

**MOTHERS WHO KILL:  
THE FORENSIC USE AND JUDICIAL RECEPTION  
OF EVIDENCE OF POSTNATAL DEPRESSION AND  
OTHER PSYCHIATRIC DISORDERS IN  
AUSTRALIAN FILICIDE CASES**

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*This article examines Australian legal responses to filicide in circumstances where mothers have killed their young children. We consider the potential legal defences that may be raised where postnatal depression ('PND') and other psychiatric disorders are present in cases of filicide: insanity/mental impairment, diminished responsibility/substantial impairment by abnormality of mind, and infanticide. We then examine 28 cases of filicide, including both cases where PND evidence was adduced, and cases where PND evidence was not adduced but other mental health issues were considered. We look at the forensic use of and judicial responses to PND and other evidence of mental illness: how do medical practitioners and judicial officers present impairment of the defendant's mental capacity? We also speculate on differences in sentencing outcomes and consider the policy and research implications of our findings.*

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## I INTRODUCTION

Between July 2008 and June 2010, there were 22 filicides recorded in Australia, of which seven involved the death of a child under one year of age.<sup>1</sup> Data were not provided on the gender of offenders, but earlier figures suggest that mothers account for around 37 per cent of filicides.<sup>2</sup> Maternal filicide is defined as the killing of a child by their mother.<sup>3</sup> In an international review of the psychiatric literature, Resnick found filicidal mothers frequently experienced depression, psychosis, suicidal thoughts and other prior mental health problems.<sup>4</sup> This article explores some of these mental health issues in the context of Australian filicide cases, with particular reference to ‘postnatal depression’ (‘PND’). PND is used as an umbrella term throughout to refer to three mental conditions that are commonly associated with childbirth: the ‘baby blues,’ postnatal depression and post-puerperal psychosis.<sup>5</sup> International-

<sup>1</sup> Andy Chan and Jason Payne, ‘Homicide in Australia: 2008–09 to 2009–10 National Homicide Monitoring Program Annual Report’ (Monitoring Report No 21, Australian Institute of Criminology, 2013) 6.

<sup>2</sup> Jenny Mouzos and Catherine Rushforth, ‘Family Homicide in Australia’ (Trends and Issues in Crime and Criminal Justice No 255, Australian Institute of Criminology, June 2003) 3.

<sup>3</sup> Susan Hatters Friedman and Phillip J Resnick, ‘Child Murder by Mothers: Patterns and Prevention’ (2007) 6 *World Psychiatry* 137, 137.

<sup>4</sup> Phillip J Resnick, ‘Child Murder by Parents: A Psychiatric Review of Filicide’ (1969) 126 *American Journal of Psychiatry* 325, 328 (Table 4), 329 (Table 5).

<sup>5</sup> Satish Dayalan, Submission No 25 to New South Wales Law Reform Commission, *Inquiry into People with Cognitive and Mental Health Impairments in the Criminal Justice System*, 13 September 2010, 3. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) 322–3. Cf Ian Brockington, ‘Diagnosis and Management of Post-Partum Disorders: A Review’ (2004) 3 *World Psychiatry* 89, 89, who suggests that a four-part classification would be more appropriate: ‘psychoses, mother-infant relationship disorders, depression and a miscellaneous group of anxiety and stress-related disorders’. It is un-

ally, it has been estimated that at least one in seven new mothers suffers from PND,<sup>6</sup> with postpartum psychosis, which may result in an inability to distinguish between right and wrong, occurring in one to four women per 1000 who give birth.<sup>7</sup>

There is a great deal of debate about the nature and extent of the connection between childbirth, lactation and mental disturbance. It has been argued that the diagnosis of PND relies on antiquated medical opinion concerning the effects of lactation and childbirth, and that its medical basis is unsound and/or outmoded — that is, the notion of mental disturbance resulting from the effects of lactation is unfounded.<sup>8</sup> Furthermore, exhaustion psychosis with attendant loss of reality has been diagnosed among both adoptive mothers and men with infants and young children.<sup>9</sup> This suggests that PND is not just biologically based, but is ‘closely associated with the stresses and rigors of child-rearing’.<sup>10</sup>

There has also been criticism of the use of PND diagnoses in the forensic setting. Unfortunately, the existing research fails to consistently identify the relationship between maternal mental disturbance and filicide.<sup>11</sup> As noted by the Victorian Law Reform Commission (‘VLRC’):

fortunately beyond the scope of this article to examine the differences between the different classifications in detail.

<sup>6</sup> Susan Hatters Friedman and Phillip J Resnick, ‘Postpartum Depression: An Update’ (2009) 5 *Women’s Health* 287, 287.

<sup>7</sup> Lita Linzer Schwartz and Natalie K Isser, *Child Homicide: Parents Who Kill* (Taylor & Francis, 2007) 155.

<sup>8</sup> Bernadette McSherry, ‘The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility’ (1993) 15 *Sydney Law Review* 292; Arlie Loughnan, ‘The “Strange” Case of the Infanticide Doctrine’ (2012) *Oxford Journal of Legal Studies* 1, 21. See also Victorian Law Reform Commission (‘VLRC’), *Defences to Homicide: Final Report* (2004), 257 [6.11]; Law Reform Commission of Western Australia (‘LRCWA’), *Review of the Law of Homicide: Final Report*, Project No 97 (2007) 108; New South Wales Law Reform Commission (‘NSWLRC’), *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultation Paper No 6 (2010) 130 [5.27]; NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 118 [5.30].

<sup>9</sup> Patricia Pearson, *When She Was Bad: Violent Women and the Myth of Innocence* (Viking Penguin, 1997) 81.

<sup>10</sup> Heather Stangle, ‘Murderous Madonna: Femininity, Violence and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide’ (2008) 50 *William and Mary Law Review* 699, 730.

<sup>11</sup> Lillian De Bortoli, Jan Coles and Mairead Dolan, ‘Maternal Infanticide in Australia: Mental Disturbance during the Postpartum Period’ (2013) 20 *Psychiatry, Psychology and Law* 301, 307.

some would argue that ‘postnatal depression’ is no different to other kinds of depression. Statistics on postnatal psychosis also reveal that in most cases the woman had some history of psychiatric illness. Others argue that the clear temporal connection between mental conditions and childbirth would seem to suggest there is an association between the condition and birth.<sup>12</sup>

An associated criticism of PND evidence in criminal trials is that, although the reference to mental disturbance from the effects of giving birth may not be outmoded, a defence founded on evidence of PND is not appropriate in many cases since there are other reasons why women kill their infant children. Postpartum disorders are associated with multiple factors, including previous psychiatric and genetic predispositions; other psychological variables, such as a low motivation for pregnancy; and stresses like socio-economic status and living in domestic violence,<sup>13</sup> which ‘can combine to cause depression and anxiety’.<sup>14</sup> Therefore, there may be evidence of depression, but the issue is instead whether its aetiology is childbirth or a response to ‘the psychological and social stresses of childbirth and child-raising, or from pre-existing mental conditions’.<sup>15</sup> As De Bortoli, Coles and Dolan have observed:

The relationship between childbirth-related mental disturbance and infanticide occurring between the first day and the first year post childbirth, is largely unknown. ... Therefore understanding the impact of a sufficiently severe mental disturbance in the context of co-occurring stressors remains largely undetermined in the literature.<sup>16</sup>

#### A Aims

One of our aims in this paper is to see whether the complexity of causes discussed above is recognised by expert witnesses and the judiciary. We examine 28 cases of filicide, including those where PND evidence was adduced and those in which PND evidence was not adduced, but other

<sup>12</sup> VLRC, above n 8, 264 [6.33] (citations omitted). Cf Emma Robertson Blackmore et al, ‘Reproductive Outcomes and Risk of Subsequent Illness in Women Diagnosed with Postpartum Psychosis’ (2013) 15 *Bipolar Disorders* 394, 399, 401–2, which found that only one third of women who experienced postpartum psychosis had a prior history of mental illness.

<sup>13</sup> See Susan Hatters Friedman and Phillip J Resnick, ‘Child Murder by Mothers: Patterns and Prevention’ (2007) 6 *World Psychiatry* 137, 138.

<sup>14</sup> Ibid 264–5 [6.34].

<sup>15</sup> NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) 114 [3.29].

<sup>16</sup> De Bortoli, Coles and Dolan, ‘Maternal Infanticide in Australia’, above n 11, 308.

mental health issues were considered. How do the consultant psychiatrists, psychologists or general practitioners present PND and other mental health issues and consider the extent to which the defendant's mental capacity was impaired? Do they emphasise post-partum psychosis or depression?

Previous studies of sentencing and the filicide of young children in Australia have shown that the 'sentencing of women who demonstrate a degree of mental impairment is often met with leniency, as evidenced in a number of infanticide, as well as manslaughter, cases alike'.<sup>17</sup> Langer, a Canadian academic, compared Australia with four other countries (the United States, the United Kingdom, Canada and New Zealand) and found that, in Australia (as well as the United Kingdom and Canada), there had been 'a virtual abandonment of carceral sentences for mentally disordered post-partum child killings'.<sup>18</sup> We delve a bit further and see whether there are differences in outcome and sentencing between those cases where there is PND evidence and those involving other mental health issues.

First, though, in the following section, we briefly examine the potential legal defences that may be available in filicide cases where there is evidence of PND or other psychiatric disorders.

## II POSSIBLE LEGAL DEFENCES

Evidence of PND or other psychiatric disorders may be potentially valuable in arguing the complete defence of mental insanity/mental impairment, and the partial defences of diminished responsibility (in Queensland, the Northern Territory and the ACT) or substantial impairment by abnormality of mind (in NSW). Evidence of PND alone may also be useful in arguing the partial defence of infanticide, which is available in NSW, Victoria and Tasmania.<sup>19</sup>

### *A Insanity/Mental Impairment*

The defence of insanity or mental illness/impairment dictates that a person who was mentally ill at the time of committing the offence cannot be convicted of the offence, and is entitled to a qualified verdict of acquittal ('not guilty

<sup>17</sup> Ibid 302.

<sup>18</sup> Rosanna Langer, "Mother of Sorrows": Post-Partum Mental Disorder and the Law across Five Jurisdictions' (2012) 19 *Psychiatry, Psychology and Law* 358, 360–1.

<sup>19</sup> We note, however, that in jurisdictions where the latter two are not available, PND evidence could also operate to reduce murder to manslaughter on the basis that intention could not be made out.

by reason of mental impairment'). The NSW position is governed by the common law,<sup>20</sup> while the other jurisdictions have codified the defence in broadly similar terms.<sup>21</sup> As Bronitt and McSherry note:

The concept of criminal responsibility is based on the notion that individuals possess the capacity to make rational choices in performing or refraining from performing acts. A person will be considered to be criminally responsible for a criminal act which was made voluntarily and intentionally and where the individual understood the significance of the act. However, some forms of mental impairment may exculpate an individual from criminal responsibility.<sup>22</sup>

The modern conception of the defence of mental impairment follows this excusatory tradition. To successfully rely upon the defence, it must be proven that, at the time of the offence, the defendant was affected by a 'disease of the mind' to such an extent that they did not know the 'nature and quality' of their act, or did not know what they were doing 'was wrong'.<sup>23</sup> The majority of Australian jurisdictions now also include circumstances where the defendant could not control his or her conduct.<sup>24</sup> Although the burden of proof to rebut the presumption of sanity will generally be borne by the defence, some jurisdictions also allow it to be discharged by the prosecution.<sup>25</sup>

Psychosis arising as a consequence of PND may provide the foundation for an insanity/mental impairment defence.<sup>26</sup> As will be discussed further below,

<sup>20</sup> *M'Naghten's Case* (1843) 10 Cl & F 200, 210; 8 ER 718, 722 ('insanity').

<sup>21</sup> *Criminal Code 2002* (ACT) s 28 ('mental impairment'); *Criminal Code* (Cth) s 7.3 ('mental impairment'); *Criminal Code Act* (NT) sch 1 s 43C ('mental impairment'); *Criminal Code* (Qld) s 27 ('insanity'); *Criminal Law Consolidation Act 1935* (SA) s 269C ('mentally incompetent'); *Criminal Code* (Tas) s 16 ('insanity'); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 20 ('mental impairment'); *Criminal Code* (WA) s 27 ('insanity').

<sup>22</sup> Bronitt and McSherry, above n 5, 237.

<sup>23</sup> See *M'Naghten's Case* (1843) 10 Cl & F 200, 210; 8 ER 718, 722; *Criminal Code 2002* (ACT) ss 28(1)(a)–(b); *Criminal Code* (Cth) ss 7.3(1)(a)–(b); *Criminal Code Act* (NT) sch 1 ss 43C(1)(a)–(b); *Criminal Law Consolidation Act 1935* (SA) ss 269C(a)–(b); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 20(1)(a)–(b). See also *Criminal Code* (Qld) s 27(1); *Criminal Code* (Tas) ss 16(1)(a)(i)–(ii); *Criminal Code* (WA) s 27.

