



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

REPORT

# DEFENCES IN CRIMINAL LAW

[LRC 95-2009]





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REPORT

# DEFENCES IN CRIMINAL LAW

(LRC 95 - 2009)

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Law Reform Commission

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## LAW REFORM COMMISSION'S ROLE

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 150 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at [www.lawreform.ie](http://www.lawreform.ie). Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

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Professor Finbarr McAuley

**Part-time Commissioner:**

Marian Shanley, Solicitor

**Part-time Commissioner:**

Donal O'Donnell, Senior Counsel

---

## LAW REFORM RESEARCH STAFF

---

**Director of Research:**

Raymond Byrne BCL, LLM (NUI), Barrister-at-Law

**Legal Researchers:**

Chris Campbell B Corp Law, LLB Diop Sa Gh (NUI)

Siobhan Drislane BCL, LLM (NUI)

Gemma Ní Chaoimh BCL, LLM (NUI)

Bríd Nic Suibhne BA, LLB (NUI), LLM (TCD), Diop sa Gh (NUI)

Jane O'Grady BCL, LLB (NUI), LPC (College of Law)

Gerard Sadlier BCL (NUI)

Joseph Spooner, BCL (Law with French Law) (NUI), Dip. French and European Law (Paris II), BCL (Oxon)

Ciara Staunton BCL, LLM (NUI), Diop sa Gh (NUI)

---

## STATUTE LAW RESTATEMENT

---

**Project Manager for Restatement:**

Alma Clissmann, BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

**Legal Researchers:**

John P Byrne BCL, LLM, PhD (NUI), Barrister-at-Law

Catriona Moloney BCL (NUI), LLM (Public Law)

---

## LEGISLATION DIRECTORY

---

**Project Manager for Legislation Directory:**

Heather Mahon LLB (ling. Ger.), M.Litt, Barrister-at-Law

**Legal Researchers:**

Margaret Devaney LLB, LLM (TCD)

Rachel Kemp BCL (Law and German), LLM (NUI)

---

## ADMINISTRATION STAFF

---

**Head of Administration and Development:**

Brian Glynn

**Executive Officers:**

Deirdre Bell

Simon Fallon

Darina Moran

Peter Trainor

**Legal Information Manager:**

Conor Kennedy BA, H Dip LIS

**Cataloguer:**

Eithne Boland BA (Hons), HDip Ed, HDip LIS

**Clerical Officers:**

Ann Browne

Ann Byrne

Liam Dargan

Sabrina Kelly

---

## PRINCIPAL LEGAL RESEARCHER FOR THIS REPORT

---

Verona Ní Dhrisceoil BCL (Dlí agus Gaeilge), LLM (NUI)

---

## CONTACT DETAILS

---

Further information can be obtained from:

Head of Administration and Development  
Law Reform Commission  
35-39 Shelbourne Road  
Ballsbridge  
Dublin 4

**Telephone:**

+353 1 637 7600

**Fax:**

+353 1 637 7601

**Email:**

[info@lawreform.ie](mailto:info@lawreform.ie)

**Website:**

[www.lawreform.ie](http://www.lawreform.ie)

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**Ms Valerie Fallon**, Department of Justice, Equality and Law Reform  
**Mr Maurice Gaffney**, Senior Counsel  
**Mr James Hamilton**, Director of Public Prosecutions  
**The late Mr Justice Kevin Haugh**, judge of the High Court  
**Mr Conor Hanly**, Faculty of Law, NUI Galway  
**Mr Liam Herrick**, Irish Penal Reform Trust  
**Mr Gerard Hickey**, Department of Justice, Equality and Law Reform  
**Mr Justice Nicholas Kearns**, judge of the Supreme Court  
**Colonel William Knott**, Department of Defence  
**Lieut. Colonel Jerry Lane**, Department of Defence  
**Mr Patrick MacEntee**, Senior Counsel  
**Prof. Paul McCutcheon**, University of Limerick  
**Mr TJ McIntyre**, School of Law, University College Dublin  
**Prof. Paul A O'Connor**, School of Law, University College Dublin  
**Mr Seoirse Ó Dúnláigh**, Barrister-at-law  
**Mr Keith Spencer**, Barrister-at-law

Full responsibility for this publication lies, however, with the Commission.



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Homicide Act 1957	1957, c.11	Eng
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Zecevic v DPP	(1987) 71 ALR 641	Aus





## INTRODUCTION

### **A Background to this Report**

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*<sup>1</sup> and contains its final recommendations concerning the following defences in the criminal law: legitimate defence (currently called self-defence); public defence (including the use of force by law enforcement officers); provocation; duress and necessity.

