

Chapter 4

Defences to Homicide

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Unwilled Conduct and Accident

INTRODUCTION

Section 23 of the *Criminal Code* (WA) (the Code) deals with two fundamental rules in relation to criminal responsibility – the defences of unwilled conduct and accident.¹ The first paragraph of s 23 of the Code provides that:

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

The first rule under s 23 of the Code is that a person is not criminally responsible for an unwilled act or omission and the second rule is that a person is not criminally responsible for an event that occurs by accident.

The relevance of 'intention' and 'motive' when determining criminal responsibility is also set out in s 23. It is stated that:

Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.²

Therefore, unless a specific intention is an element of the offence, the intention of the accused is not relevant when determining criminal responsibility.³ Section 23 also makes explicit that the motive of the accused is generally not an element of the offence. However, evidence of motive may be presented during a trial in order to assist the prosecution case.⁴ For example, if an accused claimed that she had no reason to kill her elderly mother, the prosecution could present evidence that the accused stood to gain a significant amount of money when her mother died. Similarly, an accused may rely on evidence of the absence

of a motive. Motive is, of course, relevant to sentencing because the motive of the accused may demonstrate increased or reduced culpability.

The scope of the defences under s 23 of the Code

Generally, the defences of unwilled conduct and accident are applicable to any criminal offence.⁵ However, s 23 is subject to the express provisions of the Code relating to negligent acts and omissions. This means that if the prosecution's case is based upon criminal negligence, s 23 will not operate to excuse the accused from criminal responsibility.⁶ For instance, an accused may be charged with manslaughter on the basis that he was in control of a dangerous object under s 266 of the Code.

Example

A is waving a knife around while standing in close proximity to a number of people. B trips over and falls into A pushing A's arm against C. As a result, the knife being held by A penetrates C's chest. C dies and A is charged with manslaughter.

Because A was in charge of a dangerous object he is required under the law to exercise care and take reasonable precautions. If it is determined that A failed to exercise reasonable care to the standard required under the criminal law (gross negligence) A will be convicted of manslaughter. Thus, it is the failure to exercise reasonable care and take reasonable precautions that gives rise to criminal liability. In this case it would be irrelevant that the physical act causing death was unwilled by A.

The meaning of an 'act' and an 'event'

The application of s 23 of the Code has been subject to significant judicial and academic debate. As Justice Miller

1. Although unwilled conduct and accident are commonly referred to as 'defences', the accused does not have the burden of proving the defence. The accused has the evidential burden (that is, to ensure that there is sufficient evidence to support the defence). Once this burden is satisfied the prosecution must negate the defence beyond reasonable doubt. In the case of unwilled conduct the prosecution must prove beyond reasonable doubt that the act or omission occurred independently from the exercise of the accused's will and, in the case of accident, that the event did not occur by accident: see further discussion in Chapter 1, 'How Criminal Responsibility is Determined: Burden and standard of proof'.
2. Section 23 of the Queensland Criminal Code was originally identical to s 23 of the Western Australian Code. Although the Queensland Code was amended in 1997 to separate accident and unwilled conduct, the wording of each defence is identical to the Western Australian provision. The Tasmanian Code has a similar provision which states that 'no person shall be criminally responsible for an act unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance': *Criminal Code* (Tas) s 13(1).
3. Wilful murder, for example, requires proof of an intention to kill. In contrast, manslaughter does not require proof of any specific intention.
4. See *Plomp* (1963) 110 CLR 234.
5. *Criminal Code* 1913 (WA) s 36.
6. See Chapter 3, 'Manslaughter: Manslaughter by criminal negligence'.

said in his submission, s 23 has 'caused a great deal of legal difficulty over the years'.⁷ In particular, there has been conflicting views about the meaning of the words 'act' and 'event'.⁸ The meaning of these words is important because unwilled conduct is only relevant in relation to an act (or omission) and accident is only relevant to an event. In general terms the difference between an act and an event is the difference between the physical or bodily movements of the accused and the consequences of those physical movements.⁹ For homicide offences the event for the purposes of s 23 of the Code is the death of the victim.¹⁰ Generally, the 'act' is the physical conduct that caused the death.¹¹

UNWILLED CONDUCT

As explained in Chapter 1, every offence requires proof of a physical or conduct element.¹² For homicide offences the physical element is that an act or omission of the accused must have caused the death of the victim. Both

at common law and under the Code an accused cannot be held criminally responsible for an act unless that act was voluntary. At common law, the physical or conduct element is known as the *actus reus* and the question of voluntariness is dealt with as part of this element.¹³ Under the Code the requirement of voluntariness is not part of the requirement to prove the physical element of the offence. Instead, s 23 of the Code provides that a person is not criminally responsible for an act (or omission) that occurred independently of the exercise of his or her will.¹⁴ Thus, the concept of unwilled conduct under s 23 of the Code is essentially equivalent to the common law concept of voluntariness.¹⁵ As Toohey J observed in *Falconer*,¹⁶ it is 'in keeping with the basic notions of the criminal law, that a person is responsible only for conscious, voluntary and deliberate acts or omissions'.¹⁷ In broad terms there are two categories of unwilled acts: those that occur independently from the will of the accused while the accused is conscious;¹⁸ and those that occur while the accused is in a state of unconsciousness (or impaired

7. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 6.
8. The Model Criminal Code Officers Committee (MCCOC) observed that at common law and under the Code the interpretation of the word 'act' has been difficult: see MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 7.
9. See *Vallance* (1961) 108 CLR 56, 65 (Kitto J), 69 (Taylor J), 72 (Menzies J) where the majority of the High Court expressed the view that the 'act' (in s 13(1) of the *Criminal Code* (Tas)) referred to the bodily actions of the accused and the 'event' referred to its consequences. Section 23 of the Queensland Code was considered by the High Court in *Kaporonovski* (1973) 133 CLR 209. While the victim was holding a glass, the accused had forced the victim's hand back towards the victim's face, causing grievous bodily harm. McTiernan ACJ and Menzies J held that the act was the forcing of the glass into the victim's face and the event was the grievous bodily harm: at 215. Gibbs J also held that the event was the grievous bodily harm and he stated that an act refers to 'some physical action, apart from its consequences' and the event refers to the consequences of the act: at 231 (Stephen J concurring). In *Kaporonovski* the accused was aware that the victim was holding a glass. However, in *Duffy* (1980) 3 A Crim R 1, 9 (Wallace J), 11–13 (Jones J) the accused struck the victim in the face while holding a glass and claimed that at the time he raised his hand to strike the victim he did not realise that he was holding the glass. The majority of the Western Australian Court of Criminal Appeal held that the trial judge should have directed the jury to consider whether the act of the accused occurred independently from his will. In this context it was held that in order for the accused to be criminally responsible it was necessary to prove that the accused knew he held a glass in his hand. See also *Stack* [2002] WASCA 338, [28] where Templeman J observed that the relevant act was not the striking of the deceased in the neck but the striking of the deceased in the neck with a knife. In this case the accused stabbed the deceased in the neck and maintained that he did not know he had the knife in his hand.
10. A number of cases have held that death is the relevant event: see *Taiters* (1996) 87 A Crim R 507, 509; *Falconer* (1990) 171 CLR 30, 38 (Mason CJ, Brennan and McHugh JJ); *Hooper* [2000] WASCA 394, [8] (Malcolm CJ), [39] (Wallwork J); *Seminara* [2002] QCA 131, [7] (McPherson JA; Byrne and Philippides JJ concurring); *Ugle* [2002] HCA 25, [27] (Gummow and Hayne JJ), [53] (Kirby J); *Murray* [2002] HCA 26, [7] (Gaudron J), [42]–[43] (Gummow and Hayne JJ). The Commission notes that Kirby J in *Murray* [2002] HCA 26, [78] suggested that the event is the 'entire occasion resulting in the death of the deceased'.
11. In *Falconer*, *ibid* 38, Mason CJ, Brennan and McHugh JJ stated that the death-causing act is a 'bodily action which either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility'. In certain cases (such as the discharging of firearms) it may be more difficult to identify the relevant act for the purpose of s 23 of the Code: see below, 'The discharging of firearms'.
12. See Chapter 1, 'The Criminal Law and the Criminal Justice System: How criminal responsibility is determined'.
13. Voluntariness at common law is not a 'defence' but an element for which the prosecution has both the evidential and persuasive burdens of proof. However, at common law there is a presumption of mental capacity; that is, that the actions of an apparently conscious person are voluntary: see *Radford* (1985) 20 A Crim R 388, 394 (King CJ); *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 413 (Lord Denning), as cited in *Ryan* (1967) 121 CLR 205, 215–16 (Barwick CJ). This presumption means that the accused must produce sufficient evidence that his or her actions were involuntary. Therefore in practice the accused has the evidential burden and voluntariness at common law operates in the same way as other defences: see Victorian Law Reform Commission (VLRC), *Defence to Homicide*, Final Report (2004) [5.133].
14. For the remainder of this section the Commission refers to an 'act' unless it is necessary in the context to refer to an 'omission'.
15. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [11.3]; Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 11. See also *Falconer* (1990) 171 CLR 31, 40 where Mason CJ, Brennan and McHugh JJ stated that the requirement of a willed act under the Code is 'substantially' the same as the requirement of voluntariness at common law.
16. *Falconer*, *ibid*.
17. *Ibid* 67. See also Yeo S, 'Putting Voluntariness Back into Automatism' [2001] *Victoria University of Wellington Law Review* 15, 1.
18. An example of a conscious unwilled act is when A pushes B who falls onto C. B could not be guilty of an assault upon C because the relevant act was unwilled: see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [11.4].

consciousness).¹⁹ It is necessary to emphasise that the common factor in both categories is an absence of will. Unconsciousness is not in itself sufficient to deny criminal responsibility.²⁰

Conscious unwilled acts

Conscious unwilled acts include reflex actions or unwilled muscular contractions.²¹ However, it is important to distinguish between a reflex action and a 'spontaneous action'.²² In *Ryan*,²³ Windeyer J questioned whether an act should be considered involuntary just because the 'mind worked quickly and impulsively'.²⁴ In order to make this distinction clear the Model Criminal Code Officers Committee used the phrase 'unwilled bodily movement'. It was intended by the use of this phrase to exclude certain conduct that should not be categorised as involuntary such as the 'reflex responses of a skilled sportsman'.²⁵

A further example of a conscious unwilled act is where another person has control over the bodily movements of the accused. In *Holmes*,²⁶ Jackson SPJ provided such an example:

Let us say an accused person is alleged to have wounded another. If it is shown that he had a knife in his hand but was overpowered by another and forced to do the wounding, the wounding would then not be an act of will of the man but the will of the other man who forced him to do it even though he was conscious at the time.²⁷

Similarly, an act of the accused may be considered involuntary because of the physical conduct of the victim. In *Ugle*,²⁸ for example, the accused was holding a knife during a struggle with the deceased. The deceased died from a knife wound to the chest and the accused was convicted of murder. The accused claimed that during the struggle he put up his hand to fend off the deceased and did not deliberately use the knife to stab the deceased. The accused appealed against his conviction. One issue was whether the accused deliberately inserted the knife into the deceased or whether the deceased impaled himself on the knife.²⁹ The accused argued that the trial judge should have directed the jury to consider whether the act of the accused was unwilled in accordance with s 23 of the Code. The High Court unanimously held that the jury should have been directed about unwilled acts under the Code.³⁰

The discharging of firearms

The argument that the death-causing act was involuntary is sometimes raised in cases involving the discharging of a firearm. The identification of the relevant act for the purpose of s 23 of the Code has proved difficult in these cases. There are two main approaches that have been adopted when identifying the death-causing act. The broad view is that the death-causing act includes all of the physical acts from the time the accused presented the

19. An unconscious unwilled act may be an act that takes place while the accused is sleeping. In *Jiminez* [1992] HCA 14, [9] the accused was convicted of culpable driving. The accused fell asleep while driving and the majority of the High Court held that the actions of the accused at the time he was asleep were not voluntary. The accused could not be held criminally responsible for the dangerous driving that took place while he was asleep. However, depending upon the circumstances an accused may be held criminally responsible for driving dangerously if the accused was aware that he or she was tired and had sufficient warning to stop driving.
20. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 282; Yeo S, 'Putting Voluntariness Back into Automatism' [2001] *Victoria University of Wellington Law Review* 15, 2–3. See also *Ryan* (1967) 121 CLR 205, 214–15 where Barwick CJ emphasised that although the term 'automatism' is convenient the important factor is whether there is a lack of will. Similarly, in *Falconer* (1990) 171 CLR 30, 72–73, Toohey J stated that under the Code it is necessary to determine whether the relevant act occurred independently from the accused's will and that automatism is 'merely a fact going to voluntariness'.
21. For example, in *Williams* (1990) 50 A Crim R 213 the accused and the victim were involved in fight. The accused was wounded and during a subsequent struggle the accused bit the victim's ear. It was contended by the accused that the biting of the victim's ear was unwilled because it was 'an involuntary response to pain' that occurred when the victim attacked the accused's injured face. It was held by the New South Wales Court of Criminal Appeal that on the evidence it was open to the jury to doubt whether the act of biting the victim's ear was voluntary: at 216–17. In *Ahadizad v Emerton* (2002) ACTSC 20 it was argued on behalf of the accused that he was not guilty of driving dangerously because at the relevant time the accused was suffering from a sneezing attack. The accused appealed against his conviction and the Supreme Court of the Australian Capital Territory dismissed the appeal. Miles CJ observed that having a sneezing attack does not necessarily mean that the person loses all control over his or her bodily actions: at [6]. It was open in this case for the magistrate to find that the accused could have applied the footbrake. Miles CJ also noted that it was observed 'in *Hill v Baxter* [1958] 1 QB 277 that a loss of control caused by a sudden attack by a swarm of bees is sufficient to render involuntary acts done in mechanistic response to the attack': at [6].
22. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [11.4].
23. (1967) 121 CLR 205.
24. Ibid 245–46.
25. MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 13.
26. [1960] WAR 122.
27. Ibid 124.
28. [2002] HCA 25.
29. Ibid [30] (Gummow and Hayne JJ; Gaudron J concurring).
30. Ibid [5] (Gaudron J), [30] (Gummow and Hayne JJ), [49] (Kirby J), [75] (Callinan J). Gummow and Hayne JJ observed that at the retrial, it would be necessary to consider whether the accused was criminally responsible for the death of the deceased on the basis of criminal negligence (because he was in control of a dangerous thing): at [24]; see also [55] (Kirby J).

loaded firearm until the firearm is discharged. The narrow view is that the relevant death-causing act is the final pulling of the trigger. In some cases it has been argued that, although the presentation of the loaded weapon was voluntary, the final act of pulling the trigger was an act that occurred independently from the will of the accused. Generally, the broader view has been adopted by the courts;³¹ however, recently the majority of the High Court favoured a narrower interpretation of the relevant death-causing act. In *Murray*,³² the accused approached the deceased holding a loaded shotgun following an argument with the deceased in the accused's house. The accused said that the deceased stood up and as a result the accused lifted the gun to waist height. The deceased's arm 'shot out' and something hit the accused on the head. The accused said that he only intended to frighten the deceased and to get him to leave his house. He denied deliberately pulling the trigger.³³ The majority of the High Court identified the relevant act in narrow terms, stating that it was necessary to consider whether the final pulling of the trigger was willed.³⁴

It is important to emphasise that in cases where death results from the use of a firearm, criminal negligence will

often be determinative of criminal responsibility.³⁵ If by adopting a narrow view of the relevant death-causing act it is concluded that the pulling of the trigger occurred independently from the will of the accused, it will still be necessary to consider whether the accused was negligent to the criminal standard in the circumstances.³⁶ The presentation of a loaded firearm would invariably meet this standard. Accordingly, such an accused would be convicted of manslaughter in any event.

Automatism

The term 'automatism' is generally used to refer to involuntary or unwilling conduct that occurs while the accused is unconscious.³⁷ In other words, in a state of automatism, the subject's 'bodily movements occur without direction by the conscious mind'.³⁸ However, the term has also been used in reference to involuntary conduct that occurs when the consciousness of the accused is impaired (for example, a dissociative state caused by concussion).³⁹ It is important to emphasise that automatism is not a separate defence or special legal rule.⁴⁰ The relevant defence in Western Australia is unwilling conduct under s 23 of the Code.⁴¹

31. See for example *Ryan* (1967) 121 CLR 205, 231 (Taylor and Owen JJ), 233 (Menziez J) where the majority of the High court suggested that the relevant act encompassed both the presentation of the rifle and the pulling of the trigger. Taylor and Owen JJ stated that it was not possible to isolate the pulling of the trigger from the conduct of presenting a loaded weapon: at 231. Similarly, Menziez J said that the relevant act causing death could not be limited to simply pulling the trigger: at 233. On the other hand, Barwick CJ took a narrower view and observed that the relevant act could be the presentation of the weapon or the discharging of the weapon: at 217–19. In *Falconer* (1990) 171 CLR 30, 39 the accused shot and killed her husband. Mason CJ, Brennan and McHugh JJ held that the relevant act was the discharging of the loaded gun. They stated that the act is more than just the 'contraction of the trigger finger' but the act does not 'extend to the fatal wounding'. Gaudron J also stated that the act was the discharging of the loaded gun: at 81. See also *Agnew* [2003] WASCA 188, [37] where Murray J (Anderson J concurring) followed the view expressed by Mason CJ, Brennan and McHugh JJ in *Falconer*.
32. [2002] HCA 26.
33. There was also evidence that the weapon was old and had a tendency to discharge if struck. When discussing the defence of unwilling conduct, Gummow and Hayne JJ took a broad view of the meaning of the word act, stating that 'it is important to avoid an overly refined analysis': see *ibid* [49]. They said that the act of discharging the shotgun involved a 'composite set of movements' (the loading, cocking, presentation and firing of the gun) and that there was nothing to support the view that the set of movements 'taken as a whole' was unwilling: at [53].
34. Gaudron J held that it was necessary to consider whether the gun had discharged without any pressure being applied to the trigger or whether it was 'discharged by an unwilling reflex or automatic motor action': *ibid* [17]. Kirby J agreed that it was necessary for the jury to decide whether the final death-causing act of pulling the trigger was unwilling: at [88]. Callinan J also expressed the view that in this case there was evidence that the discharging of the gun may have been unwilling: at [153].
35. As Kirby J observed in *Murray* even if the jury were not satisfied beyond reasonable doubt that the pulling of the trigger was willed they would still have to decide if the accused was criminally responsible for manslaughter by criminal negligence: *ibid* [90].
36. See Chapter 3, 'Manslaughter: Manslaughter by criminal negligence'.
37. In *Cottle* [1958] NZLR 999, 1007 Gresson P stated that automatism 'strictly means action without conscious volition'. The Commission notes that although the term 'automatism' has sometimes been used as an alternative to 'involuntary' (see eg Yannoulidis S, 'Mental Illness, Rationality and Criminal Responsibility: Tropes of insanity and related defences' (2003) 25 *Sydney Law Review* 189, 196), it is more generally referred to as an example of involuntariness: see Yeo S, 'Putting Voluntariness Back into Automatism' [2001] *Victoria University of Wellington Law Review* 15, 1; Fairall P 'Voluntariness, Automatism and Insanity: Reflections on Falconer' (1993) 17 *Criminal Law Journal* 81, 81. The Commission agrees that 'automatism' is best described as a category of involuntary conduct and, therefore, the Commission has discussed fully conscious unwilling acts (such as reflex actions) separately from automatism.
38. Colvin E, Linden S & McKechnie J, *Criminal law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [17.23]. Colvin et al explain that the term 'dissociation' is also used in this context and means that the 'body is acting separately from the conscious mind'.
39. Yeo observed that 'automatism is not confined to fully unconscious states, but extends to conduct which is performed semi-consciously and involuntarily': see Yeo S, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 14.
40. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 280; *Hall* (1988) 36 A Crim R 371 (Roden J).
41. Toohey observed in *Falconer* (1990) 171 CLR 30, 69 that s 23 'is wide enough to include automatism though it is not confined to that condition'. Callinan J stated in *Murray* [2002] HCA 26 [149] that the defence of unwilling acts is not limited to automatism.

Examples of automatism include:

- sleepwalking;⁴²
- epilepsy;⁴³
- hypoglycaemia;⁴⁴
- dissociation caused by a physical blow or other physical cause⁴⁵ (specific examples under this category include involuntary conduct carried out by a person who is suffering from concussion after receiving a blow to the head⁴⁶ or following the administration of an anaesthetic);⁴⁷ and
- dissociation caused by psychological trauma ('psychological blow' automatism). In *Radford*,⁴⁸ it was held that involuntariness caused by psychological or emotional stress is no different in principle from involuntariness caused by an external physical factor.⁴⁹ All members of the High Court in *Falconer* agreed that

sane automatism may result from psychological trauma or stress in the same way as automatism may be caused by external physical force.⁵⁰

The distinction between sane automatism and insane automatism

Automatism and the defence of insanity⁵¹ (under s 27 of the Code) are closely related because both defences deal with the concept of volition.⁵² Under s 23 of the Code an accused is entitled to an outright acquittal if the prosecution cannot prove beyond reasonable doubt that the relevant act of the accused was willed. However, under s 27 of the Code, if an accused was suffering from a mental impairment and did not have the capacity to control his or her actions, then the accused is acquitted on account of unsoundness of mind and subject to the dispositions provided under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).⁵³

42. See *Holmes* [1960] WAR 122, 124 where Jackson SPJ referred to a case where a man attacked his child believing that the child was a wild animal while he was having a nightmare; *Parks* [1992] 2 SCR 871, 908 where the Supreme Court of Canada held that sleepwalking could constitute sane automatism. See also *Falconer*, ibid 61 (Deane and Dawson JJ), 72 (Toohey J) where sleepwalking is described as an example of sane automatism. In contrast, sleepwalking has been held to constitute a disease of the mind in England: see *Burgess* [1991] 2 All ER 769, as cited in *Parks* [1992] 2 SCR 871, 890 Lamer CJ. It has been argued that there is medical evidence demonstrating that sleepwalking in some cases may be regarded as a mental illness and therefore it would come under the umbrella of insanity rather than automatism: see Ridgway P, 'Sleepwalking – Insanity or Automatism' (1996) 3(1) *Murdoch University Electronic Journal of Law* [37]–[38].
43. *Holmes* [1960] WAR 122, 125 (Jackson SPJ); *Falconer*, ibid 61 (Dawson and Deane JJ).
44. In *Quick* [1973] 1 QB 910, 922–23 it was held that hypoglycaemia could be relied upon to support sane automatism because it was not a disease of the mind. Hypoglycaemia is caused by an excess of insulin (or low blood sugar). See also *Falconer*, ibid 61 (Deane and Dawson JJ), 72 (Toohey J).
45. *Falconer*, ibid.
46. In *Cooper v McKenna* (1960) Qd R 406, 419 (Stable J; Matthews J concurring) the accused was acquitted of dangerous driving. The relevant driving occurred after the accused had received a blow to his head playing football. It was held that the accused's concussion did not amount to insane automatism. See also *Wogandt* (1988) 33 A Crim R 31, 35 (Campbell J), 41 (McPherson J; Thomas J concurring) where it was held that evidence that the accused had suffered a blow to the head during a football match was capable of raising the defence under s 23 of the Queensland Code. In *Hall* (1988) 36 A Crim R 369, 371 (Roden J), 381 (Allen J), 381 (Loveday J) the accused was convicted of stealing, breaking and entering and arson. The accused suffered a head injury the day before the incident during a motor vehicle accident. The accused successfully appealed against the conviction on the basis that the medical evidence that the accused was in a state of automatism as a consequence of swelling to the brain (cerebral oedema) supported the contention that the acts were involuntary.
47. *Radford* (1985) 20 A Crim R 388, 397 (King CJ).
48. Ibid.
49. Ibid 397–98 (King CJ; Bollen and Johnston JJ concurring). The accused shot and killed the deceased while she was shouting at him and while she was armed with a cricket bat. The accused believed that the deceased was responsible for his marriage breakdown. There was expert evidence that the accused was in a dissociative state arising from extreme stress and that the accused was not suffering from any disease of the mind. The trial judge refused to leave the issue of sane automatism to the jury. Although noting that the proposition that the firing of the gun seven times into the body of the deceased was unwilled and that this involuntary conduct was the reaction of a *sound mind* to the stresses experienced by the accused was questionable, the court held that the issue should have been left to the jury for its assessment.
50. (1990) 171 CLR 30, 54 (Mason CJ, Brennan and McHugh JJ), 73 (Toohey J), 85 (Gaudron J). Deane and Dawson JJ indicated general agreement with the reasons of Toohey and Gaudron JJ. In *Falconer* the accused was charged with the wilful murder of her husband. At the trial the accused wished to call two psychiatrists to give evidence that at the time of shooting her husband she was in a dissociative state. There was a history of violence by the deceased against the accused and she had recently discovered that the deceased had sexually abused her daughters when they were younger. On the day of the incident, among other things, the deceased had sexually assaulted the accused, taunted her and tried to grab her hair. The accused claimed that she remembered nothing from that point until she was on the floor next to her dead husband. The trial judge refused to allow the accused to call the psychiatric evidence. All seven judges of the High Court held that the evidence should have been admitted. However, Mason CJ, Brennan and McHugh JJ queried whether the evidence would have been sufficient to demonstrate that the state of dissociation was not due to a mental illness: at 59. Another example of psychological blow automatism is an English case in which a female accused was charged with robbery and assault occasioning bodily harm. Evidence was presented at her trial that she had been sexually assaulted three days earlier and that at the time of the incident she was acting in a dissociative state as a result of suffering from post traumatic stress disorder. It was held that there was sufficient evidence of sane automatism for the jury to be directed about the defence: see Smith J & Birch D, 'Case and Comment: *R v T*' [1990] *Criminal Law Reports* 256, 257.
51. The Commission has recommended that the defence under s 27 of the Code be renamed 'Mental Impairment': see Chapter 5, 'Insanity – Mental Impairment', Recommendation 33.
52. This is in contrast to the position at common law, where the defence of insanity only applies if the accused shows that he or she did not understand the nature and quality of the act or did not know that the act was wrong. Thus, where there is a disease of the mind and involuntary conduct the accused will still be required to establish either of these requirements. Although unlikely, there is the possibility that at common law an accused who was suffering from a disease of mind and acted involuntarily could be convicted because he or she would be unable to demonstrate the requirements of insanity and would also be precluded from relying on sane automatism: see *Radford* (1985) 20 A Crim R 388, 395–97 (King CJ; Bollen J concurring), 400 (Johnston J).
53. See Chapter 5, 'Insanity – Mental Impairment'.

In any case where it is asserted that the accused did not have any control over his or her physical actions it is necessary to determine whether s 23 or s 27 of the Code is relevant. This issue is of paramount importance bearing in mind the different consequences of successfully relying on each provision. The difference between involuntary conduct under s 23 and involuntary conduct under s 27 is often referred to as the distinction between sane automatism and insane automatism. The defence of insanity under s 27 applies if the accused was in 'a state of mental impairment'.⁵⁴ Accordingly, whether a particular condition is classified as sane or insane automatism depends upon the definition of mental impairment under the Code.⁵⁵

Mental impairment is defined in s 1 of the Code as 'intellectual disability, mental illness, brain damage or senility'. Under s 1 of the Code the term 'mental illness' is defined as

an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.

At common law the defence of insanity refers to a disease of the mind. In *Radford*, King CJ observed that automatism necessarily involves some 'disturbance of the mental

faculties' but a disease of the mind is an 'underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli'.⁵⁶

The definition of 'disease of the mind' at common law is almost identical to the definition of 'mental illness' under the Code. However, there is one important difference: the definition of mental illness under the Code excludes the reaction of a healthy mind to extraordinary stimuli but the common law definition excludes the reaction of a healthy mind to *external* extraordinary stimuli.⁵⁷ Thus, under the Code (in contrast to the common law) it is arguable that the reaction of a healthy mind to extraordinary *internal* stimuli is also excluded from the definition of mental illness.⁵⁸ Conditions that may fall within the meaning of *internal* stimuli include epilepsy,⁵⁹ arteriosclerosis,⁶⁰ hyperglycaemia,⁶¹ and cerebral tumour.⁶² There are conflicting views about whether these types of conditions should be categorised as a mental illness and therefore fall under the umbrella of the insanity defence.⁶³

The courts have developed two principal tests for determining whether a state of automatism is caused by mental illness.⁶⁴ The 'recurrence test' stipulates that if

54. In addition to proving 'a state of mental impairment' it is also necessary for the accused to establish that he did not have the capacity to understand what he or she was doing, the capacity to control his or her actions, or the capacity to know that he or she ought not to have done the act or made the omission.
55. For further discussion of the definition of mental impairment, see Chapter Five, 'Insanity – Mental Impairment: The insanity defence in Western Australia'.
56. (1985) 20 A Crim R 388, 396.
57. The definition of mental illness was inserted into the Code by s 6 of the *Mental Health (Consequential Provisions) Act 1996* (WA). The Commission has been unable to find any Hansard reference or any other material to explain why the word 'external' was omitted. In Project No. 69 the Commission referred to the distinction between a mental illness and the 'reaction of a healthy mind to extraordinary external stimuli'. The Commission recommended that the phrase 'mental disease or natural mental infirmity should be replaced with 'abnormality of mind (from mental illness or intellectual disability)'. It was noted that this amendment was not intended to change the scope of s 27 of the Code: see LRCWA, *The Criminal Process and Persons Suffering From Mental Disorder*, Project No. 69, Report (1991) 13–14. The Model Criminal Code also provides that a 'condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness': see MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 13.
58. Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 492. The Commission notes that, like Western Australia, the definition of mental illness under s 43A of the Northern Territory Code excludes the word external.
59. In *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 406 (Viscount Kilmuir LC), 415 (Denning L), 417 (Morris of Borth-y-Gest L; Tucker L & Hodson L concurring) it was held that psychomotor epilepsy was a disease of the mind.
60. At common law arteriosclerosis (hardening of the arteries) has been held to constitute a disease of the mind: see *Kemp* [1957] 1 QB 399, 408 (Devlin J). In that case the accused attacked his wife for no apparent reason causing her grievous bodily harm. The accused was suffering from arteriosclerosis which caused temporary congestion of blood to the brain and a temporary loss of consciousness.
61. Hyperglycaemia (an excess of blood sugar) has been treated as a disease of the mind: see *Hennessy* [1989] 2 All ER 9, 15.
62. In *Cottle* [1958] NZLR 999, 1027–28 North J commented that despite the decision of Barry J in *Charlson* (1955) 39 Cr App R 37 he would have thought that a cerebral tumour was a disease of the mind.
63. See Murray MJ, *The Criminal Code: A general review* (1983) (the Murray Review) 40–41. The Murray Review observed that the classification of epilepsy varies between jurisdictions. It was stated that judges in Western Australia have addressed juries based on the comments of Jackson SPJ in *Holmes* [1960] WAR 122, 125 that epilepsy may constitute automatism under s 23 of the Code. In contrast, it was noted that in Queensland epilepsy has been dealt with under s 27 of the Queensland Code. Under the Queensland Code there is no definition of 'disease of the mind' and the common law interpretation would apply. In *Batt* [2005] QCA 444, [9] (McPherson JA; Keane JA and Mackenzie J concurring) it was stated that there the case authority in Queensland that epileptic automatism does not fall within the provisions of s 23 of the Code. It is a mental disease or natural mental infirmity within the meaning of s 27 of the Code. The Murray Review stated that an accused who was unable to control his or her actions as a result of epilepsy should not be acquitted under s 23. Instead, such an accused should be acquitted on account of unsoundness of mind and subject to the dispositions available for mentally impaired accused. In *Youssef* (1990) 50 A Crim R 1, 5 (Hunt J; Wood and Finlay JJ concurring) it was observed that epilepsy may result in a state of sane or insane automatism depending upon the precise cause of the epilepsy. In *Meddings* [1966] VR 306, 310, as cited in Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 287 the Supreme Court of Victoria held that epilepsy was a disease of the mind. It has been argued that the categorisation of epilepsy as a mental illness is inappropriate. Williams stated that epilepsy is a 'common condition, and certainly not generally regarded by the community as a mental illness': Williams C, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 720.
64. For further discussion of these tests, see VLRC, *Defences to Homicide*, Final Report (2004) [5.137]–[5.138]; Bronitt S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2nd ed., 2005) 232–36.

the condition is likely to recur then the accused is suffering from a mental illness (insane automatism).⁶⁵ The 'internal/external' test requires consideration of the cause of the state of automatism. If there is an internal cause then the condition will be categorised as insane automatism but if the cause is external then it is sane automatism.⁶⁶ These tests have been criticised. The 'recurrence' test is not always conclusive; for example, sleepwalking may be prone to recur but is generally classified as sane automatism.⁶⁷ The 'internal/external' test has been similarly disapproved; sleepwalking and hypoglycaemia could be classified as internal conditions but have been usually treated as sane automatism.⁶⁸ The Canadian Supreme Court emphasised that these two tests should be treated as guidelines and are not necessarily decisive. In *Stone*,⁶⁹ the majority of the Canadian Supreme Court suggested that a more 'holistic' approach was required when categorising conditions as sane or insane automatism. Such an approach would need to take into account underlying policy concerns, such as the protection of the community.⁷⁰

In cases of psychological blow automatism a third test has been used. The 'sound/unsound' mind test is a qualification of the 'internal/external' test. In *Radford*,⁷¹ King CJ stated that:

The significant distinction is between the reaction of an unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress producing factors, on the other hand.⁷²

Thus the 'sound/unsound' mind distinction goes further than simply looking at whether the cause was internal or external. If the mind of an ordinary or normal person would not have entered into a dissociated state as a consequence of the psychological trauma then the state of automatism will be classified as insane.⁷³

The Commission is of the view that the absence of the word 'external' in the definition of mental illness under the Code enables a more 'holistic' approach when considering whether a particular condition should be classified as a mental illness. Because strict adherence to the internal/external distinction is not required, courts in Western Australia are able to consider all of the abovementioned tests and, when necessary, take into account any relevant policy considerations. Therefore, the Commission has concluded that the current definition of mental illness under the Code is adequate and does not require amendment.⁷⁴

The relationship between s 23 and s 27 of the Code

As explained above, automatism and insanity are closely linked. In any case where it is asserted that the relevant conduct was involuntary because the accused was unconscious or in a state of impaired consciousness, the critical issue is whether the state of automatism was caused by mental impairment. The High Court considered the relationship between s 23 and s 27 of the Code in *Falconer*. It was held that if lack of volition is caused by mental

65. The 'recurrence' test was referred to in *Falconer* (1990) 171 CLR 30, 49 (Mason CJ, Brennan and McHugh JJ), 85 (Gaudron J).

66. The 'internal/external' test was approved by Mason CJ, Brennan and McHugh JJ in *Falconer*, *ibid*, 49.

67. Williams C, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 718–19.

68. Yeo S, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 15–16. See also Gault S, 'Dissociative State Automatism and Criminal Responsibility' (2004) 28 *Criminal Law Journal* 329, 342; McSherry B, 'Defining What is a 'Disease of the Mind': The untenability of current legal interpretations' (1993) 1 *Journal of Law and Medicine* 76, 86. In *Falconer* (1990) 171 CLR 30, 75, 78 Toohey J criticised the 'internal/external' test but also held that the 'reaction of a sound mind to external stimuli' does not fall within the definition of insanity under s 27 of the Code (emphasis added).

69. [1999] 2 SCR 290.

70. *Ibid* [203] & [218] (L'Heureux-Dube, Gonthier, Cory, McLachlin and Bastarache JJ). See also *Parks* [1992] 2 SCR 871, 902) where La Forest, L'Heureux-Dube and Gonthier JJ observed that underlying the 'recurrence' test and the 'internal/external' test is the concern for public safety. Noting that the 'internal/external' test has been widely criticised they observed that the test is 'really meant to be used only as an analytical tool, and not as an all encompassing methodology'. In this case the majority held that sleepwalking could be categorised as sane automatism noting that sleepwalking is difficult to feign and the classification of sleepwalking as sane automatism would not 'open the floodgates' to claims of involuntariness.

71. (1985) 20 A Crim R 388.

72. *Ibid* 397–98.

73. In *Falconer* (1990) 171 CLR 30, 55 Mason CJ, Brennan and McHugh JJ referred to the standard of mental strength of an ordinary person and held that a temporary malfunction of the mind which is not prone to recur and to 'which the mind of an ordinary person would be subject if exposed to the same psychological trauma is neither a mental disease nor a natural mental infirmity'. Similarly, Gaudron J referred to mental states experienced by 'normal' people: at 85.

74. The Commission consulted with Professor Neil Morgan who expressed the view that the current definition of 'mental illness' was appropriate and the 'internal/external' test should not necessarily be determinative of whether a particular condition is categorised as a mental illness: Professor Neil Morgan, UWA Law School, consultation (23 May 2007). The Commission also notes that the definition of mental illness under the Model Criminal Code provides that the reaction of a healthy mind to extraordinary external stimuli, although not constituting a mental illness, may be 'evidence of a mental illness if it involves some abnormality and is prone to recur': see MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 32. This additional sentence is included in the statutory definitions of mental illness under s 43A of the *Criminal Code 1983* (NT) and s 27 of the *Criminal Code 2002* (ACT). It is also included as a note in s 269A of the *Criminal Law Consolidation Act 1935* (SA). The Commission considers that this additional sentence is a clarification of the 'internal/external' test and, therefore, because Western Australia does not expressly include the 'internal/external' test, the additional sentence is unnecessary.

disease or natural mental infirmity,⁷⁵ then criminal responsibility is determined by s 27 of the Code. On the other hand, if lack of volition is caused by the 'operation of events upon a sound mind', criminal responsibility is determined by s 23 of the Code.⁷⁶ It is also important to note that because s 28 of the Code exclusively covers how criminal responsibility is determined when an accused is intoxicated, s 23 of the Code cannot be relied upon if the state of automatism is caused by intoxication.⁷⁷ In summary, the defence of unwilling acts under s 23 of the Code is subject to the defences of insanity and intoxication under ss 27 and 28 of the Code.⁷⁸

On the face of it, it appears quite simple that if a state of automatism is caused by mental impairment criminal responsibility will be determined by s 27 and if the state of automatism is not caused by mental impairment then s 23 will be relevant. However, the connection between s 23 and s 27 of the Code is complicated by the different burdens and standards of proof that apply in each case.⁷⁹ The prosecution has the ultimate burden of proving beyond reasonable doubt that an act of the accused did not occur independently from the exercise of the accused's will. But the accused has the evidential burden to demonstrate that there is sufficient evidence to support the contention that the conduct was unwilling. In contrast, the accused has both the evidential burden and the ultimate burden of proving on the balance of probabilities that he or she was insane at the time of doing the relevant act.⁸⁰

In *Falconer* the High Court considered whether there should be any change to these rules concerning the burden of proof. Mason CJ, Brennan and McHugh JJ

expressed the view that an accused who raises automatism should have the burden of proving on the balance of probabilities that the 'malfunction of the mind' was transient, that it was not likely to recur, and that it was caused by trauma 'which the mind of an ordinary person would be likely not to have withstood'.⁸¹ They suggested that once these three 'exempting' conditions had been proven by the accused the prosecution would then be required to prove beyond reasonable doubt that the actions of the accused were voluntary or willed.⁸² However, the majority of the High Court was not prepared to interfere with the rules in relation to the burden of proof.⁸³ It was held that if the accused satisfies the evidential burden in relation to sane automatism then the prosecution must disprove that the act was unwilling beyond reasonable doubt. If the prosecution cannot meet this burden then the accused will be acquitted. If the prosecution can disprove sane automatism then—if there is also evidence of insane automatism—the jury may acquit the accused on account of unsoundness of mind if they are satisfied on the balance of probabilities that the accused was insane at the time of committing the offence.

Because the accused carries the evidential burden in relation to the defence of unwilling conduct under s 23 of the Code, a trial judge will not be required to direct the jury to consider unwilling conduct unless there is sufficient evidence to support the defence.⁸⁴ In *Falconer* it was observed that in practice this will require expert medical evidence.⁸⁵ It is a question of law for the trial judge whether the evidence presented during the trial supports a finding of mental impairment under s 27 of the Code.⁸⁶ If the only evidence presented at a trial points to insane automatism, there will be no requirement to consider s 23 of the Code.

75. Section 27 of the Code now refers to 'mental impairment'.

76. *Falconer* (1990) 171 CLR 30, 60–61 (Deane and Dawson JJ); see also 43 (Mason CJ, Brennan and McHugh JJ) & 82 (Gaudron J). In *Hawkins* (1994) 179 CLR 500, 510 the High Court confirmed that if the only evidence called in support of a claim of involuntariness establishes that the accused had a mental disease or natural mental infirmity, then that evidence cannot be relied upon to support a claim of sane automatism.

77. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [11.4] & [17.24]. In *Battle* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, No 149 of 1992, Franklyn J, 26 February 1993) 10 it was held that a state of automatism caused solely by voluntary intoxication cannot afford an excuse within s 23 of the Code.

78. In 1983 the Murray Review recommended that s 23 of the Code should be amended to expressly provide that it is subject to ss 26, 27 and 28 of the Code: see Murray MJ, *The Criminal Code: A general review* (1983) 41. Since that time, however, the decision in *Falconer* has made it clear that s 23 of the Code is subject to the defence of insanity. The real difficulty arises in cases where there is evidence supporting both sane and insane automatism.

79. *Falconer* (1999) 171 CLR 30, 62 (Deane and Dawson JJ); Murray, *ibid*. The issue also arises at common law because of the different burdens of proof in relation to voluntariness and insanity: see *Youssef* (1990) 50 A Crim R 1, 9 (Hunt J; Wood and Finlay JJ concurring); *Radford* (1985) 20 A Crim R 388, 395 (King CJ). See also Dixon O, 'A Legacy of Hatfield, M'Naughten and Maclean' (1957) 31 ALJ 255, 256.

80. At common law the accused must also provide some evidence (or point to some evidence) to support a finding of sane automatism: see *Cottle* [1958] NZLR 999, 1014 (Gresson P), 1025 (North J), 1033 (Cleary J); *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 405–407 (Viscount Kilmuir LC), 413 (Denning L), 417 (Morris of Borth-y-Gest L; Tucker L and Hodson L concurring).

81. (1990) 171 CLR 30, 56.

82. *Ibid* 56–57.

83. *Ibid* 63 (Deane and Dawson JJ), 77 (Toohey J), 86 (Gaudron J).

84. See *Middleton* [2000] WASCA 213, [55] (Anderson J; Kennedy and Wheeler JJ concurring); *Pezzino* [2001] WASCA 256, [57] (McKechnie J).

85. (1990) 171 CLR 30, 61 (Deane and Dawson JJ), 83–84 (Gaudron J).

86. *Ibid* 60 (Deane and Dawson JJ).

An example of such a case is *Nolan*.⁸⁷ The accused (a prisoner) stabbed another prisoner and was subsequently convicted of murder. The accused believed that the deceased was the man responsible for sexually abusing his son. At his trial it was argued that the stabbing of the deceased was an act that occurred independently of his will under s 23 of the Code. It was suggested that the discovery that the deceased was in prison, the history of sexual abuse against his son and the accused's own history of being sexually abused may have triggered a dissociative state.⁸⁸ A psychiatrist called by the accused explained that the accused had a 'permanent long-standing personality disorganisation due to the trauma of his childhood' and that the discovery that the deceased was in prison aggravated that condition.⁸⁹ The prosecution submitted that the accused was suffering from a mental disease because the accused's condition was long-standing and there were physical changes in the brain.⁹⁰ The trial judge ruled that the evidence of the psychiatrist was inadmissible in relation to the question of voluntariness under s 23 but it was relevant to the question of insanity under s 27.⁹¹ The Western Australian Court of Criminal Appeal held that the trial judge was correct.⁹²

However, as recognised in *Falconer*, there may be cases where there is evidence in support of both sane and insane automatism.⁹³ This may arise when there is conflicting expert evidence about the cause of the state of automatism. It may also arise when the evidence reveals more than one possible cause for the state of automatism. One cause may be consistent with sane automatism and another may be consistent with insane automatism.⁹⁴ In *Joyce*,⁹⁵ for example, the accused was charged with dangerous driving causing grievous bodily harm. The accused claimed that he was in a dissociative state at the

time of driving. The psychiatric evidence revealed two possible and conflicting causes – psychological pressures from personal family issues or the fact that accused was suffering from bipolar disorder.⁹⁶ In this case the jury were directed in relation to both sane automatism and insane automatism.⁹⁷

Criticisms of automatism

Complexity

One of the main difficulties with automatism is the complexity associated with the categorisation of automatism as either sane or insane. In addition, as discussed above, the different rules in relation to the burden of proof further complicate this aspect of the law. Underlying the various legal tests for determining whether automatism arises from mental impairment is the concern that an accused may be acquitted and able to walk free in circumstances where there is evidence to demonstrate that he or she suffers from a mental illness and is a potential danger to the community. In *Falconer*, Deane and Dawson JJ observed that:

The law is possibly open to the criticism that it envisages the release of a person who may, on the balance of probabilities, be violently insane.⁹⁸

This concern is particularly valid in cases with conflicting expert witnesses.⁹⁹ For example, an accused may present expert evidence that the act was unwilled because he was in a dissociated state caused by psychological trauma. This expert may give evidence that the dissociation was not caused by mental illness. The prosecution may then call its own expert who gives evidence that the accused was suffering from a mental illness at the time. As a consequence of the burden of proof in relation to s 23 of

87. (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, CCA No. 99 of 1995, 22 May 1997).

88. *Ibid* 12 (Malcolm CJ; Pidgeon and Murray JJ concurring).

89. *Ibid* 18.

90. *Ibid* 34.

91. *Ibid* 39–40.

92. *Ibid* 57.

93. (1990) 171 CLR 30, 62 (Deane and Dawson JJ), 70 (Toohey J). See also Fairall P 'Voluntariness, Automatism and Insanity: Reflections on Falconer' (1993) 17 *Criminal Law Journal* 81, 89.

94. Fairall referred to the difficulty in cases involving multiple possible causes: see Fairall, *ibid* 82.

95. [2003] NSWCCA 84.

96. *Ibid* [8].

97. *Ibid* [4], [10] (Hidden J). The jury were unable to reach a verdict.

98. (1990) 171 CLR 30, 63.