<sup>24</sup> *Criminal Code 2002* (ACT) s 28(1)(c); *Criminal Code* (Cth) s 7.3(1)(c); *Criminal Code Act* (NT) sch 1 s 43C(1)(c); *Criminal Code* (Qld) s 27(1); *Criminal Law Consolidation Act 1935* (SA) s 269C(c); *Criminal Code* (Tas) ss 16(1)(b), (2); *Criminal Code* (WA) s 27(1).

<sup>25</sup> See *Criminal Code 2002* (ACT) s 28(5); *Criminal Code* (Cth) s 7.3(3); *Criminal Code Act* (NT) sch 1 s 43D(2); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 21(3).

<sup>26</sup> Patricia Easteal and Anthony Hopkins, 'Women and Criminal Law: Defences to Homicide' in Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 109, 124. See also McSherry, above n 8, 306.

successfully relying upon this defence results in a qualified acquittal. Although not criminally responsible for an offence, a person may still be subjected to “prison-like” restrictions on their liberty in their own or society’s interests, depending on the nature of their illness and the available resources for treatment’.<sup>27</sup>

### B *Diminished Responsibility/Substantial Impairment by Abnormality of Mind*

The partial defence of diminished responsibility, which (like infanticide) reduces, rather than removes, liability, ‘connotes a “somewhat impaired” capacity but not one so sufficiently impaired that there is a complete lack of mental responsibility’.<sup>28</sup> According to Langer,

the partial excuse of diminished responsibility, reflected in both infanticide provisions and considerations of mental disorder to mitigate sentencing, arguably provides a more nuanced view of the spectrum of capacity and blameworthiness than treating post-partum mental disordered women ‘the same’ as other defendants.<sup>29</sup>

In addition, partial defences obviously reduce blame and culpability, as the ultimate conviction is for a lesser offence than murder. The defence of diminished responsibility/substantial impairment is only available in NSW, Queensland, the Northern Territory and the ACT.<sup>30</sup> There are differences in the wording of the defence in the four jurisdictions, but in general it is available where the accused was suffering from an abnormality of mind that substantially impaired their mental capacity.<sup>31</sup>

Previously, the defence has been successful in cases where defendants have suffered from severe depression and personality disorders.<sup>32</sup> Ultimately,

<sup>27</sup> Eastale and Hopkins, above n 26, 124. See *Crimes Act 1914* (Cth) s 20BJ; *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 38–9; *Criminal Code* (Qld) s 647; *Criminal Law Consolidation Act 1935* (SA) s 269O; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 23–4; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 21–2. See also *Crimes Act 1900* (ACT) ss 323–4; *Criminal Code Act* (NT) sch 1 s 43I; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 21.

<sup>28</sup> Langer, above n 18, 368.

<sup>29</sup> *Ibid* 361.

<sup>30</sup> *Crimes Act 1900* (ACT) s 14 (‘diminished responsibility’); *Crimes Act 1900* (NSW) s 23A (‘substantial impairment by abnormality of mind’); *Criminal Code Act* (NT) sch 1 s 159 (‘diminished responsibility’); *Criminal Code* (Qld) s 304A (‘diminished responsibility’).

<sup>31</sup> Bronitt and McSherry, above n 5, 315.

<sup>32</sup> See, eg, *R v Bartlett* [2001] NSWSC 685 (9 August 2001). See also *ibid* 316.

though, whether PND or similar disorders constitute an ‘abnormality of mind’ in filicide cases will be for the decision-maker to determine on a case-by-case basis. The accused bears the burden of proof in proving the defence, and the standard of proof is on the balance of probabilities.

### C Infanticide

In 1997, the NSW Law Reform Commission (‘NSWLRC’) argued that infanticide should be subsumed into the general defence of diminished responsibility, which ‘would have the advantage of not limiting the type of mental disturbance which might give rise to the defence’.<sup>33</sup> Therefore, using diminished responsibility (or ‘substantial impairment by abnormality of mind’, as the NSW defence is now called) would not depend on whether that condition could be said to be the direct result of the effects of giving birth.

Nevertheless, in recognition of the possible impact of postpartum disorders on the mental capacity of mothers,<sup>34</sup> specific legislative provisions on infanticide are available in NSW, Victoria and Tasmania. The availability of infanticide is variously restricted by the requirement that the child be under 12 months (in NSW<sup>35</sup> and Tasmania<sup>36</sup>) or under two years (in Victoria).<sup>37</sup> Until 2008, infanticide was also available in Western Australia.<sup>38</sup>

There seems to be some confusion about the nature of the legislative provisions on infanticide, with the NSWLRC stating that ‘[w]hile the offence of infanticide exists elsewhere, NSW is the only jurisdiction where it operates both as an offence and a partial defence to murder’.<sup>39</sup> This would seem to contradict an earlier statement by the VLRC that ‘[u]nlike the other defences to homicide, infanticide is both an offence and an alternative verdict to

<sup>33</sup> NSWLRC, *Partial Defences to Murder*, above n 8, 114 [3.30].

<sup>34</sup> Eastale and Hopkins, above n 26, 125. For a brief history of the provisions, see NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 112 [5.10].

<sup>35</sup> *Crimes Act 1900* (NSW) s 22A(1).

<sup>36</sup> *Criminal Code Act 1924* (Tas) s 165A.

<sup>37</sup> *Crimes Act 1958* (Vic) ss 6(1)(a)–(b).

<sup>38</sup> *Criminal Code* (WA) ss 281A, 287A, as repealed by *Criminal Law Amendment (Homicide) Act 2008* (WA) s 13.

<sup>39</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2010), above n 8, 120 [5.2] (citations omitted). More recently, the NSWLRC noted that NSW is also the only jurisdiction where both infanticide and substantial impairment (or its equivalent) are available as partial defences to murder: NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 112 [5.10].

murder, which has led to infanticide being treated as a partial defence'.<sup>40</sup> Loughnan has argued that infanticide

slide[s] between the categories of offence and defence, or, more precisely, between charge and plea, meaning that the doctrine itself is most accurately understood as both/either partially exculpatory and/or partially inculpatory.<sup>41</sup>

The NSW and Tasmanian provisions require that the woman's act be 'wilful',<sup>42</sup> but the NSWLRC has observed that the NSW provision 'is silent on the question of whether that act or omission must amount to an intention to kill'.<sup>43</sup> However, it added that '[w]here used as a substantive offence, ... it would seem likely that some form of intention would be presumed to be an element of the offence'.<sup>44</sup> In NSW, the prosecution must prove that the woman's mind was disturbed by 'not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child',<sup>45</sup> while the Tasmanian provision is limited to 'the effect of giving birth'.<sup>46</sup> The Victorian legislation likewise no longer makes mention of lactation, but adds as an alternative the effect of giving birth where the woman experiences 'a disorder consequent on her giving birth to that child'.<sup>47</sup> The Law Reform Commission of Western Australia ('LRCWA') has noted that

<sup>40</sup> VLRC, above n 8, xli.

<sup>41</sup> Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) 203.

<sup>42</sup> *Crimes Act 1900* (NSW) ss 22A(1)–(2); *Criminal Code* (Tas) s 165A. See also Langer, above n 18, 361.

<sup>43</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2010), above n 8, 123 [5.8].

<sup>44</sup> *Ibid.* See Loughnan, *Manifest Madness*, above n 41, 218, for discussion of the mens rea requirement under the equivalent UK provision (*Infanticide Act 1938*, 1 & 2 Geo 6, c 36, s 1). For more general discussion of the UK provision, see NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 110–11 [5.6]–[5.7].

<sup>45</sup> *Crimes Act 1900* (NSW) ss 22A(1)–(2).

<sup>46</sup> *Criminal Code* (Tas) s 165A.

<sup>47</sup> *Crimes Act 1958* (Vic) s 6(1)(b), as inserted by *Crimes (Homicide) Act 2005* (Vic) s 5. This amendment followed the recommendations of the VLRC, above n 8, 265–6 (recommendation 48) and removed reference to lactation from the legislation.

[w]hile the degree of mental imbalance required to satisfy ... infanticide is not specified, it is clear that a very slight disturbance of mind may qualify if it can be biologically linked to childbirth or [in NSW] lactation.<sup>48</sup>

In May 2013, the NSWLRC recommended that the offence/partial defence of infanticide be retained in NSW, but that it be amended to:

- remove the biological nexus between childbirth and mental illness;
- remove the reference to lactation;
- replace the term ‘wilful act or omission’ with ‘carries out conduct’; and
- redefine mental impairment, removing the requirement that the balance of the mother’s mind be disturbed.<sup>49</sup>

These amendments, if adopted, would bring NSW more into line with Victoria and Tasmania.

Criticisms of infanticide have been plentiful. First, there may be ambiguity about its scope. Wilczynski observed in relation to her English study of child homicide that ‘lawyers and psychiatrists not only take a very liberal and pragmatic approach to the degree of mental imbalance required for infanticide, but to all other aspects of the definition also’.<sup>50</sup> We do not know if the same is true in Australia. The offence of infanticide does not require that the accused’s cognition or volition be impaired,<sup>51</sup> so long as there is evidence that ‘the balance of her mind was disturbed’ by reason of childbirth or lactation at the time of the killing.<sup>52</sup> Over 20 years ago, Barga noted that the infrequent use of infanticide in Australian jurisdictions meant that there ‘has been very little occasion for the elements of the offence to be tested judicially’.<sup>53</sup> This would appear to still be the case; there were only four cases in NSW between 2001 and 2011.<sup>54</sup>

<sup>48</sup> LRCWA, above n 8, 107.

<sup>49</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 122–5 [5.52]–[5.60] (recommendation 5.1).

<sup>50</sup> Ania Wilczynski, *Child Homicide* (Greenwich Medical Media, 1997) 158.

<sup>51</sup> McSherry, above n 8, 307, 312, 314.

<sup>52</sup> Nigel Walker, *Crime and Insanity in England* (Edinburgh University Press, 1968) vol 1, 134–5.

<sup>53</sup> Lawbook, *The Laws of Australia* (1992) ‘Infanticide’ 241, 245.

<sup>54</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 109 [5.2]. One of these cases was not discussed by the NSWLRC, as the transcripts had been destroyed: at 114 [5.18]. The remaining cases were included in our analysis (see *R v Cooper* [2001] NSWSC 769 (31 August 2001), *R v Pope* [2002] NSWSC 397 (7 May 2002) and Tanya Soutter’s case in Table 1). The NSWLRC also identified ‘six cases where a mother killed her child and pleaded or was found guilty of manslaughter due to

Infanticide has also been criticised on the basis that it is gender-biased, being limited to mothers with PND;<sup>55</sup> that it is limited generally to deaths of children under one year of age; and that it 'potentially excus[es] maternal acts of lethal violence in women where motive for the infanticide could, in the absence of psychiatric pathology, otherwise be considered as fully culpable'.<sup>56</sup> At a practical level, infanticide and psychiatric pathology seem to be inextricably linked.

Another criticism of infanticide is that, given its biological grounds, it is not inclusive of most neonaticides (the killing of a child in the first 24 hours after birth)<sup>57</sup> as very few of these cases involve a (hormonally-triggered) psychotic episode.<sup>58</sup> Rather, neonaticides most commonly occur when the infant is unwanted.<sup>59</sup> They are usually committed by women who are single, relatively young and of low socioeconomic standing, but who do not suffer from serious mental illness.<sup>60</sup> In addition:

The artificial biological relationship between mental impairment and childbirth required by the offence of infanticide has been widely criticised, not only for distorting the reality of most infanticide cases, but also for encouraging medical experts to distort their diagnoses and testimony in order for the elements of the offence to be satisfied.<sup>61</sup>

There is also the issue of sentencing outcomes. Writing in the American context, Hatters Friedman, Cavney and Resnick suggest that those who are

substantial impairment': at 114 [5.19] (citations omitted). Five of these are included in Table 2; the remaining case involved children over two years of age and therefore did not fit within the parameters of the present study.

<sup>55</sup> Susan Hatters Friedman, James Cavney and Phillip J Resnick, 'Mothers Who Kill: Evolutionary Underpinnings and Infanticide Law' (2012) 30 *Behavioral Sciences and the Law* 585, 592–3.

<sup>56</sup> *Ibid* 586.

<sup>57</sup> See Phillip J Resnick, 'Murder of the Newborn: A Psychiatric Review of Neonaticide' (1970) 126 *American Journal of Psychiatry* 1414.

<sup>58</sup> Lillian De Bortoli, Jan Coles and Mairead Dolan, 'A Review of Maternal Neonaticide: A Need for Further Research Supporting Evidence-Based Prevention in Australia' (2013) 22 *Child Abuse Review* 327, 333.

<sup>59</sup> Hatters Friedman, Cavney and Resnick, above n 55, 588. See also Queensland Crime and Misconduct Commission ('QCMC'), *Vulnerable Victims: Child Homicide by Parents*, Research and Issues Paper No 10 (2013) 4.