2. The Report brings together material discussed in three Consultation Papers on which the Commission made provisional recommendations: a *Consultation Paper on Homicide: The Plea of Provocation*,<sup>2</sup> a *Consultation Paper on Duress and Necessity*<sup>3</sup> and a *Consultation Paper on Legitimate Defence*.<sup>4</sup> The recommendations made in this Report take into account developments in case law and legislation since the publication of the Consultation Papers, as well as submissions received by the Commission during the consultation process.

3. The primary purpose of this Report is to provide clarity and consistency to the nature and scope of these defences by setting out recommendations for reform, and these have been incorporated into the draft *Criminal Law (Defences) Bill* contained in the Appendix. By setting these defences in a legislative framework, the Commission considers that the aim of greater consistency and clarity can be achieved. The law surrounding these defences, as with many aspects of the criminal law, has evolved over time. The nature and scope of these defences have, in the Commission's view, been troubled with some inconsistencies, competing rationales and even arguments as to whether they should be abolished in certain instances. In this Report, the Commission proposes to provide a more coherent framework for the future application of the defences.

4. In setting out its final recommendations in this Report, the Commission revisited the provisional recommendations made in each of the

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<sup>1</sup> *Report on the Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 18. This project has involved the completion of work carried out by the Commission under its *Second Programme of Law Reform 2000-2007*, in particular the material dealt with in the three Consultation Papers referred to below.

<sup>2</sup> *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003).

<sup>3</sup> *Consultation Paper on Duress and Necessity* (LRC CP 39-2006).

<sup>4</sup> *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

three Consultation Papers mentioned, and also evaluated the submissions received during the consultation process and considered recent developments in the law and literature. The Commission also had the benefit of insights from interested parties (members of the judiciary, legal practitioners, members of the academic community and public servants) who participated in the seminar on this area which the Commission hosted in June 2007. We are extremely grateful for the assistance of all those who were involved in this process.

## **B Codification of the Criminal Law**

5. This Report complements the recent and current work of the Commission in other areas of criminal law, notably on murder and involuntary manslaughter<sup>5</sup> and inchoate offences (attempt, conspiracy and incitement).<sup>6</sup> This follows the Commission's long-standing involvement in proposals for reform of the criminal law.

6. The Commission's work now also complements the codification of criminal law being carried out by the Criminal Law Codification Advisory Committee.<sup>7</sup> The Committee's *First Programme of Work 2008-2009*<sup>8</sup> states that, as recommended in the 2004 Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law*,<sup>9</sup> it intends to publish an inaugural Draft Criminal Code Bill consisting of a General Part and a Special Part. The General Part will deal with aspects of criminal liability of general application, such as the physical elements (*actus reus*) and fault elements (*mens rea*), and the general defences, such as self-defence. The Special Part will contain the principal criminal offences, such as offences against the person, theft and fraud and offences against property.

7. The Commission anticipates that the defences dealt with in this Report and the accompanying draft Bill may, ultimately, form part of the Advisory Committee's Criminal Code Bill. Separately, of course, the Commission is conscious that the Government and Oireachtas may decide, in advance of codification, to implement the recommendations made in this Report, as incorporated into the attached draft Bill. The Commission has,

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<sup>5</sup> *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008).

<sup>6</sup> *Consultation Paper on Inchoate Offences* (LRC CP 48-2008).

<sup>7</sup> The Criminal Law Codification Advisory Committee was established under Part 14 of the *Criminal Justice Act 2006*.

<sup>8</sup> Available at [www.criminalcode.ie](http://www.criminalcode.ie).

<sup>9</sup> Government Publications 2004, available at [www.justice.ie](http://www.justice.ie).

therefore, approached the preparation of the Report and the draft Bill with both these possible outcomes in mind.

8. The Commission now turns to provide an overview of the purpose of the defences dealt with in this Report within the criminal law generally. The Commission then turns to outline briefly the content of each chapter in this Report.

### **C The role of defences in the criminal law**

9. The primary purpose of the criminal law is to prohibit behaviour that represents a serious wrong against an individual or against some fundamental social value in society.<sup>10</sup> The criminal law also recognises that certain acts should not be followed by criminal proceedings, or at least should not lead to a conviction, because of the presence of some specific factor or circumstance, such as the legitimate entitlement to defend oneself in the face of unlawful force. A fundamental reason why the criminal law contains a number of defences is because it is not a tool for vengeance, but is one of the means of attempting to ensure the peaceful existence of a community.

10. This *Report on Defences in Criminal Law* deals with circumstances where there may be some conditions or circumstances present which suggest that either no criminal liability should be attached – a complete defence, such as legitimate defence – or at least that criminal liability should be reduced – a partial defence, such as provocation.