99. McSherry suggested that one way of resolving the difficulties arising from conflicting expert opinions is to ensure that expert witnesses cannot give evidence about the 'ultimate issue': see McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and Law* 44, 46. The ultimate issue in relation to automatism is whether the conduct of the accused was in fact willed. The Commission does not consider that 'tightening' up the rules of evidence in relation to the 'ultimate issue' rule will prevent expert witnesses from giving conflicting opinions. For example, one expert might give evidence that people who are acting in a dissociative state are generally unable to control their actions. Another expert in the same case may say that from experience such people are able to exercise choice. Strict compliance with the 'ultimate issue' rule will not prevent juries from being faced with conflicting expert opinions. As another example, see *Leonboyer* [2001] VSCA 149 where there was conflicting expert evidence about whether goal-directed behaviour was consistent with automatism.

the Code, the accused may be acquitted because the prosecution cannot prove beyond reasonable doubt that the conduct was willed. At the same time the evidence from the prosecution expert witness may have been sufficient to show that the accused was insane on the balance of probabilities. It is important to emphasise that an accused can only be acquitted on the basis of sane automatism if there is evidence of automatism arising from a cause other than mental impairment. If the only evidence points to insane automatism there is no possibility of an outright acquittal. In this situation if the accused is unable to prove on the balance of probabilities that he or she was insane at the time of committing the offence, the accused cannot then rely on the same evidence to argue that the act was unwilled on the basis of sane automatism.¹⁰⁰

One possible solution would be to deal with all cases of automatism under the defence of insanity.¹⁰¹ From one perspective this option is appealing because it would eliminate the complex issue of deciding which conditions amount to sane automatism and which conditions constitute mental impairment under s 27 of the Code.¹⁰² It is arguable that if more flexible dispositions are available for accused who are acquitted on account of unsoundness of mind then there will be adequate scope to determine the appropriate disposition in any particular case.¹⁰³ The Commission received one submission (from Justice Wheeler) suggesting that automatism could be included within an extended defence of insanity. Nonetheless, Justice Wheeler acknowledged that some automatic states may be transient and unlikely to recur.¹⁰⁴

The Victorian Law Reform Commission (VLRC) observed that 'although the line between the mentally impaired

and the non-mentally impaired is very difficult to draw, it is nevertheless an important conceptual and legal distinction which should be maintained'.¹⁰⁵ Even with a degree of flexibility in the dispositions available for mentally impaired accused, the Commission does not consider that it is appropriate for automatism to be dealt with under s 27 of the Code. In response to the concern that a violent insane accused may be acquitted, Deane and Dawson JJ stated in *Falconer* that this is 'a matter to be dealt with by the means otherwise available for protecting the community from such persons and, if those means are thought to be inadequate, by legislative intervention'.¹⁰⁶ The Commission agrees with this view. Although there is the potential for an accused to be acquitted on the basis of sane automatism in circumstances where that accused may be suffering from a mental illness, it is important to emphasise that there are provisions to ensure that potentially dangerous mentally ill people are confined when necessary. A person may be detained involuntarily under the *Mental Health Act 1996* (WA) if that person has a mental illness that requires treatment and the treatment is necessary to protect the safety of any person.¹⁰⁷

As Fairall and Yeo have stated, in cases where the cause of automatism is disputed or unclear 'even if there is evidence which points to mental illness, if there is a reasonable hypothesis consistent with innocence and a sane mind, then the accused should be acquitted'.¹⁰⁸ In these circumstances, if the prosecution is unable to prove beyond reasonable doubt that the conduct of the accused was voluntary, the accused should be acquitted – as would be the case where there is no suggestion of mental illness but the prosecution are unable to prove voluntariness to the required standard.

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100. The Murray Review suggested that evidence which is insufficient to prove insanity may be relied upon by an accused to raise a reasonable doubt as to voluntariness under s 23 of the Code. Therefore, it was said that a 'poor case' of insanity could be turned into a 'good case of involuntariness': see Murray MJ, *The Criminal Code: A general review* (1983) 41. However, if the evidence only raises mental impairment (even if that evidence is weak) that evidence cannot support sane automatism: see *Williams* [1978] Tas SR 98, 105–106 (Neasey J), 110 (Nettlefold J); *Hawkins* (1994) 179 CLR 500, 510.
101. McSherry B, 'It's a Man's World: Claims of Provocation and Automatism in 'Intimate' Homicides' (2005) 29 *Melbourne University Law Review* 905, 927–28.
102. See generally McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and Law* 44, 47.
103. McSherry B, 'It's a Man's World: Claims of provocation and automatism in "intimate" homicides' (2005) 29 *Melbourne University Law Review* 905, 927–28. It has been observed that automatism developed partly because of the inflexible options available for accused found not guilty by reason of insanity: see Yannoulidis S, 'Mental Illness, Rationality and Criminal Responsibility' (2003) 25 *Sydney Law Review* 189, 195. Similarly, Williams argued that the availability of more flexible dispositions for accused found not guilty by reason of insanity would reduce the significance of the defence of automatism: see Williams C, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 735.
104. Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 5.
105. VLRC, *Defence to Homicide*, Final Report (2004) [5.156].
106. (1990) 171 CLR 30, 63.
107. The criteria for making a person an involuntary patient (set out in s 26 of the *Mental Health Act 1996* (WA)) are broader than the requirements of the defence of insanity. Section 4(1) of the Act provides that 'a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent'.
108. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 284.

Psychological blow automatism is liable to abuse

It has been argued that automatism caused by psychological trauma is easy to feign and hence the defence is liable to abuse.¹⁰⁹ In contrast to automatism caused by conditions such as epilepsy or diabetes, psychological blow automatism is difficult to independently substantiate.¹¹⁰ Psychiatric evidence called to support a state of dissociation arising from psychological trauma is often based upon the accused's lack of memory of the incident.¹¹¹ The VLRC observed a claim of amnesia is 'both very easy to make and very difficult to disprove'.¹¹² It explained that when an accused claims to have no memory of the incident there are three possibilities: the memory loss is feigned; the memory loss was caused *by* the trauma of the actual incident (for example, the killing); or the memory loss was caused by a dissociative state at the time of the incident.¹¹³

On the other hand, it is important to emphasise that the 'objective' assessment employed in cases of psychological blow automatism goes a long way to ensure that the concept is not abused. In *Falconer* Mason CJ, Brennan and McHugh JJ held that while psychological trauma may cause a dissociative state it will always be necessary to determine if that state of mind was caused by the psychological trauma or the 'natural susceptibility of the mind to affection by psychological trauma'.¹¹⁴ Therefore, in order to distinguish between sane and insane automatism caused by psychological trauma they held that the law must impose a standard of mental strength:

That standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane.¹¹⁵

Similarly, Gaudron J held that:

In general terms, a recurring state which involves some abnormality will indicate a mind that is diseased or infirm, but the fundamental distinction is necessarily between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal persons (as, for example and relevant to the issue of involuntariness, a state of mind resulting from a blow to the head) and those which are never experienced by or encountered in normal persons.¹¹⁶

As Yeo has observed, the ordinary person test is a 'formidable obstacle to a successful plea of sane automatism'.¹¹⁷ Ordinary people do not generally respond to stress by experiencing a state of automatism and therefore reliance on sane automatism will be unusual.¹¹⁸

While psychological blow automatism may be susceptible to fabrication, the Commission does not consider that the solution is to prevent accused from arguing that the relevant act was involuntary.¹¹⁹ It is an essential principle of criminal responsibility that the relevant act was willed or deliberate. An accused should not be held criminally liable for something that was beyond his or her control. In this regard it is important to bear in mind that the defence of unwilled conduct under s 23 of the Code is not limited to homicide – it applies to all offences. Even in the context

109. VLRC, *Defences to Homicide*, Final Report (2004) [5.140]. See also Wells H & Wilson P, 'R v Leonboyer: The role of expert witnesses in psychological blow automatism cases' (2002) 9 *Psychiatry, Psychology and Law* 167, 167; Williams C, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 722.

110. VLRC, *ibid* [5.141]. See also Wells & Wilson, *ibid* 171.

111. For example, in *Leonboyer* [2001] VSCA 149, [85] Phillips CJ stated that if the jury rejected the accused's contention that he did not recall the killing they could reject the expert evidence that was based upon that account of the events. In *Stone* [1999] 2 SCR 290, [117]–[118] (L'Heureux-Dubé, Gonthier, Cory, McLachlin and Bastarache JJ) the psychiatrist called by the accused gave evidence that the account given by the accused was consistent with a dissociative state caused by a psychological blow; however, that opinion was said to depend upon the accuracy of the accused's description of the incident.

112. VLRC, *Defences to Homicide*, Final Report (2004) [5.141]. See also King [2004] ACTSC 82, [45] where it was observed that the existence of amnesia does not necessarily mean that the accused was in a dissociative state at the time of the incident. In *Stone* [1999] 2 SCR 290, [122]–[123] the psychiatrist called by the prosecution gave evidence that although it was possible that the accused was acting in a dissociative state at the time of killing his wife, she was sceptical of his claim because memory loss could be caused by a number of factors.

113. VLRC, *ibid* [5.142].

114. (1990) 171 CLR 30, 55.

115. *Ibid*.

116. *Ibid* 85. Toohey J also referred to and adopted what was said by Dickson J in *Rabey* [1980] 2 SCR 513, 549 namely, that dissociation 'caused by a low stress threshold and surrender to anxiety cannot fairly be said to result from a psychological blow': at 73. Bronitt and McSherry stated that, as a consequence of the decision in *Falconer*, cases involving dissociative states will be determined by reference to an objective standard – the 'ordinary' or 'normal' person: see Bronitt S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company: 2nd ed., 2005) 235. In *Stone* [1999] 2 SCR 290, [204] (L'Heureux-Dubé, Gonthier, Cory, McLachlin and Bastarache JJ) the majority of the Canadian Supreme Court held that in cases of psychological blow automatism it is necessary to consider how a 'normal' person would have reacted in the circumstances.

117. Yeo S, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 22.

118. Williams C, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 722. See also Grace D, 'Dealing with the Insane Accused' (Paper presented at the 21st AIJA Conference, *New Challenges, Fresh Solutions*, University of Notre Dame, Fremantle, 19–21 September 2003) 6. In *Hodgson* (Unreported, Court of Appeal, Supreme Court of Queensland, CA No. 476 of 1995, 23 July 1996) 6, 9 psychiatric evidence was presented to support insane automatism. The psychiatrist explained that the case was one of insane automatism because an ordinary person, that is, a person 'free from mental abnormality, would not have gone into a dissociated state in the circumstances'. The Queensland Court of Appeal agreed that there was no evidence from which a jury could find that although 'mentally normal' the accused dissociated at the time of the killing.

119. McSherry stated that it was understandable that the VLRC did not wish to interfere with the general principle of voluntariness: see McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and Law* 44, 46. The Commission did not receive any submissions arguing that the concept of automatism should be abolished.

of homicide it is not impossible to imagine genuine examples of dissociation caused by psychological trauma.

Example

A is involved in a car crash in which his wife and two children are killed. B, an ambulance officer, tries to guide him away from the scene by grabbing hold of his arm. In an extreme state of shock A lashes his arms about and forcefully pushes B away. B falls over and hits his head on the pavement.¹²⁰ B subsequently dies from head injuries sustained from the fall. If there was evidence that A did not have any control over his bodily movements because he was in a dissociated state A should be entitled to argue that his actions were unwilling.

In order to reduce the risk of abuse, it is imperative that juries are appropriately directed in cases involving psychological blow automatism.¹²¹ For example, in some cases it will be necessary to emphasise that the expert evidence called by the accused is based wholly or in part on the accused's description of the relevant events (including the accused's claim of memory loss). It may also be necessary in particular cases to point out that the dissociative episode originated from the behaviour of the victim and, therefore, there may have been a motive for

the attack. Further, the surrounding circumstances and nature of the killing must be considered in addition to any expert evidence when assessing the accused's claim that he or she was acting in a dissociative state.¹²²

Another important practical issue is that in cases where the accused claims to have acted involuntarily because of a dissociative state arising from psychological trauma, the prosecution should ensure (when necessary) that appropriate expert evidence is presented to the court.¹²³ The likelihood of fabrication is also reduced by the risk that in any case where the accused raises sane automatism under s 23 of the Code the prosecution will be entitled to argue and present evidence that the cause of automatism was mental impairment.¹²⁴ Thus, an accused may not wish to raise sane automatism if there is the possibility that he or she may be acquitted on account of unsoundness of mind, especially if the accused is relying on other (potentially more successful) defences or arguments at trial.

Generally it appears that psychological blow automatism is rarely raised in homicide cases.¹²⁵ Indeed, the Commission is not aware of any case in Western Australia where an accused has been relieved of criminal responsibility for killing another person on the basis of psychological blow automatism.¹²⁶ Bearing this in mind, there is no evidence to suggest that the law in relation to psychological blow automatism is being applied inappropriately in Western Australia.

120. The Commission notes that A may also be able to rely on the defence of accident on the basis that it was not reasonably foreseeable that B would die. However, whether the defence of accident is successful will depend upon the particular circumstances such as the degree of the force used. Irrespective of whether the defence of accident would excuse A from criminal responsibility he should also be entitled in these circumstances to rely on the first limb of s 23 of the Code.
121. The Commission notes that the sample jury directions in the Queensland Supreme Court and District Court Bench Book contain a possible direction that a 'defence of post traumatic automatism must be closely scrutinized: blackout can be one of the first refuges of a guilty conscience and is a popular excuse': see Queensland Supreme Court and District Court Bench Book, *Unwilled Acts (Automatism)* s 23(1)(a), No. 74.2.
122. In *Stone* [1999] 2 SCR 290, [122]–[123] the psychiatrist called by the prosecution gave evidence that although it was possible that the accused was acting in a dissociative state at the time of killing his wife she was sceptical of his claim for a number of reasons. These reasons included the fact that the deceased was both the 'trigger of the dissociative episode and the victim of the [accused's] dissociated violence'. Further, the nature of the attack on the deceased (stabbing 47 times) was also consistent with an attack motivated by rage.
123. In some cases the prosecution would be alive to the issue based upon the accused's account during interviews with the police. In any event the accused is required to serve copies of any reports or statements of any expert witness he or she proposes to call at the trial at least 14 days before the trial date: see *Criminal Procedure Act 2004* (WA) ss 62(1), 96.
124. See *Falconer* (1990) 171 CLR 30, 62–63 (Deane and Dawson JJ), 69–70 (Toohey J).
125. McSherry B, 'It's a Man's World: Claims of provocation and automatism in 'intimate' homicides' (2005) 29 *Melbourne University Law Review* 905, 906.
126. The Commission notes that Falconer subsequently pleaded guilty to manslaughter after the High Court appeal by the prosecution was dismissed: see Bronitt S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2nd ed., 2005) 227. In *Stack* (Unreported, Supreme Court of Western Australia, No. 386 of 1995, Walsh J, 19 February 1996) the accused was charged with wilful murder and attempted murder. The accused stabbed the deceased approximately 15 times (and stabbed the deceased's wife four times) following an altercation in the street. The deceased and the accused, who were Aboriginal people, knew each other and there was evidence of feuding between their families. Immediately prior to the stabbing the accused claimed that the deceased had told him that he would be put 'six feet under' and, based upon the accused's cultural beliefs, this meant that he would be 'sung'. The accused believed that he would become very ill or die and this could be achieved from a distance by a traditional sorcerer (maban). The accused claimed that after being told this he felt sick, began wobbling at the knees and did not recall stabbing the deceased or the complainant. The accused called evidence from an anthropologist and a psychiatrist in support of sane automatism arising from a psychological blow. The accused was convicted of manslaughter and unlawful wounding. In relation to the charge of wilful murder, the verdict of manslaughter arose either because the jury were not satisfied beyond reasonable doubt that the accused intended to kill (or in the case of the alternative verdict of murder they were not satisfied that the accused intended to cause grievous bodily harm) or they were not satisfied beyond reasonable doubt that the prosecution had negated the partial defence of provocation. Because provocation is not available to a charge of attempted murder the only basis for the verdict of guilty of unlawful wounding was that the jury were not satisfied that the accused had the necessary intention for attempted murder. The convictions for manslaughter and unlawful wounding necessarily mean that the jury was satisfied beyond reasonable doubt that the actions of the accused were voluntary.

Psychological blow automatism and intimate partner homicides

Linked to the concern that psychological blow automatism is liable to abuse is the suggestion that psychological blow automatism is being used inappropriately to excuse intimate partner homicides. While acknowledging that psychological blow automatism is seldom raised in homicide trials (and, when it is, it is rarely successful), McSherry has argued that when it is raised it is 'usually by men who have killed their estranged partners'.¹²⁷ McSherry contended that men have been acquitted on the basis of psychological blow automatism in these types of cases and she questioned 'whether a relationship breakdown should be considered a sufficient factor to exculpate an accused'.¹²⁸ In support McSherry relied heavily on the South Australian case of *Singh*,¹²⁹ where evidence of psychological blow automatism was said to have resulted in an acquittal of a man who killed his estranged partner.¹³⁰

In *Singh*,¹³¹ the accused was convicted of the murder of his estranged wife. The relationship between the accused and the deceased was described as volatile and there was evidence that the accused had previously been violent towards the deceased.¹³² The accused and the deceased were involved in Family Court proceedings concerning the custody of their daughter and the accused claimed that the deceased had repeatedly tried to frustrate his contact visits with the child. The accused was also involved in a dispute with the Department of Immigration in relation to his status in Australia. On the day of the killing the accused, in company with a friend, met the deceased for an arranged contact visit with the child. As soon as the child left her mother's arms she began crying and apparently vomited. The accused said that the deceased screamed

at him and hit him with a telephone and took the child from his car. The accused claimed that he could not recall anything from that moment and did not remember shooting the deceased four times. The accused relied on the partial defence of provocation but also argued that he was not acting consciously or voluntarily at the time he shot the deceased. The trial judge directed the jury that there was no evidence that the accused was acting in a state of automatism but nevertheless left the question of voluntariness to the jury.¹³³

The South Australian Court of Criminal Appeal held that the trial judge was 'correct when he said there was no evidence that the appellant was acting involuntarily'.¹³⁴ The appeal against conviction was successful on the basis that the trial judge made an error in relation to the burden of proof. At the retrial the accused was acquitted of murder and McSherry states 'presumably on the basis of the psychiatric evidence'.¹³⁵ The Commission is not aware of what evidence was led in support of sane automatism at the second trial. Nonetheless, assuming that the accused was acquitted on the basis of sane automatism, the factual background (as described in the first trial) suggests that the relevant psychological 'trauma' involved more than the breakdown of a relationship. It appears that the stress and trauma experienced by the accused was primarily in relation to the care and custody of his daughter. Although the breakdown of a relationship may be a common feature in intimate partner homicides, it does not necessarily follow that the cause of psychological trauma is limited to that fact alone.¹³⁶

Another case referred to by McSherry is *Leonboyer*.¹³⁷ In this case the accused was convicted of murdering his girlfriend. The relationship was unstable and the accused

127. McSherry B, 'It's a Man's World: Claims of provocation and automatism in 'intimate' homicides' (2005) 29 *Melbourne University Law Review* 905, 906.

128. McSherry, *ibid* 907, 921.

129. [2003] SASC 344.

130. McSherry referred to 12 cases (in both Australia and overseas) where psychological blow automatism has been relied upon by men who have killed their estranged partners. No Western Australian cases were cited. In only two instances it was noted that the accused was acquitted (and one of these cases was *Singh*): see McSherry B, 'It's a Man's World: Claims of provocation and automatism in 'intimate' homicides' (2005) 29 *Melbourne University Law Review* 905, 906.

131. [2003] SASC 344.

132. *Ibid* [4] (Mullighan J; DeBelle and Gray JJ concurring).

133. *Ibid* [93].

134. *Ibid*.

135. McSherry B, 'Men Behaving Badly: Current issues in provocation, automatism, mental impairment and criminal responsibility' (2005) 12 *Psychiatry, Psychology and Law* 15, 18.

136. For example, in *Manly* [1995] SASC 5205, [9] (Prior J) the accused relied on evidence from a psychiatrist that he may have been in a state of dissociation at the time of stabbing his partner. The accused was convicted of murder after a trial by judge alone. The accused appealed against his conviction on the basis that the trial judge had reversed the burden of proof in relation to sane automatism. The Court of Criminal Appeal agreed that the reasons of the trial judge revealed that she may have dealt with the psychiatric evidence on the basis that the accused was required to prove that he was suffering from a state of dissociation. For present purposes it is important to note that the psychiatrist relied upon a number of factors that may have caused the accused to dissociate. In addition to factors connected to the breakdown of the relationship between the accused and the deceased, the accused had not had any sleep for over 30 hours and had taken an overdose of prescription drugs.

137. [2001] VSCA 149. This case has also been referred to by other commentators: see Wells H & Wilson P, 'The Role of Expert Witnesses in Psychological Blow Automatism Cases' (2002) 9 *Psychiatry, Psychology and Law* 167.

stabbed the deceased in her bedroom after she informed him of her infidelity. The accused claimed that he did not recall stabbing the deceased. The expert evidence presented by the Crown did not support sane automatism. The psychiatrists called by the prosecution were of the view that purposeful goal-directed behaviour was inconsistent with a state of automatism. Phillips CJ described the evidence presented by one of the prosecution's psychiatrists:

It is possible that, following very severe shock or psychological trauma, gross disorganisation in a person's mental function occurs such that actions can be carried out in an automatic way. However, these situations are very rare. For example, this has been described as occurring in battle situations, or as a result of disasters such as earthquakes and train accidents. In such situations you might see someone running randomly, thrashing their arms about or walking without obvious directional purpose. All of these actions would be possible in an automatic state.¹³⁸

The expert evidence called by the accused was based upon the accused's contention that he could not recall the incident. The two experts gave evidence that a person in a dissociative state could carry out purposeful actions and that it was likely that the accused had dissociated at the time of the stabbing.¹³⁹ Phillips CJ held that it was open to the jury to reject the accused's claim of memory loss and, therefore, it was open to the jury to reject the evidence of the experts called by the accused.¹⁴⁰ The majority of the Victorian Court of Appeal concluded that the jury were entitled to reject the accused's defence of sane automatism and find that the stabbing was voluntary.¹⁴¹ While this case has been relied on to illustrate the difficulties associated with psychological blow

automatism in particular, the problems of conflicting expert evidence,¹⁴² it must be remembered that the accused was in fact convicted.

Notwithstanding the claim that men have been acquitted of killing their estranged partners after arguing sane automatism, it is apparent that there are a number of cases where these types of claims have been rejected.¹⁴³ From the Commission's research and inquiries it does not appear that there is any case in Western Australia where psychological blow automatism has been successfully relied upon to excuse an accused from killing his partner or estranged partner.¹⁴⁴ Recently such a claim has been rejected. In *Vella*,¹⁴⁵ the accused appealed against his conviction for wilful murder. The marriage between the accused and the deceased had broken down. Immediately before the killing the accused had seen a man leave his wife's house and the accused confronted her. The accused claimed that the deceased threatened to prevent him from seeing his children. One ground of appeal was that there was fresh evidence (a report from a psychiatrist who examined the accused two years after the offence) to support the defence of unwilling conduct under s 23 of the Code. The accused gave evidence at the trial that he did not recall anything from the time he kicked down the bedroom door until he saw his wife bleeding from her neck. At the appeal the accused relied on a section of the psychiatric report that explained various reasons why the accused may not have recalled the killing. It was stated that some people can experience a state of dissociation caused by extreme anger or anxiousness.¹⁴⁶ However, the psychiatric report also highlighted that the killing involved two completely different types of physical conduct –

138. *Leonboyer*, *ibid* [51].

139. The VLRC observed that there is conflicting opinion within the psychiatric profession whether purposeful and goal-directed behaviour is consistent with automatism: see VLRC, *Defences to Homicide*, Final Report (2004) [5.143].

140. *Leonboyer* [2001] VSCA 149 [85].

141. See also *ibid* [129] where Charles JA observed that the accused's behaviour was 'well-directed, purposeful and logical'. (Callaway JA dissented and held that the appeal should succeed and the accused should be acquitted).

142. Wells H & Wilson P, 'The Role of Expert Witnesses in Psychological Blow Automatism Cases' (2002) 9 *Psychiatry, Psychology and Law* 167. McSherry suggested that one option for reforming automatism is to define automatism to exclude 'goal-directed and purposeful behaviour'. However, she acknowledged that this option reflects only one psychiatric view of dissociated states: see McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and Law* 44, 46–47.

143. Following his successful appeal in *Radford* (1985) 20 A Crim R 388 (one of the leading cases on psychological blow automatism), the accused was subsequently convicted at the retrial: see Gault S, 'Dissociative State Automatism and Criminal Responsibility' (2004) 28 *Criminal Law Journal* 329, 333. In *Milloy* [1993] 1 Qd R 298 the accused's claim of involuntariness was rejected because it was found that the accused had some control over his actions. Thomas J observed that the psychological trauma arising from the relationship breakdown as well as other personal stresses was not 'a particularly promising basis for a case of sane automatism': at 301. In *Quach* [2002] NSWCCA 173, [13] (O'Keefe J) the jury rejected the accused's contention that he was in a state of sane automatism at the time of inflicting grievous bodily harm to his wife. For other cases involving intimate partner homicides where psychological blow automatism was rejected, see *King* [2004] ACTSC 82, [46], [63] (Gray J); *Szabo* [2000] NSWCCA 226, [8]; *Karagoerges* [2005] VSC 193, [11].

144. The only reported Western Australian case dealing with psychological blow automatism is *Falconer* (1990) 171 CLR 30. As noted earlier, *Falconer* pleaded guilty to manslaughter. The Commission is aware of one other Western Australian case where psychological blow automatism has been argued in a homicide trial: Bill Harris, consultation (28 May 2007). This case did not involve the killing of the accused's partner or estranged partner: see *Stack* (Unreported, Supreme Court of Western Australia, No. 386 of 1995, Walsh J, 19 February 1996) where the accused was charged with wilful murder and relied on sane automatism arising from a psychological blow. The accused was convicted of manslaughter.

145. [2007] WASCA 59.

146. *Ibid* [80] (Wheeler JA).

striking the deceased with a bat and cutting her throat with a knife. For this reason the psychiatrist rejected automatism.¹⁴⁷ The Western Australian Court of Criminal Appeal rejected the accused's argument that the first limb of s 23 of the Code was available as a defence.¹⁴⁸ As mentioned above, the Commission does not consider that there is any evidence that psychological blow automatism is being abused in Western Australia.

Conclusion

Bearing in mind that sane automatism in the context of homicide is unusual,¹⁴⁹ the Commission has concluded that the current law in Western Australia is appropriate. While it is possible to argue in theory that sane automatism is liable to abuse, the Commission does not believe that there is sufficient evidence to support this contention in practice. It is an essential principle of criminal law that people should not be held criminally responsible for behaviour or conduct over which they had no control. The Commission has also considered whether it is necessary to expressly refer to automatism (or any other examples of unwilled conduct) in the Code.¹⁵⁰ The Commission's conclusion is that it is preferable not to attempt to define conduct that may fall within the first limb of s 23. Any express reference to automatism may imply that it is a separate defence. The

issue is not whether the accused was in a state of automatism but whether the conduct was unwilled. Therefore, the Commission recommends no change to the terminology used in the first limb of s 23 of the Code.¹⁵¹

ACCIDENT

The second rule under s 23 of the Code provides that an accused is not criminally responsible for an 'event which occurs by accident'.¹⁵² For homicide offences the relevant event is the death of the victim. The term 'accident' is not defined in the Code. In everyday language an 'accident' generally means that the result was not intended;¹⁵³ however, its legal meaning is more precise. In law, an event occurs by accident if it was unintended and unforeseen by the accused and not reasonably foreseeable by an ordinary person.¹⁵⁴ Thus, the defence of accident has both a subjective and objective element. The subjective element requires the prosecution to prove beyond reasonable doubt that death was either intended or foreseen by the accused.¹⁵⁵ The objective element requires the prosecution to prove beyond reasonable doubt that death would have been reasonably foreseeable by an ordinary person in the position of the accused.

147. Ibid [82].

148. Ibid [83] (Wheeler JA; Pullin and Buss JJA concurring). In *Middleton* [2000] WASCA 213, [52]–[55] (Anderson J; Kennedy and Wheeler JJ concurring) the accused was charged with the wilful murder of his wife. At the trial the main issues were voluntariness, intent and provocation. The accused was convicted of murder. The deceased was killed by multiple stab wounds. The accused stated in a video recording of the interview that he did not remember what happened other than that the deceased had 'poked' him with a knife and he 'poked' her back. He did not recall stabbing her numerous times with the knife. The accused did not give evidence at the trial. One ground of appeal was that the trial judge erred when directing the jury that as a matter of law the actions of the accused were voluntary. The Court of Criminal Appeal held that the trial judge was correct to direct the jury that the actions of the accused were voluntary because there was no evidence to support the contention that the accused's actions were involuntary.

149. The VLRC observed that automatism is 'rarely raised' in Victoria, and principally for this reason the VLRC did not make any recommendations for change: see VLRC, *Defence to Homicide*, Final Report (2004) [5.134] & [5.161]. The Commission is not aware of any examples in Western Australia where an accused has been acquitted of all charges arising from a homicide on the basis of sane automatism.

150. See eg MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 6.

151. The Commission recommends below that the first limb and the second limb of s 23 of the Code (that is, the defences of unwilled conduct and accident) should be clearly separated.

152. It has been observed that s 23 of the Griffith Codes was intended to replace the common law concept of *mens rea*: see *Widgee Shire Council v Percy Bonney* (1907) 4 CLR 977, 981–82 (Griffith CJ); *Murray* [2002] HCA 26, [40] (Gummow and Hayne JJ).

153. In *Kissier* (1982) 7 A Crim R 171, 173 (Connolly J; Andrews SPJ and Thomas J concurring) it was suggested that the use of the word 'accident' when directing a jury about s 23 may be confusing because it 'is attractive to the lay mind to regard a result which is not actually intended as an accident'.

154. See *Kaporonovski* (1973) 133 CLR 209, 231 (Gibbs CJ; Stephen J concurring). This statement of the law has been subsequently approved and referred to in numerous cases: see, eg, *Stanik* [2001] WASCA 333, [38] (Malcolm CJ); [83] (Anderson J); *Taiters* (1996) 87 A Crim R 507, 509; *Stevens* [2005] HCA 65, [16] (Gleeson CJ and Heydon J); [66] (Kirby J). See also *Vallance* (1961) 108 CLR 56, 65 where Kitto J stated that in order for an event to occur by 'chance' (which is the term used in the Tasmanian Criminal Code) the event must have been 'both unexpected by the doer of the act and not reasonably to be expected by an ordinary person, so that it was at once a surprise to the doer and in itself a surprising thing'.

155. For this reason the defence of accident is not generally relied upon in relation to a charge of wilful murder or murder, but may be considered in cases of manslaughter. If the prosecution can prove beyond reasonable doubt that the accused intended to kill the deceased then common sense would suggest that the defence of accident was irrelevant. However, Kirby J recently stated that the defence of accident under s 23 of the Code is not 'expressly excluded from application to a trial for murder' and that when deciding if the accused had the specific intention for murder the 'jury's attention must be directed (where accident is an available classification of the facts) to that category of exemption from criminal responsibility': *Stevens* [2005] HCA 65, [81]. Underlying this observation was the view that a jury does not necessarily approach the question of criminal responsibility in a strictly logical way and, therefore, there is nothing to prevent the jury considering accident before determining whether the accused had the required intention for murder. Kirby J stated that if the jury concluded that the death was accidental then the 'mental element required for murder was necessarily excluded': at [83]. See also *Murray* [2002] HCA 26, [83] & [151] where Kirby and Callinan JJ stated that the defence of accident under s 23(1)(a) of the Queensland Code may be relevant to a charge of murder. In other words, the issues that are relevant to s 23 of the Code should, in appropriate cases, be brought to the jury's attention rather than subsumed within the requirement to prove the mental element of murder.

In *Taiters*,¹⁵⁶ the Queensland Court of Criminal Appeal set out the appropriate direction to be given to the jury in cases where accident is raised:

The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person *in the position of the accused* would reasonably have foreseen the event as a *possible* outcome.¹⁵⁷

Therefore, in order for the prosecution to negate the defence of accident it is not necessary to prove that the event was foreseeable as a *probable* or *likely* outcome. It is sufficient if the event was foreseeable as a *possible* outcome. But it was also emphasised that the relevant test calls for a practical approach and is not concerned with theoretical remote possibilities.¹⁵⁸ Accordingly, the court stated that it would be 'desirable' for a trial judge to also direct the jury that 'in considering the possibility of an outcome the jury should exclude possibilities that are no more than remote or speculative'.¹⁵⁹ Similarly, Callinan J observed in *Stevens*¹⁶⁰ that:

[I]f it is possible with enough imagination and pessimism for any ordinary person to foresee the occurrence of practically any event in the range of possible events in human affairs ... It is the use of the word 'reasonably' which qualifies the concept of foreseeability in this context ... The fact that the occurrence of an event as a consequence of an act or series of acts, might seem in hindsight to have been a real possibility, does not mean that an accused must always to be taken as having foreseen it, or that an ordinary person in the same circumstances would *reasonably* have foreseen it.¹⁶¹

Therefore, an accused will be held criminally liable for homicide if death was reasonably foreseeable as a possibility by an ordinary person in the accused's position at the relevant time. The Commission concluded in Chapter 3 that this test is appropriate for manslaughter because it reinforces correspondence between the blameworthy conduct of the accused and the harm caused.¹⁶²

The defence of accident and deliberate violence

The effect of the Commission's recommendations is that the two categories of unintentional manslaughter under the Code are manslaughter by criminal negligence and manslaughter by deliberate violence. As explained in Chapter 3, unlike cases of criminal negligence, the defence of accident is applicable to cases where death has been caused by deliberate violence.¹⁶³ For the purpose of examining the law of accident it is convenient to separate those cases where death is *directly* caused by deliberate violence and those cases where death is *indirectly* caused by deliberate violence. Due to the 'eggshell skull' rule the defence of accident has traditionally not been available in cases where the victim died as a *direct* result of deliberate violence.¹⁶⁴ In contrast, accident is applicable in cases where death is *indirectly* caused by deliberate violence.

The 'eggshell skull' rule

It is well established at common law that an accused must take his or her victim as he or she finds them (the 'eggshell skull' rule).¹⁶⁵ What this means is that where injury or death results from the infliction of violence it will be irrelevant that the harm caused may not have occurred but for a particular weakness or abnormality in the victim.

Under s 273 of the Code an accused is deemed to have caused the death of another even when an act of the accused 'hastens' the death of the other person and that other person was 'labouring under some disorder or disease'. For example, if an accused stabbed and killed a person who was terminally ill, s 273 would apply and the accused would be deemed to have caused the death. However, it is not clear whether s 273 of the Code covers a case where the victim has some form of inherent weakness or defect, which on its own is not fatal, but in combination with an injury caused by the accused

156. (1996) 87 A Crim R 507.

157. Ibid 512 (emphasis added).

158. Ibid.

159. Ibid.

160. [2005] HCA 65.

161. Ibid [156].

162. See Chapter 3, 'Manslaughter: Manslaughter by deliberate act'. The defence of accident is not available in cases of manslaughter by criminal negligence. However, the Commission has recommended that a person cannot be held criminally responsible for causing death by negligence unless the conduct objectively involved at least a risk of death.

163. See Chapter 3, 'Manslaughter'. The Commission explained that the defence of accident applies irrespective of whether the death-causing act was lawful or unlawful: see *Martyr* [1962] Qd R 398, 405 (Mansfield CJ), 413 (Philp J), 417 (Townley J); *Dabelstein* (1966) Qd R 411, 428 (Wanstall J).

164. See Blackwood J, 'Humpty Dumpty Was Pushed Off the Wall Humpty Dumpty Died from the Fall: An accidental death or manslaughter in Tasmania?' (1996) 15 *University of Tasmania Law Review* 314.

165. See *Moffatt* (2000) 112 A Crim R 201, 212 (Wood CJ; Forster AJA and Adams J concurring). See also *Smithers* [1978] 1 SCR 506, 521.

contributes to death.¹⁶⁶ In any event, the Commission emphasises that s 273 only deals with the question of causation.¹⁶⁷ Proof that an accused has caused the death is not sufficient to establish criminal responsibility for killing.

On the face of it, the defence of accident appears relevant to eggshell skull cases because it is arguable that death was unforeseeable if the existence of the particular weakness or defect was unknown. However, a line of cases prior to *Van Den Bemd*¹⁶⁸ held that s 23 of the Code did not apply to cases where the death of the victim was the direct and immediate result of the deliberate application of force.¹⁶⁹ These cases stand as authority for the proposition that in order for the defence of accident to apply there must be an intervening occurrence between the willed act of the accused and the resulting harm.¹⁷⁰

Following this line of authority, in *Van Den Bemd* the trial judge refused to direct the jury in relation to s 23 of the Queensland Code because the death had resulted from a deliberate blow struck by the accused to the deceased's face. There was evidence to suggest that the deceased may have had a pre-disposition to haemorrhage either because of a natural weakness or alcohol consumption. The Queensland Court of Appeal held that following the High Court decision in *Kapronovski*.¹⁷¹

The test of criminal responsibility under s 23 is not whether the death is an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely

consequence of that act an ordinary person could not reasonably have foreseen it.¹⁷²

In response to this decision it has been observed that the Queensland Court of Appeal 'purported to eliminate, from the criminal law, the principle that one takes one's victim as one finds him or her' and accordingly pronounced a 'single test of accident' that would apply in all circumstances.¹⁷³

The majority of the High Court refused the Crown's application for special leave to appeal against the decision of the Queensland Court of Criminal Appeal.¹⁷⁴ Following the High Court's decision to refuse special leave, the Queensland Parliament amended s 23 of the Queensland Code.¹⁷⁵ Section 23(1A) now provides that:

[A] person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

The position in Western Australia is not entirely clear.¹⁷⁶ In *Ward*,¹⁷⁷ it was held that:

[W]here the injury is the direct and immediate result of a blow intending to cause some harm it is immaterial from the point of view of criminal responsibility that death only results because of some constitutional defect unknown to the person responsible for the blow.¹⁷⁸

166. Morgan has observed that s 273 (and s 274) of the Code represent the principle that accused must take their victims as they find them: see Morgan N, 'Hubert: Case and comment' (1994) 18 *Criminal Law Journal* 359, 361–62; Morgan N, 'Beware! Accident in the High Court! *The Queen v Van den Bemd*' (1994) 24 *University of Western Australia Law Review* 253, 253. In *Martyr* [1962] Qd R 398, 415 Philp J expressed the view that a 'disease' or 'disorder' under the equivalent Queensland provision would include a constitutional weakness. However, it has been observed that a similar provision under the Tasmanian Criminal Code (s 154) does not have any relevance in 'eggshell skull' cases: see Blackwood J, 'Humpty Dumpty Was Pushed Off the Wall Humpty Dumpty Died from the Fall: An accidental death or manslaughter in Tasmania?' (1996) 15 *University of Tasmania Law Review* 306, 311 (s 154(d) of the *Criminal Code* (Tas) which provides that a person is deemed to have killed another ... where his act or omission is not the immediate, or not the sole, cause of death' and 'where by any act or omission he hastens the death of another who is suffering under any disease or injury which would itself have caused death'). In *Dablestein* [1966] Qd R 411, 416 Hanger J stated that the equivalent Queensland provision does not limit the operation of s 23 of the Queensland Code.
167. See Kenny G, 'Abrogation of the "Egg-Shell Skull" Theory in Queensland Criminal Law: *R v Van Den Bemd*' (1994) 18 *University of Queensland Law Journal* 121, 124.
168. (1994) 70 A Crim R 489.
169. See *Martyr* [1962] Qd R 398, 407 (Mansfield J), 415 (Philp J), 417 (Townley J); *Mamote-Kulang of Tamagot* (1964) 111 CLR 62, 64 (McTiernan J), 67 (Taylor and Owen JJ); *Ward* [1972] WAR 36, 46–47 (Virtue SPJ delivering the judgement of the court); *Hubert* (1993) 67 A Crim R 182, 196 (Murray J).
170. Morgan N, 'Hubert: Case and comment' (1994) 18 *Criminal Law Journal* 359, 362.
171. (1973) 133 CLR 209.
172. (1994) 70 A Crim R 489, 493.
173. Kenny G, 'Abrogation of the "Egg-shell Skull" Theory in Queensland Criminal Law: *R v Van Den Bemd*' (1994) 18 *University of Queensland Law Journal* 121, 122.
174. *Van Den Bemd* (1994) 179 CLR 137, 139 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
175. Section 23 was amended by s 10 of the *Criminal Law Amendment Act 1997* (Qld). During the second reading speech it was stated that this amendment was designed to overrule the decision of the High Court in *Van Den Bemd*: see Queensland, *Parliamentary Debates*, 4 December 1996, 4870 (Mr DE Beanland, Attorney General).
176. Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 460.
177. [1972] WAR 36.
178. *Ibid* 46–47 (Virtue SPJ, delivering the judgment of the court). Virtue SPJ distinguished the situation where death results from a constitutional weakness from a case where there is some 'supervening occurrence'. In the latter case, the defence of accident may be available.

In more recent cases judges have noted, but not resolved, the conflict between Western Australian case authorities and the decision in *Van Den Bemd*.¹⁷⁹ Whether it is necessary to amend s 23 of the Code depends on the answer to the following question: should an accused be held criminally responsible where death results from the deliberate application of force but death only occurs because of some weakness or defect in the victim?

It has been argued that the defence of accident should apply in eggshell skull cases if the victim's death was unforeseeable, in the same way that accident applies in cases where the victim's death results directly from an intervening occurrence.¹⁸⁰ The common law eggshell skull rule was criticised by Hanger J in *Dabelstein*.¹⁸¹ He stated that:

The common law made a man who caused only a bruise by a wrongful punch guilty of common assault, but him whose victim had something the matter with his brain and died from a similar punch, guilty of manslaughter liable to imprisonment for life. Such a distinction in a civilised criminal code is ludicrous; that such a distinction was in the common law as a matter of history was no reason for perpetuating it.¹⁸²

The two examples referred to by Hanger J are only distinguishable on the basis of the ultimate harm caused. In both cases the blameworthy conduct is the same: a 'wrongful punch'. Criminal offences are generally defined by reference to the harm caused and the culpability or fault of the accused. Some offences are distinguished only on the basis of fault. For example, for murder and manslaughter the harm caused is the same but offences are differentiated on the basis of the culpability of the accused. Other offences may be distinguishable only by the different harm caused. Dangerous driving and dangerous driving causing death, and assault and assault occasioning bodily harm are such examples. In the same way, an assault and manslaughter may involve the same level of fault on the part of the accused but the existence of different

offences is necessary to recognise the different harm caused.

When considering the appropriateness of the eggshell skull rule, it is necessary to decide whether an accused should be held criminally responsible for the harm caused in these types of cases. As the Commission explained above, it has concluded that criminal responsibility for manslaughter should be determined by reference to the foreseeability of death. In one sense it is arguable that where death only results because of a constitutional weakness or defect the death was not reasonably foreseeable because the accused was not aware of the existence of the weakness or defect. However, the Queensland Criminal Code Advisory Working Group observed that:

It must be remembered that while human anatomy is remarkably uniform, it obviously cannot be assumed that all human beings and their bodily parts and functions are of the same health and strength. Quite apart from congenital defects, the aging process and the vicissitudes of life make it inevitable that some people will have or develop defects not all of which will be visible and obvious. This is a fact of human existence known to all. It follows that the possibility of a defect making some person more vulnerable than others cannot be said to be unforeseeable for the purposes of the criminal law.¹⁸³

The Commission agrees that even if an accused is not aware of a particular weakness or defect it is nevertheless reasonably foreseeable that the physical characteristics of some people will make them more prone to death or injury than others. When an accused directly causes the death of another person by the deliberate infliction of force, it would not be appropriate for the accused to be excused from causing the death solely on the basis that the victim was not as strong or healthy as another person. In this regard the Commission notes that:

The 'eggshell skull' rule is best regarded simply as a policy-based exception to the general principle that there is no criminal responsibility for an unforeseen and unforeseeable event.¹⁸⁴

179. In *Agnew* [2003] WASCA 188, [44] Murray J referred to the conflict between the Western Australian cases such as *Ward* and the decision of the High Court in *Van Den Bemd*. He stated that it was unnecessary to resolve the conflict in this case (Anderson J concurring and Wheeler J agreeing with his observations about the law). Similarly, Kennedy J held that it was unnecessary to review the conflicting authorities in *Azzaddin* [1999] WASCA 265, [19] (Pidgeon and Murray JJ concurring).

180. Morgan N, 'Hubert: Case and comment' (1994) 18 *Criminal Law Journal* 359, 363; Morgan N, 'Beware! Accident in the High Court! *The Queen v Van den Bemd*' (1994) 24 *University of Western Australia Law Review* 253, 255. Similarly, Kenny argued that the 'eggshell skull' rule has no 'part to play in determining criminal responsibility': see Kenny G, 'Abrogation of the "Egg-Shell Skull" Theory in Queensland Criminal Law: *R v Van Den Bemd*' (1994) 18 *University of Queensland Law Journal* 121, 123–24. See also Blackwood J, 'Humpty Dumpty Was Pushed Off the Wall Humpty Dumpty Died from the Fall: An accidental death or manslaughter in Tasmania?' (1996) 15 *University of Tasmania Law Review* 306, 317.

181. (1966) Qd R 411.

182. Ibid 424.

183. Queensland Criminal Code Advisory Working Group, *Report to the Attorney General* (1996) 19.

184. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [4.16]. The Commission notes that during the Parliamentary debates in relation to the *Criminal Code 1995* (Qld), it was observed that the decision to intervene legislatively to return the law in Queensland to the position as it was prior to *Van Den Bemd* is a 'policy decision': see Queensland, *Parliamentary Debates*, 15 June 1995, 12705 (Mr Wells).

The Commission has concluded that the eggshell skull rule is an appropriate exception to the general test for accident. Because of the conflicting case authority the Commission believes it is appropriate to amend s 23 of the Code; however, the Commission does not consider that the wording of the amendment to s 23 of the Queensland Code should be precisely followed. The Queensland provision could be interpreted so that the defence of accident is automatically precluded in any case where the death of the victim was caused or partly caused by a defect, weakness or abnormality in the victim. There may be cases where there is a deliberate application of force, but death is caused partly by the existence of a weakness or defect and partly by an intervening event.