<sup>60</sup> Hatters Friedman, Cavney and Resnick, above n 55, 588.

<sup>61</sup> LRCWA, above n 8, 108. This point was also considered by the NSWLRC in its recent report: NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 118 [5.29].

convicted ‘typically receive probation or psychiatric dispositions’.<sup>62</sup> This is supported by the NSWLRC’s finding that ‘there are no examples of women convicted of infanticide receiving a custodial sentence’.<sup>63</sup> In *R v Cooper*, Simpson J observed that:

The legislature [that introduced s 22A] identified infanticide as a form of homicide having particular characteristics and a particular genesis which therefore justifies, in an appropriate case, a different approach to sentencing.<sup>64</sup>

We will discuss the sentences imposed in our case sample further below.

### III METHODOLOGY

We used case law and newspaper databases to identify relevant Australian cases ( $n = 28$ ), from 1997 (the year that the first NSWLRC Report on infanticide was published) through to the end of 2012, where a mother killed her young child (aged under two). This age range was used as we found compelling the arguments of the VLRC that the age limit of 12 months should be extended to two years ‘because there are cases where, due to mental disturbance, mothers kill children who are older than 12 months’.<sup>65</sup> As we discuss further below, an extended period more realistically reflects the experiences of mothers of young children.

Searches for unreported and reported judgments were conducted on each state/territory’s Supreme Court website, AustLII and LexisNexis CaseBase. Various combinations of terms were used, including:

- ‘postnatal’ and ‘postpartum’;
- ‘post?natal’ or ‘post?partum’ and ‘depression’;
- ‘postnatal’ and ‘depression’ and ‘infanticide’, ‘manslaughter’ or ‘murder’;
- ‘infant’ and ‘murder’ or ‘manslaughter’; and
- ‘infant w/10 mother’ and ‘manslaughter’.

<sup>62</sup> Hatters Friedman, Cavney and Resnick, above n 55, 587.

<sup>63</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2010), above n 8, 124 [5.11]. See also Loughnan, *Manifest Madness*, above n 41, 224 for similar findings in the UK context.

<sup>64</sup> [2001] NSWSC 769 (31 August 2001) [6].

<sup>65</sup> VLRC, above n 8, 266–7 [6.41].

Searches for news articles used the same terms, plus additional searches were conducted under each defendant's name.<sup>66</sup> For cases where the defendant's name was withheld, a combination of the judge's surname and some key details of the case were used. Where possible, we tried to locate the judgment from the information contained in the media report and collected relevant information from both sources.

All search results were filtered or culled to identify only those that involved PND evidence or other mental health issues plus a victim age of newborn to 24 months.

All available material concerning each case was analysed and a number of variables were recorded, including:

- the charge(s);
- the plea(s);
- the sentence(s) imposed (both as to type and quantum);
- the age(s) of the child/ren;
- the means of death;
- the types of expert witnesses;
- the witnesses' diagnosis/es and view of the degree of mental impairment; and
- the judge's sentencing remarks.

#### *A Limitations*

Not all cases of filicide that involve the criminal justice system are available through the online databases. This is evident since some of the reports we examined made reference to matters that were heard at the intermediate court level,<sup>67</sup> where judgments are not readily accessible. Further, a number of cases were discovered through media searches, but do not appear on case law databases. Our information about the experts' and judges' comments in these matters is therefore more limited. Moreover, the cases identified from judgments are not necessarily representative of filicides as a whole, since, as Langer found:

remarkably few instances of post-partum mental disorder will come to the attention of the legal system (in the extreme example, because of suicide) and

<sup>66</sup> These searches were conducted on NewsBank, individual newspaper websites, and Google.

<sup>67</sup> See, eg, LRCWA, above n 8, 112.

fewer still will result in a searchable legal record because cases may be disposed of by plea bargain, diversion or settlement. In addition, within the data set itself, one soon realizes that the cases are about women with a marked range of psychiatric problems, from previous post-partum depression, to schizophrenia to psychosis. One cannot claim these cases are a comprehensive sample.<sup>68</sup>

In addition, some cases do not make it to the justice process because of unfitness to plead or a decision not to pursue a criminal charge.<sup>69</sup> It was unfortunately beyond the scope of the present research to explore this issue in detail, although the case of *R v Touch*,<sup>70</sup> discussed below, suggests it merits further consideration. Future research, including interviews with prosecutors and defence counsel, would be of benefit in this context.

We are also limited in what we can conclude about the expert evidence. It is often unclear who called the specialist, and the judgment material usually does not include lengthy excerpts of the medical experts' reports. Notwithstanding these limitations, we argue that our analysis presents some important insights into the responses in the Australian courts to the filicide of young children.

#### IV FINDINGS AND ANALYSIS

Given the foregoing criticisms and limitations concerning both infanticide and PND, we were particularly interested in seeing, within our sample of 28 cases, whether evidence of PND was presented exclusively with prosecutions of infanticide or whether it was argued with diminished responsibility and insanity too. Additionally, we wanted to see whether experts in any of the matters looked at depression as a result of other stressors. We also sought to determine how the judges responded to the different types of depression or mental illness.

<sup>68</sup> Langer, above n 18, 358–9.

<sup>69</sup> The NSWLRC noted a recent case where 'the law enforcement officer's decision that it was not in the "interests of justice" to pursue criminal charges against the mother was upheld by the Coroner, who described the birth as a "terrifying and very lonely experience": NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 113–14 [5.16] (citations omitted).

<sup>70</sup> *R v Touch* [2005] SADC 65 (16 June 2005); *R v Touch [No 2]* [2006] SADC 100 (25 August 2006).

In total, there were 12 matters identified that either expressly or implicitly<sup>71</sup> offered PND evidence (Table 1) and another 16 cases that raised other mental health issues (Table 2). It should be noted that all the sentences for infanticide offences followed a guilty plea by the mother. This is consistent with the NSWLRC's assertion that '[c]onvictions are generally obtained via the prosecution's acceptance of a plea of guilty to infanticide following an indictment for murder, rather than by a jury's verdict following a trial'.<sup>72</sup> Of the nine non-infanticide matters with PND evidence, five pleaded guilty (Table 1).

#### A PND Cases

Table 1 shows that expert evidence about PND was presented in infanticide, manslaughter and murder matters.

Table 1: Maternal Filicide Cases with PND Evidence

Case	Age of Child	Jurisdiction	Offence	Plea	Sentence
<i>R v SP [No 2]</i> <sup>73</sup>	A few days	ACT	Murder	NGMI	Submit to the jurisdiction of the Mental Health Tribunal
<i>R v Cooper</i> <sup>74</sup>	7 months	NSW	Infanticide	PG	4 year GBB
<i>R v NLH</i> <sup>75</sup>	7 weeks	NSW	Manslaughter (ULDA)	PG	4 years 2 months; NPP 2.5 years

<sup>71</sup> By implicitly, we mean that the expert described the defendant as having depression which began after childbirth but does not label it as PND, or PND is mentioned as one of several mitigating mental health variables.

<sup>72</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2010), above n 8, 124 [5.10].

<sup>73</sup> [2006] ACTSC 78 (12 July 2006).

<sup>74</sup> [2001] NSWSC 769 (31 August 2001).

<sup>75</sup> [2010] NSWSC 662 (17 June 2010).

Case	Age of Child	Jurisdiction	Offence	Plea	Sentence
<i>R v Pope</i> <sup>76</sup>	12 weeks	NSW	Infanticide	PG	3 year GBB
<i>R v Rowe</i> <sup>77</sup>	7 months	NSW	Manslaughter (ULDA)	VG	5.5 years; NPP 3 years
<i>R v RG</i> <sup>78</sup>	7 months	NSW	Manslaughter (SI)	PG	3 years; immediately released on parole
Tanya Soutter <sup>79</sup>	8 months	NSW	Infanticide	PG	2 years suspended sentence
<i>Re KMV</i> <sup>80</sup>	8 days	Qld	Murder	NGMI	Detention as a forensic patient and limited community treatment
Karyn Louise Kemp <sup>81</sup>	7 months	SA	Murder	NGMI	Released on licence, to remain under lifelong supervision

<sup>76</sup> [2002] NSWSC 397 (7 May 2002). For discussion of this case, see NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 114 [5.18]. In this report, the case is referred to as *R v KP* to protect the names of the child victims.

<sup>77</sup> [2007] NSWSC 300 (5 April 2007).

<sup>78</sup> [2006] NSWSC 21 (2 February 2006). Buddin J discussed the three psychiatrists' diagnoses of major depressive illness with psychotic features: at [14], [18], [20]. The onset of the illness was postnatal.

<sup>79</sup> 'Mum Gets Suspended Sentence for Infanticide', *ABC News* (online), 28 February 2008 <<http://www.abc.net.au/news/2008-02-27/mum-gets-suspended-sentence-for-infanticide/1056296>>.

<sup>80</sup> [2003] QMHC 005 (5 August 2003).

<sup>81</sup> Andrew Dowdell, 'Depressed Mother Karyn Louise Kemp Suffocated, Gassed Son', *The Advertiser* (online), 17 November 2008 <<http://www.adelaidenow.com.au/news/depressed-mother-gassed-son/story-e6freol3-1111118069631>>; 'Release Deal for Smothered Infant's Mother', *ABC News* (online), 16 February 2009 <<http://www.abc.net.au/news/2009-02-16/release-deal-for-smothered-infants-mother/297210>>.

Case	Age of Child	Jurisdiction	Offence	Plea	Sentence
<i>R v McAvoij</i> <sup>82</sup>	3 months	SA	Murder	NGMI	Released on licence, to remain under lifelong supervision
<i>R v Azzopardi</i> <sup>83</sup>	5 weeks	Vic	Infanticide	PG	18 month Community Based Order
Rebecca Doreen Morley <sup>84</sup>	4 weeks	WA	Infanticide	PG	2 year strict supervision order

[*G*BB = good behaviour bond; *GB*H = grievous bodily harm; *NG*MI = not guilty by reason of mental impairment; *N*PP = non-parole period; *P*G = plea of guilty; *S*I = substantial impairment; *U*LDA = unlawful and dangerous act; *V*G = verdict of guilty (after pleading not guilty)].

### 1 How Was PND Presented by Experts and Sentencing Judges?

Langer has observed that:

Although the determination of mens rea and culpability remain matters of legal determination, legal decision-makers look to medical experts for guidance on mental illness. In the case of post-partum mental disorders, the medical and health sciences literature is contradictory in establishing categorical symptomology and time frames, clarifying how transitory states may still eclipse mental responsibility and acknowledging the obvious relationship between social environment and mental health.<sup>85</sup>

<sup>82</sup> [2003] SASC 225 (23 July 2003).

<sup>83</sup> [2004] VSC 509 (6 December 2004).

<sup>84</sup> Warwick Stanley, 'Mum Who Suffocated Baby Appeals for Help', *The Sydney Morning Herald* (online), 19 May 2009 <<http://news.smh.com.au/breaking-news-national/mum-who-suffocated-baby-appeals-for-help-20090519-bdyu.html>>.

<sup>85</sup> Langer, above n 18, 359.

*R v SP [No 2]*<sup>86</sup> was a 2006 ACT case in which a woman suffocated her son who was only a few days old, and is illustrative of how experts can be used to present PND evidence. In that case, the defendant pleaded not guilty to murder on the basis of mental impairment,<sup>87</sup> and was ultimately acquitted on that basis. Dr Sullivan, a consultant forensic psychiatrist called by the accused, confirmed that ‘the accused was suffering from a postnatal psychosis which would qualify as a mental illness or mental dysfunction’.<sup>88</sup> Dr Allnut, another specialised forensic psychiatrist stated:

There is evidence to support the reasonable conclusion that in the third trimester of her pregnancy she developed symptoms consistent with a depressive disorder. ...

In the postnatal period ... she was manifesting early signs of an emerging psychosis in the form of disorganised thinking. It is probable that the hormonal disturbances that occurred in the postnatal period increased her vulnerability to the development of psychosis. ... At the material time ... she experienced ... auditory hallucinations of a command nature.<sup>89</sup>

He later testified that ‘the accused lacked the capacity, at the relevant time, to understand that what she was doing was wrong’,<sup>90</sup> while the other expert stated that ‘I do not believe that [the accused] was aware of the nature of her actions’.<sup>91</sup> Madgwick J accepted the evidence of the experts, noting:

In these circumstances, the only sensible conclusion is that the accused had a mental dysfunction or mental illness, and by reason of such dysfunction or illness was incapable of understanding that what she was doing was wrong when she killed the baby. ... On these findings, the law is that she is entitled to be acquitted on the grounds of mental impairment and she is so acquitted.<sup>92</sup>

<sup>86</sup> [2006] ACTSC 78 (12 July 2006).

<sup>87</sup> At the time, this defence was in s 320 of the *Crimes Act 1900* (ACT); it is now s 28(1) of the *Criminal Code 2002* (ACT). The consequence of a ‘special verdict of not guilty because of mental impairment’ relating to a ‘serious offence’ remains governed by s 324 of the *Crimes Act 1900* (ACT).

