However, excluding this category creates the risk that people who *should* receive the benefit of the regime miss out (e.g. defendants who are brain damaged, hypomanic or suffering auditory hallucinations). It is better to include this element, because the regime would be too narrow without it.[152] This limb widens the regime further than insanity to include volitional defects, which would cover, for example, the kleptomaniac or pyromaniac.

M. 'Substantially impaired'

The abnormality of mental functioning must 'substantially impair' the defendant's relevant capacity. Because 'substantially impaired' means

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[149] *R v Abraham* [1993] BCL 556. At 449, Thorp J noted that this was a case where proof of the existence of a mental disorder falling short of legal insanity nevertheless reduced the defendant's ability to appreciate the true seriousness and culpability of his actions.

[150] *R v Gordon*, n 50.

[151] Law Commission of England and Wales, n 140 at 6.58.

[152] Law Commission of England and Wales, n 140 at 6.58 – 6.59.

more than trivial or minimal, but not total, whether a condition will suffice for the regime is a matter of judgement. This can be contrasted with insanity, which is an all or nothing matter – either the defendant shows the mental impairment led him/her to not know the nature and quality of the act, or know it was wrong, or it did not.[153]

One criticism of diminished responsibility is that up to 70 per cent of expert witnesses answer the 'ultimate issue' as to whether the abnormality of mind substantially impaired the defendant's mental responsibility.[154] The proposed provision reformulates the regime in terms of whether the defendant's *capacities* have been substantially impaired. This reframes the question for the judge or jury in terms of culpability and liability, not medical terms. Expert evidence is irrelevant here. Instead, an expert would be required to offer opinions on:

1) whether the defendant was suffering an abnormality of mental functioning stemming from a recognised medical condition; and
2) whether and in what way the abnormality had an impact upon the defendant's capacities, as explained in the definition.[155]

It is submitted that the abnormality *must* affect the defendant, not merely be *capable* of doing so. Whether an abnormality is 'capable' of affecting a defendant is speculative. Allowing abnormalities 'capable' of affecting the defendant might enable someone who knew they had a condition, but controlled it, to claim. A requirement that the abnormality *must* affect the defendant avoids this and only includes actual, rather than hypothetical, cases. It would then be for the judge or jury to say, whether in light of that (and other relevant) evidence they regard the relevant capacities of the defendant to have been

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153 Law Commission of England and Wales, n 80 at 5.142. See also Mackay R D, *Mental Condition Defences in the Criminal Law* (Oxford University Press, Oxford, 1995) at 100 – 108.

154 See n 80.

155 Law Commission of England and Wales, n 80 at 5.117.

'substantially impaired'.[156]

Conclusion

Under the current New Zealand criminal law, insanity and an 'unfit to stand trial' verdict are the two regimes for dealing with mentally impaired defendants. However, as this paper demonstrates, there is still uncertainty in the law. There exist defendants who are 'neither' insane, 'nor' unfit to stand trial, and yet who are substantially mentally impaired, but still potentially face the full force of the law. These 'neither nor' defendants include those suffering volitional impairments, the 'nearly, but not quite, insane', and the 'deserving cases', like battered defendants. To enable the criminal law to provide adequately for these defendants, this paper proposes a new intermediate regime to operate between insanity and an 'unfit to stand trial' result. Although diminished responsibility has been rejected in New Zealand, fair labelling and reduced culpability for mental impairment short of insanity provide the theoretical foundations for this defence, and these bases are used to develop a new regime for the 'neither nor' defendants. Whilst infanticide provides some useful conceptual notions, its medical ambiguity means that it should be repealed and subsumed into the new regime. The proposed regime will apply to all offences, thereby having an extended application and overcoming the limitations of diminished responsibility and infanticide. To accord with fair labelling, the introduction of a new verdict – 'guilty but substantially mentally impaired' – is advocated. As with diminished responsibility and insanity, the defendant shall bear the burden of proof. Finally, drawing on the criticisms of the traditional diminished responsibility definition, a draft provision for the regime is submitted. It is hoped that this provision will sufficiently cover 'neither nor' defendants and therefore substantially ameliorate the problem identified in the New Zealand law. At the very least, this regime is capable of forming the underlying rationale for any future solution.

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[156] Ibid at 5.118.