Therefore, the Commission has recommended that a person is not excused from criminal responsibility where death or injury is *directly* caused by the deliberate application of force in circumstances where the death or injury would not have occurred but for the presence of a defect, weakness or abnormality in the victim.¹⁸⁵

An intervening occurrence

As mentioned, the cases dealing with the eggshell skull rule prior to *Van Den Bemd* qualified the general test for accident by requiring the existence of an intervening factor.¹⁸⁶ Since *Van Den Bemd* the Queensland Court of Appeal has confirmed that the defence of accident does not stipulate that there must be 'an intervening factor to produce the unforeseeable consequence'.¹⁸⁷ Nevertheless, in practical terms the defence of accident will usually be raised in circumstances where there has been an intervening event between the deliberate application of force and the resulting death.

There have been a number of cases in Western Australia and Queensland where a person has died following an assault as a consequence of falling onto a hard surface such as a road or pavement.¹⁸⁸ These cases can be distinguished from a typical eggshell skull case because death is not caused directly by the violence. Instead, death is caused by injuries sustained from the fall. In *Hooper*,¹⁸⁹ the accused was acquitted of manslaughter. The accused punched the deceased once in the jaw. The deceased fell backwards onto a driveway and died as a result of a fractured skull.¹⁹⁰ In contrast, in *Seminara*,¹⁹¹ the accused was convicted of manslaughter. The accused had pushed the deceased down a flight of stairs and the deceased died as a result of striking his head on a tiled floor at the bottom of the stairs. The trial judge directed the jury to consider the dimensions and steepness of the staircase, the hard surface at the bottom of the stairs, the state of intoxication of the deceased and the degree of force used to push the deceased down the stairs.¹⁹² In these types of cases, whether death is an event that occurred by accident will depend upon factors such as the degree of force used by the accused; whether the deceased had any warning of the impending assault; whether the deceased was intoxicated or appeared to be intoxicated; and the physical layout of the scene.

The Commission received a number of identical submissions stating that:

If a ruffian hits another person in the street and that person falls to a hard pavement, smacks their head and dies, then this act cannot be classified as an accident ... The outcome was indeed reasonably predictable and not an accident at all.¹⁹³

185. The meaning of the phrase 'defect, weakness or abnormality' under s 23(1A) of the Queensland Code was considered in *Steindl* [2001] QCA 434. The accused punched the victim in the cheekbone and eye area. As a consequence of the actions of the accused and the presence of an artificial lens implant, the victim suffered grievous bodily harm. The central issue was whether the artificial lens fell within the meaning of the phrase 'defect, weakness or abnormality'. The accused argued that the phrase 'defect, weakness or abnormality' was limited to natural conditions of the body. All three judges of the Court of Criminal Appeal held that the artificial lens was an abnormality under s 23(1A): see [29] (McMurdo P), [39] (Davies JA), [59] (Thomas JA). It was noted by McMurdo P that if the phrase 'defect, weakness or abnormality' was limited to natural conditions any defect, weakness or abnormality caused by a 'previous assault, surgery, motor vehicle accident, sporting or war injury would be excluded' because they could not be described as natural or constitutional conditions: at [29]. It was also observed that the phrase 'defect, weakness or abnormality' should be interpreted consistently with current medical technology: see [28] (McMurdo P), [56] (Thomas JA). Davies JA stated that the phrase 'defect, weakness or abnormality' includes any bodily abnormality irrespective of how the abnormality was caused: at [40].

186. O'Regan RS, 'The High Court and the Defence of Accident under the Queensland Criminal Code' (1996) 20 *Criminal Law Journal* 140, 141.

187. *Watt* [1999] QCA 202, [5] (Derrington J; McMurdo P concurring).

188. See eg *Ward* [1972] WAR 36; *Hooper* [2000] WASCA 394; *Taiters* (1996) 87 A Crim R 507; *Seminara* [2002] QCA 131.

189. [2000] WASCA 394.

190. After two trials the accused was convicted of assault occasioning bodily harm.

191. [2002] QCA 131.

192. *Ibid* [8].

193. Ron Campain, Submission No. 21 (12 June 2006) 2; Steve Robinson & Katharina Barlage, Submission No. 24 (14 June 2006) 2; Colette Doherty, Submission No. 25 (14 June 2006) 2; Jan Garabedian, Submission No. 26 (14 June 2006) 2; Pauline Harris, Arena Joondaulp, Submission No. 29 (15 June 2006) 2.

While the Commission agrees that this observation may be correct in some cases, it is not possible to say that death is reasonably foreseeable in all cases where the victim has fallen over after being assaulted in some way. Because the foreseeability of death will vary significantly depending upon the precise factual circumstances, these cases should be determined on a case-by-case basis. Therefore, the Commission believes that the current law is appropriate: the defence of accident is available, but if a jury decides that an ordinary person in the position of the accused would have reasonably foreseen that death was a possible outcome the accused will be convicted of manslaughter.

It has been suggested that it is not appropriate to distinguish between cases where death or injury results from a defect or weakness in the victim and cases where death results from an intervening occurrence.¹⁹⁴ The Law Reform Commission of Ireland did not exempt eggshell skull cases from its provisional recommendation that death caused by a low level of deliberate violence should be excluded from the offence of manslaughter.¹⁹⁵ In reaching this view the Law Reform Commission of Ireland referred to two examples. In the first example an accused punched a person once causing that person to fall down, hit his head on a pavement and die. In the second example an accused gently pushed a person in a supermarket causing that person to trip, fall back and hit his head against a wall. Due to the presence of an eggshell skull this person died. It was suggested that in both of these examples the accused should not be held criminally responsible for the death.¹⁹⁶ However, the unexpected nature of death in the second example is not only due to the existence of the eggshell skull. Death is unexpected because it is not reasonably foreseeable that a gentle push would cause a person to fall backwards and hit their head against a wall with sufficient force to cause death.

The Commission has concluded that a person should be held criminally responsible in eggshell skull cases because the consequences of deliberate violence include that some people will suffer injury, serious injury or death as a direct result of the application of force. The Commission has determined that it is not possible to exclude accident in cases where death may be indirectly caused by deliberate violence (for example, an intervening event), because in certain circumstances death may be so unexpected that there is insufficient connection between the blameworthy conduct of the accused and the resulting death.¹⁹⁷

CONCLUSION

In its Issues Paper the Commission invited submissions as to whether the two rules under s 23 of the Code—unwilled conduct and accident—should be clearly separated.¹⁹⁸ Four submissions argued that s 23 should not be changed;¹⁹⁹ however, the majority of submissions received by the Commission were in support of separating the two rules.²⁰⁰ For example, the Criminal Lawyers' Association submitted that unwilled conduct and accident should be inserted into two separate legislative provisions.²⁰¹ The Commission notes that s 23 of the Queensland Code was amended in 1997 and the defences of unwilled conduct and accident are now contained in separate subsections.

Although both defences may be relied upon in the same case, the concepts of unwilled conduct and accident are 'quite distinct'.²⁰² The Commission agrees and has concluded that it is appropriate for the Code to clearly distinguish between unwilled conduct and accident. In some cases only one of these defences will be in issue and by separating the defences it will be easier for judges, lawyers and juries to focus on the relevant legislative provision. Where both defences are in issue the existence of separate legislative provisions will make it clear that the concepts are distinct.

194. See Morgan N, 'Hubert: Case and comment' (1994) 18 *Criminal Law Journal* 359, 363.

195. Law Reform Commission of Ireland, *Involuntary Manslaughter*, Consultation Paper No. 44 (2007) [5.87]–[5.88].

196. *Ibid* [5.31]–[5.32] & [5.47].

197. As the Commission explained in Chapter 3, a person who deliberately applies force to another can still be convicted of an appropriate alternative offence: see Chapter 3, 'Alternative Offences'.

198. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 9.

199. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 6; Law Society of Western Australia, Submission No. 37 (4 July 2006) 11; Michael Bowden, Submission No. 39 (11 July 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 15.

200. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 6; Ron Campain, Submission No. 21 (12 June 2006) 1; Steve Robinson & Katharina Barlage, Submission No. 24 (14 June 2006) 1; Colette Doherty, Submission No. 25 (14 June 2006) 1; Jan Garabedian, Submission No. 26 (14 June 2006) 1; Pauline Harris, Arena Joondalup, Submission No. 29 (15 June 2006) 1; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 10. Justice Wheeler suggested amending s 23 by separating accident and unwilled reflex actions from automatism: Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 5.

201. Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 10.

202. *Kapronovski* (1973) 133 CLR 209 (Gibbs J; Stephen J concurring).

Recommendation 19

Intention and motive

That a new s 23 of the *Criminal Code* (WA) be inserted into the *Criminal Code* (WA) to provide:

23. Intention and motive

- (1) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (2) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Recommendation 20

Unwilled conduct

That s 23A be inserted into the *Criminal Code* (WA) to provide:

23A. Unwilled conduct

- (1) A person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will.
- (2) Subsection (1) is subject to the provision in Chapter XXVII of the *Criminal Code* (WA) dealing with negligent acts and omissions.

Recommendation 21

Accident

That s 23B be inserted into the *Criminal Code* (WA) to provide that:

23B. Accident

- (1) A person is not criminally responsible for an event which occurs by accident.
- (2) A person is not excused from criminal responsibility for causing death or grievous bodily harm if death or grievous bodily harm is directly caused by the deliberate application of force by the person, but the death or grievous bodily harm would not have occurred but for the presence of a defect, weakness or abnormality in the victim.
- (3) The rule in subsection (2) above applies even though the death or grievous bodily harm was not intended or foreseen by the person and not reasonably foreseeable by an ordinary person.
- (4) Subsection (1) is subject to the provisions in Chapter XXVII of the *Criminal Code* (WA) dealing with negligent acts and omissions.

Self-defence is a complete defence to homicide.¹ This means that if a person kills another for the purpose of defending himself, herself or another, and the elements of the defence are made out,² they will be found not guilty of murder.³ The rationale behind self-defence is clear: that one should not be punished for defending oneself against an 'unjustified attack'.⁴ As Deane J explained in *Zecevic*:⁵

The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of the schoolchild who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.⁶

There is clearly justification for a defence based on the use of reasonable defensive force; however, there are compelling reasons to reform the law of self-defence in Western Australia. First, it is often argued that the law of self-defence is gender-biased.⁷ The requirements of self-defence are a 'product of the historical context in which they arose'; in particular, the fact that homicides are more often committed by men.⁸ Therefore, the requirements of self-defence have 'traditionally reflected male standards of behaviour and male responses'.⁹ The typical case of self-defence has been described as 'an isolated incident in a public place between two strangers of relatively equal size, strength and fighting ability'.¹⁰ As a consequence, self-defence has traditionally required 'an immediate response to an immediate threat'.¹¹ Similarly, the law of self-defence has historically demanded that the response should be proportionate to the nature of the attack. In the 1890 case of *Ryan*,¹² it was stated that:

If a man be struck with the fist he may defend himself in a similar manner, and so knock his assailant down, but he is not justified in shooting him, or maiming him with an axe or other deadly weapon.¹³

This 'one-off physical attack' model¹⁴ for self-defence is not necessarily appropriate when assessing if the use of defensive force was reasonable in cases where one party is physically weaker than the other. In particular, it is often argued that the requirements of self-defence do not accommodate the experiences of women who kill in response to long-term serious domestic violence.¹⁵

The second justification for reform is that the requirements of self-defence in Western Australia are unduly complicated. In the introduction to this Report the Commission emphasised the importance of simplifying the law for all those involved in the criminal justice system.¹⁶ In the case of self-defence, the need to simplify the law is especially relevant because the complex provisions under the *Criminal Code* (WA) (the Code) have proved to be difficult for judges, lawyers and juries to understand.

THE LAW IN WESTERN AUSTRALIA

The provisions of the Code distinguish between self-defence against unprovoked assaults (s 248) and self-defence against provoked assaults (s 249).¹⁷ On the basis that the accused originally instigated the attack, the requirements to establish self-defence against a provoked assault are more stringent. The test for self-defence under the Code incorporates both subjective and objective elements. A subjective element refers to what the accused

1. It is also a complete defence to other crimes of violence.
2. See below, 'The Law in Western Australia'.
3. The accused carries the evidential burden in respect of self-defence, but once there is some evidence of self-defence the prosecution must prove beyond a reasonable doubt that the accused was not acting in self-defence: see *Muratovic* [1967] Qd R 15, 17 (Gibbs J; Lucas J concurring).
4. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 164.
5. (1987) 162 CLR 645.
6. Ibid 675. This view is recognised by the Commission's second guiding principle for reform: self-preservation or the protection of others is the only lawful purpose for an intentional killing: See Introduction, 'Guiding Principles for Reform: Principle Two'.
7. This criticism is not limited to the law of self-defence in Western Australia.
8. Manning F, *Self Defence and Provocation: Implications for battered women who kill and for homosexual victims*, Briefing Paper No. 33 (New South Wales Parliament, 1996) 6.
9. Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman' (1998) 5 *Psychiatry, Psychology and Law* 71, 71. The majority of homicide offenders and the majority of homicide victims are men: see Chapter 1, 'The Social Context of Homicide'.
10. Australian Law Reform Commission (ALRC), *Equality Before the Law: Justice for women*, Final Report No. 69 (1994) Volume 1, [12.2]. See also Manning F, *Self Defence and Provocation: Implications for battered women who kill and for homosexual victims*, Briefing Paper No. 33 (New South Wales Parliament, 1996) 6.
11. Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Issues Paper (2002) [4.6].
12. (1890) 11 NSW 171.
13. Ibid 182 (Windeyer J), as quoted in Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [6.09].
14. This is the phrase used by Tarrant in her opinion for this reference: Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 15.
15. The Commission has used the term 'domestic violence' throughout this Report to refer to both domestic and family violence: see Chapter 6, 'Homicide in the Context of Domestic Violence: Terminology'.
16. See Introduction, 'Guiding Principles for Reform: Principle Five'.
17. Queensland has identical provisions: *Criminal Code* (Qld) ss 271 & 272. The Commission notes that ss 34 and 35 of the *Criminal Code* (Canada) also distinguish between self-defence against provoked and unprovoked assaults.

actually believed, while an objective element refers to the reasonableness of an accused's belief or the reasonableness of the accused's conduct.

Self-defence against unprovoked assaults

First limb

Section 248 is separated into two 'limbs'. The first limb deals with self-defence against less serious assaults – it does not apply to cases where the person using defensive force intended to kill or cause grievous bodily harm, or where the force used was likely to kill or cause grievous bodily harm. It provides that:

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

The test for self-defence under this limb is objective: the force used must have been reasonably necessary.¹⁸ Nevertheless, the subjective belief of the accused may be relevant because it may be one of the factors taken into account by the jury when deciding if the force used was reasonably necessary in all of the circumstances.¹⁹

The relevance of the first limb to homicide

The first limb applies where the force used in self-defence was not intended or likely to cause death or grievous bodily harm. Therefore, it is not applicable to wilful murder or murder. Although it has been suggested that this limb may also not apply to manslaughter,²⁰ in *Prow*²¹ it was held that the equivalent provision under the Queensland Code is available to manslaughter²² because an accused may use force that 'turns out to be fatal but which was not intended or likely to be so'.²³

In her submission, Justice Wheeler highlighted the difficulty of applying self-defence in some cases of manslaughter, referring in particular to *Mason*.²⁴ In that case the accused

threw a rock in the direction of a car after being assaulted by some of the passengers. The rock struck the car killing the driver. The trial judge directed the jury that self-defence was relevant to the charge of murder but not to the alternative charge of manslaughter. The Western Australian Court of Appeal observed that because the accused claimed he did not have any intention to cause a particular result and just 'reacted' by throwing the rock and without knowing exactly where the vehicle was positioned, it is arguable that he did not use 'force' within the meaning of s 248 of the Code. Further, it was noted that there may be a difficulty in accepting that he threw the rock believing it was necessary in self-defence.²⁵ At the same time, it was observed that a person may believe on reasonable grounds that a particular act was necessary in self-defence even though he or she is subsequently unable to explain the precise reason for committing the act.²⁶ It was stated:

Many actions taken in self-defence have an instinctive element and it is, in our view, appropriate to leave the defence open for the jury's consideration, even where the connection between the action and the intended result ... is unclear or perhaps less than entirely logical.²⁷

The court held that the direction by the trial judge that self-defence was only available to the charge of murder was wrong. The jury should also have considered self-defence in relation to the charge of manslaughter.²⁸

Second limb

The second limb of s 248 deals with cases where the force used was intended or likely to cause death or grievous bodily harm. Generally, in homicide cases it is the second limb of s 248 that will be relevant:

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

18. See *Gray* (1998) 98 A Crim R 589, 593 (McPherson JA; Davies JA and Fryberg J concurring) (Qld CCA), as quoted in *Edmunds* [2004] WASCA 70, [14]–[16] (Wheeler J; Templeman J and Wallwork AJ concurring).
19. *Stanik* [2001] WASCA 333 [76] (Anderson J; McKechnie J concurring).
20. O'Regan noted that in *Williams* [1971] Qd R 414, 425 the Queensland Court of Criminal Appeal held that the first limb of s 271 of the Queensland Code is not available as a defence to manslaughter. However, O'Regan concluded after reviewing the authorities that first limb of s 271 may apply to manslaughter: see O'Regan RS, 'Self-Defence in the Griffith Code' (1979) 3 *Criminal Law Journal* 336, 340–41.
21. (1989) 42 A Crim R 343.
22. *Ibid* 349 (Thomas J), 367 (Shepherdson J), 370 (Williams J).
23. *Ibid* 349 (Thomas J).
24. [2005] WASCA 125. See Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 2.
25. *Ibid* [45]–[47].
26. *Ibid* [52].
27. *Ibid*.
28. *Ibid* [53].

The test is both subjective and objective.²⁹ The subjective element is that the accused must have feared death or grievous bodily harm and must have believed that there was no other way to prevent the harm.³⁰ The objective element is that these beliefs must be reasonable. There is no separate requirement under the second limb that the force used must have been objectively reasonable in the circumstances.³¹

In assessing the reasonableness of the accused's belief it is permissible to take into account the subjective circumstances. A belief on reasonable grounds is not the same as what a reasonable person would have believed in isolation from the circumstances as known by the accused.³² Accordingly, the court can take into account the accused's prior experience and knowledge of the assailant in deciding whether an apprehension was reasonable.³³ In *Muratovic*,³⁴ it was held that the jury was entitled to take into account that the accused had previously been assaulted and threatened by the victim (and his acquaintance) in assessing whether the accused had a reasonable apprehension of death or grievous bodily harm at the relevant time.³⁵

Self-defence against provoked assault

If the accused has provoked an assault, or unlawfully assaulted another person, he or she will only be entitled to rely on self-defence if there is a reasonable fear of death or grievous bodily harm. Section 249 of the Code provides that:

When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous bodily harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first

began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Section 249 also incorporates both objective and subjective tests. The accused's belief that there was an occasion requiring the use of force is both subjective and objective because the accused must have a reasonable apprehension of death or grievous bodily harm. The accused must also believe on reasonable grounds that it is necessary to use force in self-defence. However, the test in relation to the degree of force used is objective: the accused can only use such force as is reasonably necessary to preserve himself or herself from death or grievous bodily harm.

The availability of self-defence, in cases where the accused has provoked an assault, is restricted if the accused originally intended or attempted to kill or cause grievous bodily harm. In either of these situations the accused can only rely on self-defence if he or she had 'declined further conflict, quitted or retreated from it' before the need to use defensive force arose.³⁶

Self-defence and mistake of fact

The defence of mistake of fact under s 24 of the Code may be relied on in combination with self-defence. It provides:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

Thus, in order to rely on the defence of mistake there must have been a mistake about 'the existence of any state of things'. In the context of self-defence, this would

29. *Gray* (1998) 98 A Crim R 589, 593 (McPherson JA; Davies JA and Fryberg J concurring) (Qld CCA).

30. In *Muratovic* [1967] Qd R 15, 19 (Gibbs J; Lucas J concurring) it was held that the word 'otherwise' in the equivalent section under the Queensland Code means 'otherwise than by using the force which he in fact used'. This interpretation was approved in *Sreckovic* [1973] WAR 85, 89 (Jackson CJ; Virtue SPJ concurring).

31. In *Minniti* [2001] WASCA 148 the trial judge directed the jury in relation to self-defence under the second limb of s 248 of the Code. The jury were directed that in order for self-defence to apply under this limb the jury had to consider whether the force used was objectively reasonable. It was held that this direction was an error and not in accordance with the established authorities. The appeal was successful: see [61] (Murray J; Malcolm CJ concurring) & [32] (Wallwork J). See also *Marwey* (1977) 138 CLR 630; *Gray* (1998) 98 A Crim R 589, 594–95 (McPherson JA; Davis JA and Fryberg J concurring) (Qld CCA).

32. It was held in *Vidler* (2000) 110 A Crim R 77, 81 (Qld CCA) that in practical terms there is no real difference between a belief of the accused based on reasonable grounds and a belief of a reasonable person in the position of the accused.

33. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 265.

34. [1967] Qd R 15.

35. Ibid 19 (Gibbs J; Lucas J concurring).

36. *Randle* (1995) 81 A Crim R 113, 120 (Malcolm CJ; Pidgeon J concurring) (WA CCA).

include a mistake about the existence or nature of an attack. The defence of mistake is particularly relevant to the first limb of s 248 of the Code because there is no separate subjective requirement in relation to the accused's belief.³⁷ For example, if the accused acted under an honest and reasonable but mistaken belief that a person was about to attack them then, if the force that was used would have been reasonable if those circumstances were true, the accused may be excused.³⁸ However, the defence of mistake is not applicable where the accused misjudged the degree of force required in self-defence because this type of mistake is not mistake about the 'existence of a state of things'.³⁹ Rather, it is an error of judgement.⁴⁰

Aiding in self-defence

When discussing the law of self-defence it is important to recognise that a person is entitled to use defensive force in order to protect another person. At common law the same principles apply irrespective of whether the accused is defending himself or herself or another person.⁴¹ Similarly, s 250 of the Code provides that:

In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself against an assault, it is lawful for any other person acting in good faith in his aid to use a like degree of force for the purpose of defending such first-mentioned person.

However, s 250 of the Code is limited: it is only permissible to use defensive force to protect another person in the same circumstances in which it would have been 'lawful' to use self-defence. Because s 248 of the Code uses the term 'lawful' (and s 249 of the Code does not), the defence under s 250 is interpreted as only being applicable to unprovoked attacks.⁴² The Murray Review recommended that s 250 should be amended to make it clear that an

accused is entitled to use force in defence of another against both provoked and unprovoked assaults.⁴³

THE DIFFERENT TESTS FOR SELF-DEFENCE IN AUSTRALIA

Common law

All Australian jurisdictions now have a legislative test for self-defence. The most recent being the Victorian provision enacted in 2005.⁴⁴ This test is, unlike the legislative tests in other jurisdictions, limited to homicide. For other offences the common law applies but, in any event, the Victorian provision essentially replicates the common law test.

The test for self-defence at common law, as stated in *Zecevic*,⁴⁵ is

whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter then he is entitled to an acquittal.⁴⁶

While this test applies generally, in homicide cases it was stated that further explanation may be required.⁴⁷ Wilson, Dawson and Toohey JJ stated that:

[A] person who kills with the intention of killing or of doing serious bodily harm can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself unless he perceives a threat which calls for that response. A threat does not ordinarily call for that response unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm.⁴⁸

The common law test of self-defence includes both a subjective element (what the accused believed at the relevant time) and an objective element (whether the

37. It is probably not necessary to rely on the defence of mistake for the second limb of s 248 of the Code because the section requires that the accused held the relevant belief on reasonable grounds. It has been stated that this test is sufficiently wide to cover a mistaken but reasonable belief: Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 269. See also *Marwey* (1977) 138 CLR 630, 637 (Barwick CJ) where it was suggested that the defence of mistake may be relied on in relation to the second limb in certain circumstances.
38. In *White v Conway* (Unreported, Supreme Court of Queensland, CA No. 37 of 1991, 26 August 1991) 2 Ambrose J observed that the defence of mistake could excuse a person from criminal responsibility where he or she is mistaken as to the identity of the attacker.
39. *Lean* (1989) 42 A Crim R 149, 152.
40. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 269. See also Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 176.
41. Gillies P, *Criminal Law* (Sydney: Law Book Company, 3rd ed., 1997) 317.
42. Murray MJ, *The Criminal Code: A general review* (1983) 159.
43. *Ibid.*
44. Section 9AC of the *Crimes Act 1958* (Vic) (introduced in response to the VLRC report in 2004) provides that the accused must have held a reasonable belief that the conduct was necessary in self-defence. Section 9 AD of the *Crimes Act 1958* (Vic) also provides that an accused will be guilty of defensive homicide if he or she believed that the conduct was necessary in self-defence but there were no reasonable grounds for that belief. See below, Chapter 4, 'Excessive Self-Defence'.
45. (1987) 162 CLR 645.
46. *Ibid* 661 (Wilson, Dawson and Toohey JJ).
47. *Ibid.*
48. *Ibid* 662.

belief of the accused was based on reasonable grounds). Thus, in the case of deliberate lethal defensive force, the question is whether the accused believed on reasonable grounds that it was necessary, in self-defence, to kill. Under the common law the accused's belief covers both the need for self-defence and the degree of force used, and the belief about both of these issues must be based on reasonable grounds. There is no separate requirement that the force used must have been objectively reasonable.

Model Criminal Code

The Model Criminal Code Officers Committee (MCCOC) recommended a simplified test for self-defence incorporating a subjective test in relation to the need for self-defence and an objective test in respect of the response:⁴⁹

A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in self-defence.

Conduct is carried out by a person in self-defence if

- the person believed that the conduct was necessary
 - to defend himself or herself or another person; or
 - to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
 - to protect property from unlawful appropriation, destruction, damage or interference; or
 - to prevent criminal trespass to any land or premises; or
 - to remove from any land or premises a person who is committing criminal trespass; and
- his or her conduct was a reasonable response in the circumstances as perceived by him or her.⁵⁰

The Model Criminal Code provision in relation to self-defence has been adopted in the Australian Capital Territory,⁵¹ substantially adopted by New South Wales,⁵² and recently enacted in the Northern Territory.⁵³

By incorporating a wholly subjective test in relation to the necessity for self-defence, the Model Criminal Code departs from the common law. At common law the belief of the accused is judged both subjectively and objectively. However, the Model Criminal Code incorporates an additional requirement; namely, that the conduct of the accused must have been objectively reasonable in the circumstances as the accused perceived them to be. As Fairall and Yeo noted, under the Model Criminal Code an '*unreasonable* apprehension of harm may activate a defence of self-defence, provided the response was a reasonable response to the *perceived* harm'.⁵⁴ A subjective requirement for the accused's belief and an objective requirement in respect to the reasonableness of the accused's conduct are contained in the legislative test of self-defence in other jurisdictions.⁵⁵

THE NEED FOR REFORM

The law of self-defence is complicated

The provisions of the Code (and the equivalent provisions under the Queensland Code) have been extensively criticised for their complexity.⁵⁶ These provisions are particularly complicated because of the different rules for self-defence against provoked and unprovoked assaults. It has been observed that, in practice, these provisions can result in very complicated directions to juries about the requirements of self-defence.⁵⁷

49. The Model Criminal Code test is similar to the common law test of self-defence in England. In *Ormino* [1995] Crim LR 743, 743 it was stated that a 'person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be', as quoted in Law Commission (England and Wales), *Partial Defences to Murder*, Consultation Paper No. 173 (2003) [9.2].

50. Model Criminal Code Officers Committee (MCCOC), *General Principles of Criminal Responsibility*, Report (1992) 70, s 313.

51. *Criminal Code* 2002 (ACT) s 42.

52. *Crimes Act* 1900 (NSW) s 418.

53. *Criminal Code* (NT) s 43BD. This provision commenced on 20 December 2006.

54. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 175.

55. Section 46 of the *Criminal Code* (Tas) provides that a 'person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use'. See also *Crimes Act* 1961 (NZ) s 48. Section 15 of the *Criminal Law Consolidation Act* 1935 (SA) also provides for a subjective test in relation to the accused's belief and an objective test in respect of the response. However, s 15 (1)(b) refers to whether the conduct was 'reasonably proportionate to the threat'. The Commission notes that the VLRC recommended that the Model Criminal Code provision should be enacted in Victoria; however, a test based on the common law test was enacted in 2005: VLRC, *Defences to Homicide*, Final Report (2004) [3.73].

56. See eg Murray MJ, *The Criminal Code: A general review* (1983) 157; MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 71; Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 262; O'Regan RS, 'Self-Defence in the Griffith Code' [1979] 3 *Criminal Law Journal* 336, 353; Kift S, 'Defending the Indefensible: The indefatigable Queensland Criminal Code provisions on self-defence' (2001) 25 *Criminal Law Journal* 28, 30. *Corcoran v The Queen* [2000] QCA 114 [2]–[3] (Pincus JA); *Gray v Smith* (1996) 87 A Crim R 454, 459 (Pincus JA and Mackenzie J) (Qld CCA). The Commission notes that similar provisions in New Zealand were criticised in *Kerr* [1976] 1 NZLR 335: see O'Regan RS, 'Self-Defence in the Griffith Code' (1979) 3 *Criminal Law Journal* 336, 353.

57. Murray, *ibid*; Law Reform Committee of the Northern Territory, *Self-Defence and Provocation* (2000) 13.

Distinction between unprovoked and provoked assaults

At common law, the fact that an accused instigated or provoked an attack is a relevant factor when assessing self-defence; however, it is not a 'legal barrier' to successfully relying on the defence.⁵⁸ In *Zecevic* it was observed that if the accused is the original aggressor and the other person resists the accused's attack, the 'only reasonable view of his resistance to that force will be that he is acting, not in self-defence, but as an aggressor in pursuit of his original design'.⁵⁹

The idea that self-defence should apply differently to an original attacker is recognised under the Code by the distinction between provoked and unprovoked assaults.⁶⁰ This distinction is complicated for a number of reasons. The provisions of s 248 apply where the accused has not provoked *the* assault, but s 249 is applicable where the accused has provoked *an* assault. In *Muratovic*,⁶¹ Hart J stated that:

These words draw a distinction between provoking *the* assault actually made and provoking *an* assault; the natural inference is that it is possible to provoke an assault without provoking the assault actually made and this is the way I think the section should be interpreted.⁶²

Therefore, depending upon the circumstances, a jury may need to be directed about both provisions and consider if the accused provoked an assault or the accused provoked the assault actually made.

Further, there is no specific definition of 'provoked assault' and 'unprovoked assault' for the purposes of self-defence. It has been observed that the distinction between provoked and unprovoked assaults depends on whether the conduct constitutes 'provocation' as defined by s 245

of the Code (and s 268 of the Queensland Code).⁶³ However, the Murray Review observed that it was probably not intended that the words 'provoked' and 'unprovoked' in the self-defence provisions should be interpreted with reference to the definition of provocation in s 245 of the Code. Accordingly, it was recommended that ss 248 and 249 should use the term 'deliberately induced' instead of 'provoked'.⁶⁴

Also, under s 249 of the Code an accused can only rely on self-defence against a provoked assault if he or she fears death or grievous bodily harm. In *Gray v Smith*,⁶⁵ this requirement was questioned: why should a person who may have originally provoked a very minor assault only be entitled to defend himself or herself against a lethal attack?⁶⁶ Irrespective of whether it is necessary to expressly distinguish between an original aggressor and an innocent defender for the purpose of self-defence, it is clear that the provisions of the Code do so in an extremely complicated manner.

In its Issues Paper, the Commission asked whether self-defence should be simplified and whether the distinction between unprovoked and provoked assaults should be removed.⁶⁷ The vast majority of submissions were in favour of simplifying the test for self-defence and, in particular, removing the distinction between unprovoked and provoked assaults.⁶⁸ Justice Miller explained in his submission that it is impossible to give simple directions about the distinction between provoked and unprovoked assaults and as a result the directions given by the judge can leave juries in a 'state of incomprehension'.⁶⁹ Similarly, Justice McKechnie submitted that the provisions of the Code dealing with self-defence are in 'urgent need of simplification'.⁷⁰ The Law Society claimed that the current provisions are extremely difficult to understand for both

58. *Viro* (1978) 18 ALR 257, 279.

59. (1987) 162 CLR 645, 664 (Wilson, Dawson and Toohey JJ).

60. The Law Commission of Ireland recently expressed the view that an 'original aggressor' should be distinguished from an 'innocent defender' and proposed that the law should differentiate between provoked attacks and unprovoked attacks: Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [5.217].

61. [1967] Qd R 15.

62. *Ibid* 27–28. Hart J was discussing the equivalent sections under the Queensland Code. Hart J observed that there will be not be many cases where the accused cannot rely on the provisions of both sections.

63. O'Regan RS, 'Self-Defence in the Griffith Code' (1979) 3 *Criminal Law Journal* 336, 338.

64. Murray MJ, *The Criminal Code: A general review* (1983) 159.

65. (1996) 87 A Crim R 454 (Qld CCA).

66. *Ibid* 459 (Pincus JA and MacKenzie J).

67. Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Issues Paper (2006) 7.

68. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 4; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 4; Law Society of Western Australia, Submission No. 37 (4 July 2006) 7; Michael Bowden, Submission No. 39 (11 July 2006) 3; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 7; Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 2; Angelhands, Submission No. 47 (3 August 2006) 3; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 8; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 9. The Commission notes that the Department of Community Development submitted that the defence should be simplified but maintained the distinction between provoked and unprovoked assaults was appropriate: see Department of Community Development, Submission No. 42 (7 July 2006) 7.

69. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 4.

70. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 4.

juries and lawyers.⁷¹ The Office of the Director of Public Prosecutions (DPP) agreed that the current provisions are unnecessarily complicated and the distinction between provoked and unprovoked assaults should be abolished.⁷² Only three submissions submitted that the current provisions for self-defence under the Code were adequate and that there is no need for reform.⁷³ Just one submission expressly submitted that the distinction between provoked and unprovoked assaults is appropriate.⁷⁴

The Commission has concluded that the distinction between provoked and unprovoked assaults, for the purpose of self-defence, should be abolished. The distinction is overly complicated and unnecessary. Instead there should be one simplified test for self-defence (which includes defence of another). A jury will be able to take into account the circumstances of the case—including that the accused may have instigated the incident—when assessing the reasonableness of the accused's belief or the reasonableness of the accused's conduct.⁷⁵

The law of self-defence is gender-biased

The argument that the law of self-defence operates in a gender-biased manner is well known.⁷⁶ Specifically, it has been argued that the 'general requirements' for self-defence are problematic for women who have killed in response to serious and prolonged domestic violence.⁷⁷ The particular issues that have been said to cause difficulties for victims of domestic violence are the concepts of imminence, proportionality and retreat (often referred to as a 'duty to retreat').⁷⁸ The significance and status of these factors varies depending on the test for self-defence.

At common law, these factors do not operate as separate requirements, but may be relevant when assessing the defence. To some extent, these concepts are incorporated into the Code test for self-defence.

More recently, self-defence has been interpreted more broadly to accommodate the circumstances of 'women who kill violent partners out of self-preservation'.⁷⁹ This is particularly the case at common law because imminence, proportionality and the 'duty to retreat' are not separate requirements for the defence. Nevertheless, as the Commission explains in Chapter 6, as a consequence of the traditional 'one-off physical attack' model for self-defence, these concepts may still inform the way in which self-defence is applied in practice.⁸⁰ In order to overcome these barriers, evidence of 'battered women's syndrome' has been presented to courts in order to provide a framework in which the jury can understand the circumstances of women who have suffered long-term violence and, therefore, enable the jury to appropriately assess the reasonableness of the women's actions.⁸¹ The Commission considers these issues in Chapter 6.⁸²

Before examining the requirements of self-defence under the Code, it is important to emphasise that the arguments raised in relation to women who kill in the context of domestic violence are also applicable to women generally. For example, a woman who faces an attack by an unarmed stranger may have no realistic option but to react in an apparently disproportionate way by using a weapon. The use of weapon against an unarmed man may be viewed by a jury as unreasonable.⁸³

71. Law Society of Western Australia, Submission No. 37 (4 July 2006) 7.

72. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 9.

73. Women Justices' Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 3; Festival of Light Australia, Submission No.16 (12 June 2006) 5; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2.

74. Department of Community Development, Submission No. 42 (7 July 2006) 7. However, at the same time the Department acknowledged that the test should be simplified.

75. For a discussion of the Commission's recommendation for self-defence, see below, Recommendation 23.

76. See eg Rathus Z, *There Was Something Different About Him That Day: The criminal justice system's response to women who kill their partners* (Brisbane: Women's Legal Service, 2002) 10–12; Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) 20 *University of Western Australia Law Review* 573; Kift S, 'Defending the Indefensible: The indefatigable Queensland Criminal Code provisions on self-defence' (2001) 25 *Criminal Law Journal* 28, 31. See also Chapter 6, 'Domestic Violence and Homicide'.

77. ALRC, *Equality Before the Law: Justice for women*, Final Report No. 69 (1994) vol. 1, [12.3].

78. The Commission notes that the recent report of the Law Reform Commission of Ireland generally supported the inclusion of specific requirements such as proportionality and imminence, but at the same time acknowledged that these requirements are problematic for victims of domestic violence. Instead of recommending that these factors should not be decisive, submissions were sought about the appropriate way for the law of defensive force to accommodate the experiences of victims of domestic violence: see Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [3.117].

79. Rathus Z, *There Was Something Different About Him That Day: The criminal justice system's response to women who kill their partners* (Brisbane: Women's Legal Service, 2002) 10.

80. See Chapter 6, 'Defences to Homicide in the Context of Domestic Violence: Self-defence'.

81. Tarrant S, *Women Who Kill their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 16.

82. See Chapter 6, 'Domestic Violence and Homicide'.

83. ALRC, *Equality Before the Law: Justice for women*, Final Report No. 69 (1994) Vol. 1, [12.3].

The nature of the threat

Under the Code a person can only use force which is intended or likely to cause death or grievous bodily harm ('lethal force'), if he or she reasonably fears death or grievous bodily harm (or if he or she is defending a home invasion).⁸⁴ The definition of grievous bodily harm under s 1 of the Code is 'any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health'. This definition does not necessarily include sexual assault or deprivation of liberty.⁸⁵ Therefore, lethal force may not be justified for the purpose of preventing a sexual assault or the unlawful deprivation of liberty.⁸⁶

At common law it has been stated that the use of lethal force in self-defence would not *usually* be called for unless there was a threat of death or serious harm.⁸⁷ Therefore, there is some scope for arguing that lethal force is permitted to prevent a sexual assault.⁸⁸ The position under the Model Criminal Code is much broader than at common law or under the Western Australian Code: the only express restriction being that lethal force cannot be used for the sole purpose of protecting property or preventing criminal trespass. Nonetheless, under the Model Criminal Code, any force used in defence has to be reasonable. The Commission considers that an objective requirement that the force used must be reasonable in the circumstances, balances the need for a defined limit on the use of lethal defensive force.⁸⁹

Proportionality

Closely linked to the nature of the threat is the concept of proportionality. Historically, there was a requirement that

the force used in defence must be proportionate to the nature of the threat faced. The concept of proportionality may work against women who kill. The Law Commission (England and Wales) observed that a requirement of proportionality has been 'criticised as reflecting only cases where adversaries are of comparable strength'.⁹⁰ The New Zealand Law Commission stated that:

Women tend to have less physical strength than their partners and may not be socialised to fight in the way that some men are. Thus, they may need to defend themselves in a seemingly disproportionate way. For example, they may use a lethal weapon in response to a bare-handed attack.⁹¹

At common law there is no separate requirement that the force used in defence must be proportionate to the nature of the threat. Nevertheless, proportionality is a relevant factor when determining if the accused honestly believed on reasonable grounds that it was necessary to do what he or she did.⁹² In *Zecevic*, the potential relevance of proportionality was acknowledged, but at the same time it was observed that 'there is a danger of appearing to elevate matters of evidence to rules of law'.⁹³ Therefore, it may be necessary for the trial judge to explain to the jury that they should 'give proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection'.⁹⁴

South Australia is the only Australian jurisdiction which expressly refers to proportionality in its test for self-defence. However, it is provided that the phrase 'reasonably proportionate' does not mean that the force used by the accused cannot exceed the force used against him or her.⁹⁵ The Law Reform Commission of Ireland recently proposed

84. See below, 'The Defence Against Home Invasion'.

85. Tarrant observed that some forms of domestic violence, such as sexual assault, may not come within the definition of grievous bodily harm. She recommended the requirement that the accused feared death or grievous bodily harm should be replaced with a requirement that the accused feared death or 'really serious harm': see Tarrant S, *Women Who Kill their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 26.

86. In her submission Justice Wheeler referred to a case in Western Australia where a woman had stabbed (with a nearby knife) a man who she 'could not otherwise stop from sexually assaulting her'. The prosecution accepted a plea of guilty to a charge of manslaughter on the basis of provocation: Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 2.

87. *Zecevic* (1987) 162 CLR 645, 662 (Wilson, Dawson and Toohey JJ).

88. In *Zecevic*, *ibid* 683, Gaudron J stated that a threat of 'sexual violation'—even if there is no reasonable apprehension of death or grievous bodily harm—may be capable of justifying the need to resort to the infliction of grievous bodily harm. Deane J stated that 'the concept of serious bodily harm should, in an appropriate case, be expanded to include serious bodily abuse by way of, for example sexual abuse or prolonged incarceration': at 681.

89. The Commission notes that the Law Reform Commission of Ireland recently proposed that lethal defensive force should only be permitted in defence against a 'threat of death or serious injury, rape or aggravated sexual assault and false imprisonment by force': see Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [2.01]–[2.62]. The Law Reform Commission of Ireland considered that there were two main approaches to the issue. The first is a general 'reasonableness' test which does not require a 'threshold requirement'. The second is a test which sets the minimum requirements before a person can deliberately kill in self-defence.

90. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [4.20].

91. New Zealand Law Commission, *Battered Defendants: Victims of domestic violence who offend*, Discussion Paper No. 41 (2000) 16.

92. See *Viro v The Queen* (1978) 18 ALR 257, 266 (Barwick CJ); Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 175.

93. (1987) 162 CLR 645, 662 (Wilson, Dawson and Toohey JJ).

94. *Ibid* 662–63.

95. Section 15B of the *Criminal Law Consolidation Act 1935* (SA).

that proportionality should be a separate requirement in its own right; however, it was acknowledged that exact proportionality is not appropriate. Instead, it proposed that there should be a requirement that lethal defensive force is not permitted if it is 'grossly disproportionate' to the threat faced.⁹⁶

Although there is no express requirement of proportionality under the Code, the threshold condition—that in order to use force intended to kill or cause grievous bodily harm the accused must have feared death or grievous bodily harm—implies a degree of proportionality between the threat faced and the response. As explained above, the Commission does not consider that the threshold condition under the Code should be retained. Instead the Commission prefers the requirement under the Model Criminal Code that the response to the threat be reasonable.

As stated above, even in the absence of an express requirement of proportionality, disproportionate defensive force by a woman in response to domestic violence may be considered unreasonable by a jury, especially if all of the circumstances are not properly understood. The Victorian Law Reform Commission (VLRC) recommended that the test for self-defence should state that the 'use of force by a person may be a reasonable response in the circumstances as the person perceives them, even though the force used by that person exceeds the force used against him or her'.⁹⁷ The VLRC did not restrict this provision to cases of family violence because it could also apply to a one-off confrontational encounter where the person using defensive force is not as physically strong as the other person.⁹⁸ The Commission agrees that a disproportionate response should not be fatal to a claim of self-defence. As long as the response is reasonable in the circumstances, such as where the accused is not as strong as the attacker, self-defence should be available.

Imminence

The concept of imminence is relevant to self-defence because, in the absence of an imminent attack, options

other than the use of force (in particular, lethal force) may have been available.⁹⁹ The Law Reform Commission of Ireland stated that:

The purpose of the imminence rule is to restrict defensive force to cases where the threatened harm is so temporally proximate that there are no non-violent alternatives available.¹⁰⁰

Historically, self-defence required that an attack was taking place or was imminent. However, at common law there is now no specific requirement that an attack must be imminent, although it will be a relevant factor when assessing whether the accused was acting in self-defence. The common law test of self-defence appears flexible enough to allow pre-emptive force to be used in self-defence.¹⁰¹ However, the VLRC observed that, in practice, juries might dismiss a claim that the accused was acting in self-defence if the perceived danger was not imminent because it does 'not accord with their views on what self-defence "really" is'.¹⁰²

The concept of imminence is a barrier for women relying on self-defence because women do not necessarily respond to an imminent attack.¹⁰³ To do so may place the woman in more danger.¹⁰⁴ The New Zealand Law Commission recommended in 2001 that the legislative test for self-defence should provide that defensive force may be reasonable even though the danger or threat was not imminent, as long as it was inevitable. In coming to this conclusion it observed that:

In many, perhaps most, situations, the use of force will be reasonable only if the danger is imminent because the defendant will have an opportunity to avoid the danger or seek *effective* help. However, this is not invariably the case. In particular, it may not be the case where the defendant has been subject to ongoing physical abuse within a coercive intimate relationship and knows that further assaults are inevitable, even if help is sought and the immediate danger avoided.¹⁰⁵

The VLRC came to the same conclusion¹⁰⁶ and recommended that the test for self-defence should expressly stipulate that 'a person may believe that the

96. Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [6.68].

97. VLRC, *Defences to Homicide*, Final Report (2004) [3.71].

98. *Ibid.*

99. Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [3.08].

100. *Ibid.* [3.90], [3.112] & [3.117]. The Law Reform Commission of Ireland supported an express requirement of imminence but acknowledged that this requirement can be problematic for 'battered women'. It sought submissions about the most appropriate way for the law of self-defence to respond to cases of battered women.

101. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 180.

102. VLRC, *Defences to Homicide*, Final Report (2004) [3.52].

103. See Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) 20 *University of Western Australia Law Review* 573, 597. See further discussion in Chapter 6, 'Defences to Homicide in the Context of Domestic Violence: Imminence'.