<sup>88</sup> *R v SP [No 2]* [2006] ACTSC 78 (12 July 2006) [20] (Madgwick J).

<sup>89</sup> *Ibid* [16].

<sup>90</sup> *Ibid* [19].

<sup>91</sup> *Ibid* [20].

<sup>92</sup> *Ibid* [21]. Although acquitted, SP was to submit to the jurisdiction of the Mental Health Tribunal.

In *R v McAvoy*,<sup>93</sup> a South Australian case, the offender's baby son was found dead in the bath. The offender told a member of her family and the police that 'two men wearing masks and carrying a gun entered the house and forced her to drown her baby in the bath by forcing her hands onto the baby in the water'.<sup>94</sup> Besanko J found that the offender caused the child's death.<sup>95</sup> He indicated that '[e]ach of the experts concluded that at the time of the alleged offence the defendant was suffering from a major and severe depressive illness with psychotic features and *that she was not mentally competent to commit the offence*'.<sup>96</sup> Besanko J considered pt 8A of the *Criminal Law Consolidation Act 1935* (SA), which governs mental impairment, and ultimately released the offender on licence, to be supervised for the rest of her life, under s 269O of that Act.<sup>97</sup>

The Queensland case of *Re KMV* is another example where the defendant was found to be suffering from unsoundness of mind because of 'a major depressive episode with psychotic features at the relevant time'.<sup>98</sup> KMV squeezed her eight-day-old daughter to death, as '[s]he thought life would return to normal if [her daughter] went to heaven'.<sup>99</sup> Wilson J noted that there were conflicting opinions among the four experts who presented evidence on the defendant's state of mind:

All agreed that at the time of T's death the defendant was suffering from a mental illness. Dr Bayley diagnosed the illness as bipolar affective disorder which was in a major depressive episode with psychotic features at the relevant time. Dr Fama ultimately agreed that she suffered from bipolar affective disorder. Dr Kingswell described it as a mental illness characterised by recurrent depressive episodes associated with psychotic symptoms. Ultimately Dr Muir expressed the opinion she was suffering from major depression with psychotic features.<sup>100</sup>

Wilson J found that KMV 'was of unsound mind as described in sch 2 of the *Mental Health Act 2000* (Qld)'.<sup>101</sup> His Honour ordered that she be detained as

<sup>93</sup> [2003] SASC 225 (23 July 2003).

<sup>94</sup> *Ibid* [2] (Besanko J).

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid* [4] (emphasis added).

<sup>97</sup> *Ibid* [12]–[13].

<sup>98</sup> [2003] QMHC 005 (5 August 2003) [10] (Wilson J).

<sup>99</sup> *Ibid* [9].

<sup>100</sup> *Ibid* [10]. In this context, we note the high number of experts. This may raise questions about cost.

<sup>101</sup> *Ibid* [2].

a forensic patient and approved limited community treatment. He went on to state:

it was ultimately the opinion of the four psychiatrists who gave oral evidence that at the relevant time the defendant was suffering from major depression with mood congruent delusions which deprived her of the capacity to know that she ought not kill her daughter.<sup>102</sup>

It should be noted that KMV had previously experienced mental illness, but her 'unsound mind' at the time she killed her daughter appears to have coincided with the birth. This is indicated by statements such as '[i]mmediately after the birth of T the defendant began to worry about the baby's health ... She was concerned at her own parenting skills'.<sup>103</sup> Wilson J also referred to the fact that she was concerned 'about the baby's feeding and about her umbilicus' and 'was unable to sleep'.<sup>104</sup> This case is an example where the mother had a prior history of mental illness, but this was just one of multiple factors contributing to her poor state of mental health at the time of the killing.<sup>105</sup>

There was a similar finding to *Re KMV* in the case of Karyn Louise Kemp, a South Australian case, identified through our media search.<sup>106</sup> Kemp smothered her seven-month-old son with a pillow, before putting him in her car. She then lay beside the exhaust pipe of her car with the engine running for five hours, having taken 30 antidepressant tablets. Three psychiatrists were unanimous in their diagnoses that Kemp '*could not have known the quality of her actions*' due to her PND.<sup>107</sup> Therefore, the Crown conceded 'that the accused was mentally incompetent at the time she committed the offence'<sup>108</sup> and she was released on licence on the condition that she remain under lifelong supervision.<sup>109</sup>

<sup>102</sup> Ibid [10].

<sup>103</sup> Ibid [7].

<sup>104</sup> Ibid [9].

<sup>105</sup> See Michelle Oberman and Cheryl L Meyer, *When Mothers Kill: Interviews from Prison* (New York University Press, 2008) 159–60 for discussion of mothers who killed their children while suffering from PND, but also had suffered from mental illness previously.

<sup>106</sup> Dowdell, 'Depressed Mother Karyn Louise Kemp Suffocated, Gassed Son', above n 81.

<sup>107</sup> Andrew Dowdell, 'Depressed Mother Killed Baby', *The Advertiser* (Adelaide), 19 November 2008, 33 (emphasis added).

<sup>108</sup> Ibid.

<sup>109</sup> 'Release Deal for Smothered Infant's Mother', above n 81. As this was also a South Australian case, it can be assumed that it was governed by the same provisions as *R v McAvoy*, discussed above.

*R v Cooper*<sup>110</sup> was a NSW matter where the defendant pleaded guilty to infanticide under s 22A of the *Crimes Act 1900* (NSW). Evidence was given that the defendant had been experiencing 'auditory hallucinations'.<sup>111</sup> When the baby would not stop crying, the defendant put her hand over the baby's mouth and nose.<sup>112</sup> In sentencing her to a good behaviour bond, Simpson J commented:

She has long suffered from depression, and this plainly intensified after the birth of each of the children. A specific diagnosis of depression was made five days after Chloe's birth. ... All professionals who wrote reports used similar language in describing Ms Cooper's manner and behaviour: they described her emotional condition as 'blunted': one described her as 'vegetative'. ... There are also suggestions, not clearly made out, of schizophrenia. However, that need not be pursued, because there is ample evidence of depression of a sufficient degree to warrant the description 'psychotic'.<sup>113</sup>

In *R v Pope*, another NSW infanticide matter, in which the defendant drowned her 12-week-old daughter in the bath, a guilty plea was entered resulting in a three year bond.<sup>114</sup> The experts presented evidence of postnatal psychosis:

Doctor Michael Kluger, who had treated her during that period, was of the view that she had suffered from a post-natal psychotic episode of an essentially schizophrenic type and subsequently developed a dissociative amnesia.<sup>115</sup>

Another psychiatrist, Dr Teoh, testified to the defendant's history of severe psychotic illness for years preceding the homicide.<sup>116</sup> A third psychiatrist, Dr Westmore, concluded

that her illness was such as might have totally deprived her of the capacity to know that she ought not to act towards her child as she did and that her capacity to understand right and wrong was also likely to have been affected.<sup>117</sup>

<sup>110</sup> [2001] NSWSC 769 (31 August 2001).

<sup>111</sup> *Ibid* [9], [12] (Simpson J).

<sup>112</sup> *Ibid* [14].

<sup>113</sup> *Ibid* [20]–[22].

<sup>114</sup> [2002] NSWSC 397 (7 May 2002).

<sup>115</sup> *Ibid* [24] (James J). See also at [29], [32]–[33].

<sup>116</sup> *Ibid* [25], [29].

<sup>117</sup> *Ibid* [33].

He diagnosed her with ‘an acute psychotic illness with a depression of mood with catatonic features’<sup>118</sup> and concluded ‘that, on a balance of probabilities, her illnesses played a primary role in any action she took towards her daughter and that she will obviously require long-term close psychiatric support and supervision’.<sup>119</sup> James J explained, in agreement with the expert evidence:

A person suffering from an illness such as this, so affecting their responsibility for their actions, is not an appropriate person either to deter from acting in this fashion by the punitive sanctions of the law or to be made an example of to others in order to deter them from acting in this way. ...

In summary, the medical evidence discloses such a severe condition that the court would not be warranted in law in imposing any other penalty than that bond ...<sup>120</sup>

Similarly, in *R v RG* (a NSW case in which the defendant pleaded guilty to manslaughter), evidence was provided that the defendant had

a “psychotic illness (either a relapsing schizophrenia-like illness or a form of bipolar disorder with periods of elevated mood and severe depression)” and “a disabling level of depression (which she had suffered) from as early as 1996”.<sup>121</sup>

Expert evidence was also given that her mental illness made her ‘not aware of the nature and quality of her actions, or that her actions were wrong’.<sup>122</sup> Another psychiatrist, Dr Westmore, concluded that ‘she was acutely disturbed, possibly depressed and/or psychotic’.<sup>123</sup> Further, Buddin J noted that in Dr Westmore’s opinion,

the offender committed the offence whilst ‘in a state of psychiatric distress’. He pointed to the fact that it ‘occurred within the first twelve months of the post-partum period ... [whilst] she was depressed’. He also referred to the fact that ‘there were psycho-social stressors, she had a young infant and was trying to support the child without the assistance of the child’s father ...’<sup>124</sup>

<sup>118</sup> Ibid.

<sup>119</sup> Ibid [34].

<sup>120</sup> Ibid [36], [48].

<sup>121</sup> [2006] NSWSC 21 (2 February 2006) [18] (Buddin J).

<sup>122</sup> Ibid [19].

<sup>123</sup> Ibid [20].

<sup>124</sup> Ibid [22].

In that case, some fishermen saw RG sitting naked on a riverbank in northern NSW. Soon thereafter, they found a dead baby floating in the water. As they were attempting to recover the baby, they encountered RG again, who was screaming ‘Help me, help me’ and later told police ‘I am Jesus. I’ve done some bad things. I am a bad mother. I’ve drowned my baby’.<sup>125</sup> RG’s guilty plea was accepted by the Crown ‘upon the basis that she was suffering at the relevant time from a “substantial impairment”’,<sup>126</sup> as defined in s 23A of the *Crimes Act 1900* (NSW).<sup>127</sup> She received a three year sentence but was immediately placed on parole.<sup>128</sup>

In the Victorian case of *R v Azzopardi*,<sup>129</sup> the evidence provided and the outcome were similar to the NSW matters considered above. In that case, the defendant drowned her five-week-old daughter, after which she sat ‘crying and shaking’ and ‘pretended that someone had broken into [her] house’.<sup>130</sup> Kellam J, the sentencing judge, noted:

Professor Mullen is of the opinion that your description of significant depression, characterised by sleep disruption, loss of appetite, ruminations about guilt and worthlessness, together with a sense of hopelessness, was a clear suggestion of a state of significant depression. ...

Professor Mullen is of the opinion that at the time of the death of your child you were suffering severe postnatal depression. This is a view shared by Dr Buis, who considers that you suffered a major depressive episode which severely affected your state of mind ...<sup>131</sup>

Interestingly, the judge regarded photographs of the defendant’s home in ‘immaculate order’ as evidence of what Professor Mullen described as the defendant’s ‘rigid perfectionis[m]’, which he considered would ‘have left [her] with more than the usual difficulties in caring for a new child’.<sup>132</sup> Kellam J accepted Professor Mullen’s opinion that:

<sup>125</sup> Ibid [3].

<sup>126</sup> Ibid [2].

<sup>127</sup> Ibid [2].

<sup>128</sup> Ibid [55].

<sup>129</sup> [2004] VSC 509 (6 December 2004).

<sup>130</sup> Ibid [15] (Kellam J).

<sup>131</sup> Ibid [20], [22].

<sup>132</sup> Ibid [22]. See also *R v Rees* [2012] NSWSC 922 (15 August 2012) [9], where Grove AJ noted that ‘the word “immaculate” was a frequent descriptor as to the quality of [the defendant’s] care of the child and [her] maintenance of the home’. In that case, the psychiatrist also referred to the defendant as subscribing to ‘the “yummy mummy fantasy”’: at [9]. In the con-

when Ms Azzopardi killed her child of five weeks the balance of her mind was disturbed by a (post-partum) depression. ... This is ... a tragic case where a *mentally disordered* woman with a vulnerable personality killed her child in the context of a situation which was beyond her limited capacities to manage.<sup>133</sup>

Having pleaded guilty to infanticide under s 6 of the *Crimes Act 1958* (Vic), the defendant received a community based order of 18 months.<sup>134</sup> The judge accepted the experts' diagnoses, and went on to state:

The powerful psychiatric evidence which is before me quite sufficiently establishes that your case is a case which should be treated as involving limited, if any, reference to any matter of personal or general deterrence. A person suffering from an illness such as that you suffered and which affected your responsibility for your action is not an appropriate person, either to deter from acting in this fashion by the punitive sanctions of the law, or to be made an example of to others in order to deter them from acting in this way.<sup>135</sup>

In a Western Australian case found through media searches, Rebecca Doreen Morley pleaded guilty to infanticide and also did not receive any prison time.<sup>136</sup> This case predated the abolition of infanticide in Western Australia and Morley was accordingly dealt with under s 277 of the *Criminal Code* (WA) (as it then applied) and s 281A, which has since been repealed.<sup>137</sup> She smothered her four-week-old baby, and psychiatric evidence was led that she was 'irrational' and 'disassociated' at the time.<sup>138</sup> Like many other defendants in our sample, Morley had a history of psychiatric disorders. Interestingly, however, the media report indicated that Morley 'released a statement through her lawyers saying she did not suffer from post-natal depression, as

text of this depiction of Azzopardi and Rees as fastidious homemakers, Kennedy has observed that judges and juries have a 'soft spot' for the 'good wife': see Helena Kennedy, *Eve Was Framed: Women and British Justice* (Chatto & Windus, 1992) 22. For a discussion of how mothers who kill define being a 'good mother', see Oberman and Meyer, above n 105, 75–7. Elizabeth Rapaport suggests that '[t]he Good Mother Defense trades on the tendency of jurors to find madness or something akin to it the most plausible, and least unsettling, explanation for the death of a child at the hands of a virtuous woman': Elizabeth Rapaport, 'Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth' (2006) 33 *Fordham Urban Law Journal* 527, 557.

