

## **Defences in criminal law**

In 2009, the Commission published its Report on [Defences in Criminal Law](#) (3rd Programme of Law Reform, Project 18), which dealt with legitimate defence (self-defence); defence of the home; use of force in law enforcement; the defence of provocation; and the defences duress and necessity. The Report followed the Consultation Papers published by the Commission: Consultation Paper on [Homicide: The Plea of Provocation](#) (LRC CP 27-2003), Consultation Paper on [Duress and Necessity](#) (LRC CP 39-2006) and a Consultation Paper on [Legitimate Defence](#) (LRC CP 41-2006). On legitimate defence generally (self-defence), the Commission recommended that the defence should be divided into four key elements:

1. a threshold requirement (only certain types of unlawful attack can justify use of defensive force, especially lethal defensive force);
2. the attack must be immediate;
3. the use of defensive force must be necessary (a person should usually retreat if possible); and
4. the defensive force must be proportionate to the unlawful attack.

The test of whether the use of force is necessary and proportionate is based on an objective standard of a reasonable person (if the person attacked used lethal force, and subjectively believed it was necessary and proportionate but objectively it was not, the person should be found guilty of manslaughter, not murder: this is usually referred to as excessive or disproportionate force).

As to defence of the dwelling, the Commission recommended that the general requirements for legitimate defence (self-defence) should apply to defence of the dwelling and its vicinity; but that the general rule that a person should retreat where possible does not apply where the attack is in the home. On use of force in law enforcement, the Commission recommended that the use of lethal force in law enforcement (to assist in arresting a person, to deal with serious public disorder, such as a riot, or to prevent prison escapes) should be limited to members of An Garda Síochána and prison officers; and that the use of force, including lethal force, is permitted only when it is necessary and proportionate in the circumstances.

On provocation, the Commission recommended that it should continue to operate as a partial defence in homicide cases only, reducing what would otherwise be murder to manslaughter. The defence should be based primarily on whether the provocation (words or acts, such as assault) was such that it was reasonable for the accused, based on the standard of an ordinary person, to have lost self-control. The Commission also recommended that the fact that the killing did not immediately follow the provocation does not, in itself, mean that the defence cannot be raised. Instead, the presence or absence of an immediate response to provocation should be a matter which a jury is to take into account, along with all the other evidence, in deciding whether the accused lost self-control. This could be especially relevant in the context of cumulative violence.

On the defence of duress, which applies where threats of death or serious injury are made (“do this, or else...”), the Commission recommended that it should continue to apply as a defence to most crimes (with the exception of treason, murder and attempted murder), and should also include threatening situations (duress of circumstances). As to the defence of necessity, which

applies in very limited situations (such as where damage to property is committed to save a life, or in cases of medical necessity such as the case of operating on conjoined twins), the Commission recommended that it should continue to develop on a case-by-case basis and should not be placed on a general statutory footing. The Report included a draft *Criminal Law (Defences) Bill* to implement these recommendations.