104. Tolmie J, 'Case and Comment: *R v Secretary*' (1996) 20 *Criminal Law Journal* 223, 225.

105. New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Final Report No. 73 (2001) 12.

106. VLRC, *Defences to Homicide*, Final Report (2004) [3.54].

conduct carried out in self-defence is necessary' and a 'person's response may be reasonable' when the person believes that the harm was inevitable – irrespective of whether the harm was immediate or not.¹⁰⁷ A number of submissions received by the Commission also argued that any requirement for imminence should be removed and that instead it should be possible to rely on self-defence where the threat of harm is inevitable.¹⁰⁸

Requirement for an assault under the Code

Although the provisions of the Code do not expressly refer to 'imminence', both s 248 and s 249 stipulate that the accused must have been assaulted before being entitled to respond in self-defence. An assault is defined in s 222 of the Code as an application of force or an attempted or threatened application of force. In the case of an attempted or threatened application of force the person making the attempt or threat must have an actual or apparent 'present ability to effect' his or her purpose. Section 222 also provides that an attempted or threatened application of force must be accompanied by a 'bodily act or gesture'. Therefore, a threat by mere words alone will be insufficient to constitute an assault under the Code. It has been observed that, although the terms 'immediate' or 'imminent' are not used in the Code, the requirement of an assault 'appears to have imported notions of an existing fight into the interpretation'.¹⁰⁹ The Commission

agrees that the definition of assault implies that the attack or threat must be imminent because there must, at the very least, be a 'bodily act or gesture' and a 'present ability' to carry out the threat.¹¹⁰ In her opinion commissioned for this reference, Stella Tarrant recommended that the requirement for an assault under the Code should be removed.¹¹¹ The Commission agrees that the strict requirement for an assault under the self-defence provisions is unnecessary and inappropriate.

'Duty to retreat'

As explained above, the concept of imminence is relevant because in the absence of an imminent attack it is usually reasonable to consider whether the accused could have done anything else to avoid the danger faced. At common law there is no express or separate requirement that the accused must have retreated from the attack or threatened attack, but it is one factor that may be relevant when determining if the accused believed on reasonable grounds that what was done was necessary in self-defence.¹¹²

Similarly, there is no express requirement to retreat in s 248 of the Code.¹¹³ However, s 249 of the Code (dealing with self-defence against a provoked assault) includes a requirement to retreat.¹¹⁴ When commenting on the equivalent Queensland provisions, O'Regan noted that

107. Ibid [3.64].

108. E D'Olia, Submission No. 12 (12 June 2006) 2; Carolyn Harris Johnson, Submission No. 27 (15 June 2006) 1; Women's Council for Domestic Violence & Family Violence Services, Submission No. 46 (25 July 2006) 13; Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 2; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 10; Domestic Violence Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 7. The Commission notes that the Western Australia Police stated that it 'might be reasonable to modify the requirement of immediacy in the context of the facts'. Justice Wheeler also noted in her submission that one option (if it was considered appropriate) is to provide that self-defence is available where there is a reasonable fear of inevitable death even if death is not imminent: see Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 5.

109. Rathus Z, *There Was Something Different About Him That Day: The criminal justice system's response to women who kill their partners* (Brisbane: Women's Legal Service, 2002) 11.

110. The Commission notes that in *Secretary* (1996) 131 FLR 124, the Northern Territory Court of Criminal Appeal considered the meaning of assault in the context of self-defence. The definition of assault under s 187 of the Code in the Northern Territory is similar to the definition under the Code in Western Australia; however, one important difference is that under Northern Territory Code a threat can be constituted by words alone. Section 187(b) of the *Criminal Code* (NT) provides that an attempt or threat to apply force must be 'evidenced by bodily movement or threatening words'. In *Secretary* the accused shot her partner while he was asleep following a threat that when he woke up he would continue assaulting her. The accused had been subject to serious long-term violence and abuse by her partner and when she shot him she feared for her life. The majority (Angel and Mildren JJ) of the court held that self-defence applied because there was a threat to apply force and the accused had the actual or apparent ability to carry out the threat at the relevant time, that is, when he woke up. It is apparent from the reasoning of the majority judges that the applicability of self-defence hinged upon the existence of an assault. Although it is arguable that the judges stretched the meaning of an assault to fit the circumstances of the case, it is unlikely that self-defence would have been available to the accused in the absence of an assault of some form. The relevant assault was the utterance of threatening words just before the victim fell asleep: see Tolmie J, 'Case and Comment: *R v Secretary*' (1996) 20 *Criminal Law Journal* 223, 227.

111. Tarrant S, *Women Who Kill their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 31.

112. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 179. In *Howe* (1958) 100 CLR 448, it was held by five judges of the High Court that there is no separate element for self-defence at common law that the accused must have retreated and it is just one factor that may be considered when determining the reasonableness of the accused's conduct: 463 (Dixon CJ; McTiernan and Fullagar JJ concurring); 469 (Taylor J); 471 (Menzies J). Similar observations were made by Wilson, Dawson and Toohey JJ in *Zecevic* (1987) 162 CLR 645, 663.

113. The Commission notes that the Murray Review recommended that the requirement to retreat should be expressly included in both ss 248 and 249: see Murray MJ, *The Criminal Code: A general review* (1983) 158. In relation to the first limb of s 248 of the Code it has been held that whether the accused should have retreated is only an element to be considered when assessing the reasonableness of what the accused did: see *Hall v Fonceca* (1983) WAR 309, 312 (Burt CJ) & 315 (Smith and Kennedy JJ).

114. The Commission notes that at common law there is no separate duty to retreat, but where the accused is the original aggressor it may be relevant for the jury to consider whether the accused 'declined further conflict': see *Zecevic* (1987) 162 CLR 645, 663 (Wilson, Dawson and Toohey JJ).

because there is an express requirement to retreat in one provision it could be argued that there is no duty to retreat under the other. However, he observed that the courts in Western Australia and Queensland have incorporated the retreat requirement into the provision dealing with self-defence against unprovoked assaults (s 248) because the section requires that the accused believed on reasonable grounds that he or she 'cannot otherwise preserve the person defended from death or grievous bodily harm'.¹¹⁵ Accordingly, O'Regan suggested that the requirement to retreat is stronger under the Code provisions than at common law.¹¹⁶ This reasoning is consistent with the decision in *Randle*,¹¹⁷ where it was held that whether there was an opportunity to retreat is relevant to whether the accused had a 'reasonable apprehension of death or grievous bodily harm inducing a belief on reasonable grounds that it was necessary for self-preservation to use force in self-defence'.¹¹⁸

In Chapter 6, the Commission discusses the 'duty to retreat' in the context of domestic violence homicides, noting in particular that in these types of cases a typical question is: 'why didn't she leave?'¹¹⁹ But as the Law Reform Commission of Ireland noted, there is generally no requirement to retreat when being attacked by a stranger within the home and there is 'no logical reason' why the position should be different when a person is being attacked by someone they know.¹²⁰

The Commission does not consider that a failure to retreat should be such a significant obstacle to a successful claim for self-defence. Therefore, the Commission favours the flexibility of the common law and Model Criminal Code approach because there is no separate requirement to retreat. Nevertheless, the Commission recognises that it

is entirely appropriate that a failure to retreat may be considered relevant when assessing the reasonableness of the accused's belief or conduct.

Conclusion

The Commission has concluded that the specific requirements under the Code—that there must be an assault (imminence), that in order to use lethal force the accused must fear death or grievous bodily harm (proportionality), and the duty to retreat in s 249—should be abolished. However, as stated above, these concepts are likely to continue to inform the way in which self-defence is applied in practice.¹²¹ The VLRC recommended that the legislative test for self-defence should include that:

1. A person may believe that the conduct carried out in self-defence is necessary; and a person's response may be reasonable when the person believes the harm to which the person responds is inevitable, whether or not it is immediate.¹²²
2. The use of force by a person may be a reasonable response in the circumstances as the person perceives them, even though the force used by that person exceeds the force used against him or her.¹²³

In order to remove any gender-bias associated with the law of self-defence in Western Australia, the Commission has concluded that it should be made clear that imminence and proportionality are not decisive factors for self-defence.¹²⁴ The Commission believes that the best way to achieve this is by recommending that a provision in the *Evidence Act 1906* (WA) should provide that a trial judge

115. O'Regan RS, 'Self-Defence in the Griffith Code' [1979] 3 *Criminal Law Journal* 336, 343.

116. *Ibid.*

117. (1995) 81 A Crim R 113.

118. *Ibid* 120 (Malcolm CJ; Pidgeon J concurring). See also *Corcoran* [2000] QCA 114, [18] (McPherson JA; Thomas JA concurring).

119. Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) 20 *University of Western Australia Law Review* 573, 599. See also Chapter 6, 'Defences in the Context of Domestic Violence: Duty to retreat'.

120. Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [5.127].

121. See eg Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman' (1998) 5 *Psychiatry, Psychology and Law* 71, 76.

122. VLRC, *Defences to Homicide*, Final Report (2004) [3.64]. Similarly, Tarrant argued that the law of self-defence should be amended to provide that there is no requirement for an immediate attack. She also recommended that the law of self-defence should make it clear that self-defence is available against a one-off attack or against ongoing violence: see Tarrant S, *Women Who Kill their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 31. The Commission is of the view that the express reference in its recommendation that self-defence may apply if the threat of harm was inevitable, even though it was not imminent, would cover cases where the accused has been subject to ongoing violence. The nature of the ongoing violence would be relevant to assessing whether the threat was inevitable.

123. VLRC, *ibid* [3.71]. Tarrant also recommended that the law should be amended to make it clear that self-defence can apply even where the force used in defence was in excess of the force used by the deceased: see Tarrant, *ibid*.

124. The Commission's decision to remove any reference to an assault, and the threshold requirement that in order to use lethal force there must have been a fear of death or grievous bodily harm, will remove other unnecessary barriers to the defence. With respect to the 'duty to retreat' the Commission considers that removing reference to such a duty is sufficient. However, the Commission also recognises that in certain circumstances it may be difficult for a jury to assess the reasonableness of the actions of a victim of domestic violence who has killed her abusive partner. Therefore, the Commission recommended that expert evidence may be led to assist the jury to determine the issue of reasonableness. See Chapter 6, Recommendation 41.

must direct a jury about these factors.¹²⁵ This will enable trial judges to direct how the concepts of imminence and proportionality apply in each individual case.

Recommendation 22

Jury directions in cases of self-defence

1. That a new section be inserted into the *Evidence Act 1906* (WA) to provide that when the defence of self-defence is raised under s 248 of the *Criminal Code* (WA) the judge shall inform the jury that:
 - (a) an act may be carried out in self-defence even though there was no immediate threat of harm, provided that the threat of harm was inevitable; and
 - (b) that a response may be a reasonable response for the purpose of self-defence under s 248 of the *Criminal Code* (WA), even though it is not a proportionate response.
2. That a further section be inserted into the *Evidence Act 1906* (WA) to provide that when the defence of excessive self-defence is raised under s 249 of the *Criminal Code* (WA), the judge shall inform the jury that an act may be carried out in self-defence even though there was no immediate threat of harm, provided that the threat of harm was inevitable.¹²⁶

REFORMULATED TEST FOR SELF-DEFENCE

The Commission has concluded that there is a compelling case for simplifying and amending the law in relation to self-defence. It is clear from submissions (received from a

wide selection of participants in the criminal justice system) that the current provisions of the Code are unworkable. The Commission also sought submissions about what the test for self-defence should be; in particular, whether it should be subjective, objective or both.¹²⁷ The Commission is of the view that the current provisions under the Code should be repealed and replaced with one simple test of self-defence.¹²⁸

Subjective test

One option is an entirely subjective test; that is, if the accused believed that it was necessary to do what he or she did in self-defence, the defence will succeed. In 1991 the Law Reform Commission of Victoria recommended a subjective test for self-defence, but at the same time noted that such a test may excuse a person who makes a 'grossly unreasonable mistake about the necessity for force or its proportionality'.¹²⁹ In response to this concern it recommended a separate offence of culpable homicide for cases when the accused 'kills another in self-defence on the basis of a belief that was grossly unreasonable either in relation to the need for force or in relation to the degree of force that was necessary'.¹³⁰

One submission received by the Commission suggested that a more subjective test is necessary, but it was also noted that a subjective test may enable abusive partners to rely on the defence more readily.¹³¹ In his submission, Justice McKechnie warned against a wholly subjective test stating that, 'without a general standard of community behaviour, there is no moderation of the acts of a person who may honestly, if perversely, believe in a state of thing'.¹³² Similarly, it has been argued that a wholly subjective test for self-defence is inappropriate because it would allow people who are intoxicated, suffering from some form of mental illness, or 'excessively fearful or deranged', to rely on their genuine belief that their conduct was necessary in self-defence.¹³³

125. The Commission notes that s 36BD of the *Evidence Act 1906* (WA) provides that in sexual offence cases if there is 'absence of complaint evidence' the judge must, among other things, inform the jury that there may be 'good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence'.

126. The Commission has recommended the introduction of a partial defence of excessive self-defence: see below, Recommendation 26.

127. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 7.

128. In 2000 the Law Reform Committee of the Northern Territory also recommended that the provisions of the Code in the Northern Territory should be replaced with a single 'straightforward conception' of the defence: see Law Reform Committee of the Northern Territory, *Self-Defence and Provocation* (2000) 19.

129. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [222]–[223].

130. Ibid, Recommendation 27.

131. Department of Community Development, Submission No. 42 (7 July 2006) 7.

132. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (9 June 2006) 4.

133. Grant M, 'Self-Defence in South Australia: A subjective dilemma' (1994) 16 *Adelaide Law Review* 309, 327. However, the Code provides in s 27 that 'sane' delusions may be taken into account in assessing whether a person should be held criminally responsible for his or her actions, including those done in self-defence according to the accused's deluded mind. For further discussion see Chapter 5, 'Insanity – Mental Impairment: Delusions'.

Objective test

Another option is a wholly objective test; that is, whether the force used was reasonable in the circumstances. Justice Miller submitted that the test for self-defence should be entirely objective because it is difficult for juries to understand both the subjective and objective requirements of the defence.¹³⁴ Similarly, the Law Society argued that the test should be objective because the current test is too difficult to understand.¹³⁵ However, under the Code an entirely objective test would still require consideration of the subjective belief of the accused. If the accused held an honest and reasonable belief about the 'existence of any state of things', then under s 24 of the Code the defence of self-defence would have to be considered on the basis of the accused's mistake.

A mixed test – both subjective and objective

The majority of submissions supported a test for self-defence which incorporated both a subjective element and an objective element.¹³⁶ The Criminal Lawyers' Association submitted that the appropriate test is one which 'gives effect to an assailant's perception of the degree of the threat being offered to him and consequently the degree of force reasonably required to respond to the threat'.¹³⁷ The Western Australia Police submitted that the statutory tests in other Australian jurisdictions and the common law test are simpler than the test under the Code.¹³⁸ The Commission agrees with the majority of submissions that the test for self-defence should be both subjective and objective.

Reasonableness of belief or reasonableness of response or both

Once it is accepted that the test for self-defence should incorporate both subjective and objective elements it is then necessary to consider how the test should be structured in terms of the other two key elements of the defence: the belief of the accused about the necessity to

use force in self-defence; and the response of the accused. The two basic tests of self-defence in Australia can be distinguished on the basis of which element is subjective and which element is objective. The common law approach stipulates that the belief of the accused (that it was necessary to use deadly force) must be based upon reasonable grounds. In contrast, the Model Criminal Code formulation has a subjective test for the accused's belief that deadly force was necessary and an additional (objective) element that deadly force was a reasonable response in the circumstances as the accused perceived them to be.¹³⁹ The first part of the test is known as the 'necessity test' and the second as the 'proportionality test'.¹⁴⁰

The 'necessity test' can be split into two separate considerations. The first is whether the accused believed that the use of some force was necessary (the threat occasion). The second is whether the accused believed that the degree of force used was necessary. Yeo has observed the accused's belief about the threat occasion is not always examined separately from the belief about the degree of necessary force.¹⁴¹ The Commission considers that for the purpose of reforming the law of self-defence (and for considering whether the partial defence of excessive self-defence should be introduced in Western Australia) it is useful and necessary to separate these considerations.

Threat occasion

The Model Criminal Code formulation of self-defence largely reflects the common law test in England. Under the English test, the belief about the threat occasion need only be genuine or honest. It is a purely subjective test¹⁴² and, therefore, a mistaken but *unreasonable* belief may give rise to a successful claim of self-defence. But the reasonableness or otherwise of the belief will be a factor which the jury take into account when determining whether the belief was in fact genuinely held. It has been stated that:

134. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 4.

135. Law Society of Western Australia, Submission No. 37 (4 July 2006) 7. An objective test was also supported by Angelhands, Submission No. 47 (3 August 2006) 3.

136. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 4; Michael Bowden, Submission No. 39 (11 July 2006) 3; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 8; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 8; Domestic Violence Legal Unit, Legal Aid (WA) Submission No. 50 (6 August 2006) 7; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 10.

137. Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 7.

138. Office of the Commissioner of Police, Submission No. 48 (4 August 2006) 8.

139. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 107.

140. Ibid.

141. Yeo S, *Compulsion in the Criminal Law* (Sydney: Law Book Company, 1990) 201.

142. *Beckford* [1988] 1 AC 130.

Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.¹⁴³

But what type of cases would fall within the exceptional category? An unreasonable mistaken belief may include a belief affected by intoxication, mental illness or extreme prejudice. It has also been stated that an unreasonable belief may be based upon the accused being 'unnaturally apprehensive or cowardly'.¹⁴⁴ Yeo observed that even though in many cases an unreasonable belief will lead to a conclusion that the belief was not honestly held, this will not necessarily always be the case, and if the jury conclude that the belief was honest, they will have no choice but to acquit the accused.¹⁴⁵

In contrast to the English common law test (and the Model Criminal Code test), the common law test in Australia¹⁴⁶ requires the belief about the threat occasion to be based on reasonable grounds.¹⁴⁷ However, the Australian common law test is not wholly objective because it requires consideration of what the accused believed, and then whether that belief was based on reasonable grounds. In other words, it is not what a reasonable person would have believed, but whether the accused had reasonable grounds for what he or she actually believed. The personal characteristics and circumstances of the accused can therefore be taken into account.¹⁴⁸

Belief about degree of force needed in defence

In England the test regarding the belief about the degree of force needed to defend against an attack is objective; that is, 'what a reasonable person would believe to be reasonably necessary force'.¹⁴⁹ In contrast, the Australian common law requires that the belief about the degree of force required be based on reasonable grounds. While both tests are objective, the Australian common law test 'lends itself to greater subjectivity since it is the accused's belief which is assessed as opposed to that of the reasonable person'.¹⁵⁰

The Commission has concluded that the belief of the accused about the threat occasion and the belief about the degree of force used should be separated.¹⁵¹ In coming to this conclusion the Commission has taken into account the concerns raised above about a purely subjective test for the accused's belief about the threat occasion. Further, the Commission has recommended that a partial defence of excessive self-defence should be introduced in Western Australia.¹⁵² The separation of the threat occasion and the degree of force required are necessary so that it is clear how excessive self-defence will operate.

Reasonableness of response

The Model Criminal Code formulation has an additional requirement that the conduct of the accused was objectively reasonable in the circumstances as he or she perceived them to be.¹⁵³ The Commission agrees that the force used in self-defence should be determined objectively. This element of objective reasonableness is necessary if other specific requirements, such as the nature of the threat required before deadly force can be used, are removed. The Commission notes that if the response is held to be unreasonable, then the accused may be able to rely on excessive self-defence.

Lawfulness

The concept of self-defence generally implies that defensive force is used against an unlawful assault or attack. In *Zecevic*, Wilson, Dawson and Toohey JJ held that:

Whilst in most cases in which self-defence is raised the attack said to give rise to the need for the accused to defend himself will have been unlawful, as a matter of law there is no requirement that it should have been so ... for example, self-defence is available against an attack by a person who, by reason of insanity, is incapable of forming the necessary intent to commit a crime.¹⁵⁴

The VLRC concluded that an accused should not be able to rely on self-defence if he or she was aware that the

143. Ibid 145 (Lord Griffiths delivering the judgement of the court). See also Law Commission, *Partial Defence to Murder*, Final Report (2004) [4.6].

144. Yeo S, *Compulsion in the Criminal Law* (Sydney: Law Book Company, 1990) 214.

145. Ibid 216.

146. And the current legislative test for self-defence in Victoria.

147. Yeo S, *Compulsion in the Criminal Law* (Sydney: Law Book Company, 1990) 201.

148. Ibid 217.

149. Ibid 201.

150. Ibid.

151. The Commission notes that a report conducted in Canada in 1997 recommended that the accused belief about the existence of a threat occasion and the degree of force required should be subjectively and objectively determined and that there should be an objective test for determining the reasonableness of the accused's response: see Ratushny L, *Self-Defence Review*, Final Report (1997) [5.4]. Also s 29 of the *Criminal Code* (NT) (which since 20 December 2006 is no longer applicable to homicide offences) is similar in structure to the Model Criminal Code formulation; however, the test requires that the response must be reasonable in the circumstances as the accused 'reasonably perceives them' (emphasis added).

152. See Chapter 4, 'Excessive self-defence', Recommendation 26.

153. VLRC, *Defences to Homicide*, Final Report (2004) [3.75].

154. (1987) 162 CLR 645, 663.

'attack' was lawful.¹⁵⁵ This does not mean that a person cannot rely on self-defence just because the person 'attacking' the accused would not be held criminally responsible. For example, an accused can defend himself or herself against an attack by a child under the age of criminal responsibility or by a person who was insane at the relevant time.¹⁵⁶ Similarly, the Model Criminal Code provides that self-defence 'does not apply if the conduct to which the person responded was lawful and that person knew that it was lawful'.¹⁵⁷ It is also made clear that conduct is not lawful just because the person is not criminally responsible for it. In contrast, s 422 of the *Crimes Act 1900* (NSW) provides that self-defence is not excluded merely because:

- (a) the conduct to which the person responds is lawful, or
- (b) the other person carrying out the conduct to which the person responds is not criminally responsible for it.

An accused may be mistaken about the lawfulness of an attack and if the mistake is both honest and reasonable the accused should be entitled to rely on self-defence. For example, an accused who is deaf may be lawfully arrested by a police officer, but not hear the police officer identify himself or explain that he is being arrested. This accused should be entitled to rely on self-defence if his response to the physical application of force by the police officer was reasonable. The Commission is of the view that it should be expressly stated that the defence of self-defence does not apply if the defensive force was used in response to lawful conduct. The Commission emphasises that if the accused was not aware the conduct was lawful he or she may be able to rely on the defence of mistake under s 24 of the Code.

THE COMMISSION'S RECOMMENDATION FOR SELF-DEFENCE

The Commission has concluded that ss 248–250 of the Code should be repealed. These provisions should be replaced with a new s 248 setting out the test for self-defence in Western Australia.

Recommendation 23

Self-defence

1. That sections 248–250 of the *Criminal Code* (WA) be repealed.
2. That a new s 248 of the *Criminal Code* (WA) be enacted to provide that a person is not criminally responsible for an offence if the act constituting the offence was carried out in self-defence.
3. That the new s 248 provide that an act is carried out in self-defence if:
 - (a) the person believed on reasonable grounds that it was necessary to use force to defend himself or herself or another person; and
 - (b) the person believed that the act was necessary in order to effectively defend himself or herself or another person; and
 - (c) the act was a reasonable response to the circumstances as the person perceived them (on reasonable grounds) to be.
4. That the new s 248 provide that an act is not carried out in self-defence if the person was responding to lawful conduct and that conduct is not lawful just because the person engaging in the conduct is not criminally responsible for it.

OTHER PROVISIONS IN WESTERN AUSTRALIA DEALING WITH DEFENSIVE FORCE

Section 31(3) of the Code

Section 31(3) of the Code provides that a person is not criminally responsible for an act when 'the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence'.¹⁵⁸

155. VLRC, *Defences to Homicide*, Final Report (2004) [3.80].

156. Ibid [3.81].

157. The section also provides that conduct is not lawful merely because the person carrying it out is not criminally responsible for it: see MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 70, s 313.3.

158. Under the provisions of s 31, the defence under s 31(3) is not available for an offence punishable with 'strict security life imprisonment, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has, by entering into an unlawful association or conspiracy, rendered himself liable to have such threats made to him'.

On its face, it would appear that s 31(3) overlaps with self-defence. However, O'Regan has observed that:

There has been very little judicial discussion concerning the scope of this provision and its relation to the self-defence sections is uncertain.¹⁵⁹

Similarly, Colvin et al noted that the defence under s 31(3) may theoretically apply to circumstances which do not fit within the self-defence provisions of the Code; however, they said that it is 'difficult to imagine an example'.¹⁶⁰ Accordingly, it was suggested that the section arguably does not have any 'independent application'.¹⁶¹ In 1983 the Murray Review recommended that s 31(3) of the Code should be repealed because it is unnecessary.¹⁶² Likewise, in its submission for this reference, the DPP supported repeal of the section.¹⁶³

It has also been observed that s 31(3) may have common characteristics with the defence of duress.¹⁶⁴ For example, a person who does not hold a drivers licence may drive in order to escape from a threat of violence. Such a scenario would not fall within self-defence because the offence charged (driving without a valid drivers licence) does not involve the use of defensive *force*. It may also not fall within the current defence of duress because the person may not have feared immediate death or grievous bodily harm as required by s 31(4) of the Code.¹⁶⁵ The Commission has recommended that the defence of duress should be amended to remove, among other things, the requirement that there must be a threat of 'immediate death or grievous bodily harm'.¹⁶⁶ In light of the Commission's recommendations in relation to self-defence and duress, the Commission does not consider that there is any need to retain s 31(3) of the Code.

Recommendation 24

Repeal of section 31(3) of the *Criminal Code* (WA)

That s 31(3) of the *Criminal Code* (WA) be repealed.

Defence against home invasion

Scope of the defence in Western Australia

Under the Western Australian Code, force intended or likely to cause death or grievous bodily harm is generally not permitted in defence of property.¹⁶⁷ However, the defence against home invasion in s 244 of the Code does permit lethal force to be used against a home invader if the provisions of the section are met. Section 244 provides that:

- (1) It is lawful for a person ('the occupant') who is in peaceable possession of a dwelling to use any force or do anything else that the occupant believes, on reasonable grounds, to be necessary —
 - (a) to prevent a home invader from wrongfully entering the dwelling or an associated place;
 - (b) to cause a home invader who is wrongfully in the dwelling or on or in an associated place to leave the dwelling or place;
 - (c) to make effectual defence against violence used or threatened in relation to a person by a home invader who is —
 - (i) attempting to wrongfully enter the dwelling or an associated place; or
 - (ii) wrongfully in the dwelling or on or in an associated place; or
 - (d) to prevent a home invader from committing, or make a home invader stop committing, an offence in the dwelling or on or in an associated place.
- (2) A person is a 'home invader' for the purposes of subsection (1) if the occupant believes, on reasonable grounds, that the person —
 - (a) intends to commit an offence; or
 - (b) is committing or has committed an offence, in the dwelling or on or in an associated place.
- (3) The authorisation conferred by subsection (1)(a), (b) or (d) extends to a person assisting the occupant or acting by the occupant's authority.
- (4) Section 250 applies to the authorisation conferred by subsection (1)(c).
- (5) This section has effect even if the conduct it authorises would not otherwise be authorised under this Chapter.
- (6) In this section —

'associated place' means —

159. O'Regan RS, 'Self-Defence in the Griffith Code' [1979] 3 *Criminal Law Journal* 336, 350.

160. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 262.

161. Ibid.

162. Murray MJ, *The Criminal Code: A general review* (1983) 160.

163. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 17.

164. O'Regan RS, 'Self-Defence in the Griffith Code' [1979] 3 *Criminal Law Journal* 336, 351.

165. However, such an example may fall within the provisions of s 25 of the Code if it was held that the accused faced an extraordinary or sudden emergency.

166. See Chapter 4, 'Duress'.

167. Sections 251–256 of the Code also deal with defence of property and defence against trespassers in particular circumstances. Some of these provisions are restricted by the proviso that the person acting in defence is not permitted to cause bodily harm. Others are limited by the requirement that the force used in defence must not have been intended and not likely to cause death or grievous bodily harm.

- (a) any place that is used exclusively in connection with, or for purposes ancillary to, the occupation of the dwelling; and
- (b) if the dwelling is one of 2 or more dwellings in one building or group of buildings, a place that occupants of the dwellings use in common with one another;

'offence' means an offence in addition to any wrongful entry;

'place' means any land, building or structure, or a part of any land, building or structure.

The current s 244 was enacted on 17 November 2000.¹⁶⁸ During the second reading speech, it was declared that the Criminal Code Amendment (Home Invasion) Bill 2000 'reflects the public position of this Government – that citizens of Western Australia have a right to absolute safety within their homes from intruders'.¹⁶⁹ The Commission agrees with this sentiment, but emphasises that the question of the appropriate use of force in self-defence by an occupant of a dwelling is difficult. The difficulty arises because, depending on the circumstances, an occupant may believe that there is a threat to someone's personal safety or a threat to property, or both.

Sections 244(1)(a) and (b) provide that it is lawful for the occupant to use *any force* which he or she believes is reasonably necessary to prevent a 'home invader' from entering an 'associated place', to cause a 'home invader' to leave an 'associated place', or to prevent a home invader from committing an offence in an 'associated place'. An associated place is defined as any place that is 'used exclusively in connection with, or for purposes ancillary to, the occupation of the dwelling' and includes any land, building or structure. During the parliamentary debates, Mr Prince stated that in his view an 'associated place' in the context of a suburban house could include a 'garden shed, a garage or the grounds of the house, as long as it is within the fence line' of the house.¹⁷⁰

The previous legislative provision only permitted an occupant to use force to prevent a person from entering the dwelling if the occupant reasonably believed that the person was trying to enter.¹⁷¹ However, the Commission is concerned that the current provision applies to the 'surroundings' of a dwelling and that the occupant does not have to wait until the home invader is attempting to enter the dwelling or its 'surroundings' before he or she will be justified in using lethal force.¹⁷²

The definition of 'home invader' is also very broad. A 'home invader' is a person who the occupant believes on reasonable grounds intends to commit an offence in an associated place. It is not necessary that the person must actually be in or on the associated place.¹⁷³ During the parliamentary debates on the Criminal Code Amendment (Home Invasion) Bill 2000, Jim McGinty stated that:

I raise a potential problem with the legislation, which I would describe as allowing pre-emptive strikes against someone who a householder thinks might intend to unlawfully come onto his or her property. That is dangerous. That takes the legislation beyond the realm of defending oneself and one's property.¹⁷⁴

Thus, it is possible for a person to rely upon the defence against home invasion in circumstances where the occupant believes on reasonable grounds that a person (who may actually be outside the boundaries of the property) intends to steal a car from the driveway. If the occupant believes on reasonable grounds that it was necessary to use lethal force to prevent the home invader from entering the property then the occupant may be acquitted. It is not necessary under s 244 for the actual force used to be objectively reasonable.¹⁷⁵ However, as observed by Wheeler J, in most cases there will not be any difference in practical terms between a belief based on reasonable grounds and the question whether the force used was reasonably

168. *Criminal Code Amendment (Home Invasion) Act 2000 (WA)*.

169. Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 August 2000, 389 (Mr K Prince, Minister for Police). A similar policy is expressly recognised in s 149A of the *Criminal Code* (NT) which provides that it is the public policy of the Northern Territory that occupants (of both residential and commercial premises) have the 'right to enjoy absolute safety in the premises from attack by intruders'.

170. Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 October 2000, 1774 (Mr K Prince, Minister for Police).

171. Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 August 2000, 389 (Mr K Prince, Minister for Police). During the second reading speech it was stated that the amendments widen the defence by allowing the use of any force: at 390. The previous section referred to the use of *such force* as the occupant believes on reasonable grounds to be necessary to prevent the forcible entry whereas the current provisions refers to the use of *any force* or *anything else*. However, as Jim McGinty observed 'the amount of force that a person can use against a home invader will not be changed by the legislation. The existing legislation is clear. A person can use such force as he or she believes, on reasonable grounds, to be necessary': see Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 October 2000, 1778 (Mr J McGinty). On the other hand, in *James v Sievwright* [2002] WASCA 343, [27] McKechnie J commented that '[p]revious limitations as to the degree of force sanctioned by the law have gone'.

172. Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 August 2000, 390 (Mr K Prince, Minister for Police).

173. McKechnie J observed in *James v Sievwright* [2002] WASCA 343 [28] that s 244 of the Code determines 'the status of a home invader in a most unusual way, not by reference to any fact or circumstance but simply upon a further belief of the occupant, albeit on reasonable grounds, that a person intends to commit an offence or is committing, or has committed an offence'. In this case the accused had assaulted a person in his home. The altercation took place after a Christmas party and the person who was assaulted was known to the accused.

174. Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 October 2000, 1778 (Mr J McGinty).

175. *Edmunds* [2004] WASCA 70, [8]–[9] (Wheeler J; Templeman J and Wallwork AJ concurring).

necessary.¹⁷⁶ But the Commission remains concerned that there is the potential for an accused to be relieved of criminal responsibility even though the force used was not reasonably necessary in the circumstances.

Other jurisdictions

In a number of jurisdictions it is provided that it is not permissible to use force intending to cause death or grievous bodily harm (or serious harm) solely for the purpose of defending property.¹⁷⁷ For example, s 420 of the *Crimes Act 1900* (NSW) provides that self-defence is not available if the person 'uses force that involves the intentional infliction of death or reckless infliction of death only to protect property' or 'to prevent criminal trespass or to remove a person committing criminal trespass'. This provision is based upon the Model Criminal Code formulation of self-defence.¹⁷⁸ The prohibition against using lethal force in defence of property also applies in the Northern Territory¹⁷⁹ and South Australia.¹⁸⁰ In other jurisdictions the defence of a dwelling is more limited by the requirement that force can only be used in response to a person who is unlawfully in the dwelling or attempting to enter the dwelling.¹⁸¹

CONCLUSION

The scope of s 244 of the Code is potentially wider than other jurisdictions in Australia mainly because the defence allows the use of any force even where the 'home invader' is not actually in the dwelling or even on the surrounding premises. The Commission does not consider that it is appropriate for the defence to apply in such a broad fashion, especially because there is no objective requirement that the force used must have been reasonable. In the Commission's recommendation for the general test of self-defence, the requirement that the

force used must have been objectively reasonable in the circumstances replaces the existing threshold requirement that in order to use lethal force the accused must have feared death or grievous bodily harm.

In its recent report on *Legitimate Defence* the Law Reform Commission of Ireland posed the question:

Should lethal defensive force ever be allowed in defence of property when the other threshold requirements are not satisfied, that is, the defender is not otherwise threatened with death or serious injury (or sexual offending or deprivation of liberty)? Intuitively, many people would not consider the preservation of property as sufficiently important to warrant the taking of human life.¹⁸²

The VLRC concluded in its report, *Defences to Homicide*, that a person is 'never justified in intentionally causing death or serious injury where the threat of harm is to property only'.¹⁸³ The Law Reform Commission of Ireland emphasised the unique situation of defence of a dwelling as distinct from defence of property generally. It observed that a number of jurisdictions permit the use of lethal force in defence of a dwelling but the examples given (other than Western Australia) all require at the very least for there to be an attempt to enter the dwelling.¹⁸⁴ It concluded that there should be no 'upper limit' on the level of force permitted in defence of a dwelling, noting that in many cases an occupant will fear serious harm in the face of a burglary and it is extremely difficult to make a 'split-second' decision about the precise nature of the possible threat.¹⁸⁵

The Commission agrees that people are entitled to complete safety within their own homes; however, it does not consider it appropriate that force intended or likely to cause death or grievous bodily harm can be used without any requirement that such force is objectively reasonable. This is especially the case given that under s 244, force may be used solely for the purpose of protecting property.

176. Ibid [12].

177. It has been observed that at common law it is generally accepted that killing a person in defence of a dwelling is not justified: see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 268.

178. The MCCOC included the word 'intentional' in order to ensure that a person may still be excused from criminal responsibility for accidental harm: see MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 71. The Model Criminal Code provision has been adopted in the Australian Capital Territory: *Criminal Code 2002* (ACT) s 42.

179. Section 29(3) of the *Criminal Code* (NT) provides that a person cannot rely on the defence of 'defensive conduct' if the conduct involved 'the use of force intended to cause death or grievous bodily harm' for the purpose of defending property or preventing criminal trespass.

180. *Criminal Law Consolidation Act 1935* (SA) s 15A. See also s 15C which provides that in the case of defence against home invasion, unlike the case of self-defence generally, it is not necessary that the force used was reasonably proportionate to the threat.

181. See eg *Criminal Code* (Qld) s 267; *Criminal Code* (Tas) s 40.

182. Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [2.63]. The Law Reform Commission of Ireland provisionally recommended that lethal force should not be permitted in defence of *personal* property; however, it did not consider that it was appropriate to limit the use of lethal force in the case of defence of a dwelling.

183. VLRC, *Defences to Homicide*, Final Report (2004) [3.82].

184. Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) 33–34. The examples given were Western Australia, Queensland, Tasmania and New Zealand.

185. Ibid 36–37.

One of the Commission's guiding principles for reform is that the only lawful excuse for an intentional killing is self-preservation or the protection of another.¹⁸⁶ Consistent with this principle, the Commission recommends that s 244 be amended to provide that force intended or likely to cause death or grievous bodily harm cannot be used solely in defence of property. This ensures that lethal force can only ever be justified where the accused fears personal harm to himself or herself or another.

Recommendation 25

Defence against home invasion

That s 244 of the *Criminal Code* (WA) be amended by adding that force intended to cause death or grievous bodily harm cannot be used in defence of property only.

186. See Introduction, 'Guiding Principles for Reform: Principle Two'.

Excessive Self-Defence

Excessive self-defence is a partial defence that reduces the offence of murder to manslaughter. It might apply in circumstances in which an accused has killed to defend himself or herself or another person, but either the occasion did not require the use of force, or more force was used than was reasonably necessary.¹ Generally, in Australia, the partial defence has applied where the degree of force used was objectively unreasonable. Excessive self-defence operates in conjunction with the complete defence of self-defence; therefore, in a case where an accused claims to have intentionally killed in self-defence there are three possible outcomes: an acquittal on the basis of self-defence, a conviction for manslaughter on the basis of excessive self-defence, or a conviction for murder (if the claim of self-defence is completely rejected).

The purpose of this section is to examine whether excessive self-defence should be introduced in Western Australia.² It is important to recognise that in the absence of a partial defence of excessive self-defence, a person who uses more force in self-defence than was necessary is held criminally responsible to the same extent as if no force was justified at all.³

HISTORY

The partial defence of excessive self-defence had a relatively short history at common law.⁴ The defence was first recognised in *McKay*⁵ and affirmed by the High Court

one year later in *Howe*.⁶ In *Viro*,⁷ the majority of the High Court held that where excessive force is used in self-defence but the accused believed that the 'force used was reasonably proportionate to the danger which he believed he faced' the accused should be convicted of manslaughter instead of murder.⁸ However, in 1987 a majority of the High Court in *Zecevic*⁹ rejected the partial defence of excessive self-defence because of its complexity.¹⁰

Despite it being abolished at common law, there has been a recent move towards the legislative introduction of excessive self-defence in Australia.¹¹ The partial defence of excessive self-defence now exists in New South Wales, South Australia and Victoria. In 2002, New South Wales essentially adopted the Model Criminal Code test for self-defence;¹² however, it departed from the Model Code by reintroducing excessive self-defence.¹³ The New South Wales formulation of the partial defence provides that if an accused kills believing it necessary to do so, but the conduct is not a reasonable response in the circumstances, then the accused is to be found guilty of manslaughter.¹⁴ This test is entirely subjective: there is no requirement for the accused's belief to be based on reasonable grounds. The South Australian formulation is similar: the partial defence applies if the accused genuinely believed the conduct was 'necessary and reasonable for a defensive purpose' but the conduct was not 'reasonably proportionate'.¹⁵

1. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 178.
2. Section 260 of the *Criminal Code* (WA) (the Code) currently provides that in 'any case in which the use of force by one person to another is lawful, the use of more force than is justified by law under the circumstances is unlawful'. See also *Aleksovski* 1979) WAR 1, 5 (Burt CJ; Wickham and Smith JJ concurring).
3. Colvin E, Linden S, and McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials*, (Sydney: LexisNexis Butterworths, 2005) 271.
4. While the defence has been traced historically to English common law it has been suggested that the relevant English cases were limited to the use of defensive force to resist unlawful arrests: see Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [7.138]. In any event the Privy Council clearly rejected any partial defence of excessive self-defence in *Palmer* [1971] AC 814.
5. [1957] VR 560, as cited in Weinberg M, 'Moral Blameworthiness: The "objective test" dilemma' (2003) 24 *Australian Bar Review* 1, 19.
6. (1958) 100 CLR 448, 460 (Dixon CJ; McTiernan and Fullagar JJ concurring), 477 (Menzies J).
7. (1978) 18 ALR 257.
8. *Ibid* 303 (Mason J; Stephen, Aickin and Gibbs JJ concurring). Thus the partial defence of excessive self-defence at common law was based upon an unreasonable degree of force, rather than an unreasonable mistake about the necessity for the use of force. The six-stage test pronounced by Mason J provided that if the accused did not have a reasonable belief about the need for self-defence then the defence of self-defence would not be available at all and the accused would be convicted of murder.
9. (1987) 162 CLR 645.
10. *Ibid* 645, 664–65 (Wilson, Dawson and Toohey JJ; Mason CJ and Brennan J concurring; Deane and Gaudron JJ dissenting).
11. A significant number of law reform bodies and commentators have argued for the reintroduction (or retention) of the partial defence of excessive self-defence. See eg Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Final Report (2004) [3.103]; Law Commission (England and Wales), *Partial Defences to Murder*, Consultation Paper No. 173 (2003) [9.17]. See also Yeo S, 'Revisiting Excessive Self-Defence' (2000) 12(1) *Current Issues in Criminal Justice* 39. In his article Yeo refers to the support for excessive self-defence from various academics and judges as well as evidence of community support on the basis of a survey in New South Wales. The New Zealand Law Commission did not recommend the introduction of excessive self-defence, instead favouring reliance on sentencing discretion. However, it acknowledged the 'strength of the arguments in support of excessive self-defence' and noted that of all the partial defences it would favour the excessive self-defence: see New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Final Report No. 73 (2001) 25.
12. Section 418 *Crimes Act 1900* (NSW). For further discussion of the Model Criminal Code test for self-defence, see above, 'Self-Defence: Model Criminal Code'.
13. *Crimes Amendment (Self-Defence) Act 2001* (NSW) s 3 & Schedule 1.
14. *Crimes Act 1900* (NSW) s 421.
15. *Criminal Law Consolidation Act 1935* (SA) s 15 (2).

Excessive self-defence was most recently introduced in Victoria. In 2005 the *Crimes Act 1958* (Vic) was amended to create an offence of 'defensive homicide'. The penalty for defensive homicide is the same as for manslaughter. Therefore, although not expressed as a partial defence, the effect is similar – an accused is convicted of a lesser offence than murder.¹⁶ Under s 9AD an accused will be guilty of defensive homicide if he or she believed that the relevant conduct was necessary in defence, but in circumstances where there were no reasonable grounds for the belief. Unlike the partial defence in New South Wales and South Australia, it appears that an accused could be convicted of defensive homicide on the basis that there were no reasonable grounds for either the belief about the threat occasion (the need to use defensive force), or the belief about the degree of force required in the circumstances. In either case, however, the offence of 'defensive homicide' is based solely on the subjective belief of the accused.

EXCESSIVE SELF-DEFENCE IN PRACTICE

Is excessive self-defence too complicated?

A common criticism of the partial defence of excessive self-defence is that it is unduly complicated and difficult for juries to understand.¹⁷ The Victorian Law Reform Commission (VLRC) noted that the 'defence [at common law] involved the jury being instructed about a complicated six-stage test, filled with difficult language and double negatives'.¹⁸ As noted above, excessive self-defence was abolished at common law because it was considered to be

too complex. Similarly, the Model Criminal Code Officers Committee declined to recommend the introduction of excessive self-defence, observing that the vagueness of the concept has 'resulted in no satisfactory test being promulgated'.¹⁹

Nonetheless, a number of jurisdictions have sought to formulate less complex tests. The VLRC expressed the view that any problems arising from the complexity of excessive self-defence could be solved by a simple legislative test and clear jury directions.²⁰ Further, it has been observed that in South Australia and New South Wales the partial defence is operating well in practice.²¹ In South Australia written jury directions have sometimes been used to overcome problems in explaining the partial defence to juries.²²

Is excessive self-defence unnecessary?

It has been suggested that a partial defence of excessive self-defence is unnecessary.²³ This argument can be advanced on two bases. The first is that if an accused had a genuine belief in the need to use force, then the appropriate verdict is an acquittal on the basis of self-defence. In the English case of *Palmer*,²⁴ it was stated that:

If there had been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken.²⁵

16. In 2004 the VLRC recommend that the partial defence of excessive self-defence should be introduced; however, its recommended partial defence of excessive self-defence was based upon the general test for self-defence under the Model Criminal Code: VLRC, *Defences to Homicide*, Final Report (2004) [3.114].
17. Weinberg M, 'Moral Blameworthiness – The 'objective test' dilemma' (2003) 24 *Australian Bar Review* 1, 22; VLRC, *Defences to Homicide*, Final Report (2004) [3.94].
18. VLRC, *Defences to Homicide*, Final Report (2004) [3.89]. In *Zecevic*, Mason CJ acknowledged that including the burden of proof in the formulation of the test in *Viro* resulted in unnecessary complexity: *Zecevic* (1987) 162 CLR 645, 653.
19. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 113.
20. VLRC, *Defences to Homicide*, Final Report (2004) [3.113].
21. Yeo S, 'Partial Defences to Murder in Australia and India: Provocation, diminished responsibility and excessive defence' in Law Commission (England & Wales), *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, 58. The Commission notes that Victoria only introduced the offence of defensive homicide at the end of 2005. The Judicial Commission of New South Wales recently examined cases where partial defences have been raised. It found that since the introduction of the defence in 2002 until the end of June 2005, there were only 13 cases where the partial defence of excessive self-defence was raised. Of these 13 cases, 12 were successful. Two of the 12 successful cases involved a female accused. Four of the 10 male accused were intoxicated at the time of the incident. It was observed that because the test for excessive self-defence in New South Wales is 'entirely subjective, the accused's state of intoxication can play a crucial role in their belief that their conduct was necessary'. Five of these 12 cases were successful because the prosecution accepted a plea of guilty to manslaughter. See Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 51–52.
22. See Yeo, *ibid*.
23. Weinberg observed that excessive self-defence has been regarded by many commentators as unnecessary: Weinberg M, 'Moral Blameworthiness: The "objective test" dilemma' (2003) 24 *Australian Bar Review* 1, 22.
24. [1971] AC 814.
25. *Ibid* 832, as quoted in Law Commission (England & Wales), *Partial Defences to Murder*, Final Report (2004) [4.10].

This decision implies that a disproportionate response to an attack will not necessarily prevent an outright acquittal on the basis of self-defence. The Commission agrees that a disproportionate response should not necessarily preclude successful reliance on the complete defence of self-defence. To this end, it has recommended that when an accused relies on the complete defence of self-defence, the trial judge should inform the jury that a response may be considered reasonable even if it is not proportionate.²⁶ However, the Commission also recognises that the intentional killing of another person is the most extreme type of defensive response and there will be cases where that response is considered unreasonable. In the absence of a partial defence of excessive self-defence, in these cases the accused will be convicted of murder.