<sup>133</sup> *R v Azzopardi* [2004] VSC 509 (6 December 2004) [23]–[24] (emphasis added).

<sup>134</sup> *Ibid* [1], [31] (Kellam J).

<sup>135</sup> *Ibid* [27].

<sup>136</sup> Stanley, above n 84.

<sup>137</sup> See *Criminal Law Amendment (Homicide) Act 2008* (WA) s 13.

<sup>138</sup> Stanley, above n 84.

reported after earlier hearings of her charges'.<sup>139</sup> The statement added: 'Often post-natal depression is used as a general term to cover all kinds of psychiatric disorders after childbirth ... If only depression is looked for, other disorders can be missed, with tragic results'.<sup>140</sup>

Kennedy DCJ, the sentencing judge, was reported to have stated that 'there were lessons to be learnt from the fact that Morley's repeated cries for help, up to the time the baby was killed, had largely gone unheeded by family and doctors'.<sup>141</sup> Morley's lawyer described her as

desperate as things started to go wrong immediately after Frederick's birth. ...  
But people kept telling her this was normal ... [even though] she was climbing  
up the walls and crying out for help she was discharged from hospital.<sup>142</sup>

After killing her baby, Morley said to police: 'What have I done? My mind snapped. I went mad. I just couldn't cope'.<sup>143</sup> In light of these facts, it is unclear to us why Morley was so keen to disassociate herself from a PND diagnosis; certainly, it would appear to be supported by the fact that she pleaded guilty to infanticide. Perhaps this example highlights the ambiguity around what is encapsulated by such a diagnosis as well as the particular challenges which may arise in filicide cases when PND coexists with other mental illnesses.

In two of the other cases with PND evidence, the experts described a mental state, distinct from that described in the previous cases, in which the woman still could assess right from wrong. *R v NLH* was a NSW matter in which the defendant shook her seven-week-old son in a 'fit of anger'.<sup>144</sup> She had thrown the baby into his bassinette and failed to get him medical attention until he died. Although he died of head injuries, the autopsy revealed injuries indicative of physical abuse — possibly committed by the father, who was violent towards the defendant.<sup>145</sup> NLH was charged with murder, pleaded guilty to manslaughter on the basis of an unlawful and dangerous act, and

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> [2010] NSWSC 662 (17 June 2010) [1], [97] (Hulme J). For discussion of head trauma and 'shaken baby syndrome', especially in the context of 'an intolerance of aspects of the child's behaviour, such as crying' see QCMC, above n 59, 7.

<sup>145</sup> *R v NLH* [2010] NSWSC 662 (17 June 2010) [19], [72] (Hulme J).

received a custodial sentence.<sup>146</sup> The expert, Professor Buist, reported that the defendant had described to her ‘a number of depressive symptoms she experienced following the birth of [the child]’.<sup>147</sup> Further, she indicated that NLH had low self-esteem, and ‘offered the opinion that this has a strong correlation to an increased risk for depression and anxiety disorders, including postnatal depression’.<sup>148</sup> In this case, none of the experts presented evidence of psychosis or mental impairment serious enough to have affected the offender’s capacity to know right from wrong. Hulme J stated that

the Crown fairly concedes that there was depression at the time of the offence and I accept that to have been the case. ...

This depression is a significant feature, although it must be said that it was not to the extent that the offender was completely debilitated to a degree sometimes seen in similar cases.<sup>149</sup>

The offender received a sentence of imprisonment for four years and two months, with a non-parole period of two and a half years.<sup>150</sup> It should be noted that her depression was (as is often the case) just one of a number of mitigating factors.

In *R v Rowe*, a NSW case, the defendant’s baby died of methadone toxicity.<sup>151</sup> Rowe was convicted of manslaughter by a jury. In sentencing her, Howie J mentioned that ‘[t]here is some suggestion that [the defendant] may have been suffering from Post Natal Depression’.<sup>152</sup> Rowe was a long-term drug addict who had been taking methadone for some time before conceiving the child, who was born methadone-dependent. There is reference in the judgment to only one report by a psychologist, which stressed the defendant’s difficult childhood, drug addiction and dependent personality.<sup>153</sup> Rowe received a similar non-parole period to NLH.

It was only in these last two cases that the offender received a sentence that involved spending further time in prison. This may be because they were the only cases in the sample in which the women were convicted of an offence that did not depend on an impaired state of mind. Unlike the verdicts of not

<sup>146</sup> Ibid [25]–[26], [107].

<sup>147</sup> Ibid [57].

<sup>148</sup> Ibid [76].

<sup>149</sup> Ibid [79], [100].

<sup>150</sup> Ibid [107].

<sup>151</sup> [2007] NSWSC 300 (5 April 2007) [1], [16] (Howie J).

<sup>152</sup> Ibid [28].

<sup>153</sup> Ibid [26], [28].

guilty of murder on the basis of mental illness,<sup>154</sup> the pleas of guilty to infanticide<sup>155</sup> and the guilty plea on the basis of substantial impairment,<sup>156</sup> these two cases of manslaughter by an unlawful and dangerous act involved conviction on the basis of an *objective* standard, notwithstanding the fact that the defendants may not have been able to easily meet this standard.<sup>157</sup>

### B Non-PND Cases

Ten of the sixteen matters we identified that mentioned non-PND mental health issues provided some evidence of (non-PND) depression (see Table 2 for cases). In four cases, there was evidence of a personality/adjustment disorder, with other cases including psychosis, schizophrenia, delusion/panic and emotional immaturity. In most of these cases, the evidence indicated that the defendant had multiple psychological issues. In addition, a number of defendants, experienced violence or trauma during their childhood, or in their adult relationships, or suffered from a lengthy history of psychiatric disorders or addiction.

On the basis of these cases, we suggest that the age of the victim may be a factor in why PND evidence was not presented — there were two neonaticides in this sub-sample which, as discussed above, does not generally coincide with a diagnosis of PND.<sup>158</sup> The cases of *R v Curnow*<sup>159</sup> (who pleaded guilty to infanticide) and Dianne Lorraine Munro<sup>160</sup> are examples of newborn killings.

<sup>154</sup> *R v SP [No 2]* [2006] ACTSC 78 (12 July 2006); *Re KMV* [2003] QMHC 005 (5 August 2003); Karyn Louise Kemp's case; *R v McAvoy* [2003] SASC 225 (23 July 2003).

<sup>155</sup> *R v Cooper* [2001] NSWSC 769 (31 August 2001); *R v Pope* [2002] NSWSC 397 (7 May 2002); Tanya Soutter's case; *R v Azzopardi* [2004] VSC 509 (6 December 2004); Rebecca Doreen Morley's case.

<sup>156</sup> *R v RG* [2006] NSWSC 21 (2 February 2006).

<sup>157</sup> For discussion of manslaughter by unlawful act, including the fact that the person's emotional or mental state is not to be taken into account in an assessment of this objective standard, see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5<sup>th</sup> ed, 2011) 454–60.

<sup>158</sup> Indeed, it has recently been suggested that '[d]espite public perception that these women must be "mad", research suggests that neonaticide offenders are rarely psychotic': QCMC, above n 59, 3. For discussion of neonaticide, see Oberman and Meyer, above n 105, 151–6.

<sup>159</sup> Transcript of Proceedings, *R v Curnow* (Supreme Court of Victoria, Bongiorno J, 24 April 2005), on file with authors; Jamie Berry, 'Teenager Who Killed Baby Spared Jail', *The Age* (Melbourne), 29 April 2005, 6.

<sup>160</sup> Christine Flatley, 'Mother Jailed over Manslaughter of Newborn', *Nine News* (online), 9 March 2012 <<http://news.ninemsn.com.au/national/2012/10/10/12/58/mother-jailed-over-manslaughter-of-newborn>>.

In the latter case, Munro had concealed her pregnancy and '[t]he court was told she was severely depressed at the time and did not realise the baby was alive when born'.<sup>161</sup> The basis on which she pleaded guilty to manslaughter was not noted in the media reports.

In addition, as Table 2 shows, there were another six cases where the victim was between one and two years of age. This would preclude the availability of infanticide in all jurisdictions except Victoria, and again arguably makes it more difficult to rely on a defence based on PND evidence.

Table 2: Maternal Filicide Cases That Included Non-PND Mental Health Evidence

Case	Age of child	Jurisdiction	Offence	Plea	Mental Health Evidence	Sentence
<i>R v Folbigg</i> <sup>162</sup>	4 children; 19 days to 19 months	NSW	3 x murder; 1 x manslaughter (ULDA/CN); 1 x GBH with intent	VG	State of depression; <sup>163</sup> personality disorder	39.5 years; NPP 29.5 years (total)

<sup>161</sup> Ibid.

<sup>162</sup> [2003] NSWSC 895 (24 October 2003). See Emma Cunliffe, *Murder, Medicine and Motherhood* (Hart Publishing, 2011) for discussion. Cunliffe argues that Folbigg was wrongly convicted, a view which has received support from some legal and medical experts: Eamonn Duff, 'New Science Would Let Folbigg Go Free', *The Sydney Morning Herald* (Sydney), 3 February 2013, 4 <<http://www.smh.com.au/nsw/new-science-would-let-folbigg-go-free-20130202-2dr7y.html>>; Janek Speight, 'What If She Didn't Do It?', *Newcastle Herald* (Newcastle), 15 July 2013, 1. Earlier in 2013, a spokesperson for the NSW Department of Attorney-General and Justice said 'Folbigg had several avenues of review available to her, although they were "only possible in exceptional circumstances": Joanne McCarthy, 'Crusade to Free Kathleen Folbigg', *Newcastle Herald* (online), 4 February 2013 <<http://www.theherald.com.au/story/1278171/crusade-to-free-kathleen-folbigg>>.

<sup>163</sup> See *R v Folbigg* [2003] NSWSC 895 (24 October 2003) [67], where Barr J quotes from the diagnosis of a psychiatrist who met with Ms Folbigg who states: 'It is nonetheless clear to me that her state of depression was serious enough and persistent enough to have strongly contributed to a state of mind that led to her killing her children.'

Case	Age of child	Jurisdiction	Offence	Plea	Mental Health Evidence	Sentence
<i>R v GJL</i> <sup>164</sup>	9 weeks	NSW	Manslaughter (basis not stated)	PG	Depressed mood; possible major depressive illness; substance abuse	6 years; NPP 4 years
<i>R v LTN</i> <sup>165</sup>	2 years	NSW	Manslaughter (SI)	PG <sup>166</sup>	Schizophrenia or schizoaffective disorder	4 years; NPP 2 years
<i>R v Rees</i> <sup>167</sup>	17 months	NSW	Manslaughter (SI)	VG <sup>168</sup>	Severe adjustment disorder; Depression	5 years; NPP 3 years, 2 months
<i>R v Raigan Frances Richards</i> <sup>169</sup>	Almost 21 months	NSW	1 x manslaughter (SI); 2 x attempted murder	PG	Suffered from delusions	15 months attempted murders (already served); 5 year GBB for manslaughter

<sup>164</sup> [2009] NSWDC 167 (3 July 2009).

<sup>165</sup> [2011] NSWSC 614 (17 June 2011).

<sup>166</sup> LTN 'told her legal representatives that she wanted to plead guilty to murder because she was responsible for what she had done and deserved whatever sentence she got', but Hidden J noted that '[t]he subsequent decision of the Crown to accept her plea of guilty to manslaughter was obviously in the interests of justice': *ibid* [34].

<sup>167</sup> [2012] NSWSC 922 (15 August 2012).

<sup>168</sup> Rees offered to plead guilty, 'but the Crown declined to accept such plea in discharge of the indictment': *ibid* [28] (Grove AJ).