The second argument is that excessive self-defence is unnecessary because the accused might be convicted of manslaughter on another basis. In *Palmer* it was observed that in cases where the defence of self-defence fails, the accused may nevertheless be convicted of manslaughter on the basis of provocation or because the necessary intention for murder could not be proved.²⁷ However, the Law Commission (England and Wales) noted that although the direction in *Palmer* is 'theoretically generous', it does not necessarily operate favourably in practice in cases where a weaker person has used disproportionate force against a stronger person, such as where a woman uses a weapon against an unarmed man.²⁸

In *Trevenna*,²⁹ the accused was charged with murder but pleaded guilty to manslaughter on the basis of excessive self-defence. The deceased had attacked the accused by choking and strangling her. The accused managed to break free, but the deceased continued to threaten her. While the deceased had moved away (the accused believed he did so to reach for a cricket bat to further assault her) the accused found the deceased's gun and shot him in the back of the head. By pleading guilty to manslaughter, the accused accepted that her response to the attack was excessive. Nonetheless, the accused was clearly in fear of her life. It was observed that she 'shot the deceased in

the head when his head was turned, so making death almost inevitable as against a shot directed elsewhere'.³⁰

Although the partial defence of provocation could be available in these types of cases to reduce murder to manslaughter, the Commission believes that the concept of excessive self-defence more accurately reflects the circumstances—that the conduct of the accused was carried out for the purpose of defence—than the partial defence of provocation. As Deane J observed in *Zecevic*:

There may, no doubt, be cases in which a defence of provocation is available to a person who has acted excessively in self-defence. The two defences are however quite distinct. Excessive self-defence may well be available in circumstances where there is no basis at all for a defence of provocation. Indeed, in some circumstances there may be an element of inconsistency between a genuine (albeit unreasonable) belief that what was done was done reasonably in self-defence (or defence of another) and the loss of control which ordinarily lies at the heart of a defence of provocation.³¹

Furthermore, in this Report the Commission has recommended the repeal of the partial defence of provocation.³² The Commission has observed that reliance on provocation by women who kill in response to domestic violence (and therefore the need to demonstrate a 'loss of self-control') is a distortion of their true circumstances.³³ Because of the potential inconsistency between provocation and self-defence, relying on provocation in these types of cases has the potential to misrepresent the reality of what happened and, therefore, reduce the accused's chances of successfully arguing that the purpose of the killing was self-defence.

Might excessive self-defence disadvantage women?

It has been suggested that the introduction of excessive self-defence may disadvantage women who kill in response to domestic violence because the jury may convict an accused of manslaughter in circumstances where the accused should have been acquitted by reason of self-defence.³⁴ The VLRC considered that this was strongest

26. See Chapter 4, 'Self-Defence', Recommendation 22.

27. [1971] AC 814, 832, as quoted in Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [4.10].

28. Law Commission (England and Wales), *ibid* [4.12].

29. [2004] NSWCCA 43.

30. *Ibid* [84] (Santow JA).

31. (1987) 162 CLR 645, 678.

32. See Chapter 4, 'The Partial Defence of Provocation', Recommendation 29.

33. See Chapter 6, 'Defences to Homicide in the Context of Domestic Violence: Provocation'.

34. See Yeo S, 'Partial Defences to Murder in Australia and India: Provocation, diminished responsibility and excessive defence' in Law Commission, *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, 63.

argument against excessive self-defence: 'it may prevent women from being acquitted on the basis of self-defence due to the existence of an "easy" middle option'.³⁵

In its submission, the Women's Law Centre of Western Australia expressed a similar concern, emphasising that in the absence of reform to self-defence, the introduction of excessive self-defence may 'undermine' the opportunity for women to successfully rely on self-defence.³⁶ However, the Commission notes that if the law of self-defence is not reformed to accommodate women who kill in response to domestic violence, women will remain disadvantaged, irrespective of whether excessive self-defence is introduced or not. In the absence of reform to the law of self-defence, the Commission considers that a partial defence of excessive self-defence would mean that women who are now convicted of manslaughter on the basis of provocation may instead be convicted of manslaughter on the basis of excessive self-defence. Importantly, however, the Commission has recommended a reformulated test for self-defence removing the main legal obstacles for women and others who kill in response to long-term abuse.³⁷ Further, the Commission has recommended that juries be directed that self-defence may apply even if the threat was not imminent and the response was not proportionate.³⁸

Conversely, it has been observed that the partial defence provides an appropriate 'half-way' house in some cases.³⁹ The VLRC stated that a partial defence of excessive self-defence may give women who kill in response to domestic violence 'more confidence in going to trial on self-defence, knowing that it is no longer an "all or nothing" defence'.⁴⁰ It has been observed that, for some women who have killed in the context of domestic violence, relying on self-defence may be considered too risky and the prospect of

a murder conviction (and life imprisonment) too great. Therefore, some accused may have pleaded guilty to manslaughter rather than testing their claims of self-defence.⁴¹ From its examination of Director of Public Prosecutions files in Western Australia, where women killed in the context of domestic violence, the Commission found that the majority of women pleaded guilty to manslaughter.⁴² The Commission believes that one benefit of introducing excessive self-defence is that such women may be more likely to rely on self-defence at trial in the knowledge that there is an appropriate alternative if the complete defence of self-defence fails. Further, excessive self-defence gives the prosecution the opportunity to appropriately assess an accused's claim of self-defence and, where excessive force has been used, accept a plea of guilty to manslaughter on a basis that better reflects the reality of the circumstances.

Excessive self-defence and moral culpability

The main argument in support of excessive self-defence is that the culpability of a person who kills for the purpose of defence is significantly reduced.⁴³ In *Viro*,⁴⁴ Stephen J supported the partial defence of excessive self-defence because

an accused who honestly believed that his response to aggression was a reasonable one will lack that degree of culpability which a murderer possesses.⁴⁵

Even Mason CJ, who decided that the partial defence should be abolished because of its complexity, stated that excessive self-defence reflects 'acceptable standards of culpability'.⁴⁶ Culpability is significantly reduced because the accused initially acted lawfully⁴⁷ or, as Yeo asserts, the

35. VLRC, *Defences to Homicide*, Final Report (2004) [3.92]. See also Coss G, 'Provocative Reforms: A comparative critique' (2006) 30 *Criminal Law Journal* 138, 148.

36. Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 4.

37. See Chapter 4, 'Self-Defence: Reformulated test for self-defence'.

38. See Chapter 4, Recommendations 22 & 23.

39. VLRC, *Defences to Homicide*, Final Report (2004) [3.91].

40. VLRC, *ibid* [3.108].

41. Law Commission (England & Wales), *Partial Defences to Murder*, Final Report (2004) [4.22]; Australian Law Reform Commission, *Equality Before the Law: Justice for women*, Final Report No. 69 (Vol. 1, 1994) [12.4]; Rathus Z, *There Was Something Different About Him That Day: The criminal justice system's response to women who kill their partners* (Brisbane: Women's Legal Service, 2002) 25–26. Similarly, Bradfield observed that women may rely on both self-defence and provocation at trial in order to avoid the all or nothing defence: see Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman' (1998) 5 *Psychiatry, Psychology and Law* 71, 79.

42. See Chapter 6, 'Defences in the Context of Domestic Violence: The prevalence of guilty pleas'.

43. See Yeo S, 'Partial Defences to Murder in Australia and India: Provocation, diminished responsibility and excessive defence' in Law Commission, *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, 53; Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 179.

44. (1978) 18 ALR 257.

45. *Ibid* 292. See also Mason J (at 297) and Aickin J (at 330) who noted that there is a significant difference in the culpability of a person who responds excessively to a 'real or reasonably apprehended attack'.

46. *Zecevic* (1987) 162 CLR 645, 653.

47. VLRC, *Defences to Homicide*, Final Report (2004) [3.104].

accused had an 'initial right' to use defensive force.⁴⁸ Yeo also observed that:

A person who defends herself or himself over-zealously should not be treated as equally culpable with one who killed but not in circumstances of self-defence at all.⁴⁹

The Commission is of the view that there must be a clear justification for categorising intentional killings as manslaughter. The presence of a lawful purpose of self-preservation (or the protection of another) provides this justification. Unlike the partial defences of provocation and diminished responsibility, the accused in an excessive self-defence case has a 'worthy motive'.⁵⁰ Despite the existence of the requisite intention for murder, excessive self-defence killings are in fact conceptually much closer to manslaughter (by criminal negligence) than murder.⁵¹ The accused has genuinely killed in self-defence, but made an error of judgment in assessing the appropriate response.

SHOULD EXCESSIVE SELF-DEFENCE BE INTRODUCED IN WESTERN AUSTRALIA?

In its Issues Paper the Commission asked whether the partial defence of excessive self-defence should be introduced in Western Australia and, if so, how it should be formulated.⁵² The majority of submissions opposed the introduction of excessive self-defence.⁵³ Some argued that excessive self-defence would bring uncertainty to the law,⁵⁴

while others contended that excessive self-defence could appropriately be dealt with during sentencing.⁵⁵

Nevertheless, there were a number of submissions supporting the introduction of a partial defence of excessive self-defence.⁵⁶ The Department of Community Development suggested that excessive self-defence would be beneficial to victims of domestic violence.⁵⁷ The Western Australia Police recognised that a person who honestly, but unreasonably, uses more force than was necessary is less culpable than a murderer.⁵⁸ Apart from the Western Australia Police—who supported the test for excessive self-defence in South Australia—none of the submissions addressed how the defence should be formulated.⁵⁹ Stella Tarrant, in her opinion commissioned for this reference, also recommended that excessive self-defence should be introduced in Western Australia if the partial defence of provocation is abolished.⁶⁰

The Commission's first guiding principle for reforming the law of homicide is that generally intentional killing should be distinguished from unintentional killing. The effect of introducing excessive self-defence would be to treat some intentional killings as manslaughter instead of murder. However, the Commission has acknowledged that there may be circumstances where an intentional killing is morally equivalent to an unintentional killing.⁶¹ The Commission is of the view that the only situations where this is true are cases where the accused's purpose for an intentional killing is self-preservation or the protection of another. In order

48. Yeo S, 'Revisiting Excessive Self-Defence' (2000) 12 (1) *Current Issues in Criminal Justice* 39, 40.

49. Yeo S, 'Applying Excuse Theory to Excessive Self-Defence' in Yeo S (ed), *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 158, 163.

50. See Fairall P, 'Excessive Self-Defence in Australia: Change for the worse?' in Yeo, *ibid* 178, 185.

51. *Ibid* 184; Yeo S, 'Applying Excuse Theory to Excessive Self-Defence' in Yeo, *ibid* 158, 163.

52. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 8.

53. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 4; Justice John McKechnie, Submission No. 9 (7 June 2006) 4; Women Justices' Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 3; Festival of Light Australia, Submission No. 16 (12 June 2006) 5; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 8; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 5.

54. Justice John McKechnie, Submission No. 9 (9 June 2006) 4; Law Society of Western Australia, Submission No. 37 (4 July 2006) 8; Office of the Director of Public Prosecutions, Submission No. 51A (31 July 2006) 5.

55. Women Justices' Association of Western Australia (Inc), Submission No. 14 (7 June 2006) 4; Law Society of Western Australia, Submission No. 37 (4 July 2006) 8; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 5.

56. Michael Bowden, Submission No. 39 (11 July 2006) 3; Department of Community Development, Submission No. 42 (7 July 2006) 7; Office of the Commissioner of Police, Submission No. 48 (4 August 2006) 9; Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 4.

57. Department of Community Development, Submission No. 42 (7 July 2006) 7.

58. Office of the Commissioner of Police, Submission No. 48 (4 August 2006) 9.

59. *Ibid*.

60. Tarrant S, *Women Who Kill their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 40. Nevertheless, Tarrant expressed concern that juries may convict of manslaughter on the basis of excessive self-defence in circumstances where the accused should have been acquitted because of self-defence. Tarrant proposed that if the partial defence is introduced in Western Australia the government should conduct a review in five years to 'assess the impact' of introducing excessive self-defence. In the introduction to this Report the Commission has recommended a review of the reforms to the law of homicide after the recommendations in this Report have been implemented for a period of five years: see Chapter 1, Recommendation 2. If excessive self-defence is introduced in Western Australia this review should consider, among other things, the impact of excessive self-defence in cases where women who kill in response to domestic violence. A similar recommendation was made by the VLRC: see VLRC, *Defences to Homicide*, Final Report (2004) [3.115]. The VLRC recommended that the Victorian Department of Justice should conduct a review after the defence had been in operation for five years and the review should include consideration of how the defence is being used in practice.

61. See Introduction, 'Guiding Principles for Reform: Principle One'.

to ensure that any partial defences are consistent with these principles, the Commission concluded that partial defences should only be introduced (or retained) if the circumstances giving rise to the defence *always* demonstrate reduced culpability. Excessive self-defence meets these criteria and, having regard to the arguments discussed above and the submissions, the Commission has determined that such a defence should be introduced in Western Australia.

The appropriate test for excessive self-defence

It is vital that the test for excessive self-defence ensures that the partial defence only captures those cases where moral culpability is reduced and where the purpose of the killing was lawful. The Commission has recommended that the test for the complete defence of self-defence should be separated into three elements: the accused's belief about the threat occasion; the accused's belief about the degree of force required; and the reasonableness of the accused's response.⁶² In formulating the test for excessive self-defence it is necessary to consider whether the partial defence should apply only in cases where there is an unreasonable belief about the degree of force required or whether it should also apply if there is an unreasonable belief about the threat occasion. As discussed earlier, excessive self-defence has traditionally only applied where more force was used than was necessary.

It has been argued that there is no reason to differentiate between the accused's belief about the threat occasion and the accused's belief about the degree of force needed in defence.⁶³ In *Zecevic*, Deane J stated that much of the complexity of the test will vanish if excessive self-defence can be founded on either an unreasonable belief about the occasion for self-defence or an unreasonable belief about the degree of force required.⁶⁴ Even though Yeo has argued that the accused's belief about the threat occasion should be reasonable for the purpose of self-defence, he acknowledged this argument by stating that an accused who honestly but unreasonably believes that he or she was threatened may exhibit less culpability than others convicted of murder.⁶⁵

For the purpose of the complete defence of self-defence the Commission concluded that the accused's belief about the threat occasion must be based on reasonable grounds. The reasons for this conclusion are also applicable to the partial defence of excessive self-defence. If excessive self-defence could be successfully raised, even where the belief about the need to use some force is unreasonable, irrational fears and prejudices may form the basis of the partial defence. The Law Reform Commission of Ireland noted that if the accused's belief about the need to use force is unreasonable, this may allow a person to 'kill a member of a particular ethnic group, where this defender believed on racist grounds that this member constituted a threat to his or her life'.⁶⁶ Similarly, the VLRC observed that one argument against the introduction of excessive self-defence is that it may excuse people who are 'excessively fearful'.

For example, if a white person who is excessively fearful of black people sees a black person walking towards him or her and kills the person believing he or she is about to be attacked, he or she might be convicted of manslaughter on the basis that although their response was not reasonable, the belief in the need to use force was genuinely held.⁶⁷

The Commission considers that the clear separation of the accused's belief about the threat occasion and the accused's belief about the necessity for the force used avoids some of the complexity associated with the concept of excessive self-defence. However, the principal justification for requiring a reasonable belief about the need to use force is to ensure that the defence only partially excuses intentional killings where culpability is reduced and where the accused had an initial lawful right to use defensive force.⁶⁸ It is on this basis that the partial defence is an appropriate exception to the principle that intentional killings should be distinguished from unintentional killings. In any other case—where the accused unreasonably believes he or she is being attacked—any mitigation can be dealt with in sentencing. In such a case the accused would not have been justified in using defensive force at all under the Commission's test for self-defence. However, where the accused reasonably believes that it was necessary to use defensive force and believes that the

62. See Chapter 4, 'Self-Defence', Recommendation 23.

63. See *Zecevic* (1987) 162 CLR 645, 680 (Deane J); Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [7.231].

64. *Zecevic*, *ibid* 681.

65. Yeo S, *Compulsion in the Criminal Law* (Sydney: Law Book Company, 1990) 219.

66. Law Reform Commission of Ireland, *Legitimate Defence*, Consultation Paper No. 41 (2006) [7.254].

67. VLRC, *Defences to Homicide*, Final Report (2004) [3.93].

68. Yeo S, 'Revisiting Excessive Self-Defence' (2000) 12(1) *Current Issues in Criminal Justice* 39, 40.

force used was necessary, but the actual force used was unreasonable, the term 'partial defence' is accurate – the conduct of the accused is partially justified.

Recommendation 26

Introduce partial defence of excessive self-defence

That a new s 249 be inserted into the *Criminal Code* (WA) to provide that a person will be guilty of manslaughter and not murder if the act done in self-defence was not a reasonable response to the circumstances as the person perceived them, on reasonable grounds, to be and

- (a) the person believed on reasonable grounds that it was necessary to use force in defence of himself, herself or another person; and
- (b) the person believed that the act was necessary in order to effectively defend himself or herself or another person.

Duress and Extraordinary Emergency

INTRODUCTION

The defences of duress and extraordinary emergency (hereafter referred to as emergency) are closely related.¹ Both deal with unusual and difficult circumstances where a threat of harm compels an accused to commit an offence. In the case of duress, the harm is threatened to be inflicted by another person. For example, an accused may be acting under duress if forced to commit an offence at gunpoint. In the case of emergency, the harm arises from the circumstances in which the accused is placed. An accused who is caught speeding while driving a very sick person to hospital could rely on the defence of emergency. The main difference between duress and emergency is that in the former case the proposed action is 'dictated by the threatener', whereas for the latter it is the accused who decides what to do to avoid the harm.²

Although the defences have been linked with the concept of involuntary conduct³ (for example, it has been said that the will of a person acting under duress has been overborne), this does not mean that the physical conduct of the accused is involuntary or unwilling.⁴ For both duress and emergency the physical conduct of the accused is voluntary and the decision to commit the offence is deliberate.⁵ Of course, in both cases 'freedom of choice' is constrained.⁶ As the Law Reform Commission of Ireland has explained, the accused 'faces a moral dilemma': the choice is to commit an offence or suffer harm.⁷

Duress and emergency are similar to self-defence because the accused acts for the purpose of self-preservation or for the purpose of protecting another. However, as a general rule, for self-defence the accused acts directly

against the 'attacker' whereas for duress and emergency the accused acts against an innocent person.⁸

Despite the similarities between duress and emergency, in Western Australia some offences (including wilful murder⁹ and murder) are excluded from the scope of duress; but the defence of emergency is available for all crimes. It is difficult to understand why the two defences are treated differently: both should be available as a defence to all crimes or both defences should be limited in the same manner.¹⁰ If the defence of duress was extended to all crimes, including murder, both duress and emergency may equally excuse the intentional killing of an innocent person.

Underlying rationale

In Chapter 1 the Commission explained that defences may be categorised as either a justification or an excuse.¹¹ A justification has been described as 'socially approved conduct' and an excuse is conduct which is not socially approved but 'forgivable'.¹² In Western Australia, there is no practical distinction between the two – in both cases the accused is acquitted of the crime. However, the distinction may be useful when considering moral questions associated with particular defences.¹³ Determining whether duress and emergency should be available as defences to murder clearly involves moral questions and, therefore, it is helpful to examine these defences with reference to the rationales of justification and excuse.

Justification: A choice of evils

If by committing an offence under duress or during an emergency the accused caused less harm than the harm avoided, the defences would fit within the justification

1. Section 31(4) of the Code provides for the defence of duress and s 25 sets out the defence of emergency. Duress is also sometimes referred to as compulsion: Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 134. Emergency is known as necessity at common law: Review of the Commonwealth Criminal Law Committee, *Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) 141. The defence of necessity at common law has also been referred to as duress of circumstances: Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [1.07]. In *Dunje v Cross* [2002] WASCA 14, [40] Miller J observed that s 25 of the Code appears to 'reflect the common law defence of necessity'. The Commission has decided to use the terms 'duress' and 'emergency' when discussing the defences in Western Australia. The terms 'compulsion' and 'necessity' will only be used where the context requires those terms.
2. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [7.14].
3. Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Final Report (2004) [3.150].
4. *Palazoff* (1986) 43 SASR 99, 105 (Cox J), as quoted in Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths: 4th ed., 2005) 137.
5. Fairall & Yeo, *ibid.* See also Dennis I, 'Duress, Murder and Criminal Responsibility' (1980) 96 *Law Quarterly Review* 208, 220–21; Yeo S, 'Voluntariness, Free Will and Duress' (1996) 70 *Australian Law Journal* 304.
6. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [1.02] & [3].
7. *Ibid* [1.02].
8. *Hasan* [2005] UKHL 22, [19] (Lord Bingham of Cornhill).
9. Because the Commission has recommended the repeal of wilful murder, this section will only refer to murder.
10. In the leading English case of *Howe* [1978] 1 AC 417, 429 Lord Hailsham of St Marylebone LC stated that 'duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other'.
11. See Chapter 1: 'How Criminal Responsibility is Determined'.
12. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 1–2.
13. *Ibid.*

◀ Duress and Extraordinary Emergency

rationale.¹⁴ Otherwise it would not be possible to describe the conduct as 'rightful in the eyes of society'.¹⁵ Both defences involve a choice between 'two evils'. Hence the justification rationale is potentially applicable to both defences if, in the particular circumstances, the accused chose the lesser of two evils.¹⁶

However, if the 'two evils' involve equal harm the justification rationale is difficult to apply. For instance, if the accused intentionally kills one innocent person in order to save another innocent person the killing could not be described as justified. In comparison, the justification rationale could arguably apply if one person was killed in order to save the lives of many.¹⁷

It is important to recognise that the justification rationale is not absolute. Even if the harm avoided is significantly greater than the harm done, the conduct may still be considered wrong.¹⁸ An example given by one commentator to illustrate this point is a surgeon with five patients all requiring organ transplants in order to survive. A sixth patient attends the surgeon for an annual check-up. The surgeon would clearly not be justified (nor for that matter excused) for killing this patient for the purpose of providing organs to the other five so that they might live.¹⁹

Excuse: Plight of the accused

If duress and emergency are excuse-based defences the conduct is considered wrong, but the circumstances dictate that it would be unjust to punish the accused.²⁰ The excuse rationale maintains that it would be unfair to expect the accused to comply with standards 'beyond the reach' of an ordinary or reasonable person.²¹ It has

been stated that if the defence 'is seen as an *excuse*, then the focus shifts from a balancing act between two "evils" to the plight of the actor'.²² In the context of murder, the excuse rationale does not require the weighing up of one life against another. Where the choice involves 'comparable evils' the decision by the accused to kill an innocent person is still condemned but nevertheless excused if a reasonable person would have acted in the same way.²³

In Western Australia, duress and emergency are treated as excuse defences.²⁴ This is consistent with how the defences are viewed in other jurisdictions. The Law Commission (England and Wales) observed that 'the prevailing judicial view is that duress operates as an excuse rather than a justification'.²⁵ In Canada, Dickson J stated that if the defence of necessity (the common law equivalent of emergency) is described as an excuse, it is 'much less open to criticism'.²⁶ Nonetheless, it has been observed that some examples of duress are more consistent with justification than excuse.²⁷ The Law Reform Commission of Ireland stated that 'a defensible case can be made for treating the plea of necessity as *either* a justification *or* an excuse depending on the circumstances of the case'.²⁸ In other words, both rationales have a role in explaining the defences. In particular, when considering if the defences of duress and emergency should be available to murder, both rationales may be relevant. If an accused is faced with the choice of killing one person in order to save many more it could be argued that the killing is justified because the accused opted for the lesser of two evils. It would also be appropriate to apply the excuse rationale because it is understandable and reasonable that a person facing such a difficult situation would act to avoid the greatest harm.

14. Yeo S, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17, 18.

15. *Ibid.*

16. The justification rationale has been said to apply to both duress: see Cross R, 'Murder under Duress' (1978) 28 *Toronto Law Journal* 369, 372; and emergency: see Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [4.05]; Law Reform Commission of Canada, *Criminal Law: Liability and Defences*, Working Paper No. 29 (1982) 93.

17. Dennis I, 'Duress, Murder and Criminal Responsibility' (1980) 96 *Law Quarterly Review* 208, 231.

18. McSherry B, 'The Doctrine of Necessity and Medical Treatment' (2002) 10 *Journal of Law and Medicine* 10, 13–14.

19. *Ibid.*

20. Yeo S, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17, 19; Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [2.21].

21. Dennis I, 'Duress, Murder and Criminal Responsibility' (1980) 96 *Law Quarterly Review* 208, 232; Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [4.05].

22. McSherry B, 'The Doctrine of Necessity and Medical Treatment' (2002) 10 *Journal of Law and Medicine* 10, 14.

23. See Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [1.08].

24. Sections 31 and 25 of the Code use the phrase 'a person is not criminally responsible'. In contrast, s 248 which deals with self-defence uses the phrase 'it is lawful for' and is therefore treated as a justification. The excusatory nature of the defence is apparent from the comments made by Sir Samuel Griffith when drafting the section. He said the 'section gives effect to the principle that no man is expected ... to be wiser or better than all mankind': see O'Regan R, 'The Defence of Sudden or Extraordinary Emergency in the Griffith Code' (1985) 9 *Criminal Law Journal* 347, 347.

25. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.5].

26. *Perka* [1984] 2 SCR 232, 248.

27. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.61].

28. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [4.99]. Also it observed that although duress is usually described in terms of an excuse it may also be based on the justification rationale.

DURESS IN WESTERN AUSTRALIA

The defence of duress is set out in s 31(4) of the Code. It provides that a person is not criminally responsible for an act or omission if

he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution.

The Commission recently examined the defence of duress as part of its reference on Aboriginal customary laws. It observed that the defence in Western Australia is one of the most restrictive models in Australia.²⁹ The Commission identified a number of specific problems (discussed below) and recommended a new formulation based upon the defence of duress under the Model Criminal Code.³⁰

The problems with duress under the Code

The threat must be made by a person actually present

It has been observed that the requirement that the threat must be made by a 'person actually present' is inappropriate given modern communications and weapons technology.³¹

Western Australia and Tasmania are the only Australian jurisdictions that have this requirement.³² A threat made over the telephone, coupled with a visual recording of a loved one at gunpoint is not necessarily any less compelling than a threat made by a person actually present. Further, the requirement may operate unfairly against victims of domestic violence.³³ If there was a history of long-term abuse and past attempts to escape the relationship had failed, a threat made by the abusive partner at an earlier time may be just as convincing as a threat made by that person at the time of the offence.

The threat must be directed to the accused and not to a third party

In virtually all other jurisdictions the defence of duress applies if the threat is made against either the accused or another person.³⁴ Numerous law reform bodies have supported the availability of duress when a threat has been made against a third party.³⁵ In 1978 the Victorian Law Reform Commissioner convincingly stated that '[f]ear combined with love can provide perhaps a more worthy and no less strong or irresistible force' than self-preservation.³⁶ The Commission agrees that a threat against a third party may be even more compelling than a threat against oneself. This is especially true if the third party is someone close, such as a child or relative.³⁷

29. Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 180.

30. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 153–55.

31. Clarke B, 'The Defence of Duress: Telephone threats and 'telescopic targets'', (2002) 29(4) *Brief* 22, 22. A similar requirement under the Queensland Code was removed following a recommendation by the Queensland Criminal Code Advisory Working Group in 1996. It was observed that with modern weaponry technology a person 'far removed from the scene may be able to carry out a threat of death or grievous bodily harm': Queensland Criminal Code Advisory Working Group, *Report to the Attorney General* (1996) 25. The same recommendation was made four years earlier: see Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 187.

32. *Criminal Code* (Tas) s 20(1). In Canada and New Zealand it is also stipulated that the person making the threat must be actually present: *Criminal Code* (Canada) s 17; *Crimes Act 1961* (NZ) s 24. The Law Reform Commission of Ireland noted that the Supreme Court of Canada has held that a similar requirement under s 17 of the Canadian Code is contrary to the Canadian Charter of Rights and Freedoms because it is unduly restrictive: Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [2.119].

33. McDonald E, 'Women Offenders and Compulsion' (1997) *New Zealand Law Journal* 402, 404. See also New Zealand Law Commission (NZLC), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [176]–[215].

34. See *Criminal Code* (Cth) s 10.2; *Criminal Code 2002* (ACT) s 40; *Criminal Code* (NT) s 40; *Criminal Code* (Qld) s 31(1)(d); *Crimes Act 1958* (Vic) s 9AG. The defence of duress at common law applies in South Australia and New South Wales. At common law a threat made against a third party may be sufficient for duress: see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [16.5]; *Hurley & Murray* [1967] VR 526, 543 (Smith J). In England the common law defence of duress applies to threats made against the accused, his or her family or someone close: see *Hasan* [2005] UKHL 22, [21] (Lord Bingham of Cornhill).

35. See eg Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [2.48]; Queensland Criminal Code Advisory Working Group, *Report to the Attorney General* (1996) 25; Queensland Criminal Code Review Committee, *Final Report to the Attorney General*, (1992) 187; Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [2.59].

36. Victorian Law Reform Commissioner, *ibid* [2.48].

37. The Commission notes that s 31(3) of the Code provides that a person is not criminally responsible for an act that is 'reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence'. There is potential overlap between this provision and the defences of duress, emergency and self-defence. On the basis of the Commission's recommendations for the reform of these defences it has concluded that s 31(3) should be repealed: see Chapter 4: 'Self-Defence', Recommendation 24. The Commission acknowledges that s 31(3) may apply to cases of 'duress' involving a threat to a third party. For example, if a bank teller hands over the bank's money to a thief while the thief is holding a knife at a customer's throat the bank teller would not be criminally responsible for stealing. The act of handing over the money would obviously be an act reasonably necessary to resist the violence threatened against the customer. Section 31(3) stipulates that the threat of violence must be made in the presence of the accused and it is therefore subject to the same criticism as discussed above in relation to duress under s 31(4). Under the Commission's recommendation the retention of s 31(3) is unnecessary.

The threat must be a threat of immediate harm

Under the Code the requirement for immediacy means that there must be a threat that harm will be inflicted within a very short time.³⁸ A similar (although less strict) requirement exists at common law: there must be a threat of imminent harm.³⁹ The Model Criminal Code abandons this requirement.⁴⁰ It has been argued that the immediacy requirement can be particularly problematic for victims of domestic violence.⁴¹ In such cases an accused may commit an offence as a consequence of threats to be harmed in the future. Although there may not be a threat of immediate harm (and the person making the threat may not be present at the time the offence is committed) the carrying out of the threat may nevertheless be inevitable.⁴² For example, if a woman was threatened by her abusive husband that if she did not falsely claim social security benefits he would kill her, the fact that there was an interval of time between the making of the threat and when it is likely to be carried out should not preclude reliance on the defence.⁴³

The threat must be to cause death or grievous bodily harm

Currently, the defence of duress is only applicable if the threat is to cause death or grievous bodily harm. The definition of grievous bodily harm in Western Australia does not include sexual assault or deprivation of liberty.⁴⁴ Tasmania is the only other jurisdiction (with a statutory defence of duress) to continue with the requirement that the threat must be to cause death or grievous bodily harm. In 2000 the Queensland Code was amended to provide for a much 'wider range of threats', including threats to property.⁴⁵

In its recent consultation paper on duress, the Law Reform Commission of Ireland concluded that only threats of death or serious harm should suffice to establish the defence. In support of this view it was stated that because a person acting under duress has 'injured an innocent victim' the law should set a minimum standard; that is, a threat to 'bodily integrity'.⁴⁶ However, a person acting under duress may not necessarily physically injure an innocent victim; the crime committed could be theft, damage or social security fraud. As Yeo has stated, widening the range of threats can be balanced with a requirement that the response was reasonable.⁴⁷ This is precisely what the Model Criminal Code formulation achieves. For example, committing a trivial offence may be considered reasonable if there was a serious threat to property or reputation.⁴⁸

The defence of duress is potentially gender-biased

A number of the requirements under s 31(4) of the Code may operate unfairly to women who are victims of domestic violence. In relation to the defence of duress in New Zealand (which is similar to that in Western Australia) it was observed that the defence is under-used by women.⁴⁹ Specifically, the requirements that there must be a threat of *immediate* death or grievous bodily harm and that the threat must be made by a person actually present may operate unfairly against women who are victims of serious and sustained violence and abuse.⁵⁰ Evidence of 'battered woman syndrome' has been given in cases dealing with duress for the purpose of assisting juries to understand why an accused was unable to avoid the threat from being carried out and to assess whether an ordinary person would have yielded to the threat.⁵¹

38. *Pickard* [1959] Qd R 475, 476 (Townley and Stable JJ), as cited in *P (A Child)* (Unreported, Supreme Court of Western Australia, Library No. 950469, Kennedy J, 7 September 1995) 9.
39. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [16.11].
40. The current legislative provisions dealing with duress in Queensland, Victoria, the Northern Territory, the Australian Capital Territory, and the Commonwealth do not provide that the threat must related to the infliction of *immediate* harm: *Criminal Code* (Cth) s 10.2; *Criminal Code 2002* (ACT) s 40; *Criminal Code* (NT) s 40; *Criminal Code* (Qld) s 31(1)(d); *Crimes Act 1958* (Vic) s 9AG.
41. See McDonald E, 'Women Offenders and Compulsion' (1997) *New Zealand Law Journal* 402, 404. See also NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [176]–[215].
42. See Chapter 6: 'Defence to Homicide in the Context of Domestic Violence: Imminence'.
43. The defence of duress has been relied on successfully in a case dealing with social security fraud. An accused called evidence of 'battered woman syndrome' in support of her claim that she had obtained unemployment benefits when she was in fact employed because of threats made by her ex-partner: *Easteal P, Hughes K & Easter J, 'Battered Women and Duress'* (1993) 18(3) *Alternative Law Journal* 139. This case was dealt with on the basis of the common law defence of duress.
44. See Chapter 4, 'Self-Defence: Concepts under the law of self-defence that may operate in a gender-biased manner'.
45. *Criminal Law Amendment Act 2000* (Qld) s 16. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 3101 (MJ Foley, Attorney General).
46. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [2.47].
47. Yeo S, 'Private Defence, Duress and Necessity' (1991) 15 *Criminal Law Journal* 139, 143.
48. *Ibid* 144.
49. McDonald E, 'Women Offenders and Compulsion' (1997) *New Zealand Law Journal* 402, 403.
50. McDonald, *ibid* 404. See also NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [176]–[215].
51. *Runjanjic & Kontinnen* (1992) 56 SASR 114, [23] (King CJ); *O'Brien* [2003] NSWCCA 121. See also *Lorenz* [1998] ACTSC 81 where evidence of 'battered woman syndrome' was accepted but the defence of duress failed because the accused's partner did not actually demand that the accused commit the offence. He threatened to kill her if she did not get him some money but he did not demand that she steal it.

A new defence of duress

In its final report on Aboriginal customary laws the Commission recommended that s 31(4) of the Code be amended to provide that a person is not criminally responsible for an offence if he or she reasonably believes that:

1. a threat has been made that will be carried out unless the offence is committed;
2. there is no reasonable way to make the threat ineffective; and
3. the conduct is a reasonable response to the threat.⁵²

The Commission remains of the view that this recommended defence of duress should be introduced in Western Australia because it removes unwarranted restrictions on the availability of the defence. Importantly, it caters for threats made against a third party;⁵³ removes the requirement for the presence of the person making the threat; and allows any type of threat to be taken into account. The reformulated defence will also better take into account the circumstances of victims of domestic violence.⁵⁴

While the elements of the defence are wider under this model, the inclusion of an objective test significantly and appropriately narrows its scope. Currently, the defence in Western Australia is subjective – an accused can be excused from criminal responsibility for committing an offence if he or she *unreasonably* believes that there is no other way to avoid the threat being carried out. The Commission notes that apart from Western Australia and Tasmania, every other Australian jurisdiction's duress defence features an objective test.⁵⁵

As mentioned above, this recommendation was based upon the defence of duress under the Model Criminal Code. The Model Criminal Code defence has been adopted by Victoria, the Australian Capital Territory and the Commonwealth.⁵⁶ Geoffrey Miller has observed that the Commonwealth provision involves 'considerations very different from the application of the defence at common law' and its application has not yet been fully worked out.⁵⁷

The Commission is only aware of two reported cases dealing with s 10.2 of the Commonwealth Criminal Code. Both cases concerned the importation of prohibited drugs into Australia and, in both cases, the defence of duress failed. In *Oblach*,⁵⁸ the majority of the court held that the phrase 'reasonably believes' in s 10.2 requires consideration of what the accused actually believed and whether that belief was reasonable.⁵⁹ In *Morris*,⁶⁰ the accused (who was from England) claimed that he only agreed to import drugs into Australia because a person in England had threatened to harm him and his parents. The accused said that he was too scared to go to the police. The appeal against conviction was dismissed by the Western Australian Court of Appeal. Roberts-Smith JA emphasised that there were numerous opportunities for the accused to contact law enforcement authorities. He stated that:

The requirement that an accused believe that there is no reasonable way the threat can be rendered ineffective is not one to be met too readily. There are clear considerations of public policy dictating that people under threat should take opportunities to render such threats ineffective by reporting their circumstances to police or other appropriate authorities, rather than commit serious criminal offences, when presented with realistic opportunities to do so.⁶¹

52. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 155.

53. It has been suggested that the defence of duress under the Model Criminal Code does not cover threats made against a third party: Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [16.14]. In *Morris* [2006] WASCA 142 the accused claimed that he imported prohibited drugs into Western Australia as a result of threats made against himself and his parents. The defence of duress under s 10.2 of the *Criminal Code* (Cth) applied. McLure JA stated that s 10.2 'does not in terms limit the threat of harm to particular persons or limit the context, nature or timing of the threats': at [142].

54. The Commission acknowledges that the recommended test for duress requires a jury to assess what was reasonable. If there is a lack of understanding in the general community about the circumstances faced by victims of domestic violence, expert evidence may need to be admitted to ensure that the jury properly understands those circumstances: see Chapter 6: 'How the Commission's Reforms Apply to Domestic Violence Homicide: Evidence about reasonableness'.

55. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 143. Yeo has observed that an objective requirement about the accused's belief (for the defence of emergency) is appropriate because it limits the defence 'so as to prevent, for example, an unusually apprehensive accused from committing criminal acts with impunity': Yeo S, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17, 27–28. The same observation would apply to duress.

56. *Crimes Act 1958* (Vic) s 9AG; *Criminal Code 2002* (ACT) s 40; *Criminal Code* (Cth) s 10.2.

57. Miller G, 'The Defence of Duress or Compulsion' (2007) 3 *Western Australia Bar Association Review* 21, 23. In his submission Justice Miller did not support the introduction of the Model Criminal Code defence in Western Australia: Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 6.

58. [2005] NSWCCA 440.

59. Ibid [62] (Spigelman CJ), [94] (Hume JJ). On the other hand, Sully J held that s 10.2 requires consideration of what an ordinary person in the position of the accused would have believed: at [77]–[80]. In *Morris* [2006] WASCA 142, the Western Australia Court of Appeal declined to express a final view about the meaning of the words 'reasonably believes'. Roberts-Smith JA appeared to support the majority view in *Oblach*.

60. [2006] WASCA 142.

61. Ibid [112].

◀ Duress and Extraordinary Emergency

Roberts-Smith JA concluded that in the circumstances of this case the accused's belief that there was no other way to render the threats ineffective was objectively unreasonable.⁶² The other members of the court also placed significant weight on the accused's failure to seek assistance from the authorities.⁶³

It was also observed by McLure JA that the requirement that there is no reasonable way to render the threat ineffective and the requirement that the conduct must be a reasonable response to the threat are linked. If there is another reasonable way to render the threat ineffective, the commission of the offence will not be a reasonable response to the threat. But, even if there is no reasonable way to render the threat ineffective, the commission of the offence may still be regarded as an unreasonable response to the threat. This imports the concept of proportionality into the defence.⁶⁴

These cases demonstrate that it will not be easy to successfully raise the defence of duress under the Model Criminal Code formulation. And this is consistent with how the law has historically approached the defence of duress: that it should be confined within strict limits. But the limits under the Code defence are potentially unfair and unnecessary. Instead the Model Criminal Code formulation invokes a simple objective assessment. The Commission received two submissions supporting the inclusion of an objective test.⁶⁵ The Western Australia Police emphasised the importance of including an objective test if the defence applies to threats against a third party.⁶⁶ The Commission believes that the objective test under its recommended defence is, as the Model Criminal Code Officers Committee states, a 'sufficient safeguard against abuse'.⁶⁷

Offences excluded from the defence

A number of offences are currently excluded from the defence of duress. Section 31 provides that the defence

does not extend to an act or omission which would constitute an offence punishable with strict security life imprisonment, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has, by entering into an unlawful association or conspiracy, rendered himself liable to have such threats made to him.

Therefore an accused cannot rely on duress for wilful murder or murder under s 279(1) of the Code.⁶⁸ The defence is, however, available to felony-murder under ss 279(2), (4) and (5). These offences do not require proof that the accused intended to cause grievous bodily harm.⁶⁹ Duress is also not available for the offences of intentionally causing grievous bodily harm and causing grievous bodily harm. But duress is a defence to attempted murder and manslaughter. A similar anomaly exists in Queensland.⁷⁰

The inconsistency between the offences that are included within the scope of the defence and those that are not was highlighted in two submissions. Justice Blaxell argued that there is no basis for allowing duress as a defence to attempted murder but not for an offence of intentionally doing grievous bodily harm.⁷¹ The Office of the Director of Public Prosecutions (DPP) submitted that felony-murder, attempted murder and manslaughter should all be excluded from the defence. It was argued that felony-murder should be treated in the same way as the general murder offence.⁷² The DPP also submitted that it is anomalous to allow duress as a defence for manslaughter but not for doing grievous bodily harm.⁷³

The Commission agrees that there are problems in respect to the offences excluded from the defence of duress. The current law is illogical. If duress is available as a defence to all offences it would appear to solve the problems. At this stage it is sufficient to note that if duress is not available as a defence to murder then attempted murder should also be excluded.⁷⁴ On the other hand, the Commission

62. Ibid.

63. Ibid [153] (McLure JA), [171] (Buss JA).

64. Ibid [150].

65. Department for Community Development, Submission No. 42 (7 July 2006) 10; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 13.

66. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 13.

67. Model Criminal Code Officers Committee (MCCOC), *General Principles of Criminal Responsibility*, Report (1992) 65.

68. Section 279(1) of the Code requires proof that the accused intended to cause grievous bodily harm.

69. The Commission has recommended the repeal of s 279(3)–(5): see Chapter 2, Recommendation 5.

70. In Queensland, duress is not available to murder or to an offence of which grievous bodily harm or an intention to cause grievous bodily harm is an element but the defence is available as a defence to attempted murder: *Criminal Code* (Qld) s 31(2). At common law in England, duress is not a defence to murder and attempted murder: *Gotts* [1992] 2 AC 412. In Victoria, it has been held that at common law duress is available as a defence to attempted murder even though it is not available as a defence to murder: *Goldman* [2004] VSC 291, [62].

71. Justice Peter Blaxell, Supreme Court of Western Australia, Submission No. 35 (23 June 2006) 1–2. The DPP agreed that it was inconsistent to exclude murder but include attempted murder: see Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 16.

72. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 16.

73. Ibid 17.

74. The Commission is of the view that the defence of duress should be available to both manslaughter and grievous bodily harm because these offences involve causing harm unintentionally. The offence of doing grievous bodily harm should not be excluded from the defence.

does not agree that felony-murder (under s 279(2) of the Code) should be excluded from the defence. An accused may be convicted of felony-murder even though he or she did not intend to harm anyone. Although the Commission supports the retention of felony-murder under s 279(2) of the Code, in the context of duress there is a significant difference between felony-murder and the general definition of murder. Felony-murder can be equated in terms of seriousness with the general offence of murder because the accused has caused death by a dangerous act while committing another crime. It is the fact that the accused has freely chosen to become involved in the unlawful enterprise and, further, to engage in dangerous behaviour during that enterprise, which elevates the seriousness of the conduct. But what if the accused did not freely choose to become involved in the unlawful enterprise?

Example

A and B are acquaintances, but B has no knowledge of A's criminal activities. A jumps into B's car and threatens to kill B unless he drives A to a bank and assists him to commit a robbery. A is in possession of a gun. Under instructions from A, B causes an explosion in order to open the bank's safe. As a result a fire starts and a bank customer is killed. In addition to other offences, A is charged with murder on the basis of the felony-murder provision under the Code.⁷⁵

In respect of the example above the question becomes: should B be held criminally responsible for murder? B was compelled at gunpoint—under threat of death—to assist A in robbing the bank. As a consequence of assisting A, B unintentionally killed the customer. When considering the defence of duress, felony-murder can be distinguished from the general offence of murder because the accused did not intend to harm anyone. Generally, the presence of an unlawful purpose elevates the seriousness of killing in the

felony-murder context. But if the accused is acting under duress, he or she did not willingly engage in the relevant criminal behaviour. The Commission is of the view that even if the general offence of murder remains excluded from s 31 of the Code, the defence of duress should continue to be available to the offence of felony-murder.

EMERGENCY IN WESTERN AUSTRALIA

The defence of emergency under s 25 of the Code is similar to the defence of necessity at common law.⁷⁶ Section 25 provides that:

Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.

Both the common law defence of necessity and the defence of emergency in Western Australia impose an objective test. However, the most significant difference between the two is that under the Code the defence applies to all crimes but at common law the defence of necessity has only been recognised in specific circumstances.⁷⁷ In Australia, it has been observed that the defence of necessity at common law has only been recognised in Victoria and New South Wales.⁷⁸ Significantly, the defence of necessity has traditionally not been available as a defence to murder,⁷⁹ although an English case dealing with the separation of conjoined twins has potentially opened that door.⁸⁰

Nature of the threat

Unlike duress there is no restriction on the nature of the threat required before the defence can be relied on. It has been held that a sudden or an extraordinary emergency involves circumstances which are likely to endanger life or property.⁸¹ Yeo has explained that a sudden emergency is

75. For a full discussion, see Chapter 2, 'Felony-Murder'.

76. For the elements of the common law defence of necessity, see *Loughan* [1981] VR 443, 448–49 (Young CJ and King J). It has been noted that at common law the defence of necessity may apply in circumstances that cannot strictly be described as a sudden or extraordinary emergency, such as certain medical procedures: *McSherry B & Naylor B, Australian Criminal Laws: Critical perspectives* (Melbourne: Oxford University Press, 2004) 578. However, in Western Australia any gap in this respect is filled by the separate defence relating to medical treatment under s 259 of the Code.

77. See Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 100.

78. Aronson K, 'Expanding the Defences to Murder: A more fair and logical approach' (2001) 5 *Flinders Journal of Law Reform* 129, 136–37.

79. *Dudley and Stephens* (1884) 14 QBD 273.

80. In *Re A (children)* [2001] 2 WLR 480 as referred to in Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 109, a hospital sought an order that it would be lawful to separate the twins in order to save the life of the strongest. Without the operation both would die but, if separated, the stronger twin had a good chance of survival. The court allowed the operation to take place. One of the judges (Brooke LJ) referred to the defence of necessity and distinguished the case from *Dudley and Stephens*, *ibid*, on the basis that the weaker twin was already destined to die.

81. *Dudley v Ballantyne* (Unreported, Supreme Court of Western Australia, Owen J, 26 June 1998). See also *Dunje v Cross* [2002] WASCA 14, [47] where it was held that s 25 can apply where there is danger to property.

'one that comes upon the accused unexpectedly, catching her or him off guard'.⁸² An extraordinary emergency may also be unexpected or sudden but it must be a situation of 'extreme gravity and abnormal or unusual danger'.⁸³

Proportionality

Even though the defence of emergency can apply where there is a threat to property, the nature of the criminal offence committed to avoid the danger must be balanced against the threatened harm. In relation to the equivalent provision under the Queensland Code it has been stated that:

[T]he seriousness of the emergency must be weighted against the seriousness of the criminal conduct in question, by reference to the standard of the ordinary person with ordinary powers of self-control.⁸⁴

In *Dunje v Cross*,⁸⁵ Miller J commented that the 'concepts of reasonableness and proportionality are clearly incorporated' within the defence under s 25 of the Code.

Ordinary person test

Section 25 of the Code requires consideration of what an ordinary person 'possessing ordinary power of self-control' would have done in the circumstances. In 1992 the Queensland Criminal Code Review Committee recommended that the equivalent Queensland provision should be amended by removing the words 'possessing ordinary power of self-control'.⁸⁶ Instead the section should use the phrase 'an ordinary person similarly circumstanced'.⁸⁷

Commentators have expressed the view that it would be preferable to remove the ordinary person test. When discussing duress at common law, Leader-Elliot stated that the defence of duress should 'abandon reference to the person of ordinary firmness'.⁸⁸ It has been contended that

the Model Criminal Code formulation for emergency, in particular the requirement that the response is reasonable, 'bypasses the problems associated with the "ordinary" or reasonable person'.⁸⁹

A new defence of emergency

The Model Criminal Code defence of emergency is similar to the Western Australian provision because it contains an objective test and does not limit the nature of the emergency to only those involving a risk of death or grievous bodily harm. The Model Criminal Code provides that the defence applies if the accused reasonably believes that:

1. circumstances of sudden or extraordinary emergency exist; and
2. committing the offence is the only reasonable way of dealing with the emergency; and
3. the conduct is a reasonable response to the emergency.⁹⁰

The Model Criminal Code defence has been adopted by Victoria, the Australian Capital Territory and the Commonwealth.⁹¹

Submissions received by the Commission did not identify any particular problems with the current test under s 25 of the Code. Nonetheless, the Commission is of the view that the adoption of the Model Criminal Code defence of emergency would achieve consistency and simplicity in the law. The use of the phrase 'self-control' in s 25 appears somewhat misleading. In determining if an accused should be held criminally responsible for breaking the law when his or her conduct is a response to an emergency, the question should not be whether the accused lost self-control but whether the response was reasonable.

82. Yeo S, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17, 23.

83. Ibid 24. The Commission notes that the defence of mistake of fact under s 24 of the Code may be relied on in conjunction with the defence of emergency so that an accused may be excused from criminal responsibility if he or she was acting under an honest and reasonable but mistaken belief that a sudden or extraordinary emergency existed: ibid 25. See also *Stevens* [2005] HCA 65, [49] (Kirby J).

84. *Berbic v Steger* [2005] QDC 294, [36] (McGill J).

85. [2002] WASCA 14, [42].

86. Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 185.

87. Ibid 50. This recommendation has not been implemented. The Northern Territory provision uses the phrase 'an ordinary person similarly circumstanced': *Criminal Code* (NT) s 33.

88. Leader-Elliot I, 'Case and Comment: Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 364. He also noted that the 'ordinary person' is no longer used for self-defence. The ordinary person test for provocation has been particularly difficult. The Commission has recommended that the partial defence of provocation be repealed: see Chapter 4, Recommendation 29.

89. McSherry B & Naylor B, *Australian Criminal Laws: Critical perspectives* (Melbourne: Oxford University Press, 2004) 579.

90. MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 68.

91. *Crimes Act 1958* (Vic) s 9AI; *Criminal Code 2002* (ACT) s 41; *Criminal Code* (Cth) s 10.3. The defence emergency under s 10.3 of the Commonwealth *Crimes Act 1958* was considered by the Western Australian Court of Criminal Appeal in *Nguyen* [2005] WASCA 22. The majority stated that under s 10.3 it is not necessary for the emergency to be both sudden and extraordinary; that although the time period between becoming aware of the emergency and the response is relevant, delay is not determinative; and that although proof that no emergency in fact existed is relevant, the 'ultimate question is whether the offender reasonably believed in the existence of the emergency': at [17].

Therefore, the Commission has concluded that the Model Criminal Code defence should be adopted in Western Australia.

The proviso under s 25 of the Code

Section 25 of the Code provides that the defence of emergency is subject 'to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence'. A similar proviso is included in the Northern Territory and Queensland Codes.⁹² In *Smith*,⁹³ the Queensland Court of Appeal considered the meaning of the equivalent Queensland provision. The accused was charged with murder.⁹⁴ An acquaintance of the accused woke him up in the middle of the night demanding that the accused provide him with a gun. The accused complied after being told that there were two people in the boot of a car and unless he handed over the gun he would also end up in the boot. On appeal it was argued that even though the defence of duress was not available to murder, the jury should have been instructed in relation to the defence of emergency. It was held that if the relevant conduct fits within the defence of duress under s 31(4) then the defence of emergency under s 25 of the Code is not available. It was emphasised that because the factual circumstances relied on by the accused to support the defence of emergency were exactly the same as the facts that would support duress, the proviso applied.⁹⁵

Therefore, if the relevant conduct falls within the provisions of the Code dealing with compulsion (s 31 of the Code), self-defence or provocation, criminal responsibility must be determined by the relevant provision of the Code dealing with those defences. This is particularly significant in relation to duress because duress is not available as a defence to all crimes.

In its submission the DPP referred to *Smith* and argued that, because s 25 is excluded, if the provisions under s 31 come into operation the 'defence of extraordinary emergency is not available in respect of the offences of wilful murder and murder'.⁹⁶ The Commission does not agree with this interpretation. The defence of emergency is only excluded as a defence to wilful murder or murder if the relevant factual circumstances fall within the scope of s 31(4) of the Code. Therefore, if an accused is threatened with harm, unless he or she commits an offence, the defence of duress is applicable. The exclusion of wilful murder and murder in s 31 cannot be circumvented by arguing that s 25 also applies. In contrast, if an accused kills another in response to an extraordinary emergency but where that emergency does not involve a threat made by another person then s 25 may be relied on.⁹⁷ As an example, if a captain of a ship seals off a burning section of the vessel in order to save the crew and, in doing so, intentionally traps two men in the burning section, the defence of emergency would be available to the captain if he or she was charged with murder.⁹⁸

THE DEFENCES IN PRACTICE

In the context of homicide the defences of duress and emergency are rarely raised.⁹⁹ A study of homicide prosecutions in Victoria between 1981 and 1987 found that duress was relied on in four cases and necessity was not raised at all.¹⁰⁰ The Commission is aware of only one reported case where duress has been argued in relation to manslaughter. In *Smith*,¹⁰¹ the accused was charged with murder but convicted of manslaughter – the jury rejecting the defence of duress in respect of the alternative offence. In *Goldman*,¹⁰² the Victorian Court of Appeal considered the defence of duress at common law in relation to a charge of attempted murder.¹⁰³ The accused

92. *Criminal Code* (NT) s 33; *Criminal Code* (Qld) s 25.

93. [2005] QCA 1.

94. The accused was convicted of manslaughter. Davies JA (Fryberg and Mullins JJ concurring) observed that the accused was convicted of manslaughter because the jury were satisfied that he supplied the gun to his acquaintance knowing that the acquaintance intended to shoot the two people in the boot of the car: *ibid* [2]. He was not convicted of murder because the jury were probably not satisfied beyond reasonable doubt that the accused knew that the acquaintance intended to kill or cause grievous bodily harm to either of the men in the car.

95. *Ibid* [19].

96. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 17.

97. It has been observed elsewhere that the defence of emergency is available to all crimes: see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [16.19]; Yeo S, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17, 36.

98. This example was referred to in Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 111.

99. Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [4.16] & [4.83]; Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [237].

100. Law Reform Commission of Victoria, *ibid*, Appendix 6, [163]. The Commission notes that this study included culpable driving causing death and it is not known whether any of the four cases were successfully raised.

101. [2005] QCA 1.

102. [2007] VSCA 25.

103. The trial judge had ruled that duress was available as a defence to attempted murder at common law: see *Goldman* [2004] VSC 291, [62]. However, in England duress is not available as a defence to attempted murder: *Gotts* [1992] 2 AC 412.

claimed that he shot the deceased because of threats made by a third person who was present at the time. Evidence obtained from a sound recording device did not support this defence; there was nothing on the recording to suggest the presence of a third person. The evidence revealed that the accused had undertaken a 'sustained interrogation' of the deceased before shooting him. The appeal against conviction failed; the majority stated that the evidence in relation to duress was unconvincing and inconsistent with the objective facts of the case.¹⁰⁴

The defence of emergency is commonly relied on where the accused has been charged with a driving offence. In such cases the accused usually drives in a manner contrary to the law (such as speeding or driving without a licence) in order to avoid harm or to respond to an emergency.¹⁰⁵ The defence has also been relied on in cases of dangerous driving causing death.¹⁰⁶

Section 25 of the Queensland Code was unsuccessfully argued in relation to a charge of murder in *Stevens*.¹⁰⁷ The prosecution case was that the accused intentionally killed the victim (his business partner) by shooting him in the head. The accused claimed that he had walked in on the victim as he was about to commit suicide. After grabbing the gun to stop the victim from killing himself, the gun discharged. The trial judge directed the jury about the defence of emergency under s 25 of the Queensland Code. The jury convicted the accused of murder.¹⁰⁸ Despite its availability as a defence to murder, the Commission is not aware of any reported case where an accused has been acquitted of murder on the basis of emergency.

DURESS AND MURDER

Arguments against extending duress to murder

Historically, at common law, duress has not been available as a defence to murder.¹⁰⁹ Many jurisdictions continue to exclude murder from the defence.¹¹⁰ A number of law reform bodies have concluded that duress should not be available as a defence to murder.¹¹¹

The sanctity of human life

The principal justification for excluding murder from the defence of duress is the view that the law must uphold the 'sanctity of human life'. In *Howe*,¹¹² Lord Hailsham of St Marylebone LC stated that the 'overriding objects of the criminal law must be to protect innocent lives'.¹¹³ The Law Reform Commission of Ireland suggested that extending duress to murder could mean people would consider that the law was 'countenancing' murder.¹¹⁴

When discussing the 'lesser of two evils' rationale for the defence, Lord Hailsham stated that choosing to save one's own life and sacrificing the life of another cannot be considered the 'lesser of two evils'.¹¹⁵ Others have asserted that there is a 'duty to sacrifice one's own life rather than take another's'.¹¹⁶ In its submission, Festival of Light Australia stated that a 'threat to one's own life does not justify the murder of another person'.¹¹⁷

The 'sanctity of human life' argument has been criticised on the basis that it elevates every person to the status of

104. [2007] VSCA 25, [11] (Maxwell P and Vincent JA).

105. See eg *Dudley v Ballantyne* (Unreported, Supreme Court of Western Australia, Owen J, 26 June 1998); *McMurry v Green* [2007] WASC 90; *Russell-Smith v Illich* [2000] WASCA 247; *Berbic v Steger* [2005] QDC 294.

106. *Warner* [1980] Qd R 207; *Piane* [1975] PNGLR 53.

107. [2005] HCA 65.

108. The appeal before the High Court concerned the failure of the trial judge to direct the jury about the defence of accident. In any event Gleeson CJ and Heydon J observed that 'if a person possessing ordinary power of self-control, sees another person about to shoot himself in the head, the proposition that the first person could not reasonably be expected to act otherwise than by attempting to seize the gun is at least open to debate': *ibid* [11].

109. However, in some instances it has been held that duress is available as a defence to murder if the accused was not the actual killer; that is, the accused was charged with murder because he or she assisted the actual killer: Law Reform Commission of Victoria, *Homicide*, Discussion Paper No. 13 (1988) [163].

110. Duress is not available as a defence to murder in the Northern Territory, Queensland, Tasmania, South Australia, New South Wales, England, Ireland, Canada and New Zealand.

111. House of Lords Select Committee, *Report on Murder and Life Imprisonment*, HL Paper 78–1 (1989) [93]. The Gibbs Report proposed that the defences of duress and necessity should be available to all crimes except if the accused 'acted with an intent to kill': see Review of the Commonwealth Criminal Law Committee, *Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) 148–49. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [214]. The Murray Review did not discuss whether duress should be available to murder but recommended no change to the defence: see Murray MJ, *The Criminal Code: A general review* (1993) 48; Queensland Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (1999) ch 6 (unpaginated).

112. [1978] 1 AC 417.

113. *Ibid* 430.

114. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [3.75].

115. *Howe* [1978] 1 AC 417, 433.

116. Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [2.55].

117. Festival of Light Australia, Submission No. 16 (12 June 2006) 7.

a hero and assumes that 'a person of ordinary firmness would always choose to sacrifice his or her own life rather than kill an innocent person'.¹¹⁸ It has also been contended that general statements about the sanctity of human life are unhelpful: they do not address the 'emotional and moral complexity' involved in such extreme situations.¹¹⁹ Significantly, the sanctity of human life argument cannot be applied to a situation where the accused was forced to kill one person in order to save many others.¹²⁰

Duress should be dealt with by prosecutorial discretion

The New Zealand Law Reform Commission concluded that duress should not be available as a defence to murder or attempted murder. It acknowledged that there may be exceptional cases and these could be dealt with by prosecutorial discretion.¹²¹ However, Fairall and Yeo have argued that reliance on prosecutorial discretion is unsatisfactory because it is not open and accountable, and any claim of duress should be tested in a criminal trial.¹²² While expressing the view that prosecutorial discretion is one way of dealing with difficult cases, the Law Reform Commission of Ireland acknowledged that reliance on the discretion of prosecutors 'would lead to a divergence of law in code and law in practice and would also lead to a lack of jurisprudence in the area'.¹²³

Duress is open to abuse

It has been suggested that the defence of duress is easy to raise and difficult to disprove because the relevant facts are only known to the accused.¹²⁴ The Law Commission (England and Wales) distinguished duress from self-defence in this regard. It explained that unlike self-defence, the circumstances giving rise to a claim of duress are likely to have taken place some time before, and at a distance from, the scene of the crime.¹²⁵ Under the Commission's recommendation for duress this may be correct. It will no

longer be necessary for the person making the threat to be actually present or for there to be a threat of immediate harm. Nevertheless, it is not possible to say that in every case of duress the making of the threat would have taken place away from the scene of the crime and, even if it had, there may be independent evidence to substantiate the claim.

The fact that the only evidence in support of a claim of duress has come from the accused is not a sufficient reason to disallow the defence to murder. The Law Reform Commission of Victoria concluded that the potential for fabrication was not necessarily any greater than for other defences such as self-defence or provocation.¹²⁶ Further, it has been observed that 'juries are routinely entrusted with the responsibility of separating fact from fiction' and there is no reason to suppose that they are any less capable of doing this in the context of duress as they are in any other context.¹²⁷

The threat may not eventuate

One argument against allowing duress as a defence to murder is that the threat may not eventuate.¹²⁸ In other words, the accused should take the chance that if he or she fails to comply with demands, the person making the threat will not in fact carry it out. However, as the Law Reform Commission of Victoria explained, this argument ignores the fact that in some cases it will be clear that the threat will be executed.¹²⁹ The Commission's recommended defence of duress expressly requires that the accused must *reasonably* believe that 'a threat has been made that will be carried out unless the offence is committed'.

Deterrence

It has been contended that excluding duress as a defence to murder is necessary in order to deter people who might easily give in to threats. Linked to this argument is the view that extending the defence to murder may encourage

118. Arenson K, 'Expanding the Defences to Murder: A more fair and logical approach' (2001) 5 *Flinders Journal of Law Reform* 129, 139.

119. Fisse B, *Howard's Criminal Law* (Sydney: Law Book Company, 5th ed., 1990) 545–47.

120. See Cross R, 'Murder under Duress' (1978) 28 *Toronto Law Journal* 369, 376.

121. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [214]. See also Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [7.18].

122. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 155.

123. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [3.80]–[3.81].

124. See eg House of Lords Select Committee, *Report on Murder and Life Imprisonment*, HL Paper 78-1 (1989) [93]; *Hasan* [2005] UKHL 22, [20] (Lord Bingham of Cornhill); [72] (Baroness Hale of Richmond).

125. Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the person and general principles*, Report No. 218 (1993) [33.5]–[33.6].

126. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [243].

127. Arenson K, 'Expanding the Defences to Murder: A more fair and logical approach' (2001) 5 *Flinders Journal of Law Reform* 129, 140.

128. Law Reform Commission of Victoria, *Homicide*, Discussion Paper No. 13 (1988) [164].

129. *Ibid* [166].

terrorists and organised crime groups.¹³⁰ The Commission finds this argument unconvincing. It is unrealistic to think that terrorist or organised crimes groups would employ coercive tactics only as a consequence of a legislative amendment that allowed the defence of duress to apply to murder. The use of coercive tactics is unlikely to be affected by the criminal law. As the Law Reform Commission of Victoria noted, the deterrence argument is 'unrealistic' because the threat of death is far more real than any threat of future punishment for murder.¹³¹ Similarly, it has been observed that 'the instinct of self preservation in the face of an immediate threat will nearly always take precedence over the threat of legal punishment at some future date'.¹³²

It has also been suggested that terrorists (and by extension people involved in organised criminal activities) are more 'vulnerable' to threats than the ordinary man and this fact may mean that their claims of duress are 'all the more plausible'.¹³³ But every jurisdiction prohibits an accused from relying on the defence if he or she has voluntarily joined such an organisation. The Model Criminal Code provides that the defence of duress does not apply

if the threat is made by or on behalf of persons with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out by him or her.¹³⁴

The Law Reform Commission of Ireland noted that unavailability of the defence to those who have voluntarily joined a criminal association is 'an important limitation on the defence in practice'.¹³⁵ The Law Commission (England and Wales) observed that the defence is not available to

voluntary members of a criminal or terrorist group but that 'innocent tools of terrorists should be excused if they could not have been expected to act otherwise'.¹³⁶

Arguments in support of extending duress to murder

Despite past resistance to extending the defence of duress to murder, the contemporary approach is that duress should be available as a defence to any crime. In recent times, a number of jurisdictions have allowed duress to operate as a defence to murder.¹³⁷ In 2005 the *Crimes Act 1958* (Vic) was amended to introduce the Model Criminal Code defence of duress.¹³⁸ In 2006 the Law Commission (England and Wales) recommended that duress be available as a defence to murder (including first degree murder).¹³⁹ Numerous other law reform bodies and commentators have concluded that murder should not be excluded from the scope of the defence.¹⁴⁰

Self-preservation

While it is clearly commendable for a person to sacrifice his or her own life in order to save the life of another, it has been observed that this does not necessarily mean that a person who acts for the purpose of self-preservation should be treated as a murderer.¹⁴¹ The Law Commission (England and Wales) stated that:

[I]t is not only futile, but also wrong, for the *criminal* law to demand heroic behaviour. The attainment of a heroic standard of behaviour will always count for great merit; but failure to achieve that standard should not be met with punishment by the State.¹⁴²

130. Glazebrook P, 'Structuring the Criminal Code: Functional approaches to complicity, incomplete offences and general defences' in Simester A & Smith A (eds), *Harm and Culpability* (1996) 209, as cited in Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [7.49].
131. Law Reform Commission of Victoria, *Homicide*, Discussion Paper No. 13 (1988) [166]. See also VLRC, *Defences to Homicide*, Final Report (2004) [3.151].
132. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [3.74].
133. *Howe* [1978] 1 AC 417, 434 (Lord Hailsham of St Marylebone LC).
134. MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 64. The VLRC supported this wording: VLRC, *Defences to Homicide*, Final Report (2004) [3.157].
135. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [2.137].
136. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [7.19].
137. See *Criminal Code* (Cth) s 10.2; *Criminal Code 2002* (ACT) s 40; *Crimes Act 1958* (Vic) s 9AG.
138. *Crimes Act 1958* (Vic) s 9AG. Section 9AG(4) provides that duress is only available for murder 'if the threat is to inflict death or really serious injury'. Duress is available as a defence to murder in the Australian Capital Territory and the Commonwealth: *Criminal Code 2002* (ACT) s 40; *Criminal Code* (Cth) s 10.2. The offence of murder has limited application under Commonwealth legislation. For example, it is an offence to murder a United Nations or associated person under s 71.2.
139. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [1.57].
140. Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [2.15]; Law Commission (England and Wales), *Legislating the Criminal Code: Offences Against the Person and General Principles*, Report No. 218 (1993) [31.8]; Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [244]; VLRC, *Defences to Homicide*, Final Report (2004) [3.153]; MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 64–65; Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law*, Fourth Report (Adelaide, circa 1900) 3–4, as cited in Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 141; Law Commission (England and Wales), *ibid*; Dennis I, 'Duress, Murder and Criminal Responsibility' (1980) 96 *Law Quarterly Review* 208, 238; Yeo S, 'Private Defence, Duress and Necessity' (1991) 15 *Criminal Law Journal* 139, 148.
141. VLRC, *Defences to Homicide*, Final Report (2004) [3.150].
142. Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the person and general principles*, Report No. 218 (1993) [30.11].

It is important to note that, even when an accused has killed another to save him or herself, the motive may extend beyond self-preservation. As the Law Commission (England and Wales) suggested, a pregnant woman may kill another to save her unborn child. A father might be compelled to kill another person under duress in order to save himself because he has planned, the next day, to donate a kidney to his seriously ill child.¹⁴³ The Commission does not consider that extending the defence of duress to murder implies that it is always reasonable to choose to kill an innocent person for the purpose of self-preservation. Clearly that is not the case.

The protection of others

A far more compelling justification for extending duress to murder is that a person might be compelled to kill one innocent person in order to save another innocent person. If an accused was confronted with the choice of killing an innocent stranger or allowing his or her child to be killed, it would be unfair to hold the accused accountable as a murderer.¹⁴⁴ The Law Commission (England and Wales) was told that if duress is not available as a defence to murder the law would be saying that 'it is better to prevent the death of a stranger than to prevent the death of one's children'.¹⁴⁵

The Commission agrees with the observation that a 'parent who acts out of love for a child is perhaps the most obvious case where duress might be put forward as an excuse to murder'.¹⁴⁶ The Law Commission (England and Wales) provided examples of possible 'deserving cases' of duress. One such example is where the actions of the accused resulted in 'net gain of life'.¹⁴⁷ The Commission agrees that where an accused acts to save a number of people, the killing of one person may be considered reasonable.

Definition of murder

Under the Commission's recommendations, murder is defined as an unlawful killing with an intention to kill or an intention to cause an injury likely to endanger life. Murder

also extends to an unlawful killing if death is caused by an act of such a nature as to be likely to endanger life when that act is done in the prosecution of an unlawful purpose.¹⁴⁸ In order to be held criminally responsible for murder it is not necessary for the prosecution to prove that the accused actually killed the victim. For example, an accused can be held criminally responsible for murder for knowingly aiding another person in committing the offence.¹⁴⁹

Example

A is driving his car. B hijacks the car when it stops at the traffic lights. B holds a gun to A's head and orders him to drive to a particular location, where B intends to shoot a person unknown to A. If A complies and drives B to the location and thereby knowingly aids B in committing murder, in the absence of the defence of duress A would also be guilty of murder.¹⁵⁰

In its 2006 report the Law Commission (England and Wales) recommended that duress should be available as a defence to murder. One category relied on in support of this conclusion was offences where the accused took a secondary role in the killing.¹⁵¹

Consistency in the law

Duress is a complete defence to most crimes. It has been argued that it is illogical to exclude certain crimes from the defence. In *Howe*,¹⁵² Lord Brandon of Oakbrook stated that:

It is not logical, and I do not think it can be just, that duress should afford a complete defence to charges of all crimes less grave than murder, but not even a partial defence to a charge of that crime.¹⁵³

Self-defence is available as a defence for all crimes. While the Commission acknowledges that there is an important difference between self-defence and duress (that in the case of duress the victim is innocent) this does not mean that duress should not be available to murder. The essential

143. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.55].

144. Arenson K, 'Expanding the Defences to Murder: A more fair and logical approach' (2001) 5 *Flinders Journal of Law Reform* 129, 139.

145. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.51].

146. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 155.

147. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.48].

148. See Chapter 2, Recommendation 7. The Commission has explained above that even if duress is not extended to all types of murder, it should remain available to felony-murder under s 279(2) of the Code.

149. *Criminal Code* (WA) s 7(c).

150. A similar example was referred to by the Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [1.54].

151. *Ibid* [6.48].

152. [1978] 1 AC 417.

153. *Ibid* 432. More recently, Lord Bingham of Cornhill observed in *Hassan* [2005] UKHL 22, [21] that the Law Commission (England and Wales) had 'recommended that the defence should be available as a defence to all offences, including murder, and the logic of this argument is irresistible'.

question for self-defence is whether it was reasonable to kill the deceased. Likewise for duress the killing must be a reasonable response to the threat. The difference between self-defence and duress means that in practice duress will rarely be successfully raised because it would rarely be considered reasonable to kill an innocent person.

Duress as a partial defence

As a compromise it has been suggested that duress could operate as a partial defence to murder.¹⁵⁴ The Law Reform Commission of Ireland stated that a partial defence would

allow for a balance between recognising the sanctity of life and recognising the difficult situation that those who fall under duress are placed in.¹⁵⁵

It provisionally recommended that duress should be available as a full defence to all crimes except for murder and attempted murder, and duress should operate as a partial defence to murder.¹⁵⁶ It was acknowledged that where an accused has chosen the 'lesser of two evils' there is a strong argument that the accused should be entitled to a complete acquittal. Submissions have been specifically sought about this issue.¹⁵⁷

In 2005 the Law Commission (England and Wales) also provisionally recommended that duress should operate as a partial defence reducing first degree murder to second degree murder.¹⁵⁸ However, by 2006 the Law Commission (England and Wales) had revised its provisional view and concluded that duress should be a full defence to murder. One reason for this conclusion was that it would be anomalous for duress to operate as a partial defence to murder but as a full defence to attempted murder.¹⁵⁹ While acknowledging that a partial defence would accommodate both sides of the argument, it concluded that it was more principled to recommend that duress be available as a full defence to murder.¹⁶⁰

It has also been observed that duress is conceptually more closely aligned with self-defence (which is a full defence) than it is with the partial defences of provocation and diminished responsibility.¹⁶¹ The Commission has recommended the introduction of a partial defence of excessive self-defence. While self-defence remains a full defence to murder, excessive self-defence reduces what would otherwise be murder to manslaughter in circumstances where the accused was otherwise acting in self-defence but the response of the accused was unreasonable.¹⁶²

In order to avoid the inconsistency that would arise if duress was a partial defence to murder but a full defence to other crimes, one option would be to create a partial defence of duress based upon an excessive or unreasonable response. The Commission received one submission in support of a partial defence based on duress.¹⁶³ However, the Commission does not consider that this is an appropriate option because, despite the similarities between duress and self-defence, there are significant differences. Apart from the fact that in the case of duress the accused has killed an innocent victim, the choice to be made by the accused is somewhat different. For self-defence, a person is faced with a threat from an attacker and has to weigh up the best way to defend him or herself in a short period of time. However, for duress the proposed action is dictated by the person making the threat: either kill or be killed. If the decision to kill is unreasonable the accused should not be partially excused. For self-defence, it is much easier to understand that an accused might make a mistake about the precise response required in the circumstances.

The Commission's view

A majority of submissions received by the Commission were against extending the defence of duress to murder.¹⁶⁴ The Law Society expressed caution about extending the

154. Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [2.58]. See also McSherry B & Naylor B, *Australian Criminal Laws: Critical perspectives* (Melbourne: Oxford University Press, 2004) 582.

155. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [3.86].

156. *Ibid* [3.100].

157. *Ibid* [3.101].

158. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [7.1].

159. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.26]. The inconsistency that would arise if duress was a partial defence to murder has been noted elsewhere: see *Howe* [1978] 1 AC 417, 435 Lord Hailsham of St Marylebone LC; Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the person and general principles*, Report No. 218 (1993) [30.18].

160. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, *ibid* [6.45].

161. *Ibid* [6.39].

162. See below, 'Excessive Self-Defence'.

163. Women's Justices' Association of Western Australia, Submission No. 1 (7 June 2006) 4.

164. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 6; Festival of Light Australia, Submission No. 16 (12 June 2006) 7; Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 3; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 10; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 16.

defence.¹⁶⁵ But there were a number of submissions in support of allowing duress as a defence to murder.¹⁶⁶ The Western Australia Police submitted that it could not ‘fault the logic’ of expanding the defence to murder and could see no reason to exclude murder if an objective test is required.¹⁶⁷

Notwithstanding the arguments against extending the defence of duress to murder, the Commission is convinced that it is appropriate to do so. The Commission has not reached this conclusion lightly: it recognises that excusing the killing of an innocent person raises complex moral questions. However, it must be emphasised that extending the defence of duress to murder does not mean that every time a person kills under duress he or she will be relieved of criminal responsibility. The recommended new defence of duress is not easy to make out. In practical terms, it is unlikely that the defence would ever be successfully raised in a murder trial. Bearing in mind both rationales for the defence—the avoidance of greater harm and the terrible predicament faced by a person acting under duress—the Commission believes that it is necessary that the criminal law provides for the possibility that in extreme circumstances an accused should not be held criminally responsible for killing under duress.¹⁶⁸

Limiting conditions

In some instances, the extension of duress to murder has been qualified by specific limiting conditions. In 2005 the *Crimes Act 1958* (Vic) was amended to allow duress as a defence to murder following the recommendations of the VLRC. Section 9AG(4) of the *Crimes Act 1958* (Vic) provides that the defence only applies to murder if ‘the threat is to inflict death or really serious injury’. Similarly, the Law Commission (England and Wales) concluded that for murder there must be a threat of death or life-threatening harm.¹⁶⁹

The Victorian provision was not based upon the recommendations of the VLRC; it was not considered necessary because

[i]t is most unlikely that a jury would acquit a person of murder on the basis that he or she acted under duress, except where that person was threatened with very serious harm.¹⁷⁰

The Commission agrees that it is unnecessary to expressly limit the availability of duress to particular forms of serious harm. Commonsense dictates that a jury would be unlikely to consider murder a reasonable response to anything other than very serious harm. The factual circumstances will be relevant to assessing this issue. If an accused’s child had been kidnapped there may not be an express threat of death or serious harm but the accused may reasonably fear the worst. In the Western Australian context the definition of grievous bodily harm is problematic – it may not include serious harm such as kidnapping, deprivation of liberty or sexual assaults. The requirement that the response to the threat must be reasonable is sufficient to ensure that a person is not excused from murder unless the nature of the threat involved a significant risk of death.

It has also been suggested that if duress is a defence to murder the accused should have the burden of proving the defence on the balance of probabilities. The necessity for reversing the burden of proof is based upon the view that duress is easy to claim and difficult to disprove. The view of the Law Commission (England and Wales) has vacillated on this question. In 1993 it was recommended that duress should be available as a complete defence to murder but at the same time the Law Commission (England and Wales) accepted the argument that duress is an easy claim to make and difficult for the prosecution to disprove. As a consequence, it recommended that the accused should bear the persuasive burden of proof on the balance of probabilities.¹⁷¹

In 2005 the Law Commission (England and Wales) changed its view. It was concluded that the current legislative disclosure requirements for the accused meant that it was no longer necessary to reverse the burden of proof.¹⁷² However, in its final report in 2006 the Law Commission recommended that in the case of murder and attempted murder the accused should bear the burden of proving the defence of duress on the balance of probabilities.¹⁷³ It

165. Law Society of Western Australia, Submission No. 37 (4 July 2006) 11.

166. Paul Ritter, Submission No. 4 (29 May 2006) 3; Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 6; Michael Bowden, Submission No. 39 (11 July 2006) 4; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 13.

167. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 13.

168. The VLRC concluded in its 2004 report that the objective test of reasonableness (for both duress and emergency) ‘will ensure these defences apply only in extreme situations, and prevent them from being raised too readily’: VLRC, *Defences to Homicide*, Final Report (2004) [3.163].

169. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.21].

170. VLRC, *Defences to Homicide*, Final Report (2004) [3.156].

171. Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the person and general principles*, Report No. 218 (1993) [33.1].

172. Law Commission (England and Wales), *A New Homicide Act for England and Wales?*, Consultation Paper No. 177 (2005) [7.67].

173. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [6.21].

noted that in the case of duress the offence is 'committed during a sequence of events that is likely to be separate from those in which the threat was made' and the accused may be the 'sole source of the evidence that provides the foundation for the defence'.¹⁷⁴

In its submission, the Law Society suggested that if duress is extended to murder it might be appropriate to reverse the burden of proof noting that the defence is open to abuse.¹⁷⁵ The Commission is not convinced that duress is any more easily fabricated than any other defence. It appears that successful reliance on duress is rare even for offences other than murder. If the circumstances of duress are first revealed during a trial it is very likely that the claim will be met with suspicion. If the accused discloses the making of the threat to police or the prosecution, then the authorities will have an opportunity to investigate the claim. By its very nature, it will not be common for duress to be raised and it is hard to imagine an accused raising duress in a trial for murder without attempting to corroborate the claim or at least informing the police as soon as possible. The Commission maintains its view that the inclusion of the objective requirements is an adequate safeguard against any potential for abuse.

Recommendation 27

Duress

1. That s 31(4) of the *Criminal Code* (WA) be repealed.¹⁷⁶
2. That s 32(1) of the *Criminal Code* (WA) provide that a person is not criminally responsible for an act or omission if he or she does the act or makes the omission under duress.

3. That s 32(2) of the *Criminal Code* (WA) provide that a person does an act or makes an omission under duress if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless the offence is committed;
 - (b) there is no reasonable way to make the threat ineffective; and
 - (c) the act or omission is a reasonable response to the threat.
4. That s 32(3) of the *Criminal Code* (WA) provide that subsections (1) and (2) do not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out an act or omission of the same kind actually carried out or for the purpose of carrying out unlawful conduct in circumstances where it is likely that such threats would be made.¹⁷⁷

EMERGENCY AND MURDER

The distinction between duress and emergency

In all Australian jurisdictions with a legislative defence of emergency the defence is available to murder.¹⁷⁸ It is only at common law that the position is unclear.¹⁷⁹ Many of the arguments in relation to whether duress should be extended to murder equally apply to emergency. As discussed earlier both defences can be explained in terms of the excuse rationale and the justification rationale. It is difficult to see why duress has been treated differently to emergency.

174. Ibid [6.104].

175. The Law Society of Western Australia, Submission No. 37 (4 July 2006) 11.

176. The Commission has also recommended that s 31(3) of the Code be repealed: see Chapter 4, 'Self-Defence', Recommendation 24.

177. In relation to this limitation, the Commission has followed the Model Criminal Code but has also added that duress does not apply if the person is voluntarily associating with the person making the threat for the purpose of carrying out unlawful conduct in circumstances where it is likely that threats would be made. In the case of murder, the Model Criminal Code exception could be interpreted as only applying to cases where the accused is voluntarily associating with the person making the threat for the purpose of killing. The Commission notes that although the VLRC recommended the Model Criminal Code wording, when the defence of duress was made available to murder in Victoria in 2005 the wording was changed to 'voluntarily associating for the purpose of carrying out violent conduct'. The Commission has concluded it should also be provided that the defence should not be available where the accused is voluntarily associating with the person making the threat for criminal purposes and in circumstances where it is likely that such threats would be made. For example, an accused who is voluntarily part of an organised crime group which is involved in illegal drug activities should not be entitled to rely on the defence of duress as a defence to murder if a member of that group threatened the accused unless he or she killed a competitor.

178. See *Criminal Code* (Cth) s 10.3; *Criminal Code* 2002 (ACT) s 41; *Criminal Code* (NT) s 33; *Criminal Code* (Qld) s 25; *Crimes Act 1958* (Vic) s 9AI. Section 9AI(3) provides that the defence is only available to murder if 'the emergency involves a risk of death or really serious injury'. The Commission explained above that it is not necessary to expressly limit the nature of the threat for duress. The same observations apply for emergency.

179. The common law defence of necessity applies in New South Wales and South Australia. Although there is no defence of emergency under the Tasmanian Code, it appears that the common law defence of necessity is preserved in Tasmania by virtue of s 8 of its Code. Similarly, the common law defence of necessity applies in Canada.

The Commission is of the view that the most significant difference between the two defences is a practical one. It is generally easier to empathise with people who were faced with an emergency than people who acted under duress – in everyday life, emergencies are more likely to occur. A real-life example occurred in England when a ferry was sinking. A number of passengers attempted to get onto the deck of the ferry by climbing a rope ladder. A man was stationary on the ladder and because of shock he would not move. After shouting at the man to move he was eventually pushed, falling into the water. The man drowned, while the other passengers climbed the ladder to safety.¹⁸⁰ Other examples might include:

If you are roped to a climber who has fallen, and neither of you can rectify the situation, it may not be very glorious on your part to cut the rope, but is it wrong? Is it not socially desirable that one life, at least, should be saved? Again, if you are flying an aircraft and the engine dies on you, it would not be wrong, but would be praiseworthy, to choose to come down in a street (where you can see you kill a few pedestrians) rather than in a crowded sports stadium.¹⁸¹

Natural disasters, shipwrecks and plane crashes can and do happen but being threatened at gunpoint and told to commit murder is extremely unlikely. But that does not mean that the predicament faced is any less difficult or that duress should not be capable of excusing murder. In its submission, the Law Society stated that if an objective test was applied to duress (as it currently is with emergency) it could not see any justification for distinguishing the two defences in terms of moral culpability.¹⁸²

The Commission's view

Most submissions did not directly address whether emergency should remain available as a defence to murder. Most were focussed on the question of duress. The Commission received two submissions stating that there should be no change to s 25 of the Code.¹⁸³ The DPP

submitted that emergency should not be available as a defence to murder because no person could be required to commit murder 'out of necessity'.¹⁸⁴ The Commission believes that the examples referred to above demonstrate the possibility of a person killing in response to an emergency.

Bearing in mind that the Commission has concluded that duress should be available as a defence to murder, there is no reason that emergency should not remain available as a defence to any crime, including murder.¹⁸⁵ The Commission also believes that the defence of emergency under the Model Criminal Code provides an appropriate test if the defence is available to murder.¹⁸⁶ The ultimate test is whether the response of the accused was reasonable. In assessing what is a reasonable response, a jury will no doubt take into account the predicament faced by the accused and whether the harm suffered was less than the harm caused by the accused. Of course, other factors will also impact upon the jury's decision.

One factor that has been raised by commentators when discussing the defence of necessity is whether the deceased was already 'destined to die'. In the famous case of *Dudley and Stephens*,¹⁸⁷ two accused were convicted of murder.¹⁸⁸ The two accused killed and ate the flesh of a cabin boy after being shipwrecked and without food for days. Lord Coleridge CJ stated that:

Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? ... In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be No.¹⁸⁹

In an English case dealing with the separation of conjoined twins, the decision in *Dudley and Stephens* to disallow necessity as a defence to murder was distinguished because the weaker twin was already destined to die.¹⁹⁰

180. McSherry B & Naylor B, *Australian Criminal Laws: Critical perspectives* (Melbourne: Oxford University Press, 2004) 579–580.

181. *Re A (children)* [2000] 4 All ER 961, 1039.

182. Law Society of Western Australia, Submission No. 37 (4 July 2006) 12.

183. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 7; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 10.

184. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 18.

185. A number of law reform bodies have concluded that the defence of emergency/necessity should be available as a defence to murder: see eg Law Reform Commission of Canada, *Criminal Law: Liability and defences*, Working Paper No. 29 (1982) 96–97; Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the Person and General Principles*, Report No. 218 (1993) [35.10]; Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No. 5 (1978) [3.33]; MCCOC, *General Principles of Criminal Responsibility*, Report (1992) 68; VLRC, *Defences to Homicide*, (2004) [3.153].

186. For a similar view, see McSherry B, 'The Doctrine of Necessity and Medical Treatment' (2002) 10 *Journal of Law and Medicine* 10, 15.

187. (1884) 14 QBD 273.

188. Even though the two accused were convicted of murder and sentenced to the mandatory penalty of death, the Home Secretary commuted the death sentence to six months' imprisonment: see *Howe* [1978] 1 AC 417, 430 (Lord Hailsham of St Marylebone LC).

189. (1884) 14 QBD 273, 286–88, as cited in *Howe* [1978] 1 AC 417, 431 (Lord Hailsham of St Marylebone LC).

190. *Re A (children)* [2001] 2 WLR 480, as cited in Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 109.

The Law Reform Commission of Ireland stated that there is a strong case for allowing necessity as a defence to murder in those cases where the victim was already going to die.¹⁹¹ The example referred to earlier where a ship's captain seals off a burning section of the ship leaving people inside in order to save the entire crew is such a case. A test of what is reasonable in the circumstances is flexible enough to cater for the moral questions involved. In another example mentioned above, where a surgeon kills a healthy patient to use his organs to save five dying patients, the surgeon's act would clearly be viewed as unreasonable even though the surgeon acted to save more harm than he caused.

The proviso

The only remaining issue is whether the proviso currently in s 25 of the Code (which excludes the defence of emergency if the circumstances fall within duress, self-defence or provocation) is still necessary. It has been observed that the inclusion of provocation in the proviso is unnecessary because the concepts underlying provocation and emergency are distinct.¹⁹² A similar proviso in the defence under the Northern Territory Code only refers to self-defence and duress.¹⁹³ The Commission has recommended the repeal of the partial defence of provocation; there is therefore no need to retain provocation in the proviso.¹⁹⁴

The most obvious reason for including duress within the proviso is that duress is not currently available as a defence to murder. The Model Criminal Code which allows both duress and emergency as defences to murder does not limit the operation of emergency by including a proviso. However, the Commission believes that the proviso should remain. Under the Commission's recommendations duress does not apply to a person who is voluntarily associating with the person making the threat for criminal purposes. Further, each defence has slightly different considerations. For example, duress requires that the accused must

reasonably believe that a threat has been made that will be carried out. Self-defence requires that the accused must reasonably believe that it is necessary to use defensive force. And for emergency the accused must reasonably believe that a sudden or extraordinary emergency exists. Commonsense dictates that the same set of factual circumstances cannot be relied on for each defence. There must be a threat for duress; an attack for self-defence; and a sudden or extraordinary emergency for the defence of emergency. Trials will become unnecessarily complicated if juries are required to be directed on two or more of these defences in relation to the same set of facts. Of course, if there is some dispute or uncertainty about the precise factual circumstances, it may still be necessary for the jury to be directed about more than one of these defences.

Recommendation 28

Extraordinary emergency

That s 25 of the *Criminal Code* (WA) be repealed and replaced with a new section that provides:

25. Extraordinary emergencies

Subject to the provisions of this Code dealing with acts or omissions done under duress and in self-defence, a person is not criminally responsible for an act or omission if the person reasonably believes that —

- (a) circumstances of sudden or extraordinary emergency exist: and
- (b) doing the act or making the omission is the only reasonably way of dealing with the emergency; and
- (c) the act or omission is a reasonable response to the emergency.

191. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No. 39 (2006) [4.113].

192. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [16.15].

193. *Criminal Code* (NT) s 33.

194. See Chapter 4, 'The Partial Defence of Provocation', Recommendation 29.

The Partial Defence of Provocation

The partial defence of provocation reduces the offence of wilful murder or murder to manslaughter.¹ As a general statement, the defence applies if there is provocative conduct by the deceased which causes the accused to lose self-control and form an intention to kill or to cause grievous bodily harm. The provocation must also be sufficiently serious that it could have caused an ordinary person to lose self-control and kill. Provoked killings are often described as 'hot-blooded' killings or killings committed in the 'heat of passion'. Because provocation is a partial defence it is not relevant unless the prosecution has proved beyond reasonable doubt that the accused had the required intention for murder. Thus, a provoked killing is an intentional killing.²

Provocation has been the subject of significant criticism and controversy. In recent years it has been abolished in Victoria³ and Tasmania⁴ and is currently being reviewed in Queensland.⁵ The partial defence remains in South Australia, New South Wales, the Northern Territory and the Australian Capital Territory.⁶ The purpose of this section is to consider whether provocation should be retained as a partial defence in Western Australia. The consequence of abolishing the defence is that the offender is convicted of murder and any mitigating factors in relation to provocation can only be taken into account in sentencing. Therefore, the degree of flexibility within the sentencing regime for murder is a crucial factor in determining whether provocation should be abolished. As explained in the introduction to this Report, the Commission's approach to partial defences is that they should not be retained or introduced unless the circumstances giving rise to the defence *always* demonstrate reduced culpability.⁷ Partial defences reduce intentional killings to the equivalent status of unintentional killings: a manslaughter conviction. Because

manslaughter is a less serious offence with less serious consequences, there must be a clear justification for categorising intentional killings as manslaughter.

HISTORY

The development of the modern defence of provocation can be traced back to at least as early as the 16th century in England.⁸ Changes in laws and social norms have influenced the development of the defence over time. It is important to bear these factors in mind when deciding if the defence should be retained because the law of homicide and the social context in which it takes place has changed considerably since the introduction of the defence.

THE LAW OF MURDER

It has been observed that the death penalty was 'the catalyst in the emergence of the distinction between murder and manslaughter'.⁹ Certain types of killings were not considered sufficiently serious to attract the death penalty. In particular, the death penalty was considered inappropriate for 'intentional killings as a result of drunken brawls and breaches of honor'.¹⁰ Hence, the offence of manslaughter was developed to distinguish those killings that were deserving of the death penalty from those that were not.