<sup>169</sup> [2002] NSWSC 415 (17 May 2002). The offender killed her 21 month old and attempted to kill her two older children, aged 11 and 6. A five year good behaviour bond was imposed in respect of the manslaughter: at [74] (Kirby J).

Case	Age of child	Jurisdiction	Offence	Plea	Mental Health Evidence	Sentence
<i>R v Schoultz</i> <sup>170</sup>	8 months	NSW	Manslaughter (SI)	PG	Major depressive illness; possible bipolar; possible personality disorder	7 years; NPP 3.5 years
<i>R v Sette</i> <sup>171</sup>	15 months	NSW	Manslaughter (SI)	PG	Significant depression, fugue state	2 year suspended sentence; 2 year GBB
<i>R v Wang</i> <sup>172</sup>	Almost 2 years	NSW	1 x manslaughter (SI); 1 x manslaughter (ULDA)	PG	Major depression	2 years (child); 6 years (husband); NPP 4 years (served concurrently)
Candaneace Lea Metius <sup>173</sup>	8 months	Qld	Murder	VG	Claimed she was depressed	Life
Dianne Lorraine Munro <sup>174</sup>	New-born	Qld	Manslaughter (basis not stated)	PG	Major depression	5 years, to be released after one year

<sup>170</sup> [2007] NSWSC 809 (27 July 2007).

<sup>171</sup> [2000] NSWSC 648 (6 July 2000).

<sup>172</sup> [2000] NSWSC 447 (23 May 2000).

<sup>173</sup> Christine Kellett 'Baby-Killing Mum Jailed For Life', *Brisbane Times* (online), 28 November 2007 <<http://www.brisbanetimes.com.au/news/queensland/youre-a-gutless-bitch/2007/11/28/1196036944883.html>>.

<sup>174</sup> Flatley, above n 160.

Case	Age of child	Jurisdiction	Offence	Plea	Mental Health Evidence	Sentence
<i>R v PAO</i> <sup>175</sup>	4 days	Qld	Murder	VG	History of depression/psychotic symptoms	Life <sup>176</sup>
Sarah Michelle Peters <sup>177</sup>	6 months	SA	Manslaughter (basis not stated)	VG	Depression/anxiety	5 years, 7 months; NPP 4 years, 3 months
<i>R v Touch</i> <sup>178</sup>	4 months	SA	1 x manslaughter (ULDA); 1 x AOABH	VG	Possible depression	Mental health supervision
<i>R v Curnow</i> <sup>179</sup>	new-born	Vic	Infanticide	PG	Dissociative episode of psychosis	3 year GBB <sup>180</sup>

<sup>175</sup> [2012] QCA 8 (10 February 2012).

<sup>176</sup> Murder convictions in Queensland carry a mandatory life sentence: *Criminal Code* (Qld) s 305(1).

<sup>177</sup> Todd Cardy, 'Baby Thrower An "Almost Perfect" Mother', *The Age* (online), 12 November 2007 <<http://news.theage.com.au/national/baby-thrower-an-almost-perfect-mother-2007-1112-19m5.html>>; Todd Cardy, 'Young Mum Acquitted of Baby Murder', *The Age* (online), 13 November 2007 <<http://news.theage.com.au/national/young-mum-acquitted-of-baby-murder-20071113-19to.html>>; Gavin Lower, 'Tragedy: Dad's Dismay Mum Jailed for Killing Baby Girl', *The Advertiser* (Adelaide), 7 March 2008, 15.

<sup>178</sup> *R v Touch* [2005] SADC 65 (15 June 2005); *R v Touch [No 2]* [2006] SADC 100 (25 August 2006). During the initial trial before Judge Kitchen (unreported), the defendant became unfit to stand trial and it was found she was unlikely to become fit within the next 12 months: *R v Touch* [2005] SADC 65 (15 June 2005) [8] (Rice DCJ). In *R v Touch*, the defendant applied unsuccessfully for a permanent stay of proceedings. The matter was sent to a judge alone to determine the issue of causation: see *R v Touch [No 2]* [2006] SADC 100 (25 August 2006) [3]–[9] (Rice DCJ). In that case, Rice DCJ found that the elements of manslaughter were made out and the defendant was dealt with under the mental impairment provisions in pt 8A of the *Criminal Law Consolidation Act 1935* (SA).

<sup>179</sup> Transcript of Proceedings, *R v Curnow* (Supreme Court of Victoria, Bongiorno J, 24 April 2005).

<sup>180</sup> Jamie Berry, 'No Jail' for Killing Son', *The Age* (online), 28 April 2005 <<http://www.theage.com.au/news/National/No-jail-for-killing-son/2005/04/28/1114635673013.html>>.

Case	Age of child	Jurisdiction	Offence	Plea	Mental Health Evidence	Sentence
<i>R v Rosa Maria Richards</i> <sup>181</sup>	20 months	Vic	Manslaughter (CN)	PG	Significant intellectual impairment; 'no capacity to cope with stress' <sup>182</sup>	7 years; NPP 4 years. Reduced on appeal to 5 years; NPP 3.5 years
Rita Ariyaratnam <sup>183</sup>	7 month twins	WA	2 x manslaughter (basis not stated)	PG	Bipolar disorder; severe depression	2 x 3 years (served concurrently)

[AOABH = assault occasioning actual bodily harm; CN = criminal negligence; GBB = good behaviour bond; GBH = grievous bodily harm; NPP = non-parole period; PG = plea of guilty; SI = substantial impairment; ULDA = unlawful and dangerous act; VG = verdict of guilty (after pleading not guilty)].

### 1 Mental Health Evidence and Sentencing

In contrast to the PND matters, the second case sample indicates a higher chance of a custodial sentence. As Table 2 shows, only three defendants were spared jail time.<sup>184</sup> We now briefly look at what was argued, the role of the experts in this group and why judges appear less lenient.

<sup>181</sup> Transcript of Proceedings, *R v Richards* (Supreme Court of Victoria, Cummins J, 17 October 1996); *R v Richards* [1998] 2 VR 1. We initially identified this case from the appeal, but felt it would be helpful to also access the original sentence, even though this fell outside of the period under review (1997–2012).

<sup>182</sup> Transcript of Proceedings, *R v Richards* (Supreme Court of Victoria, Cummins J, 17 October 1996) 408.

<sup>183</sup> Glenn Cordingley, 'Depressed Mum Rita Ariyaratnam Gets Three Years for Killing Twin Babies' *PerthNow* (online), 3 September 2010 <<http://www.news.com.au/national-news/depressed-mum-rita-ariyaratnam-gets-three-years-for-killing-twin-babies/story-e6frkvr-1225913863776>>.

<sup>184</sup> This includes the defendant in *R v Touch*, who was initially unfit to stand trial: see above n 178.

The sentences in six of the seven killings of children over the age of one involved imprisonment.<sup>185</sup> In the one that did not, *R v Sette*, evidence of non-PND depression was presented.<sup>186</sup> In that case, the offender stabbed her 15-month-old son, whom she had arranged to have adopted. She pleaded guilty to substantial impairment under s 23A of the *Crimes Act 1900* (NSW).

Similarly, in *R v Rees*, the verbally battered and suicidal defendant had evidence of serious depression.<sup>187</sup> A jury had found her not guilty of the murder of her 17-month-old daughter, whom she had drowned in the bath, but guilty of manslaughter on the basis of her substantial impairment.<sup>188</sup> A psychiatrist, Dr Westmore, gave evidence of 'depression and depersonalisation' that meant she could neither assess nor control her actions.<sup>189</sup> There was also evidence that Rees was suffering from an 'adjustment disorder of severe intensity'.<sup>190</sup> Although Grove AJ stated 'I am satisfied that your capacity to understand the events, to judge whether your actions were right or wrong and to control yourself were all substantially impaired at that time',<sup>191</sup> she was sentenced to five years' imprisonment.<sup>192</sup> It should be noted, however, that the majority of this time had already been served on remand and the offender was therefore eligible to be released on parole less than two months from the date of sentence.

There was a similar outcome for Rita Ariyaratnam, who also drowned her children in the bath, although the babies were younger (seven-month-old twins).<sup>193</sup> In Ariyaratnam's case, evidence was also given of non-PND mental illness: 'The court was told the mother had suffered from bipolar disorder and severe depression'.<sup>194</sup> Murray J sentenced Ariyaratnam, who had pleaded guilty to manslaughter, to two concurrent sentences of three years' imprisonment for manslaughter, taking into account the 14 months she had already

<sup>185</sup> *R v Rees* [2012] NSWSC 922 (15 August 2012); *R v Folbigg* [2003] NSWSC 895 (24 October 2003); *R v Wang* [2000] NSWSC 447 (23 May 2000); *R v LTN* [2011] NSWSC 614 (17 June 2011); *R v R F Richards* [2002] NSWSC 415 (17 May 2002); *R v Richards* [1998] 2 VR 1.

<sup>186</sup> [2000] NSWSC 648 (6 July 2000) [26] (Barr J).

<sup>187</sup> [2012] NSWSC 922 (15 August 2012) [10] (Grove AJ).

<sup>188</sup> *Ibid* [1].

<sup>189</sup> *Ibid* [32].

<sup>190</sup> *Ibid* [32].

<sup>191</sup> *Ibid* [24].

<sup>192</sup> *Ibid* [34].

<sup>193</sup> Cordingley, above n 183.

<sup>194</sup> *Ibid*.

spent in a psychiatric institution.<sup>195</sup> As in *R v Rees*, the media reported that the judge accepted that Ariyaratnam was ‘in the grips of a depressive episode at that stage’ and that she ‘had not wanted to harm her children, but in her “disordered thought process” as she tried to kill herself, she had wanted to take them with her’.<sup>196</sup> Ariyaratnam was released on parole after five months.<sup>197</sup>

In *R v Wang*, there was also evidence that the defendant had depression.<sup>198</sup> Wang had tied her husband up, so that he could not stop her from killing herself and their baby, who had cerebral palsy. In the process, she accidentally strangled her husband. As in *R v Sette* and *R v Rees*, the psychiatrists agreed that her mental illnesses (dependent personality disorder and a severe depressive illness) ‘substantially impair[ed] her ability to form a rational judgment as to whether what she was doing was right or wrong’.<sup>199</sup> Again, the judge accepted the view of the experts, but believed that there was still culpability, which required ‘denunciation by the criminal law’.<sup>200</sup>

The experts were not in agreement in *R v PAO*,<sup>201</sup> which we hypothesise may have influenced the outcome. In addition, a post-mortem was unable to determine the cause of death, which could have been due to ‘sudden infant death syndrome; smothering ...; compression to the neck to block off the airways in the neck (strangulation or asphyxiation); or a sleeping accident’.<sup>202</sup> Although there was evidence that the defendant had previously self-harmed<sup>203</sup> and showed signs of mental illness,<sup>204</sup> a mental health clinical nurse found ‘no mental illness or psychosis’<sup>205</sup> and a head psychiatrist ‘did not find any major

<sup>195</sup> Lloyd Jones, ‘Mother Who Killed Baby Twins Sentenced’, *The Sydney Morning Herald* (online), 3 September 2010 <<http://news.smh.com.au/breaking-news-national/mother-who-killed-baby-twins-sentenced-20100903-14tqf.html>>.

<sup>196</sup> *Ibid.*

<sup>197</sup> Aja Styles, ‘Mother of Drowned Twins Granted Parole’, *WA Today* (online), 8 February 2011 <<http://www.watoday.com.au/wa-news/mother-of-drowned-twins-granted-parole-20110208-1alek.html>>.

<sup>198</sup> [2000] NSWSC 447 (23 May 2000) [31] (Adams J).

<sup>199</sup> *Ibid.* Wang had pleaded guilty to two counts of manslaughter. She was accordingly dealt with under s 23A of the *Crimes Act 1900* (NSW), ‘which permits a verdict of manslaughter where the offender’s mental capacity ... is substantially impaired by an abnormality of mind’: at [1].

<sup>200</sup> *Ibid* [38].

<sup>201</sup> [2012] QCA 8 (10 February 2012).

<sup>202</sup> *Ibid* [3] (McMurdo P).

<sup>203</sup> *Ibid* [6], [18]–[20].

<sup>204</sup> *Ibid* [20].

<sup>205</sup> *Ibid* [8].

psychotic or major mood disorder'.<sup>206</sup> PAO's appeal against her murder conviction was dismissed. Incidentally, we note that this case highlights the differences which may arise between experts called in to assess a person after they have been charged with an offence and experts who have been working directly with the person prior to the child's death.<sup>207</sup>

The expert also appears to have arrived at a different conclusion in another Queensland case, where Candaneace Lea Metius was found guilty of murdering her eight-month-old son and sentenced to life imprisonment.<sup>208</sup> The baby was in hospital with severe brain damage, from what prosecutors alleged was an earlier attempt on his life by the defendant. This prompted police to set up surveillance cameras in the hospital, which captured the homicide on video.<sup>209</sup> The key defence issue was her state of mind, with the defendant claiming to be depressed and unaware of her actions. An expert psychiatrist called by the Crown testified that she had not been mentally impaired.<sup>210</sup> The judge said that the tape did 'not show a distressed and depressed mother who is unable to control her actions' but rather 'someone who is cold and calculating'.<sup>211</sup>

The case of *R v Folbigg*<sup>212</sup> should also be noted. Three of Folbigg's four children were under 12 months when they died and the first three initially were believed to have died from natural causes. The evidence of two expert psychiatrist witnesses who saw the defendant, Dr Westmore and Dr Giuffrida, was discussed at length in the sentencing judgment. Dr Giuffrida found that Folbigg had been traumatised as a young child, and was unable to bond emotionally with her children.<sup>213</sup> Dr Westmore noted that while Folbigg 'probably experienced significant disturbances in mood state from time to time', she was not psychotic.<sup>214</sup> He diagnosed her with a 'severe personality disorder of an unspecified kind'.<sup>215</sup> However, Dr Westmore also testified that, at the times of the children's deaths, Folbigg's 'capacity to control her behaviour ... was most likely impaired'.<sup>216</sup> Both specialists also determined that

<sup>206</sup> Ibid [25].

<sup>207</sup> We thank one of the anonymous reviewers for pointing out this issue.

<sup>208</sup> Kellett, above n 173.

<sup>209</sup> Jason Gregory, 'Life Jail for Killer Mum', *The Courier Mail* (Brisbane), 29 November 2007, 3.

<sup>210</sup> Ibid.

<sup>211</sup> Kellett, above n 173.

<sup>212</sup> [2003] NSWSC 895 (24 October 2003). See also above nn 162–3.

<sup>213</sup> Ibid [50]–[51], [67] (Barr J).

<sup>214</sup> Ibid [69].

<sup>215</sup> Ibid [72].

<sup>216</sup> Ibid [73].

Folbigg was depressed, but ultimately the evidence did not support any legal defence, and Folbigg was convicted of one count of manslaughter and three counts of murder. Barr J, in sentencing her to 40 years' imprisonment with a non-parole period of 30 years, appears to have been guided by the psychiatrists' evidence, and mentioned that both Dr Giuffrida and Dr Westmore believed that her condition was untreatable, and therefore her chances of rehabilitation low.<sup>217</sup>

There were a few cases in the non-PND sample in which the experts expressed a view that the defendants suffered from mental illness, but they still received lengthier sentences than others in the sample. In our view, it is possible that the type of killing and, in particular, the degree of violence shown by the defendant, influenced the judges in arriving at their sentence.<sup>218</sup> Such an assessment is consistent with general sentencing practice, but, notably, the most severe sentences imposed in the cases in this sample, that is, in *R v Folbigg* and *Metius*, followed death by smothering, which might be regarded as a less brutal means of death (in comparison with more overt acts of physical assault, as in the *Peters* case below).<sup>219</sup>

Notwithstanding this observation, the cases suggest a positive relationship between the degree of violence and the length of sentence imposed. For example, in *R v Schoultz*, the defendant, having pleaded guilty to manslaughter, received a sentence of seven years (three years and six months non-parole), despite evidence from Dr Westmore and the psychiatrist called by the prosecution, Dr Neilssen, that she 'had available to her the defence of substantial impairment by abnormality of mind'.<sup>220</sup> In that case, the child 'died by having her head struck with great force, probably more than once, by or against some hard object'.<sup>221</sup> Barr J, the sentencing judge noted that it was 'possible that her unwillingness or inability frankly to acknowledge her actions is associated with her mental condition'.<sup>222</sup> His Honour also consid-

<sup>217</sup> *Ibid* [97]–[98].

<sup>218</sup> We acknowledge that the sentences tend to fall within similar ranges. In addition, variations in sentence could be due to varying severity of mental illness and differences in the type of conviction.

<sup>219</sup> We note, though, that Folbigg was found guilty of murdering three children (and the manslaughter of a fourth), while *Metius'* homicide was captured on video and tried in Queensland where a life sentence is mandatory for murder.

<sup>220</sup> [2007] NSWSC 809 (27 July 2007) [2] (Barr J).

<sup>221</sup> *Ibid* [8].

<sup>222</sup> *Ibid* [19].

ered it 'possible that she genuinely does not remember what happened, though I doubt that'.<sup>223</sup>

Extreme violence was also shown in Sarah Michelle Peters' killing of her six-month-old baby: 'A post-mortem examination revealed Crystal suffered fractures to her skull, arm and ribs, and serious bruising to her groin and lower back. She also had heavy bleeding inside her skull'.<sup>224</sup> The defence contended that Peters suffered from depression and anxiety.<sup>225</sup> A jury found Peters guilty of manslaughter (which carries a maximum penalty of life imprisonment in South Australia, under s 13 of the *Criminal Law Consolidation Act 1935 (SA)*).<sup>226</sup> She was sentenced to five years and seven months' imprisonment, with a non-parole period of four years and three months.<sup>227</sup>

In a Victorian case, *R v Rosa Maria Richards*, the expert, Dr Vine, suggested that, in killing the baby, the mother 'was not intending to harm the child', as 'her deficiencies precluded her from appreciating the significance of her actions'.<sup>228</sup> She was given a sentence of seven years at trial,<sup>229</sup> which was reduced to five years on appeal. The Court of Appeal stated that:

The severity of the sentence imposed on the applicant Richards reflects, in my view, a failure by the learned judge to adequately recognise that the circumstances, as he found them to be, significantly reduced the culpability of the applicant.<sup>230</sup>

Richards pleaded guilty to manslaughter on the basis of criminal negligence. She had violently shaken her baby, causing bleeding into the brain, after her partner had struck the 20-month-old boy, causing him to hit the floor and start to convulse. The key issue at sentencing, however, was the woman's extremely impaired level of cognitive ability.

<sup>223</sup> Ibid.

<sup>224</sup> Pia Akerman, 'Mother Denies Killing Seven-Month-Old,' *The Australian* (online), 26 February 2007 <<http://www.theaustralian.com.au/news/mother-denies-killing-seven-month-old/story-e6frg6p6-1111113059837>>.

<sup>225</sup> Cardy, 'Baby Thrower An Almost Perfect Mother', above n 177.

<sup>226</sup> Cardy, 'Young Mum Acquitted of Baby Murder', above n 177.

<sup>227</sup> Lower, above n 177.

<sup>228</sup> [1998] 2 VR 1, 10 (Winneke P).

<sup>229</sup> Transcript of Proceedings, *R v Richards* (Supreme Court of Victoria, Cummins J, 17 October 1996).

<sup>230</sup> *R v Richards* [1998] 2 VR 1, 10 (Winneke P).

In *R v GJL*, the defendant was an amphetamine addict, and had similarly shaken her baby.<sup>231</sup> The basis on which a manslaughter plea was accepted by the Court was not stated, but GJL received a six year sentence, with a non-parole period of four years.<sup>232</sup> Dr Westmore gave psychiatric evidence that the woman ‘had a history of a depressed mood’ and ‘possibly a recurrent major depressive illness’.<sup>233</sup> Less than a month before the child’s death, the defendant said that she was neither coping nor bonding with the baby.<sup>234</sup> Dr Westmore’s report to the judge did not discuss psychosis, but described the defendant as having ‘multiple social, psychological and psychiatric problems’.<sup>235</sup>

Another striking finding about the means of killing was that six of the deaths were by drowning,<sup>236</sup> with all but one taking place in the bathtub at home.<sup>237</sup> There have been other cases overseas where mothers suffering from mental illness have drowned their young children in the bath, including the widely publicised case of Andrea Yates, who drowned her five children while suffering from PND;<sup>238</sup> Allyson McConnell, an Australian woman living in Canada, who drowned her two sons in the bath and was found to be suffering from depression;<sup>239</sup> and Julia Duda, a ten-week-old baby in the United States, who drowned in 2012 after her ‘depressed mother le[ft] her alone in the bath to make a coffee’.<sup>240</sup> In Oberman and Meyer’s sample of 37 women convicted

<sup>231</sup> [2009] NSWDC 167 (3 July 2009).

<sup>232</sup> *Ibid* [81] (Knox DCJ).

<sup>233</sup> *Ibid* [28].

<sup>234</sup> *Ibid* [5].

<sup>235</sup> *Ibid* [28].

<sup>236</sup> *R v Pope* [2002] NSWSC 397 (7 May 2002); *R v Rees* [2012] NSWSC 922 (15 August 2012); *R v RG* [2006] NSWSC 21 (2 February 2006); *R v McAvoy* [2003] SASC 225 (23 July 2003); *R v Azzopardi* [2004] VSC 509 (6 December 2004); Rita Ariyaratnam’s case.

<sup>237</sup> In *R v RG* [2006] NSWSC 21 (2 February 2006), the baby drowned in a river.

<sup>238</sup> Andrew Cohen, ‘How Andrea Yates Lives, and Lives with Herself, a Decade Later’, *The Atlantic* (online), 12 March 2012 <<http://www.theatlantic.com/national/archive/2012/03/how-andrea-yates-lives-and-lives-with-herself-a-decade-later/254302>>.

<sup>239</sup> ‘Australian Allyson McConnell, Who Drowned Sons, to Be Freed in Canada’, *The Australian* (online), 4 April 2013 <<http://www.theaustralian.com.au/news/nation/australian-woman-who-drowned-sons-to-be-freed-in-canada/story-e6frg6nf-1226612603822>>.

<sup>240</sup> ‘Ten-Week-Old Baby “Drowns after Depressed Mother Leaves Her Alone in the Bath to Make a Coffee”’, *The Daily Mail* (online), 7 September 2012 <<http://www.dailymail.co.uk/news/article-2199803/Julia-Duda-Baby-drowns-depressed-mother-leaves-bathtub-make-coffee.html>>.

of the murder or manslaughter of their children, drowning was ‘the most predominant method used to kill their child (48 per cent)’.<sup>241</sup>

## V CONCLUSION

In this article, we have sought to shine a light on a relatively uncommon but nevertheless critical criminal justice issue. In our analysis of women who committed filicide on their young children, we found stories of anguish, isolation, and remorse, as well as the tragic loss of life of some of the youngest, and therefore most vulnerable, members of society. In this respect, our findings parallel those of Oberman and Meyer, whose interviews with 37 women in the United States incarcerated for killing their children revealed ‘core themes ... [of] violence, isolation, and hopelessness’.<sup>242</sup>

Our 28 cases also support Langer’s findings that: ‘Women plead guilty to manslaughter or infanticide in order to avoid going to trial because they feel overwhelming remorse and that they deserve punishment’.<sup>243</sup>

In fact, *none* of the PND cases in our sample charged with infanticide involved a trial, and only six of the sixteen filicide defendants not using PND evidence were convicted following a trial.<sup>244</sup>

In sentencing, a number of judges made reference to the fact that, but for the defendant pleading guilty, the defence of mental illness, which would have absolved the defendant of criminal responsibility, could have been an option for them. For example, in *R v RG*, Buddin J noted:

It is also a material factor that in pleading guilty to manslaughter, the offender abandoned any reliance upon the ‘defence’ of ‘mental illness’ which was clearly open to her on the expert evidence. Such a ‘defence’, if made out, would have absolved her of any criminal responsibility for her conduct.<sup>245</sup>

<sup>241</sup> Oberman and Meyer, above n 105, 143. It should be noted that the average age of victims in that study was five years old, ie, significantly older than in our sample.

<sup>242</sup> *Ibid* 5. They also note: ‘Surprisingly, having killed one’s child is not evidence that one was a bad mother. On the contrary, these mothers seem to have struggled to be good mothers and to have waged that struggle under exceedingly difficult circumstances’: at 67.

<sup>243</sup> Langer, above n 18, 381.

<sup>244</sup> *R v Folbigg* [2003] NSWSC 895 (24 October 2003); *R v Rees* [2012] NSWSC 922 (15 August 2012); Candaneace Lea Metius’s case; *R v PAO* [2012] QCA 8 (10 February 2012); Sarah Michelle Peters’ case; *R v Touch [No 2]* [2006] SADC 100 (25 August 2006). We acknowledge that there may have been other matters in which the defendant was acquitted or the matter no billed.

<sup>245</sup> [2006] NSWSC 21 (2 February 2006) [37].

Likewise, in *R v Pope*, James J observed:

At the time of the acts or omissions causing the death, it is common ground that Mrs Pope, who had had a lengthy history of psychiatric illness and had been the subject of recent admissions to hospital and very recent medical observation and treatment, was suffering from such a condition of mind as to verge upon not being mentally responsible in law for her actions at all.<sup>246</sup>

However, as the NSWLRC has noted, an acquittal on the basis of mental illness ‘may be a less attractive or appropriate option given the fact that ... [it] usually results in indeterminate disposition in prison’.<sup>247</sup> We would therefore not support greater reliance being placed on the mental illness ‘defence’.