Historically, murder was defined as killing with 'malice aforethought'.¹¹ Initially the concept of 'malice aforethought' only captured premeditated or planned killings. Manslaughter covered non-premeditated killings, in particular those which occurred upon a 'sudden quarrel'

1. Because the Commission has recommended the repeal of wilful murder, for the remainder of this section the term murder will be used.
2. Presently, the mental element for wilful murder or murder is an intention to cause death or grievous bodily harm. Under the Commission's recommendations, the mental element of murder is an intention to kill or cause an injury of such a nature as to be likely to endanger life: see Chapter 2, Recommendation 7.
3. The partial defence of provocation was abolished in Victoria in 2005: *Crimes Homicide Act 2005* (Vic) s 3.
4. Provocation was abolished in Tasmania in 2003 by s 4 of the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).
5. The Queensland provisions are almost identical to the provisions under the Code: *Criminal Code* (Qld) ss 268, 269 & 304. In July 2007 the Queensland Attorney General instigated a review of the partial defence of provocation: K Shine, Queensland Attorney General, 'Audit of Queensland Murder Trials', *Ministerial Media Statements*, 18 July 2007. Also provocation is not available as a defence under the *Criminal Code* (Cth).
6. See *Crimes Act 1900* (NSW) s 23; *Criminal Code* (NT) s 158; *Crimes Act 1900* (ACT) s 13. The common law partial defence of provocation applies in South Australia. The Australian Capital Territory is progressively working toward codifying its criminal law using the Model Criminal Code as its guide. While some parts of the Model Criminal Code (such as general principles of criminal responsibility) have already been enacted in that jurisdiction, the section dealing with fatal offences against the person has not yet been implemented. It is unclear at this stage whether the partial defence of provocation will survive the codification process in the Australian Capital Territory; however, it should be noted that provocation is not included in the Model Criminal Code.
7. See Introduction, 'The Commission's Approach to Reform'.
8. For a discussion of the earlier history of provocation, see Coss G, 'God is a Righteous Judge, Strong and Patient and God is Provoked Every Day: A brief history of the doctrine of provocation in England' (1991) 13 *Sydney Law Review* 570, 570–72.
9. Law Reform Commission of Ireland, *Homicide: The plea of provocation*, Consultation Paper No. 27 (2003) [1.01].
10. Dressler J, 'Rethinking Heat of Passion: A defense in search of a rationale' (1982) 73 *Criminal Law and Criminology* 421, 426.
11. New South Wales Law Reform Commission (NSWLRC), *Partial Defence to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.2].

◀ The Partial Defence of Provocation

(also known as 'chance-medley' killings).¹² Chance-medley killings were classified as manslaughter because of the absence of malice aforethought.¹³

The concept of provocation or 'hot-blooded' killings distinguished premeditated deliberate killings from unpremeditated killings. Planning or premeditation is inconsistent with a sudden loss of self-control. Therefore, historically the doctrine of provocation negated an essential element of murder: malice aforethought. But over time the concept of malice aforethought was widened to catch brutal or heinous but unpremeditated killings.¹⁴ Now, the mental element of murder does not require proof of premeditation. The mental element for murder can be established even if the offender formed a split-second intention to kill. The direct link between provocation and the mental element of murder has gone. Currently the defence of provocation does not negate intention but instead only arises if the relevant intention for murder is proven.

The social context

Provocation developed 'at a time when men bore arms and retaliated to affronts to their honour'.¹⁵ As the Victorian Law Reform Commission (VLRC) observed the 'notion of honour was of great importance to society'.¹⁶ A breach of honour demanded a response and an 'angry response was expected'.¹⁷ Such breaches of honour occurred during drunken fights between men or when a man discovered his wife in the act of adultery.¹⁸

Although loss of self-control was an element of the defence, historically the defence was limited to particular categories. These categories have been summarised as: 'killing in response to a grossly insulting assault; killing a person you

see attacking a friend; killing to free a person who is being unlawfully deprived of their liberty; and killing a man caught in the act of adultery with one's wife'.¹⁹ In relation to the latter category, it was held that:

When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of property.²⁰

Up until the middle of the 20th century violent provocative conduct generally 'remained the badge of provocation'.²¹ By this stage there were two exceptions:

[T]he discovering by a husband of his wife in the act of committing adultery and the discovering by a father of someone committing sodomy on his son; but these apart, insulting words or gestures unaccompanied by physical attack did not in law amount to provocation.²²

Clearly the underlying basis for provocation has changed: violent reactions to provocative behaviour are no longer expected or required. Even so, affronts to male honour feature strongly in provocation cases today.²³

The changing rationale for the defence

Defences are often categorised as a justification or an excuse.²⁴ A justification-based defence implies that the conduct of the accused was right or acceptable whereas an excuse-based defence contends that the conduct was wrong but the accused is forgiven. Historically, provocation was a partial justification.²⁵ As can be seen from the above discussion, the defence focussed on the 'magnitude of the wrong rather than the mental state of the accused'.²⁶ To demonstrate this it has been observed that while the discovery of one's wife in the act of adultery clearly constituted sufficient provocation for killing, the discovery

12. Coss G, 'God is a Righteous Judge, Strong and Patient and God is Provoked Every Day: A brief history of the doctrine of provocation in England' (1991) 13 *Sydney Law Review* 570, 573. See also Dressler J, 'Rethinking Heat of Passion: A defense in search of a rationale' (1982) 73 *Criminal Law and Criminology* 421, 421.
13. Law Reform Commission of Ireland, *Homicide: The plea of provocation*, Consultation Paper No. 27 (2003) [1.06].
14. Ibid [1.04].
15. Coss G, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 52.
16. Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Final Report (2004) [2.4].
17. Ibid. See also Yannoulidis S, 'Excusing Fleeting Mental States: Provocation, involuntariness and normative practice' (2005) 12 *Psychiatry, Psychology and Law* 23, 25–26; Horder J, *Provocation and Responsibility* (1992) 26–27, as cited in Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 263.
18. VLRC, *Defences to Homicide*, Issues Paper, (2002) [4.7].
19. VLRC, *Defences to Homicide*, Final Report (2004) [2.5]. These categories are based upon the decision of Chief Justice Holt in *Mawgridge* (1707) Kel. 119.
20. [1707] Kel. 119 as cited in Bandalli S, 'Provocation – A Cautionary Note' (1995) 22 *Journal of Law and Society* 398, 399.
21. *Camplin* [1978] AC 705; [1978] UKHL 2, [2] (Lord Diplock).
22. Ibid.
23. See below, 'Gender-Bias'.
24. See further discussion in Chapter 1, 'The Criminal Law and the Criminal Justice System: How criminal responsibility is determined'.
25. VLRC, *Defences to Homicide*, Issues Paper, (2002) [4.7]; Goode M, 'The Abolition of Provocation' in Yeo S (ed) *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 37, 39.
26. VLRC, *Defences to Homicide*, Final Report (2004) [2.4].

of one's unmarried partner in the act of adultery did not. Dressler maintained that the difference between the two scenarios could only be explained by reference to the justification theory: adultery was considered the highest invasion of a husband's *property*.²⁷

Over time the rationale of the defence shifted to an excuse-based defence with the focus on the accused's loss of self-control rather than 'justifiable retribution'.²⁸ Hence provocation came to be described as a 'concession to human frailty'.²⁹ By the 19th century instead of restricting the defence to particular categories, provocation was limited by the concept of the reasonable man.³⁰ In *Kirkham*,³¹ it was stated that:

Though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being and requires that he should exercise a reasonable control of his passions.³²

The concept of the reasonable man remains, albeit in a different guise – the ordinary person. At common law the partial defence now requires that the accused was in fact deprived of self-control and that the provocation is sufficiently serious that an ordinary person could have lost self-control and killed.³³

PROVOCATION IN WESTERN AUSTRALIA

Only in Western Australia and Queensland is provocation both a partial defence to murder and a complete defence to offences that contain an assault as an element.³⁴ Because the Commission's terms of reference are restricted to the laws of homicide, only the partial defence under s 281 of the Code is relevant. It provides:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which

causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

The term 'provocation' is not defined in this provision. However, provocation is defined under s 245 of the Code which provides:

The term 'provocation' used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another, to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

It is not clear whether the definition of provocation under s 245 applies to the partial defence under s 281 of the Code. In Queensland it has been held that the common law definition of provocation applies to the partial defence and the equivalent statutory definition is only applicable to the complete defence of provocation. Traditionally, the Western Australian Supreme Court has taken the opposite view: that the definition under s 245 of the Code applies to the partial defence.³⁵ However, more recently it has been stated that the Queensland approach is probably correct.³⁶ In any event, it has been observed that the

27. Dressler J, 'Rethinking Heat of Passion: A defense in search of a rationale' (1982) 73 *Criminal Law and Criminology* 421, 440.

28. VLRC, *Defences to Homicide*, Issues Paper, (2002) [4.12]; See also Yannoulidis S, 'Excusing Fleeting Mental States: Provocation, involuntariness and normative practice' (2005) 12 *Psychiatry, Psychology and Law* 23, 26.

29. VLRC, *Defences to Homicide*, Final Report (2004) [2.7].

30. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 188.

31. (1837) 173 ER 422.

32. Ibid 424 (Coleridge J) and also *Welsh* (1869) 11 Cox CC 336, 338 (Keating J), as cited in *Moffa* (1977) 138 CLR 601, 625 (Murphy J).

33. VLRC, *Defences to Homicide*, Issues Paper (2002) [6.3]. See also *Masciantonio* (1995) 183 CLR 58, 66.

34. The complete defence of provocation is found in s 246 of the Code. Queensland is the only other jurisdiction in Australia with a complete defence of provocation. Previously, such a defence existed in the Northern Territory. It was abolished in 2006 by the *Criminal Reform Amendment Act (No. 2) 2006* (NT) s 8. See *Kaporonovski* (1973) 133 CLR 209, 219 (McTiernan ACJ and Menzies J); 223 (Walsh J) where it was held that the complete defence under the Queensland Code only applies to offences that expressly contain an assault as an element such as assault occasioning bodily harm.

35. Murray MJ, *The Criminal Code: A general review*, (1993) 175.

36. In *Hart* [2003] WASCA 213, [33] (Steytler J; McLure J concurring) it was observed that given the High Court's decision in *Kaporonovski* (1973) 133 CLR 209 it is difficult to see how the definition under s 245 could apply to s 281. In *Roberts* [2007] WASCA 48, [97] Roberts-Smith JA expressed the view that the common law definition of provocation 'probably' applies in relation to s 281 of the Code.

defences of provocation at common law and under the Code are similar.³⁷ In *Stingel*,³⁸ the High Court stated that the common law and the various statutory defences of provocation 'have tended to interact and to reflect a degree of unity of underlying notions'.³⁹ Thus, for the purpose of examining whether provocation should be retained, the Commission's focus is on the fundamental elements of the partial defence irrespective of whether the defence is based upon the Code, the common law or another statutory provision.

FUNDAMENTAL ELEMENTS OF PROVOCATION

Provocation

Provocative conduct is an essential element of the defence. There are various rules limiting or explaining the type of conduct that is sufficient to constitute provocation. Historically, at common law, words alone were insufficient; but there is now scope to rely on provocative words of an 'extreme and exceptional character'.⁴⁰ If the definition of provocation under s 245 of the Code applies to the partial defence, the provocative conduct must be a 'wrongful act or insult'.⁴¹ It is not entirely clear what is meant by 'wrongful',⁴² but at common law it is no longer necessary to establish that the alleged provocative conduct was unlawful.⁴³

Also, it is generally required that the provocation must have originated from the deceased⁴⁴ although it is not necessary that the provocation directly affected the accused.⁴⁵ The 'hearsay provocation rule' also limits the circumstances in which the defence can apply.⁴⁶ In *Vella*,⁴⁷ Roberts-Smith JA noted that under s 281 of the Code the provocation 'must be something done to, or (at the very least) in the presence of the accused'.⁴⁸ This rule is designed to avoid the defence being relied on where the allegation of provocation is untrue and therefore prevents the defence from partially excusing the killing of an innocent person.⁴⁹

In more recent years, law reform commentators have proposed additional rules to limit the type of provocative conduct that can support the defence. For example, it has been suggested that the defence should not apply to a non-violent homosexual advance; where the deceased and the accused were involved in an intimate relationship and the deceased left or threatened to leave; and to cases of suspected or discovered infidelity.⁵⁰ On the other hand, others have recommended relaxing some of the rules designed to limit the defence. The New South Wales Law Reform Commission (NSWLRC) and the Law Reform Commission of Victoria both recommended that the 'hearsay provocation rule' be abolished.⁵¹ These different approaches illustrate a perpetual dilemma: when to allow the defence and when to exclude it.

37. *Hart*, ibid [34] (Steytler J; McLure J concurring); *Verhoeven* [1998] WASCA 73. The Murray Review also noted that provocation at common law is similar to provocation under the Code but it was recommended that it should be made clear that the definition under s 245 applies to the partial defence under s 281. Amendments to the Code definition were also recommended: Murray MJ, *The Criminal Code: A general review*, (1993) 175–77. A similar recommendation was made in Queensland in 1992: see Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 195.
38. (1990) 171 CLR 312.
39. Ibid 320.
40. Yeo S, 'Partial Defences to Murder in Australia and India' in Law Commission (England and Wales), *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, [1.14]. See also *Moffa* (1977) 138 CLR 601, 605 (Barwick CJ); 620 (Mason J); *Leonboyer* [1999] VSC 450, [16] & [18] (Cummings J).
41. In *Stingel* (1990) 171 CLR 312, 323 the High Court held that the word 'wrongful' in the phrase 'wrongful act or insult' under the Tasmanian Code did not qualify the word insult.
42. In *Stevens & Doglione* (1989) 41 A Crim R 60, 64 it was held that 'wrongful' means unlawful under the criminal law or something that infringes a legal right. However, that interpretation may have been affected by the fact that in Queensland the definition under the Code only applies to the complete defence of provocation.
43. See *R* (1981) 28 SASR 321, 327 (King CJ); NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.102].
44. In *Hart* [2003] WASCA 213, [46] (Steytler J; McLure J concurring) it was observed that under s 245 of the Code the provocation must originate from the deceased, but at common law the position may be different. Yeo stated that at common law there are some exceptions to the general rule. For example, provocation has been relied on where the accused mistakenly or accidentally kills an innocent third person while intending to kill the provoker: Yeo S, 'Partial Defences to Murder in Australia and India' in Law Commission (England and Wales), *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, [1.12].
45. At common law the provocation can affect a third party as long as it occurs in the presence of the accused: *Arden* [1975] VR 449, 450. However, if the definition of provocation under s 245 of the Code applies the provocation must affect a person under the immediate care of the accused or a person with whom the accused is in a 'conjugal, parental, filial, or fraternal' relationship.
46. See *Arden* [1975] VR 449; *Quartly* (1986) 11 NSWLR 332.
47. [2006] WASCA 177.
48. Ibid [24].
49. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.89]–[2.91].
50. See eg McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and the Law* 44, 45; Brown H, 'Provocation as a Defence to Murder: To abolish or to reform', (1999) 12 *Australian Feminist Law Journal* 137, 140. In the Northern Territory and the Australian Capital Territory it is expressly provided that a non-violent sexual advance is not of itself sufficient to establish provocation: *Criminal Code* (NT) s 158 (5); *Crimes Act 1900* (ACT) s 13(3).
51. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.89]–[2.91]; Law Reform Commission of Victoria, *Homicide*, Final Report No. 40 (1991) [199].

Loss of self-control: the subjective element

In order to establish the defence it is necessary that the accused actually lost his or her self-control as a result of the provocation.⁵² The phrase 'in the heat of passion' in s 281 of the Code implies loss of self-control.⁵³ In any event, loss of self-control is an express requirement under both the common law defence and the definition of provocation under s 245 of the Code.⁵⁴

Traditionally, loss of self-control in response to provocation has been linked to the emotion of anger. Although, as Yeo observed, more than normal anger is required.⁵⁵ More recently, it has been acknowledged that loss of self-control may be based upon fear, as well as anger. In *Van Den Hoek*,⁵⁶ Mason J stated that provocation may apply to 'a sudden and temporary loss of self-control due to an emotion such as fear or panic as well as anger or resentment'.⁵⁷ In *Masciantonio*,⁵⁸ the majority of the High Court observed that, although anger is 'primarily a feature of provocation and fear a feature of self-defence, loss of self-control may be due to a mixture of fear and anger'.⁵⁹

The extent to which a person must lose self-control is uncertain; however, it is clear that there must be something less than a complete lack of capacity to control one's actions.⁶⁰ In most Australian jurisdictions a full loss of capacity to control oneself, if caused by a relevant mental impairment, would give rise to a defence of insanity.⁶¹ A complete lack of capacity caused by something other than mental impairment may constitute automatism.⁶² While

both automatism and provocation involve the loss of self-control, for provocation the accused retains some capacity to control his or her conduct.⁶³ Accordingly, loss of self-control for the defence of provocation could mean a 'failure to exercise self-control'.⁶⁴

The ordinary person test: the objective element

While loss of self-control is essential to establish provocation not every loss of self-control is partially excused. The objective test requires consideration of whether an ordinary person *could* have lost self-control in the circumstances.⁶⁵ The ordinary person test imposes a uniform standard of self-control and it has been stated that its purpose is 'to keep the defence within appropriate bounds by ensuring that it cannot be invoked unless the provocation was substantial'.⁶⁶ As will be evident from the discussion below, it is apparent that the test does not always achieve this goal.

The ordinary person test has two stages. The first is to assess the gravity (or seriousness) of the provocation. The second is to consider whether an ordinary person could have lost self-control and formed an intention to kill (or cause grievous bodily harm) when faced with provocation of that degree of seriousness.⁶⁷ In order to assess the gravity of the provocation it is necessary to take into account any relevant personal characteristics of the accused. In *Stingel*,⁶⁸ the High Court stated that 'the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused.

52. It is not, however, essential for the accused to give direct evidence that he or she lost self-control. In *Van Den Hoek* (1986) 161 CLR 158, 161 (Gibbs CJ, Wilson, Brennan and Deane JJ); 169 (Mason J) it was held that the trial judge was required to direct the jury to consider provocation even though the accused did not give evidence that she lost self-control and did not raise the defence. Loss of self-control can be inferred from other evidence.

53. *Kaporonovski* (1973) 133 CLR 209, 239 (Gibbs J; Stephen J concurring).

54. See *Van Den Hoek* (1986) 161 CLR 158, 168 (Mason J).

55. Yeo S, 'Partial Defences to Murder in Australia and India' in Law Commission (England and Wales), *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, [1.19].

56. (1986) 161 CLR 158.

57. *Ibid* 168.

58. (1995) 183 CLR 58.

59. *Ibid* 68.

60. Odgers S, 'Contemporary Provocation Law – Is Substantially Impaired Self-Control Enough?' in Yeo S (ed) *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 101, 102.

61. See Chapter 5, 'Insanity – Mental Impairment'.

62. See above, 'Unwilled Conduct and Accident: Automatism'.

63. Odgers S, 'Contemporary Provocation Law – Is Substantially Impaired Self-Control Enough?' in Yeo S (ed) *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 101, 103.

64. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.28].

65. In *Stingel* (1990) 171 CLR 312, 329 the High Court held that when applying the ordinary person test it is necessary to consider if an ordinary person *could* or might have lost the capacity of self-control, not whether an ordinary person *would* have lost self-control. It has been held that the ordinary person test as laid down in *Stingel* applies in Western Australia: *Hart* [2003] WASCA 213, [47] & [54] (Steytler J; McLure J concurring). However, the Commission notes that s 245 of the Code refers to whether the provocation would be *likely* to cause an ordinary person to lose control.

66. Yannoulidis S, 'Excusing Fleeting Mental States: Provocation, involuntariness and normative practice' (2005) 12 *Psychiatry, Psychology and Law* 23, 27.

67. Traditionally, at common law it was a separate requirement that the response of the accused was proportionate to the provocation. However, in *Masciantonio* (1995) 183 CLR 58, 67 the majority of the High Court explained that the question of proportionality is now 'absorbed in the application of the test of the effect of the provocation upon the ordinary person'. It was also stated that the formation of an intention to kill or cause grievous bodily harm is the central issue rather than 'the precise form of physical reaction'.

68. (1990) 171 CLR 312.

Otherwise, it would be quite impossible to identify the gravity of the particular provocation'.⁶⁹ Similarly, in *Masciantonio*,⁷⁰ the majority of the High Court stated that:

the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done.⁷¹

After considering the gravity of the provocation, it is necessary to assess the power of self-control of an ordinary person. The only personal characteristic of the accused that can be considered for the second stage of the test is age.⁷² But the High Court has noted that the power of self-control of a 'hypothetical' ordinary person will be 'affected by contemporary conditions and attitudes'.⁷³

Criticisms of the ordinary person test

The ordinary person test has been extensively criticised. It has been asserted that the two-staged process is too complicated for juries to apply.⁷⁴ The Model Criminal Code Officers Committee (MCCOC) observed that the ordinary person in the law of provocation has 'developed a split personality'.⁷⁵ Depending on which stage of the test is being assessed the character of the ordinary person

changes. For the first stage of the test the jury take into account the personal characteristics and background of the accused when assessing the gravity of the provocation. The jury are then expected to disregard these factors for the second stage of the test in assessing the power of self-control of an ordinary person.

The objective/subjective debate

The objective nature of the second stage of the test (assessing the power of self-control of an ordinary person) has been criticised for not taking into account the gender and race of the accused.⁷⁶ The Commission received two submissions highlighting the need for greater subjectivity in the ordinary person test.⁷⁷ However, it has been observed that the law has quite rightly rejected the notion that men and women have different powers of self-control because recognising 'these differences would breach the principle of equality before the law'.⁷⁸

The Commission has previously examined the objective test in the context of culture. In its reference on Aboriginal customary laws the Commission considered the argument that the test is potentially discriminatory because it fails to take into account cultural differences when assessing the power of self-control.⁷⁹ The Commission expressed the view that any assertion that one cultural group has a different capacity for self-control than another is mere speculation and potentially offensive.⁸⁰ The Commission

69. Ibid 325.

70. (1995) 183 CLR 58.

71. Ibid 67.

72. *Stingel* (1990) 171 CLR 312, 327. This test was affirmed by the majority of the High Court in *Masciantonio* (1995) 183 CLR 58. McHugh J (dissenting) held that when assessing the self-control of an ordinary person the age, race, culture and background of the accused should be taken into account in order to avoid 'discrimination and injustice': at 72. In *Green* [1997] 191 CLR 334, 356, McHugh J reiterated this view.

73. *Stingel*, ibid.

74. VLRC, *Defences to Homicide*, Final Report (2004) [2.34]; Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 103; McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and the Law* 44, 45. It has been observed that Ireland is the only common law jurisdiction to adopt a purely subjective test for provocation: Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 3; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 7.

75. MCCOC, ibid 79.

76. One of the strongest critics of the objective test was Murphy J. In *Moffa* (1977) 138 CLR 601, 626 he stated that the 'objective test should be discarded. It has no place in a rational criminal jurisprudence'. Murphy J's decision strongly influenced the Court of Criminal Appeal in Ireland to adopt a subjective test for provocation a year later. It has been observed that Ireland is the only common law jurisdiction to adopt a purely subjective test for provocation: Law Reform Commission of Ireland, *Homicide: The plea of provocation*, Consultation Paper No. 27 (2003) [4.05] & [5.21].

77. Women's Justices Association of Western Australia, Submission No. 14 (7 June 2006) 3; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 7.

78. Hocking BA, 'Gender-Specific Response Patterns in Criminal Defences' (1996) 20 *Criminal Law Journal* 185, 185–86.

79. LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 185. The Commission noted that McHugh J (who dissented in *Masciantonio*) expressed the view that the cultural background of the accused should be taken into account when assessing the power of self-control of an ordinary person. McHugh J was informed by the views of Stanley Yeo. However, Yeo later changed his mind and concluded that there is no justification for assuming that some cultures have different capacities for self-control: Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 305. However, Yeo did assert that the test of assessing the power of self-control of an ordinary person should be split into two: the capacity for self-control and the response pattern of an ordinary person deprived of the power of self-control. It was said that the second stage of this test would enable age, sex and culture to be taken into account on the basis that men, women and people from different cultural backgrounds might respond differently when faced with provocation. Without commenting on the overall merits of this proposal, the Commission notes that an additional stage would further complicate the ordinary person test.

80. LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 186. Other law reform bodies and commentators have expressed the view that it is inappropriate to take into account cultural background when assessing the power of self-control of an ordinary person: see eg VLRC, *Defences to Homicide*, Final Report (2004) [2.80]; Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 269. Up until 2006 the Northern Territory defence enabled the power of self-control of an Aboriginal person to be taken into

maintains this view.⁸¹ Overall there is significant support for an objective assessment of the power of self-control of an ordinary person.⁸² As Gibbs J stated in *Johnson*:⁸³

[T]he law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life.⁸⁴

The Commission received a number of submissions expressing support for the current ordinary person test.⁸⁵

Even the subjective nature of the first stage of the test (the assessment of the gravity of the provocation) is not beyond criticism. The VLRC observed that one problem with the test is that it allows prejudiced beliefs to form the basis of the defence.⁸⁶ In *Verhoeven*,⁸⁷ Wheeler J stated that:

[A]n undue emphasis upon the susceptibility and sensitivity of the person provoked has the result that, to a great extent, the test becomes lost in a wilderness of detail, and there is little left for the second limb of the *Stingel* test to do, once all of those details are taken into account.⁸⁸

While the need to take into account cultural views or other personal attributes is obvious (otherwise the seriousness of the provocation would in some cases be impossible to judge), the subjective assessment of the gravity of the provocation has the potential to undermine the objective nature of the second stage of the ordinary person test. Once inappropriate, biased or idiosyncratic personal views are given weight during the first stage, these same views cannot easily be divorced from the second stage. For instance, if the jury decides—from the

accused's point of view—that the provocation was extremely severe, then the question whether an ordinary person could have lost control to 'extremely severe' provocation would probably be 'yes'. However, this does not mean that an ordinary person could have lost self-control as a result of the deceased's conduct. This point is best illustrated by case examples.

In *Khan*,⁸⁹ the accused was convicted of manslaughter on the basis of provocation. The accused killed the deceased after finding him in bed with his wife. The deceased and the accused were friends and the deceased had been living with the accused and the accused's wife at the time. The accused had suspected for some time that his wife and the deceased were intimately involved. On the night of the killing the accused secretly returned home and waited in a spare room in an attempt to find out if his suspicions were true. After hearing his wife and the deceased together in the bedroom the accused became so angry that he went to the kitchen and grabbed a knife. He entered the room and stabbed the deceased 67 times. The injuries were described as 'so gross that they were close to disembowelling the deceased'.⁹⁰ Evidence was led at the trial to explain that the accused was a devout Muslim and that under Muslim religion adultery is extremely grave: it is viewed as a sin and a crime. The accused was sentenced to five years' imprisonment which was increased to six years on appeal.

In *Dimond*,⁹¹ provocation was successfully raised, although the relevant provocative conduct 'might in some circumstances have been regarded as trivial and merely childish'.⁹² Prior to the killing the accused had been drinking

account: see eg *Jabarula v Poore* (1989) 68 NTR 26. However, in 2006 amendments to the Northern Territory Code made it clear that the new defence would be based upon decision of the High Court in *Stingel* in relation to assessing self-control: Northern Territory, *Parliamentary Debates*, Tenth Assembly, 31 August 2006, Parliamentary Record No. 9.

81. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 155–56. Submissions received by the Commission for its Aboriginal customary laws reference did not support any reform to the test that would allow cultural characteristics to be taken into account when assessing the power of self-control of an ordinary person.

82. Yeo observed that a purely subjective test has the support of two Australia law reform bodies but overall the objective test has greater support: Yeo S, 'Partial Defences to Murder in Australia and India' in Law Commission (England and Wales), *Partial Defences to Murder: Overseas studies*, Consultation Paper No. 173 (2003) Appendices, [1.30]. For support of the objective test, see Leader-Elliot I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72.

83. (1976) 136 CLR 619, 656.

84. Ibid 656, as cited in *Green* (1997) 191 CLR 334, 403.

85. Justice Miller, Justice McKechnie and the Office of the Director of Public Prosecutions submitted that provocation should be abolished but stated that the current ordinary person test is appropriate if the defence is retained: Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 4; Justice John McKechnie, Submission No. 9 (7 June 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 6. See also Festival of Light Australia, Submission No. 16 (12 June 2006) 4. The Criminal Lawyers' Association supported the retention of provocation as it is currently framed: Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 6.

86. VLRC, *Defences to Homicide*, Final Report (2004) [2.34].

87. (Unreported, Supreme Court of Western Australia, Library No. 980162, 3 April 1998).

88. Ibid 23. Justice Wheeler referred to this case in her submission. She also submitted that it is necessary to urgently clarify whether subjective issues that are unknown to the deceased can be taken into account when assessing the gravity of the provocation: Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 1.

89. (Unreported, New South Wales Court of Criminal Appeal, 27 May 1996).

90. Ibid 3 (Allen J).

91. [2000] NSWSC 1212.

92. Ibid [41].

alcohol and had passed out on the footpath. After waking up he commenced to walk home, wearing a baseball cap – the cap was the first trophy he had won in a skateboarding competition. The accused had removed his t-shirt and it was tucked into the back of his jeans. After coming across a group of young people he inexplicably put his t-shirt and wallet on the ground. One member of the group told the accused to pick up his wallet and he did. Someone else picked up the t-shirt and began teasing the accused by holding the t-shirt out of his reach. His baseball cap was also taken. After trying to regain his belongings the accused left the scene, went home and returned with a steak knife with the intention of using it to scare the group in order to retrieve his belongings. When the accused asked the deceased where his belongings were, the deceased replied up 'in the tree'. It was at this point that the accused lost self-control and stabbed the deceased once to the chest. Despite the observation that the provocation in this case would be regarded by some as trivial, the sentencing judge emphasised that he was required to consider the gravity of the provocation from the accused's point of view. Relevant personal circumstances affecting the gravity of the provocation in this case included that the accused was 22 years old; was affected by alcohol; had a disturbed childhood; was socially isolated; and had been diagnosed in the past as suffering from a personality disorder. From the accused's perspective, the judge found that the conduct amounted to 'quite extreme provocation'.⁹³ The accused was sentenced to six years' imprisonment with a non-parole period of four years and six months. Clearly an ordinary person would not lose self-control as a result of such a prank. However, once provocation is assessed from the perspective of the accused as 'grave', the objective nature of the actual provocation arguably becomes irrelevant.

These cases demonstrate that the correct balance between subjective and objective factors is difficult to strike. It has been suggested that the ordinary person

test is unworkable and should be abolished. In its place, the NSWLRC adopted a subjective test coupled with a 'test incorporating community standards of blameworthiness'. It was said that this test 'avoids the complexities of the ordinary person test while still allowing the jury to make a value judgement about whether or not a particular accused should be convicted of murder or manslaughter'.⁹⁴ This recommendation has been criticised because it provides little guidance to the jury.⁹⁵ Specifically, the VLRC noted that:

While the jury does play an important role in the criminal justice system, its role should be to determine whether the requirements of the defence have been met – not what the scope of the law should be.⁹⁶

The Commission agrees. As discussed in Chapter 1, the role of the jury is to determine criminal responsibility. It is Parliament's role to determine the scope of the offences. In the context of homicide, this includes determining the appropriate boundary between murder and manslaughter.

Is the 'ordinary person' a fallacy?

The objective test for provocation presumes that an ordinary person could lose self-control and deliberately kill as a consequence of provocative conduct. However, as Coss has stated, 'ordinary people, when affronted, do not resort to lethal violence'.⁹⁷ This point was usefully illustrated by comparing the number of intimate partner homicides with the number of intimate relationship breakdowns.⁹⁸ In 2005 there were approximately 52,000 divorces recorded in Australia.⁹⁹ During the period from 2005–2006 there were 74 intimate partner homicides.¹⁰⁰ As discussed below, a common feature of intimate partner homicides is the breakdown of the relationship or jealousy caused by infidelity.¹⁰¹ Bearing in mind the incidence of divorce and the frequency in which other relationships end, it is clear that ordinary people do not respond to relationship break-ups or infidelity by killing their partners. As Coss stated, '[m]en who kill when affronted by their intimate partners are truly extraordinary'.¹⁰²

93. Ibid.

94. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.80] & [2.127]. A similar recommendation was made in 1991: see Law Reform Commission of Victoria, *Homicide*, Final Report No. 40 (1991) [191].

95. See eg Howe A, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127, 128; Criminal Law Review Division, Attorney General's Department, New South Wales, *Homosexual Advance Defence: Final report of the working party* (1998) [5.38]; Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 305.

96. VLRC, *Defences to Homicide*, Final Report (2004) [2.76].

97. Coss G, 'Provocative Reforms: A comparative critique' (2006) 30 *Criminal Law Journal* 138, 142.

98. Coss G, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18 *Current Issues in Criminal Justice* 51, 52–53. See also Nourse V, 'Passion's Progress: Modern law reform and the provocation defense' (1997) 106 *Yale Law Journal* 1331, 1384.

99. Australian Bureau of Statistics, 'Lifetime Marriage and Divorce Rates' (2007) *Australian Social Trends* 1.

100. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report*, (Canberra: Australian Institute of Criminology, 2007) 24.

101. See below, 'Gender-Bias'.

102. Coss G, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18 *Current Issues in Criminal Justice* 51, 53.

In a similar vein, Leader-Elliot explained that it 'is not an appropriate test for provocation to ask whether most people *would* have responded in the same way as the accused'.¹⁰³ If the test was framed in that manner, he argued, it would never succeed. When a jury considers if an ordinary person *could* lose self-control and kill as a result of provocation, they could easily be influenced by the fact that the accused (who might be seen as an ordinary person) *did* in fact lose self-control and kill. Thus, the test is potentially circular and it may not achieve the purpose for which it was intended: to limit the defence.

CRITICISMS OF PROVOCATION

The lack of a consistent rationale

The underlying rationale for provocation has shifted from its historical origins. From its inception, provocation focussed on the wrongfulness of the deceased's conduct and was therefore considered a justification-based defence. However, today the focus is on the accused's loss of self-control and hence the defence is viewed principally as an excuse-based defence. Of course, provocation can only be viewed as a *partial* excuse or a *partial* justification because the accused is still held criminally responsible for manslaughter.

The NSWLRC stated that the justification rationale 'explains the defence of provocation in terms of recognising that the victim's own blameworthy conduct has contributed to the killer's actions in circumstances which could have moved an ordinary person to retaliate'.¹⁰⁴ In contrast, the excuse-based rationale focuses on the accused rather than the deceased. Because it is understandable that the accused lost self-control, the killing is partially excused.¹⁰⁵ The excuse-based rationale has also been explained on the basis that the mental state of the accused is 'impaired by loss of self-control' and therefore culpability is reduced.¹⁰⁶

Both rationales continue to underpin the defence. The central requirement that the accused must have actually lost self-control is clearly based upon the excuse theory. However, various rules that have been developed to restrict the defence (such as the hearsay provocation rule and the general rule that the provocative conduct must have been committed by the deceased) are consistent with the justification theory.¹⁰⁷ Goode observed that courts have not consistently applied one rationale over the other and therefore 'provocation exhibits characteristics of both justification and excuse'.¹⁰⁸ As a result, it has been said that the 'rationale underlying the defence of provocation is elusive' and that the 'doctrine has never been truly coherent, logical or consistent'.¹⁰⁹

The justification rationale

It has been argued that if the justification rationale is valid, then there is no need to include the requirement for loss of self-control.¹¹⁰ The question would simply be whether the deceased's conduct was bad enough to partially justify the killing. However, as the NSWLRC stated:

[T]o characterise the defence of provocation as a partial justification for killing is inconsistent with contemporary conceptions of civilised society, which does not approve personal acts of retaliation or retribution as opposed to acts of self-defence.¹¹¹

Even so, the justification theory has featured in law reform proposals. Underlying recommendations to exclude non-violent sexual advances or factors such as leaving a relationship is the view that in these types of cases the conduct of the deceased is not 'wrongful' enough to partially justify the killing.¹¹² In 2006 the Law Commission (England and Wales) recommended a reformulated partial defence of provocation; it removed the concept of loss of self-control, instead focussing on whether the accused had a 'justifiable sense of being seriously wronged' by gross provocation.¹¹³ The VLRC expressed the view that this

103. Leader-Elliot I, 'Case and Comment: Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 363–64. (emphasis added).

104. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.15].

105. Goode M, 'The Abolition of Provocation' in Yeo S (ed) *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 37, 39.

106. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.15].

107. *Ibid* [2.98].

108. Goode M, 'The Abolition of Provocation' in Yeo S (ed), *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 37, 39. See also NSWLRC, *ibid* [2.16].

109. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.21]. See also NSWLRC, *ibid* [2.15]; Dressler J, 'Rethinking Heat of Passion: A defense in search of a rationale' (1982) 73 *Criminal Law and Criminology* 421, 423; Coss G, 'God is a Righteous Judge, Strong and Patient: and God is Provoked Every Day: A brief history of the doctrine of provocation in England' (1991) 13 *Sydney Law Review* 570, 601.

110. Dressler J, 'Rethinking Heat of Passion: A defense in search of a rationale' (1982) 73 *Criminal Law and Criminology* 421, 459.

111. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.19].

112. For further discussion of these types of recommendations, see VLRC, *Defences to Homicide*, Final Report (2004) [2.57]–[2.68]; Criminal Law Review Division, Attorney General's Department, New South Wales, *Homosexual Advance Defence: Final report of the working party* (1998) [6.7]; McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and the Law* 44, 45. Brown H, 'Provocation as a Defence to Murder: To abolish or to reform' (1999) 12 *Australian Feminist Law Journal* 137, 140.

113. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [5.1]. The recommended partial defence of provocation only reduces first degree murder to second degree murder. It was also recommended that the partial defence could apply if the accused acted

proposal 'appears to be advocating a return to "anger as outrage"—a reaction which is justifiable in the circumstances—rather than "anger as loss of self-control" as the proper basis for the defence'.¹¹⁴ Favouring a justification-based defence, which implies that the deceased somehow 'deserved it', is contrary to contemporary standards and would countenance revenge killings.

The excuse rationale

The excuse rationale is reflected in the requirement for a loss of self-control. It has been observed that the requirement for a loss of self-control means that the defence applies to those who are acting 'on an impulse while suffering from a temporary impairment of the capacity to make moral choices between courses of action'.¹¹⁵ Thus, a loss of self-control is designed to ensure that the defence cannot be relied on to excuse cold-blooded revenge killings.¹¹⁶

However, the precise meaning of 'loss of self-control' is unclear. Because the accused retains some capacity to control his or her actions, it has been suggested that the true question for provocation is not whether the accused could have exercised control but whether he or she *should* have exercised control.¹¹⁷ Such an inquiry would necessarily require an assessment of the wrongfulness of the deceased's conduct.

If the excuse rationale was sufficient to explain the partial defence of provocation, the accused would only need to establish that he or she lost self-control.¹¹⁸ The reason for the loss of self-control would be irrelevant. But the option of a purely subjective test of whether the accused lost self-control has in general been rejected. Even those who favour the excuse rationale acknowledge that the test for provocation requires more than a loss of self-control. For instance, the NSWLRC stated that:

Arguably, it may be unduly lenient to allow every case of unlawful killing where there is a loss of self-control to be reduced to manslaughter.¹¹⁹

In its submission, the Law Society of Western Australia stated that a purely subjective test 'would not only dramatically expand the defence but would remove its present moral justification'.¹²⁰ The Commission agrees that loss of self-control on its own is an insufficient basis for the defence.

In fact, neither the justification rationale nor the excuse rationale provides a sufficient explanation for the defence of provocation. Furthermore, the Commission is of the view that combining both rationales does not eliminate the conceptual difficulties with each theory. The current test for provocation reflects both theories yet it is complicated, confusing and arguably unworkable. One response is to reform the defence; however, any reform would necessarily favour one theory over the other. The Commission agrees with the view expressed by the VLRC that:

Despite the best efforts of legislatures and law reform bodies to remedy current problems with the defence, the Commission believes that no entirely satisfactory and conceptually coherent test has yet been developed. In our view, any attempt to reform the defence would simply risk creating a new set of problems.¹²¹

Most significantly, the option of reforming the elements of provocation does not deal with the fundamental question: why should the law privilege loss of self-control over other emotions?

Provocation excuses intentional killings

Provocation partially excuses intentional killings; the accused either intended to kill or cause grievous bodily harm. There are many reasons why someone might form such an intention. These include fear, anger, revenge, greed, despair and compassion. Provocation singles out loss of self-control caused by anger (and sometimes fear) as a

in response to 'fear of serious violence', essentially incorporating the doctrine of excessive self-defence within the partial defence of provocation. The recommended defence retained an objective test: whether a person of the accused's age and of ordinary temperament in the same circumstances might have reacted in the same or a similar way. The Law Reform Commission of Ireland expressed the view that the appropriate rationale for provocation is a combination of both justification and excuse theory but with the emphasis on justification: Law Reform Commission of Ireland, *Homicide: The plea of provocation*, Consultation Paper No. 27 (2003) [2.14].

114. VLRC, *Defences to Homicide*, Final Report (2004) [2.89].

115. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [15.7].

116. See *Chhay* (1994) 72 A Crim R 1, 13 where Gleeson CJ stated that the law 'is not intended to encourage resort to self-help through violence'.

117. McAuley F, 'Provocation: Partial justification, not partial excuse' in Yeo S (ed) *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 19.

118. VLRC, *Defences to Homicide*, Issues Paper (2002) [6.22].

119. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.77], [2.80] & [2.82]. The NSWLRC recommended a subjective test of loss of self-control coupled with a 'test incorporating community standards of blameworthiness'. The NSWLRC acknowledged that this would still require the jury to assess the nature of the provocative conduct.

120. Law Society of Western Australia, Submission No. 37 (4 July 2006) 6. See also Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 7.

121. VLRC, *Defences to Homicide*, Final Report (2004) [2.98].

sufficient reason to reduce an intentional killing to the equivalent status of an unintentional killing. The VLRC stated that it is 'difficult, if not impossible, to explain why anger and a loss of self-control' should be privileged (by forming the basis of a partial defence) over other circumstances that are only taken into account during sentencing.¹²²

The NSWLRC recommended the retention of the partial defence of provocation, concluding that there 'are circumstances in which a person's power to reason and control his or her actions accordingly is impaired by a loss of self-control to such an extent as markedly to reduce that person's culpability for killing'.¹²³ While this may be true, there are also intentional killings committed while the accused is in full control but the circumstances significantly reduce culpability. For example, a person who kills their child's murderer in revenge might be regarded by some as less culpable than a person who loses self-control and kills as a result of a foolish prank.¹²⁴

The fact that a provoked killing is still an intentional killing is one of the major criticisms of provocation¹²⁵ and, as the VLRC stated, 'one of the most compelling reasons for recommending the abolition of the defence'.¹²⁶ In this regard, it is important to emphasise that historically the doctrine of provocation served to negate an essential element of murder: malice aforethought. Malice aforethought originally required proof of premeditation; a killing done under a sudden loss of self-control is logically inconsistent with a premeditated killing. But now provocation is only relevant if all of the elements of murder are proven.¹²⁷ What this means is that if provocation is established, an accused is convicted of manslaughter.

However, if an accused forms a split second intention to kill, but provocation cannot be established, the accused is convicted of murder.

Provocation condones violence

The defence of provocation developed at a time when angry retaliation to certain conduct was expected and supported by society.¹²⁸ This is no longer the case. In contemporary society any form of violence—other than what is necessary in self-defence—is generally condemned and actively discouraged.¹²⁹ The Commission received two submissions to this effect. The Women's Council for Domestic & Family Violence Services (WA) emphasised that self-protection or the protection of others is the only acceptable excuse for violence¹³⁰ and the Women's Law Centre of Western Australia stated that 'we do not believe that loss of self control is a valid excuse for violence'.¹³¹

It has been asserted that by partially excusing (or partially justifying) violent behaviour provocation condones violence. In response to this argument the NSWLRC said that the defence does not condone violence because the accused is still convicted of manslaughter and therefore the conduct is considered wrongful.¹³² But it is not considered as wrongful as it would otherwise be in the absence of the defence. At the very least, the partial defence can be seen to *partially* condone violence.

Gender-bias

A major criticism of provocation and a frequent justification for its abolition is that the defence operates in a gender-biased manner.¹³³ As mentioned above, the partial defence developed at a time when breaches to male honour

122. Ibid [2.26].

123. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.28] (emphasis omitted).

124. See the discussion of *Dimond* above, 'The Objective/Subjective Debate'.

125. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [156]. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 87.

126. VLRC, *Defences to Homicide*, Final Report (2004) [2.17].

127. It has been suggested that in the absence of a partial defence of provocation 'the concept of intention could become the new battleground for the provoked killer seeking a manslaughter verdict': Law Reform Commission of Ireland, *Homicide: The plea of provocation*, Consultation Paper No. 27 (2003) [6.40]. However, lack of intention is now the primary legal route to a manslaughter conviction. Loss of self-control and anger may be relevant to the question of intention irrespective of whether provocation is available as a partial defence or not: see eg *Turner* [2004] WASCA 127, [18] (Wheeler J; Murray and Templeman JJ concurring) where it was stated that 'anger and aggression may well be emotions which lead to the formation of' an intention to kill but not necessarily so'. The Commission notes that in its review of 25 cases between 2000 and 2007, where a woman killed her intimate partner in the context of domestic violence, there were 19 cases where the accused pleaded guilty to manslaughter. In 14 cases the reason was lack of intent; in three cases there were a number of reasons including lack of intent and provocation. There was only one case where the accused pleaded guilty to manslaughter solely on the basis of provocation. Clearly, in this sample, lack of intention was the primary basis for a manslaughter conviction.

128. New Zealand Law Commission (NZLC), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [117].

129. Eburn M, 'A New Model of Provocation in New South Wales' (2001) 25 *Criminal Law Journal* 206, 210. Eburn noted that 'contemporary legal, educative and policing efforts' are aimed at reducing violence.

130. Women's Council for Domestic & Family Violence Services (WA), Submission No. 46 (25 July 2006) 3.

131. Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 4.

132. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.36].