In many of the PND cases where the psychiatrists deemed the defendant to have been temporarily psychotic, the judges did not give a prison sentence. Accordingly, in our sample, cases with PND evidence, as compared to cases with evidence of other mental illnesses, correlated with fewer sentences of imprisonment, although we acknowledge that a finding of not guilty by reason of mental illness will result in a qualified verdict of acquittal with mental health supervision rather than a sentence.<sup>248</sup> The forensic psychiatrists in the PND matters almost always included their view that the defendant was acting in a psychotic state. As we have noted, in the non-PND cases, where the experts expressed the view that the woman’s mental state was impaired, this allowed for a conviction of manslaughter instead of murder, but judges were inclined to sanction with imprisonment.<sup>249</sup> Our preliminary research indicates this could be a correlate of the violence inflicted;<sup>250</sup> other relevant considerations could relate to the number of victims, the perception of

<sup>246</sup> [2002] NSWSC 397 (7 May 2002) [4].

<sup>247</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2010), above n 8, 128 [5.21].

<sup>248</sup> *R v SP [No 2]* [2006] ACTSC 78 (12 July 2006); *Re KMV* [2003] QMHC 005 (5 August 2003); Karyn Louise Kemp’s case; *R v McAvoy* [2003] SASC 225 (23 July 2003).

<sup>249</sup> For convictions of manslaughter resulting in imprisonment, see *R v Folbigg* [2003] NSWSC 895 (24 October 2003); *R v LTN* [2011] NSWSC 614 (17 June 2011); *R v Rees* [2012] NSWSC 922 (15 August 2012); *R v Schoultz* [2007] NSWSC 809 (27 July 2007); *R v Sette* [2000] NSWSC 648 (6 July 2000); *R v Wang* [2000] NSWSC 447 (23 May 2000).

<sup>250</sup> There may also be some gender bias at play here: the more physical violence involved in the killing, the greater the deviation from societal conceptions of the good woman and femininity. For further discussion, see Patricia Eastal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001); Stangle, above n 10, 706. See also Hilary Allen, ‘Rendering Them Harmless: The Professional Portrayal of Women Charged with Serious Violent Crimes’ in Pat Carlen and Anne Worrall (eds), *Gender, Crime and Justice* (Open University Press, 1987) 81, where women’s passivity is associated with more lenient sentences.

seriousness of mental health disorder, or the judges' perception of the woman's degree of culpability.

On the basis of our analysis, it does not appear that the offence/partial defence of infanticide is being abused. We identified filicides in two jurisdictions with infanticide provisions: in NSW, there were only three infanticide convictions, with a further two in Victoria. Of these five, four had evidence of PND. In Victoria, it may be that Curnow argued infanticide because the 2005 amendments broadened the grounds.<sup>251</sup>

The NSWLRC has recently recommended that infanticide be retained in NSW.<sup>252</sup> The criticisms of infanticide, which we have discussed above, were considered, but the Commission ultimately concluded that infanticide 'affords an appropriate and compassionate criminal law response to the complex and tragic set of circumstances that may result in a mother killing her infant'.<sup>253</sup> There was clear recognition that the biological nexus between childbirth and mental illness should be removed:

We now recognise the causes of post-natal mental illnesses as being complex and including the stresses of providing primary care and the social, economic and other issues that face women after childbirth.<sup>254</sup>

In this respect, the NSWLRC has followed the position of the VLRC, which suggested that the infanticide provisions need to reflect the complexities of new mothers' lives and recognise 'the particular role that women play in caring for and raising young children, and the fact that this role can be very isolating and may often be unsupported'.<sup>255</sup>

We strongly endorse this approach and the retention of infanticide as a separate offence/defence. In particular, we note that the effect of the NSWLRC's proposed terminology — that the mental impairment be 'consequent on or exacerbated by [the defendant] having given birth to [the victim] within the preceding 12 months'<sup>256</sup> — recognises that childbirth and parenting responsibilities may only be some of the factors that give rise to the woman's actions. In addition, this formulation better reflects the comorbidity

<sup>251</sup> See above n 47 and accompanying text.

<sup>252</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 122 [5.47]–[5.50].

<sup>253</sup> *Ibid* 122 [5.49].

<sup>254</sup> *Ibid* 120 [5.37].

<sup>255</sup> VLRC, above n 8, 265 [6.36].

<sup>256</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 124–5 (recommendation 5.1).

of PND and other mental illnesses. However, like the VLRC,<sup>257</sup> we would also support extending the scope to victims aged up to two years, which we believe would better recognise and reflect the experiences of those for whom the challenges of parenting do not cease automatically once a child turns one, and who may experience ongoing difficulties as a result of this role.<sup>258</sup>

This broadening of infanticide would correlate with our finding that expert evidence tends to focus on the totality of a woman's mental health, rather than solely on any diagnosis of PND. In more matters than not, the experts offered their opinion that the defendant had another type of depression or psychiatric condition. This is appropriate, given that, in most of the filicides, the mother had often experienced violence or trauma during their childhood, or in their adult relationships, or suffered from a lengthy history of psychiatric disorders or addiction.<sup>259</sup> In fact, there were very few defendants with backgrounds of 'clean' mental health and drug/violence-free upbringings and adult lives. In this context, it is important to note that most of those in our sample who were diagnosed with PND had histories of psychiatric problems.

Allowing an infanticide defence for use by women who have not been diagnosed with PND would assist those women who kill their child (or children) who may not be presenting PND evidence in their defence because they have fallen through the 'cracks'. These cracks include the failure to be properly diagnosed and the lack of appropriate expert witnesses. As we have noted earlier, none of those in the sample who were arguing infanticide spent time incarcerated. Oberman and Meyer suggest, in the United States context, that the women they spoke to 'seldom *fell* through the cracks. Rather, they moved into and out of reach of the system, in part by their own choices, and in part because of the narrowly defined duties of those who held up the safety net'.<sup>260</sup>

In fact, as Langer notes, expert opinion evidence about PND may also

<sup>257</sup> VLRC, above n 8, 267 (recommendation 49).

<sup>258</sup> In this context, we note that the New Zealand provision goes much further still, making infanticide available as a partial defence to the murder of a child of up to 10 years of age. For discussion, see NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 112 [5.12].

<sup>259</sup> Although not a focus of this paper, we found that, in a number of these tragic cases, there was a history of domestic violence: see, eg, Tanya Soutter, who was 'dominated by her obsessive and jealous partner': 'Mum Gets Suspended Sentence for Infanticide', above n 79.

<sup>260</sup> Oberman and Meyer, above n 105, 103 (emphasis in original). They saw the 'safety net' of public institutions designed to serve and protect the vulnerable as 'an apt metaphor: a net has gaping holes; it is composed of narrow ropes; it may well be easier to get ensnared in it than to be "saved" by it'.

be rejected as irrelevant unless the trial judge has satisfied her/himself that the accused has distinct behavioural characteristics, that a particular offence would most likely be committed by a defined class of persons, and that there are reliable indicators of a standardized behavioural profile for such a distinct group.<sup>261</sup>

In addition, if a woman has killed more than one child over time, forensic psychiatrists might be (incorrectly) eliminating the possibility that she is evidencing a history of PND.

We found there were several psychiatrists who presented evidence in a number of cases.<sup>262</sup> In 12 of the 28 cases, PND evidence was offered in arguing infanticide, manslaughter and substantial impairment. Unfortunately, it is beyond our knowledge to determine whether there were other cases which might have lent themselves to a PND diagnosis had appropriately trained experts been available to assess the defendant. In addition, there may be a broader issue about the availability of forensic psychiatric expertise more generally, as well as the extent to which psychiatric and medical experts are familiar with the aetiology of and responses to PND.

Clearly, judges do not consider potential biochemical imbalances in a sentencing vacuum. PND and other mental health issues are only one variable that the court takes into account. Other relevant factors may include financial and social circumstances and personal background. For example, in *R v Cooper*, where the defendant smothered her seven-month-old baby, Simpson J stated:

This is a tragic case. ... That happened in circumstances where little real culpability can be attributed to the perpetrator. It happened because Ms Cooper

<sup>261</sup> Langer, above n 18, 381.

<sup>262</sup> Dr Westmore presented evidence in: *R v Folbigg* [2003] NSWSC 895 (24 October 2003); *R v GJL* [2009] NSWDC 167 (3 July 2009); *R v Pope* [2002] NSWSC 397 (7 May 2002); *R v Rees* [2012] NSWSC 922 (15 August 2012); *R v RG* [2006] NSWSC 21 (2 February 2006); *R v Schoultz* [2007] NSWSC 809 (27 July 2007). Dr Neilssen presented evidence in: *R v LTN* [2011] NSWSC 614 (17 June 2011); *R v R F Richards* [2002] NSWSC 415 (17 May 2002); *R v RG* [2006] NSWSC 21 (2 February 2006); *R v Schoultz* [2007] NSWSC 809 (27 July 2007). Dr Giuffrida presented evidence in: *R v Folbigg* [2003] NSWSC 895 (24 October 2003); *R v Wang* [2000] NSWSC 447 (23 May 2000). Dr Buist presented evidence in: *R v NLH* [2010] NSWSC 662 (17 June 2010); Transcript of Proceedings, *R v Curnow* (Supreme Court of Victoria, Bongiorno J, 24 April 2005); *R v Azzopardi* [2004] VSC 509 (6 December 2004).

lacked the resources — mainly emotional, but also intellectual and probably financial — to manage the family for whom she was responsible.<sup>263</sup>

More research is required though to assist the community and judiciary to better understand the experiences of women who struggle in their mothering role, and whose criminal behaviour, especially violence against their children, occurs in this context. For example, we believe the relationship between maternal filicide, mental illness and drowning merits additional study.

Indeed, more research and a better understanding about PND and filicide is crucial. One reason why PND evidence may not be introduced in filicide cases might be the lack of identification (by the mother or health staff), with a psychiatrist recently noting that there are about 150 women a year in NSW alone who suffer from postnatal psychosis.<sup>264</sup> In such cases, '[p]aranoia, delusions and hallucinations are common, and usually appear rapidly in women without previous experience of mental illness', but the condition is 'off the radar for many people, including health staff, because it is so rare, and it can sometimes seem taboo'.<sup>265</sup>

Further, in a number of the cases, both those in which the woman had PND and those where they suffered from other mental health issues, the woman had sought help — sometimes on numerous occasions — but there was no effective intervention before the tragedy played out. For example, in *Re KMV*, five days before the defendant felt 'that she had no other choice, [and] she squeezed the baby hard until she died',<sup>266</sup> she was admitted to the local hospital overnight because of sleeplessness. Two days later, she had contact with the local mental health service and was prescribed antidepressants by her general practitioner. The following day, she again attended the mental health service, 'complaining of poor sleep and a low mood'.<sup>267</sup> She had further contact with the mental health service the day before the death, providing yet another missed opportunity for the relevant medical services to

<sup>263</sup> [2001] NSWSC 769 (31 August 2001) [24]. For discussion, see NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (2013), above n 8, 120 [5.38].

<sup>264</sup> Kate Hagan, 'Little-Known Illness a Danger to Mum and Baby', *Maitland Mercury* (online), 25 March 2013 <<http://www.maitlandmercury.com.au/story/1387115/little-known-illness-a-danger-to-mum-and-baby>>.

<sup>265</sup> *Ibid.*

<sup>266</sup> [2003] QMHC 005 (5 August 2003) [9] (Wilson J).

<sup>267</sup> *Ibid* [8].

intervene.<sup>268</sup> The failure to do so was all the more regrettable, given that murder convictions in Queensland result in a mandatory life sentence.<sup>269</sup>

Similarly, as discussed above, *R v PAO* was another case where there was evidence that the defendant had previously shown signs of mental illness. Specifically, two weeks before giving birth to her daughter, she self-harmed and told a paramedic, pointing to her abdomen, that she was going to ‘kill this fucking beast’.<sup>270</sup> She also told a paramedic and a nurse at the hospital when she was admitted that she wanted to stick a knife in her belly, and there was evidence of ‘about 15 pinpricks all over the top of her belly towards her chest’.<sup>271</sup> In spite of this, a senior social worker who saw her that day determined that she did not have a psychiatric problem. She killed her daughter four days after birth and was convicted of murder. Like KMV, due to being convicted in Queensland, she was sentenced to life imprisonment.

Ultimately, we believe that, in addition to extending the scope of infanticide, what is required is better awareness of PND by the community and medical practitioners, to improve detection and thus work towards preventing filicides. More research and improved understanding by both doctors and those working in the criminal justice realm could also translate into a more sensitive and well-informed response by the legal system when such tragedies occur.

<sup>268</sup> Ibid [9]. See also Oberman and Meyer, above n 105, 121, for discussion of missed opportunities with healthcare professionals.

<sup>269</sup> *Criminal Code* (Qld) s 305(1).

<sup>270</sup> *R v PAO* [2012] QCA 8 (10 February 2012) [18] (McMurdo P).

<sup>271</sup> Ibid [19].