133. Commentators who have argued that the defence is gender-biased include Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 255; Howe A, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127, 130; Tarrant S, 'The "Specific Triggering Incident" in Provocation: Is the Law Gender Biased?' (1996) 26 *University of Western Australia Law Review* 190, 206; Hocking B, 'Limited (and Gendered?) Concessions to Human Frailty: Frightened women, angry men and the law of provocation'

'demanded' a violent response. It has been said that provocation is gender-biased because the defence 'was designed by men for men'¹³⁴ and, in reality, it is a concession to 'male frailty'.¹³⁵

The fact that the defence has centred on male behaviour is unsurprising – the vast majority of homicides are committed by men. National homicide data shows that men constituted 88 per cent of all homicide offenders in the period from 2005–2006.¹³⁶ However, while men are responsible for the majority of killings, both men and women are victims of homicide. Again the majority of victims are men, but the proportion of female victims is significantly higher than the proportion of female offenders. Sixty three per cent of homicide victims in 2005–2006 were male and 37 per cent were female.¹³⁷ In the same period, the proportion of female victims in Western Australia was higher than the national average: 42 per cent (almost half) of all homicide victims in Western Australia were female.¹³⁸ Gender-bias must, therefore, be viewed from two perspectives: the offenders who rely on provocation and the victims of the killings that are partially excused by the defence.¹³⁹

The elements of provocation do not reflect female patterns of behaviour

A common criticism is that the elements of the partial defence of provocation do not reflect or accommodate the way in which women respond to provocative conduct.¹⁴⁰ Two factors traditionally required to establish provocation are suddenness and the presence of a specific

triggering incident. The VLRC noted that the requirement for a 'triggering incident' has been watered down in recent years by allowing 'cumulative' provocation to be taken into account.¹⁴¹ Cumulative provocation means that a series of events (which may each individually be insufficient) can, when combined, amount to provocation.¹⁴² Cumulative provocation has been recognised by Western Australian courts. In *Mehmet Ali*,¹⁴³ it was stated that:

The final wrongful act or insult might, of itself, be comparatively trifling, but when taken with what had gone before, might be the last straw in a cumulative series of incidents which finally broke down the accused's self-control and caused him to act in the heat of passion.¹⁴⁴

Nevertheless, it is apparent that a final triggering event is still required under the Code.¹⁴⁵ The VLRC observed that, in the absence of a particular triggering event, the killing may be viewed as a revenge killing.¹⁴⁶ For victims of domestic violence the need to identify a specific triggering incident may prove difficult if there has been a significant delay between the last violent episode and the killing.

The response patterns of women do not necessarily fit within the requirement of suddenness. It was once considered necessary at common law that the accused responded immediately to the provocative conduct. While it is no longer essential that the killing occurred suddenly or immediately after the provocative conduct occurred, any delay between provocation and killing might be evidence to suggest that the accused did not actually lose self-control.¹⁴⁷ As Tarrant has observed, women 'who

(1999) 6 *Psychiatry, Psychology and Law* 57, 58; Coss G, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133, 136. See also MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 89.

134. Bandalli S, 'Provocation – A Cautionary Note' (1995) 22 *Journal of Law and Society* 398, 398.

135. See *Chhay* (1994) 72 A Crim R 1, 11 (Gleeson CJ). See also Bradfield R, 'Criminal Cases in the High Court of Australia' (1998) 22 *Criminal Law Journal* 296, 302.

136. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report*, (Canberra: Australian Institute of Criminology, 2007) 20.

137. *Ibid* 12.

138. *Ibid* 13.

139. It is also important to take into account the prevalence of intimate partner homicides: for a full discussion, see Chapter 6, 'Homicide in the Context of Domestic Violence'.

140. See eg Hocking B, 'Limited (and Gendered?) Concessions to Human Frailty: Frightened women, angry men and the law of provocation' (1999) 6 *Psychiatry, Psychology and Law* 57, 58; Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) 20 *University of Western Australia Law Review* 573, 591–96; VLRC, *Defences to Homicide*, Issues Paper, (2002) [6.11].

141. VLRC, *ibid* [6.5].

142. See eg *R* (1981) 28 SASR 321, 323 where a rather innocuous comment by the deceased was viewed against the 'appalling background of domestic violence and ill treatment'.

(1957) 59 WALR 28.

144. *Ibid* 39 (Jackson J), as cited in *Ellis v Ellis* [1999] WASCA 30, [16] (Templeman J).

145. Under s 281 of the Code there must be 'sudden' provocation. Tarrant has suggested that this element of suddenness could be interpreted with reference to the process of losing control rather than limiting the nature of the provocation. However, she conceded that the Code provision has generally be interpreted as requiring sudden provocation in addition to a sudden response: Tarrant S, 'The "Specific Triggering Incident" in Provocation: Is the Law Gender Biased?' (1996) 26 *University of Western Australia Law Review* 190, 206. Bradfield noted that the similar (now repealed) provocation under the Tasmanian Code has been interpreted to mean that the provocative conduct must have occurred suddenly or by surprise: Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 17–19.

146. VLRC, *Defences to Homicide*, Final Report (2004) [2.82].

147. VLRC, *Defences to Homicide*, Issues Paper, (2002) [6.6]. See also *Chhay* (1994) 72 A Crim R 1.

are the victims of repeated marital violence regularly respond at a time *other than* the time of the attack'.¹⁴⁸ Some women 'might respond to provocation by suffering a "slow-burn" of anger, despair and fear which eventually erupts into the killing of the provoker'.¹⁴⁹ Importantly, women may not respond immediately because an immediate response to violent conduct could be fatal.¹⁵⁰

Another requirement for provocation—that an ordinary person could have lost self-control in the circumstances—is also potentially gender-biased. Bearing in mind the frequency with which men kill, it has been argued that men have a lower standard of self-control than women. Morgan asserted that because the 'ordinary person only has to comply with the lower limits set for ordinary people' that standard is necessarily the male standard.¹⁵¹

Some of the factors that have operated as barriers to women accessing the defence have been relaxed in other jurisdictions.¹⁵² The Commission recognises the need to ensure that the law adequately reflects the circumstances of women as well as men. Arguably, the Code provisions could be reformed to better reflect the way in which women respond to provocative conduct.¹⁵³ However, by extending the application of the defence to accommodate women, the defence is necessarily also extended for men. For example, Bradfield observed that, while the acceptance of cumulative provocation may have assisted women, it has also assisted men who have relied on provocation in circumstances involving infidelity or rejection.¹⁵⁴

The true gender-bias: circumstances in which the defence is relied on

It has been suggested that statistical evidence does not support the view that the defence operates in a gender-biased manner.¹⁵⁵ Specifically, some studies have concluded that the partial defence of provocation is more successfully relied on by women than men.¹⁵⁶ However, in its recent study of homicide prosecutions, the VLRC found that only three women raised the defence of provocation and none were successful.¹⁵⁷ The Commission reviewed all cases identified by the DPP during the period 2000–2007 where a woman was charged with wilful murder, murder, attempted murder or manslaughter. From these, the Commission identified 25 cases that involved females killing their intimate partners in the context of domestic violence. The Commission found that provocation was not raised at all in the six cases that went to trial. In the remaining 19 cases where the accused pleaded guilty to manslaughter, the plea was accepted solely on the basis of provocation in only one case.¹⁵⁸

In any event, evidence that women have successfully raised provocation does not automatically lead to the conclusion that the defence is not gender-biased. A bare statistical analysis of success rates ignores the 'very different circumstances in which men and women raise' the defence.¹⁵⁹ Various studies have found that the vast majority of female accused who successfully raise provocation do so in circumstances where they have killed a violent partner.¹⁶⁰ In contrast, studies have found that

148. Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) 20 *University of Western Australia Law Review* 573, 593.

149. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 191. See also Hocking BA, 'Gender-Specific Response Patterns in Criminal Defences' (1996) 20 *Criminal Law Journal* 185, 186.

150. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.28].

151. Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 258–59.

152. For example, under s 23 of the *Crimes Act 1900* (NSW) the defence can apply where the conduct of the deceased occurred at any time prior to the killing and proportionality between the act and the provocation is no longer required. See also *Crimes Act 1900* (ACT) s 13(2)(b); *Criminal Code* (NT) s 158(4).

153. For example, s 281 could be amended by removing the requirement for the provocation to be 'sudden' and removing the requirement that the death-causing act must be done before there is time for the accused's 'passion to cool'.

154. Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 13.

155. See eg Law Reform Commission of Victoria, *Homicide*, Final Report No. 40 (1991) [165]–[167]; NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.115].

156. The Law Reform Commission of Victoria found that although the numbers were small, all of the female accused who raised provocation in its study of homicide prosecutions between 1981 and 1987 were convicted of manslaughter: Law Reform Commission of Victoria, *ibid*. In a study of prosecutions between 1990 and 1993 by the Judicial Commission of New South Wales found that there were nine women who killed intimate partners and all were convicted of manslaughter. Five of these nine accused relied on provocation: NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.142].

157. VLRC, *Defences to Homicide*, Final Report (2004) [2.21].

158. In three cases a plea of guilty to manslaughter appeared to be accepted for a number of different reasons, including lack of intent and the possibility of provocation. The remaining 14 accused pleaded guilty to manslaughter on the basis of lack of intent.

159. VLRC, *Defences to Homicide*, Final Report (2004) [2.22]. A similar observation was made by the Queensland Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (1999) ch 6 (unpaginated).

160. Bradfield's study of homicides between 1980 and 2000 found that in all of the cases where a woman successfully argued provocation, there was a history of violence: Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 146, as cited in VLRC, *Defences to Homicide*, Final Report (2004) [2.22]. In its recent study of homicides in New South Wales from 1990 to 2004, the Judicial Commission of New South Wales found that there were 13 cases where provocation was successfully raised in a

men have successfully relied on provocation for killing in response to a relationship breakdown and/or infidelity.¹⁶¹ In some cases, the offender's intimate partner is killed and in other cases a third party (the new partner) is killed. Put simply, the principal motivation for the killing in cases where women have successfully relied on provocation is self-preservation, but men have sometimes relied successfully on the defence where the motivation is jealousy, frustration or the desire for control in the context of a relationship breakdown and/or infidelity.¹⁶² As stated by Coss:

If a man successfully claims provocation when he kills a woman who has rejected him, then that one instance *is* proof of gender-bias. Full stop. The success for women who kill (defending themselves) becomes irrelevant.¹⁶³

The Commission agrees with this analysis. To further illustrate, if four women successfully relied on provocation after killing their violent and abusive partners out of fear and two men successfully relied on provocation after killing their partners out of jealousy, then on a superficial level the defence is biased against men. But there is a strong argument that in today's society the defence should have failed in the two cases involving male offenders. Accordingly, once the full circumstances are considered, it can be seen that men benefit disproportionately from the defence because it gives them a partial excuse for murder in circumstances where it is inappropriate.¹⁶⁴

The Commission is not aware of any reported appeal cases in Western Australia where provocation has been successfully relied on to partially excuse a male offender for killing his intimate partner. However, there are a number of appeal cases where provocation has been unsuccessfully

raised in these circumstances. In these cases the trial judge has directed the jury to consider provocation; however, the defence has failed.¹⁶⁵ These are precisely the cases that one would expect to be appealed. It would be extremely unlikely that an accused would appeal against a verdict of manslaughter. In order to leave the defence open for the jury's consideration there must be evidence (looked at in its most favourable light) that is sufficient to enable a properly directed jury to reach a verdict of manslaughter on the basis of provocation.¹⁶⁶ In its submission, the DPP stated that the 'evidential threshold for provocation has become so low that it is at times left to the jury in inappropriate cases'.¹⁶⁷

The Commission is not aware how many times provocation has been successfully raised by men when they have killed an intimate partner. But there is at least one reported case where the offender killed the new male partner of his estranged wife.¹⁶⁸ And the defence has been successfully raised in the context of relationship breakdowns and infidelity on numerous occasions in other Australian jurisdictions.¹⁶⁹ In one such case, *Auberson*,¹⁷⁰ the accused strangled his wife, beat her over the head with bathroom scales and cut her throat with a knife. The relationship between the accused and the deceased had deteriorated; the deceased had left the accused and for some time he suspected that she had been having an affair. On the day of the killing, the accused asked the deceased to visit him to discuss reconciliation; she was dead within approximately seven minutes of arriving at the house. The accused claimed during an interview with police that the deceased had told him the relationship was over, admitted that she had formed a new relationship; and declared that she was going

case involving domestic violence. Ten of these cases involved women killing her male partner where there was a history of physical abuse. The other three cases involved men who killed their female partner: Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 45.

161. The Judicial Commission of New South Wales found that during the period 1990 to 2004 there were 11 cases where provocation was successfully raised in the context of a relationship breakdown and/or infidelity. In all of these cases the offender was male. Four of the victims were the offender's intimate partner and seven of the victims were the new partner of the offender's spouse: Indy, Donnelly & Keane, *ibid* 42. See also VLRC, *ibid* [2.23]. In 1997 Morgan stated that she was not aware of any reported cases where a woman had killed her male partner because of infidelity or because their partner had left them: Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 256.
162. VLRC, *ibid* [2.22]. See also Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 7–8; Coss G, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133, 135.
163. Coss, *ibid* 136. See also Queensland Taskforce, *Women and the Criminal Code* (1999) ch 6 (unpaginated).
164. It is also somewhat ironic that men can successfully rely on provocation in circumstances when their partner has left or threatened to leave but a woman who fails to leave a violent relationship may be disadvantaged when relying on self-defence. Nourse observed that if a 'battered woman' leaves the relationship, her departure provides the male partner with a reason for killing: Nourse V, 'Passion's Progress: Modern law reform and the provocation defense' (1997) 106 *The Yale Law Journal* 1331, 1334.
165. See eg *Vella* [2006] WASCA 177; [2007] WASCA 59; *Jacovic* [2002] WASCA 149; *Agnew* [2003] WASCA 188; *Perich* (Unreported, Supreme Court of Western Australia, Library No. 9605777, 3 September 1996). In other cases the trial judge has refused to direct the jury to consider the defence: see eg *Hart* [2003] WASCA 213; *T* (1998) 20 WAR 130.
166. *R* (1981) 28 SASR 321 322.
167. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 6.
168. *Roche* (1988) WAR 278.
169. See eg *Ramage* [2004] VSC 508; *Butay* [2001] VSC 417; *Schubring* [2004] QCA 418; *Auberson* [1996] QCA 321; *Sebo* (Unreported, Supreme Court of Queensland, No. 977 of 2006, Byrne J, 30 June 2007); *Hamoui* [2005] NSWSC 279.
170. [1996] QCA 321.

to try and get as much of his money as possible. The accused was convicted of manslaughter and sentenced to nine years' imprisonment.

Commentators and law reform bodies have been highly critical of the way that provocation operates to partially excuse men in these circumstances.¹⁷¹ Coss maintains that:

The case of a jealous man who kills his partner who threatens to leave him, and a case of a battered woman who kills to stay alive, cannot—indeed MUST not—be thought of as equivalent.¹⁷²

In its submission for this reference, the DPP stated that it is inappropriate for infidelity or a threat to leave a relationship to constitute the basis for provocation.¹⁷³ Some commentators have recommended that leaving a relationship (or attempting/threatening to leave the relationship) and infidelity should be expressly excluded from the defence.¹⁷⁴ While the rationale behind these proposals has merit, the operation of a defence of provocation with exclusionary categories would be problematic. Potentially deserving cases might be excluded and undeserving cases might be included by characterising the conduct in a different way.¹⁷⁵

Provocation is an important defence for victims of domestic violence

While acknowledging that provocation is gender-biased, a number of commentators have argued that provocation should be retained (and reformed) because it is necessary—in the absence of an appropriate defence of self-defence—

for women who kill abusive partners.¹⁷⁶ In her opinion prepared for this reference, Tarrant explained that provocation is an inappropriate defence for victims of serious and prolonged domestic violence. The focus of provocation is loss of self-control rather than a 'necessary reaction to a very dangerous situation'.¹⁷⁷ In contrast self-defence emphasises the very real danger faced by the accused.¹⁷⁸ In its reference on homicide, the VLRC also concluded that reform to the law of self-defence and the introduction of the partial defence of excessive self-defence are more appropriate reforms to address the circumstance of women who kill in response to domestic violence.¹⁷⁹

In this Report the Commission has made significant recommendations to reform the law of self-defence in Western Australia and has also recommended that excessive self-defence be introduced.¹⁸⁰ In light of these recommendations the Commission does not consider that it is necessary to retain provocation solely for the purpose of accommodating the circumstances of victims of domestic violence.¹⁸¹

Provocation is unnecessary in the absence of mandatory life imprisonment

The mandatory penalty of death (and now in some jurisdictions the mandatory penalty of life imprisonment) has provided one of the strongest justifications for the partial defence of provocation.¹⁸² For all other crimes provocation is taken into account during sentencing.¹⁸³ The MCCOC observed that provocation 'has enjoyed its elevated status in the context of fatal offences because

171. See eg MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 91; Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 38.

172. Coss G, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133, 135.

173. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 6.

174. McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and the Law* 44, 45; Brown H, 'Provocation as a Defence to Murder: To abolish or to reform', (1999) 12 *Australian Feminist Law Journal* 137, 140. See also VLRC, *Defences to Homicide*, Final Report (2004) [2.57]–[2.68]. Similar proposals were made in submissions: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 18–19; Women's Law Centre, Submission No. 49 (7 August 2006) 4–5.

175. It has also been argued that a non-violent sexual advance (including a non-violent homosexual advance) should be excluded from the defence. Some jurisdictions have done this: see *Crimes Act 1900* (ACT) s 13 (3); *Criminal Code* (NT) s 158 (5). The VLRC observed that this exclusion could be circumvented by relying on other factors. For example, a non-violent homosexual advance might be interpreted as a reaction to childhood abuse rather than a reaction to the particular incident: VLRC, *Defences to Homicide*, Final Report (2004) [2.68]. See *Green* [1997] 191 CLR 334 where the accused relied on the fact that his father had sexually abused his sisters as part of the reason why he reacted to a homosexual advance by the deceased.

176. Brown H, 'Provocation as a Defence to Murder: To abolish or to reform' (1999) 12 *Australian Feminist Law Journal* 137, 139; Bradfield R, 'The Demise or Provocation in Tasmania' (2003) 27 *Criminal Law Journal* 322, 324; Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 37.

177. Tarrant, *ibid*.

178. *Ibid*.

179. VLRC, *Defences to Homicide*, Final Report (2004) [2.48].

180. See Chapter 4, Recommendations 22, 23 & 26.

181. Stella Tarrant proposed that provocation should be abolished provided that excessive self-defence was introduced: Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 38.

182. The Murray Review observed that the defence was illogical but nevertheless recommended its retention because of the mandatory penalties for wilful murder and murder: Murray MJ, *The Criminal Code: A general review* (1993) 154.

183. The Commission notes that Western Australia and Queensland are an exception to this general rule because there is a complete defence of provocation for offences involving an assault: see below, 'The Complete Defence of Provocation'.

of the rigid sentencing regime' for murder.¹⁸⁴ The partial defence enables provoked killings to be classified as manslaughter – opening the way for full sentencing discretion.

In 2004 the Law Commission (England and Wales) stated that it was not aware of any common law legal system that had abolished provocation while still retaining mandatory sentencing for murder. It was also not aware of any law reform body that had made such a recommendation while still retaining mandatory life imprisonment.¹⁸⁵ These observations are consistent with the Commission's research. However, in many jurisdictions the mandatory penalty for murder has been abolished – hence the view that flexible sentencing for murder renders the defence unnecessary.¹⁸⁶ A number of law reform bodies have recommended the abolition of provocation where there is flexibility in sentencing or with an accompanying recommendation to abolish mandatory life imprisonment.¹⁸⁷ The Commission has recommended greater flexibility in sentencing by its recommendation to replace the mandatory penalty of life imprisonment for murder with a presumptive sentence of life imprisonment.¹⁸⁸ On this basis, the case for abolishing provocation is significantly strengthened.

However, it is important to acknowledge that some jurisdictions have retained provocation even with flexible sentencing for murder.¹⁸⁹ A major justification for this approach is the argument that retaining the partial defence enables community input into the criminal justice system.¹⁹⁰ The conclusion of the NSWLRC to retain provocation was strongly influenced by the view that abolishing partial defences would undermine the public's confidence in the criminal justice system. It was stated that by permitting the *jury* to assess the culpability of the accused the community would be more likely to accept a lower sentence

imposed for a provoked killing.¹⁹¹ As discussed further in Chapter 7, partial defences are not the only way to improve the public's confidence in the criminal justice system.¹⁹² Further, this argument fails to take into account the potential for members of the community to be dissatisfied that a deliberate killing has resulted in a conviction for manslaughter rather than murder.¹⁹³

The argument that it is preferable for a jury—rather than a sentencing judge—to determine issues affecting culpability, does not fully take into account what occurs in practice. The existence of a partial defence does not mean that it is always the jury who decide if the defence applies. In some cases the prosecution is responsible for assessing the culpability of the offender by accepting a plea of guilty to manslaughter. For instance, a study by the Judicial Commission of New South Wales found that 28 per cent of homicide offenders who relied on provocation had a plea of guilty to manslaughter accepted by the prosecution.¹⁹⁴ Therefore, a significant proportion of offenders were sentenced on the basis of provocation without any 'community input' by the jury. Further, in some cases an accused may rely on more than one partial defence and it may not be clear why the jury convicted the offender of manslaughter. If, for example, the offender relied on provocation and diminished responsibility, some members of the jury may have based their verdict on provocation and others on diminished responsibility. In these situations it is actually the sentencing judge who decides the factual basis for sentencing.¹⁹⁵

The Commission emphasises that sentencing judges routinely make decisions about an offender's culpability for murder, and about provocation in respect of all other crimes.¹⁹⁶ The Commission can see no reason why provocation as a mitigating factor for murder should be singled out as one issue requiring community input via the jury.

184. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 89.

185. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.33].

186. VLRC, *Defences to Homicide*, Final Report (2004) [2.31].

187. New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* (1976) [6]; NZLC, *Some Criminal Defences With Particular Reference to Battered Defendants*, Report No. 73 (2001) [120]; VLRC, *ibid* [2.102]; MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 87;

188. See Chapter 7, 'Sentencing: Presumptive life imprisonment'.

189. Two of the six Australian jurisdictions with the partial defence of provocation do not have mandatory life imprisonment: New South Wales and the Australian Capital Territory.

190. See eg Finlay MD, *Review of the Law of Manslaughter in New South Wales* (2003) 54; McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and the Law* 44, 45; Cato C, 'Criminal Defences and Battered Defendants' [2002] *New Zealand Law Journal* 35, 37.

191. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.24].

192. See Chapter 7, 'Sentencing: Public confidence in sentencing'.

193. This occurred recently in Queensland in a case where the accused successfully relied on provocation after killing his girlfriend as a result of taunts: *Sebo* (Unreported, Supreme Court of Queensland, No. 977 of 2006, Byrne J, 30 June 2007). See further discussion in Chapter 7, 'Sentencing: Public confidence in sentencing'.

194. Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 37.

195. See eg *Schubring* [2004] QCA 418. See also Finlay MD, *Review of the Law of Manslaughter in New South Wales* (April 2003) 44.

196. VLRC, *Defences to Homicide*, Final Report (2004) [2.99].

SHOULD PROVOCATION BE RETAINED IN WESTERN AUSTRALIA?

It is clear that the problems with provocation are considerable and the case for abolition is strong. Nonetheless, there remains support for the defence. A number of law reform bodies¹⁹⁷ and commentators have recommended the retention of provocation.¹⁹⁸ But the law of homicide varies between jurisdictions. In particular, the mandatory penalty for murder or the lack of appropriate defences to accommodate 'battered women' has influenced recommendations to retain the defence. Thus it is necessary to examine the merits of retaining the partial defence in the context of the Commission's overall approach to the reform of homicide.

Intentional killings should be distinguished from unintentional killings

One of the Commission's guiding principles for reforming the law of homicide is that intentional killings should be distinguished from unintentional killings.¹⁹⁹ As a general statement, an unlawful killing done with an intention to cause death or an injury of such a nature as to be likely to endanger life is conceptually different and significantly more serious than an unintentional killing.²⁰⁰ This distinction provides the primary basis for the division between the offence of murder and manslaughter.

It has been argued that provoked killings should not be labelled as murder. For example, the NSWLRC stated that the partial defence of provocation

means that people who kill with reduced culpability as a result of a loss of self-control under provocation are not misleadingly and unfairly stigmatised by the label 'murderer'.²⁰¹

However, it is not immediately apparent why the label of murder is misleading for a provoked killing. As the Law Reform Commission of Canada stated:

[E]ven if 'murder' seems an inappropriate term for killing under provocation, 'manslaughter' is surely (with all due respect to the common law) as singularly inappropriate a term for killing with intent (which killing under provocation is).²⁰²

More recently the Law Commission (England and Wales) recommended that the partial defence of provocation be retained; however, only so far as to reduce first degree murder to second degree murder.²⁰³ Thus, a provoked killing would be classified as murder rather than manslaughter.²⁰⁴ The Commission does not consider that the label of murder is unfair or misleading for a provoked killing. Irrespective of how provoked killings are classified, the offence of murder covers a wide range of culpability. The reasons and the circumstances in which people intentionally kill differ; therefore, it has been said that 'differences in degrees of culpability for intentional killings should be dealt with at sentencing, rather than through the continued existence of partial defences to homicide'.²⁰⁵

The Commission's approach to partial defences

The Commission has adopted the approach that issues affecting culpability for intentional killings should be dealt with in sentencing. It is also one of the Commission's guiding principles that the only lawful purpose for an intentional killing is self-preservation or the protection of others. This principle underpins the Commission's recommendations concerning the defences of self-defence, duress and emergency.²⁰⁶ It also impacts upon the Commission's conclusions in relation to partial defences. Despite the general principle that issues affecting moral

197. House of Lords Select Committee, *Report on Murder and Life Imprisonment*, HL Paper 78–1 (1989) [83]; Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [160] (only a majority of the Commissioners recommended retention); Law Reform Commission of Ireland, *Homicide: The plea of provocation*, Consultation Paper No. 27 (2003) [6.44]; Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [5.11]; NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.127].

198. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 216; Brown H, 'Provocation as a Defence to Murder: To abolish or to reform' (1999) 12 *Australian Feminist Law Journal* 137, 139; Cato C, 'Criminal Defences and Battered Defendants' [2002] *New Zealand Law Journal* 35, 37.

199. See Introduction 'Guiding Principles for Reform: Principle One'.

200. The only exceptions to this general rule are excessive self-defence and felony-murder. For a more detailed discussion, see Chapter 2, 'Felony-murder' and Chapter 4, 'Excessive Self-Defence'.

201. NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.33].

202. Law Reform Commission of Canada, *Homicide*, Working Paper No. 33 (1984) 74.

203. The principal reason for retaining provocation as a partial defence reducing first degree murder to second degree murder was the continued existence of mandatory life imprisonment for murder. Because the Law Commission (England and Wales) recommended that only first degree murder should attract mandatory life imprisonment, the provision for partial defences reducing first degree murder to second degree murder enabled provoked killers to avoid the mandatory penalty: Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.124].

204. Law Commission (England and Wales), *ibid* [2.151].

205. VLRC, *Defences to Homicide*, Final Report (2004) [2.1]. As the NZLC stated it 'seems unfair and illogical to single out one particular' factor reducing culpability: NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [114].

206. In this regard the Commission notes that the Women's Council for Domestic & Family Violence Services (WA) stated in its submission that 'there is no excuse for violence, other than in the need for self-protection or for the protection of others': Women's Council for Domestic & Family Violence Services (WA), Submission No. 46 (25 July 2006) 2.

culpability for murder should be dealt with in sentencing, the Commission has recommended the introduction of the partial defence of excessive self-defence. The Commission has concluded that partial defences are only justified if the circumstances giving rise to the defence *always* demonstrate reduced culpability. Excessive self-defence adheres to this approach; additionally, it is consistent with the Commission's view that the only lawful purpose for an intentional killing is self-preservation or the protection of others. However, the partial defence of provocation does not meet this test.

Provoked killings do not always demonstrate reduced moral culpability

Proponents of the partial defence of provocation often point to the reduced culpability associated with provoked killings.²⁰⁷ However, it is widely accepted that this observation does not apply to all provoked killings.²⁰⁸ Furthermore, law reform bodies (even those which support provocation) have acknowledged that the defence may be relied upon in inappropriate or undeserving cases.²⁰⁹ In *Kumar*,²¹⁰ O'Bryan AJA stated that:

I have experienced, as I believe have other judges who have presided over murder trials, unjustified jury verdicts which could only be explained in terms of provocation.²¹¹

Typical examples of 'unjustified' manslaughter convictions are those cases where the provocation arose from a non-violent homosexual advance, a relationship breakdown or infidelity. As discussed elsewhere in this section there have been recommendations to exclude these types of cases from the ambit of the defence. Some might argue that these restrictions are sufficient; however, it is only necessary to refer to the case of *Dimond*²¹² (in which the deceased and his friends took the accused's baseball cap and t-shirt as a prank) to illustrate why exclusionary categories are inadequate. It is difficult to think of a specific category that would have excluded provocation in that case.

Similarly, in *Dunn*,²¹³ provocation was relied on successfully in circumstances that might be viewed as inappropriate.

The accused and the deceased were friends and they shared a house together; they were not romantically involved. They frequently drank alcohol while in each other's company. The accused had previously been married but his ex-wife and children had left Australia. The deceased was apparently the accused's only friend. While drinking together the deceased and the accused would often argue and the deceased would 'taunt the [accused] about the lack of family and other meaningful relationships in his life, contrasting his position with her own, blessed as she was with a daughter, grandchildren and siblings'.²¹⁴ On the night of the killing, the deceased and the accused were again drinking together and arguing. At one stage the accused said to the deceased: 'if you don't shut up, I will kill you'. But the deceased didn't stop. The accused went to the kitchen, grabbed two knives and—while the deceased was sitting on a chair smoking a cigarette—stabbed her once in the stomach. The sentencing judge was not satisfied beyond reasonable doubt that the accused intended to kill the deceased and accordingly sentenced him on the basis that he intended to cause grievous bodily harm. The accused claimed that his threat to kill was only a joke and it was only after she persisted in her taunts that he formed an intention to cause grievous bodily harm. The sentencing judge observed that the degree of provocation was not significant but the 'accused had endured her jibes for some years over the course of their relationship; so that the cumulative effect of the provocative conduct was triggered on this particular evening'.²¹⁵ The accused was sentenced to eight years' imprisonment for manslaughter with a non-parole period of five years.²¹⁶

If provocation is reformulated to exclude verbal taunts, non-violent sexual advances, relationship breakdowns (including leaving, threatening to leave or attempting to leave a relationship) and infidelity, then there would not be much left. What would remain is violent provocative conduct and other criminal behaviour. To restrict the partial defence of provocation to these categories would be a return to the justification theory and potentially encourage violent retaliation to unlawful behaviour.

207. See eg Law Reform Commission of Victoria, *Homicide*, Discussion Paper No. 13 (1988) [137].

208. See eg MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 105.

209. See eg NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.37]; Law Reform Commission of Victoria, *Homicide*, Discussion Paper No. 13 (1988) [134].

210. [2002] VSCA 139.

211. *Ibid* [176].

212. [2000] NSWSC 1212.

213. [2005] NSWSC 1231.

214. *Ibid* [4].

215. *Ibid* [8].

216. *Ibid* [16].

That being said, the partial defence of excessive self-defence will capture some intentional killings committed in response to violent conduct. If the accused reasonably believed that it was necessary to use force in self-defence (or in the defence of another) and genuinely believed that killing was necessary, excessive self-defence will apply. This recommendation will be particularly relevant to victims of domestic violence who have killed their violent partners. It may also be relevant to other cases where self-defence is inapplicable because the accused over-reacted.

For example, in *Mehinovic*,²¹⁷ the accused was convicted of the murder of his father. The accused relied on self-defence. There was a previous history of violence by the deceased towards the accused; in the past the deceased had assaulted and threatened to kill the accused. The accused lived with the deceased at the time. On the day of the killing the deceased threw food all over the floor while complaining that the accused had eaten his food. The deceased struck the accused on the head with his metal walking stick; continuing to swing the walking stick at the accused even though the accused was bleeding from his head. While this was happening the accused was being gradually forced into a corner. The accused said he was afraid. Although he agreed he could have initially pushed his father over he claimed he didn't want to in case he damaged his already fractured leg. However, once the accused was forced into the corner and unable to stop the blows being delivered by his father, he grabbed a kitchen knife and stabbed his father five times. The trial judge refused to leave the defence of provocation to the jury, but on appeal the court held that there was sufficient evidence of provocation and it ought to have been considered.

In such a case it could be argued that the accused reasonably believed it was necessary to use force in self-defence. Further, it is arguable that the accused believed it was necessary to stab his father to thwart the attack. However, the killing might be considered an unreasonable response to the threat and, if so, a conviction for manslaughter could result by applying the partial defence of excessive self-defence. Interestingly, the accused did not even claim to have lost self-control: clearly his defence

was based upon self-defence and not an angry reaction to his father's conduct.

Provocation does not always catch 'deserving' cases

Just as undeserving cases may fall within the defence, provocation does not always capture deserving cases where moral culpability is reduced. This is because some of the specific rules designed to limit the defence potentially exclude such cases.²¹⁸ One example is hearsay provocation. It has been argued that while the hearsay provocation rule excludes weak cases of provocation it may also 'exclude some very strong cases'.²¹⁹

A recent case, *Wetherall*,²²⁰ is a useful illustration of how the 'hearsay provocation rule' can exclude deserving cases. The accused stabbed her de facto partner after discovering that he had sexually abused her daughter for a second time. The accused was told about the second incident by her daughter. The offender had herself been repeatedly sexually abused as a child by various family members. At the age of 14 she was sexually assaulted by an uncle who resided with her family and she became pregnant; the child was subsequently adopted. A relationship commenced between the offender and the deceased when she was only 16 years old. During this relationship the offender suffered several miscarriages and, after believing that she would not be able to have any more children, she agreed to take over the care of her sister's newborn baby. It was this child that the offender believed had been sexually assaulted by the deceased. Although accepting a plea of guilty to manslaughter on another basis, the prosecution had indicated that if the matter went to trial it would have argued that provocation could not be relied on because of the 'hearsay provocation rule'.²²¹

Provocation can be dealt with during sentencing

The Commission believes that the sentencing process is uniquely suited to identifying those cases of provocation that call for leniency and those that do not. This is because the sentencing process is flexible and is accustomed to

217. (Unreported, Supreme Court of Western Australia, No. 42 of 1991, 8 October 1991).

218. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 198. In *Tyne v Tasmania* [2005] TASSC 119, [28] it was stated that there may be cases of provocation involving significant mitigation but the factual circumstances would not have fallen within the previous legislative defence.

219. Lanham D, 'Provocation and the Requirement of Presence' (1989) 13 *Criminal Law Journal* 133, 148.

220. [2006] NSWSC 486. The Law Society of Western Australia referred to this case in its submission: The Law Society of Western Australia, Submission No. 37 (4 July 2006) 13–14.

221. The accused pleaded guilty to manslaughter on the basis of diminished responsibility: for a full discussion of this case: see Chapter 7, 'Sentencing for Murder: Introducing flexibility into sentencing for murder'.

taking into account both aggravating and mitigating factors. The VLRC observed that the sentencing process allows for 'greater flexibility to take provocation into account when it is appropriate to do so, and to ignore it when it is not'.²²² But there must be sufficient flexibility within the sentencing regime to take into account differences in culpability. The Commission believes that its recommendation for a presumptive sentence of life imprisonment achieves this.²²³ An adult offender convicted of murder must be sentenced to life imprisonment unless, given the circumstances of the offence or the offender, a sentence of imprisonment for life would be clearly unjust. In some cases the existence of provocation would satisfy this test.²²⁴ Further, this test may be satisfied in 'deserving' cases previously excluded from the partial defence.

It has been suggested that, in the absence of provocation, overall sentences for homicide may increase because some offenders who would be currently sentenced for manslaughter will instead be sentenced to a greater penalty for murder.²²⁵ The Commission agrees that if provocation is abolished, in some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder. Thus, it has been argued that abolishing provocation may lead to 'inconsistent dealings with those who kill after losing self-control'.²²⁶ However, this is precisely the point. Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to

less mitigation than a person who kills his friend after discovering him sexually abusing his child.

It has been argued that the abolition of provocation will not necessarily eliminate gender-bias.²²⁷ Bradfield warns that the sentencing process might 'reiterate the legitimacy of men's violence in response to sexual jealousy and possessiveness'.²²⁸ It is impossible to know the extent, if any, that gender-bias will be repeated in the sentencing outcomes for murder. In Chapter 7 the Commission has recommended the establishment of a body in Western Australia to monitor sentencing practices for homicide. If the partial defence of provocation is abolished, this body should specifically monitor sentencing practices and outcomes for murder when issues concerning provocation are raised.²²⁹

The Commission's recommendation

The Commission received eight submissions in favour of retaining provocation in Western Australia.²³⁰ However, one of these submissions submitted that provocation should only be retained if mandatory life imprisonment remained.²³¹

In contrast, there were six submissions clearly in favour of abolishing provocation²³² and an additional five submissions expressing qualified support for abolition.²³³ The Women's Council for Domestic & Family Violence Services (WA) submitted that provocation should be abolished as a defence for men who kill their partners or ex-partners where there is a history of domestic violence, in response

222. VLRC, *Defences to Homicide*, Final Report (2004) [2.32].

223. The Commission notes that in his submission, Justice McKechnie supported the abolition of the partial defence but considered the provocation could be adequately dealt with under the current sentencing regime for murder. He suggested that the *Sentencing Act 1995* (WA) should expressly provide that provocation is a relevant sentencing factor when setting the minimum term for murder: Justice John McKechnie, Supreme Court of Western Australia, Submission No. 1 (12 September 2005) 3.

224. See Chapter 7, Recommendation 44. The Commission notes that it has also recommended that where life imprisonment is imposed the minimum term must be between 10 and 30 years (unless a whole-of-life term is ordered). With only one category of murder, and in the absence of the penalty of strict security life imprisonment, the sentencing regime for murder (even when life imprisonment is imposed) is more flexible than is currently the case.

225. NSWLRC, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No. 31 (1993) [3.135]. See also Tolmie J, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] *New Zealand Law Review* 25, 30.

226. McSherry B, 'Afterword: Options for the reform of provocation, automatism and mental impairment' (2005) 12 *Psychiatry, Psychology and the Law* 44, 45.

227. Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 275; Coss G, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133, 139.

228. Bradfield R, 'The Demise or Provocation in Tasmania' (2003) 27 *Criminal Law Journal* 322, 324.

229. As a result of the abolition of provocation in Victoria in 2005, the Sentencing Advisory Council of Victoria is currently examining 'how provocation has featured in sentencing decisions for non-fatal offences in Victoria and is also looking to interstate and intentional authorities to extract sentencing principles': see <www.sentencingcouncil.vic.gov.au>.

230. Paul Ritter, Submission No. 4 (29 May 2006) 2; Women's Justices Association of Western Australia, Submission No. 14 (7 June 2006) 3; Dr Thomas Crofts, Murdoch University, Submission No. 33 (undated) 6; Law Society of Western Australia, Submission No. 37 (4 July 2006) 5; Michael Bowden, Submission No. 39 (11 July 2006) 3; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 7; Department for Community Development, Submission No. 42 (7 July 2006) 6; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2.

231. Department for Community Development, Submission No. 42 (7 July 2006) 3.

232. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 3; Justice John McKechnie, Submission No. 9 (7 June 2006) 3; Office for Women's Policy, Submission No. 44 (17 July 2006) 2; Angelhands, Submission No. 47 (3 August 2006) 3; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 7; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2007) 5.

233. Two of these submissions stated that provocation should not be available as a partial defence to wilful murder but should (or could) remain as a partial defence to murder: Festival of Light Australia, Submission No. 16 (12 June 2006) 4; Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 2.

to jealousy or in response to the woman leaving or attempting to leave the relationship.²³⁴ Likewise, the Women's Law Centre of Western Australia submitted that provocation should not be open 'in circumstances of separation assault, sexual jealousy or non-violent sexual advances'.²³⁵ The Women's Law Centre of Western Australia emphasised that it would support the eventual abolition of provocation once it is clear that amendments to the defence of self-defence are clearly working for victims of domestic violence.²³⁶ Also, the Domestic Violence Legal Unit, Legal Aid (WA) submitted that on the condition that the law of self-defence and sentencing provisions were amended, provocation should be abolished.²³⁷ Bearing in mind the Commission's recommendations to reform the law of self-defence (including the introduction of excessive self-defence) and to abolish mandatory life imprisonment, the majority of submissions (taken as a whole) support abolition of provocation. The Commission also notes that a number of law reform bodies²³⁸ and commentators have recommended abolition of the partial defence of provocation.²³⁹

As stated at the outset, retention of provocation requires a clear justification. The Commission believes that the only justification for retaining provocation is the continued existence of mandatory life imprisonment for murder. However, the Commission has recommended that the mandatory penalty for murder be abolished. After considering how the partial defence of provocation fits within the overall structure for homicide, as recommended in this Report, the Commission has concluded that the partial defence of provocation under s 281 of the Code should be repealed.

Recommendation 29

Repeal of the partial defence of provocation

That s 281 of the Commission be repealed, but only if the Commission's recommendation to replace the mandatory penalty of life imprisonment for murder with a presumptive sentence of life imprisonment is implemented.

The complete defence of provocation

For the sake of completeness, the Commission highlights that many of the problems associated with the partial defence of provocation also apply to the complete defence of provocation under the Code. Further, the complete defence of provocation under s 246 of the Code has its own difficulties. Queensland and Western Australia are the only jurisdictions in Australia with such a defence. In all other jurisdictions issues of provocation for offences other than murder are taken into account during sentencing.

The defence only applies to offences that contain an assault as an element – such as common assault and assault occasioning bodily harm. The defence is not available for other violent crimes such as unlawful wounding or grievous bodily harm.²⁴⁰ There have been different approaches to eradicating the anomaly that arises because the complete defence is available to some crimes of violence but not to others. In 1992 the Queensland Criminal Code Review Committee recommended that the complete defence of provocation under the Queensland Code should be available to every offence which involves the *commission*

234. Women's Council for Domestic & Family Violence Services (WA), Submission No. 46 (25 July 2006) 13 & 18.

235. Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 4.

236. Ibid 5.

237. Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 4.

238. New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide*, (1976) [6]; MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 107; NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [120]; VLRC, *Defences to Homicide*, Final Report (2004) [2.102].

239. Goode M, 'The Abolition of Provocation' in Yeo S (ed) *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 37, 55; Coss G, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18 *Current Issues in Criminal Justice* 51, 71; Coss G, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133, 139; Howe A, 'Reforming Provocation (More or Less)' (1999) 12 *The Australian Feminist Law Journal* 127, 127; Howe A, 'Provocation in Crisis – Law's Passion at the Crossroads? New Directions For Feminist Strategists' (2004) 21 *The Australia Feminist Law Journal* 53, 60; Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 275; Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 36 (although Bradfield suggests in this article that reform of provocation is necessary she makes it clear that her preferred view is abolition).

240. In its reference on Aboriginal customary laws the Commission considered the differential treatment of assault occasioning bodily harm and unlawful wounding in terms of the availability of the 'defence' of consent. In particular, it was noted that both offences have the same maximum penalty and hence are regarded as serious as one another. The Commission also noted that there does not appear to be any justification for distinguishing between assault occasioning bodily harm and unlawful wounding in terms of the availability of provocation as a defence: LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 141. The Commission recommended that the offence of unlawful wounding be repealed: see Recommendation 25. The repeal of the offence of unlawful wounding would remove one anomaly in respect to the availability of the complete defence of provocation.

◀ The Partial Defence of Provocation

of an assault as distinct to only those offences that require *proof* of an assault.²⁴¹ In contrast, the Murray Review recommended the repeal of the complete defence of provocation.²⁴²

The Commission received a number of submissions to the effect that if the partial defence of provocation was abolished, the complete defence of provocation should also be repealed.²⁴³ However, others submitted that even if the partial defence of provocation was abolished, the complete defence of provocation under s 246 of the Code should be retained.²⁴⁴ The DPP suggested that it does not necessarily logically follow that just because the partial defence is abolished the complete defence is inappropriate. It was suggested that this issue requires further consideration and consultation.²⁴⁵

It is the Commission's provisional view that the complete defence of provocation should be abolished because the availability of full sentencing discretion for offences other than murder clearly enables any mitigating factors to be taken into account. However, the Commission agrees that further consultation is required. In particular, the repeal of the complete defence of provocation would be likely to have significant practical implications. Offences such as common assault and assault occasioning bodily harm are

frequently committed and without the complete defence, the sentencing practices and outcomes for these types of offences would change. Currently, by virtue of the defence of provocation, a conviction for assault means that the assault was unprovoked. In the absence of the defence, assault convictions will include both provoked and unprovoked assaults. The sentences imposed for provoked assaults would, therefore, tend to be less severe than the sentences imposed for unprovoked assaults. If the complete defence is to be abolished, it will be necessary for all those involved in the criminal justice system, as well as the community, to fully understand the implications.

Recommendation 30

Review of the complete defence of provocation under the Code

That the Department of the Attorney General conduct a review of the complete defence of provocation under ss 245 and 246 of the *Criminal Code* (WA) to consider whether the defence should be retained and, if so, to which offences it should apply.²⁴⁶

241. Queensland Criminal Code Review Committee, *Final Report to the Attorney-General* (1992) 175. The Commission received submissions emphasising the inconsistency in the application of the complete defence of provocation: Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 4; Law Society of Western Australia, Submission No. 37 (4 July 2006) 6. It was also submitted that the complete defence of provocation should be extended to other crimes such as unlawful wounding, grievous bodily harm and attempted murder: Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 4; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 7.

242. Murray MJ, *The Criminal Code: A general review* (1993) 154–55.

243. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 4; Paul Ritter, Submission No. 4 (29 May 2006) 2; Law Society of Western Australia, Submission No. 37 (4 July 2006) 6; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 8.

244. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 4; Festival of Light Australia, Submission No. 16 (12 June 2006) 5.

245. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 8. The Department of Community Development also submitted that further consideration of this issue was required: Department for Community Development, Submission No. 42 (7 July 2006) 7.

246. This review should also consider s 247 of the Code, which provides that it is a defence if the accused uses reasonable force to prevent the repetition of an act or insult of such a nature as to amount to provocation as long as the accused does not intend to cause death or grievous bodily harm (and the force used is not likely to cause death or grievous bodily harm). In addition to recommending the repeal of ss 245 & 246 of the Code, the Murray Review recommended the repeal of s 247 of the Code: Murray MJ, *The Criminal Code: A general review*, (1993) 154–55.