11. It is important to distinguish between a defence and mitigation. Where a defendant successfully raises a defence, he or she is found not guilty, or is convicted of a lesser offence. By contrast, mitigation is a factor that becomes relevant at the sentencing stage only. On occasion, mitigating factors can be so persuasive that a nominal sentence only is imposed.<sup>11</sup>

12. As already mentioned, the purpose of the criminal law is to prohibit behaviour that is considered a serious wrong against an individual or against some fundamental moral or social value in society. Thus, the content of the criminal law and the associated sanctions also reflect the moral or social values held by a society, and these will inevitably change over time. Punishments for criminal offences, for example, have been transformed from their place at the 'stock and gallows' in the 17th century to the use of imprisonment, fines and

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<sup>10</sup> Ashworth *Principles of the Criminal Law* 5<sup>th</sup> ed (Oxford University Press, 2006) at 1.

<sup>11</sup> See generally O'Malley, *Sentencing Law and Practice* 2<sup>nd</sup> ed (Round Hall Sweet & Maxwell, 2006); and Herring *Criminal Law* (Palgrave Macmillan Law Masters 2005) at 355.

community service in the 21st century. What was deemed appropriate punishment 300 years ago is no longer acceptable today. Similarly, the way the law has viewed criminal defences has changed over the centuries. Over time, the nature and boundaries of the criminal defences have shifted; and acceptable behaviour or an acceptable reaction in the 17th century is not necessarily acceptable today.

13. An American commentator has noted that “defences are an embodiment of complex human notions of fairness and morality”<sup>12</sup> which change over time because of “change” in opposing dynamics. Such dynamics include compassion for an accused person, concession to the realities of human frailty, a consideration of what is appropriate when confronted by the criminal or unlawful conduct of another party, a policy requiring the criminal law to be upheld and not avoided by unworthy or insufficient excuses; and, as in Ireland, “a desire enshrined in the Constitution to do what is just.”<sup>13</sup> These opposing dynamics mean that the development of the various defences in the criminal law has not always involved a cohesive or systematic approach; and this has contributed to some inconsistency in their application.

14. In the Irish context, it has been noted that, as with so much else in criminal law, “the defences... were formulated at a time when the accused could not give evidence on his own behalf and where, in consequence, the jury judged his actions, in the absence of his own testimony” with the outcome being that an accused would not escape liability unless they had behaved in an objectively reasonable manner.<sup>14</sup> This objective criterion has remained an integral part of defences in modern Irish criminal law.

15. Defences in the criminal law can be categorised in a number of ways. For example, one category would be where the defendant lacked sufficient capacity to commit the crime, such as because of age or other similar reasons such as insanity. A second category of defences (which have sometimes been described as defences in the true sense) arises where the defendant has engaged in the required physical element (*actus reus*) and fault element (*mens rea*) of an offence but where some justifying or excusing circumstance arises, such as legitimate defence or provocation.<sup>15</sup> A third categorisation is to distinguish between defences that can lead to an acquittal, such as legitimate

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<sup>12</sup> Robinson “Criminal Law Defenses: A Systematic Analysis” (1982) *Columbia Law Rev*, Vol.82 (2):199 -291 at 203.

<sup>13</sup> Charleton, McDermott, Bolger, *Criminal Law* (Butterworths 1999) at 1021-22.

<sup>14</sup> *Ibid*, at 1018.

<sup>15</sup> Ormerod *Smith & Hogan’s Criminal Law* 11<sup>th</sup> ed (Oxford University Press 2005) at 247.

defence, and a defence leading to a reduction only in the nature of the crime involved, such as provocation. A fourth method differentiates between defences that apply to all crimes (such as legitimate defence), and those which apply to particular crimes only (such as provocation and diminished responsibility, which for example only apply to murder and which also involve, as already mentioned, a reduction from murder to manslaughter only).

16. Thus, the defences can be categorised using a number of factors, some of which, as we have seen, involve overlaps: whether they are complete or partial defences; and whether they are general or limited to specific crimes. One further well-recognised matter is based on the underlying rationale for the defence: whether it is justificatory or excusatory.<sup>16</sup> Indeed, a large amount of the literature on defences in the criminal law has focused on the distinction between “justification” and “excuse.” The categorisation has long historical foundations<sup>17</sup> and the distinction continues to be used to assess the fundamental basis for the various defences.

17. A defence that is labelled as “justified,” such as legitimate defence, implies that the conduct of the accused was morally right and acceptable; whereas an “excuse-based” defence, such as provocation, implies that the conduct of the accused is wrong, but, perhaps in part, forgiven. This distinction should not be equated with the question of whether a defence leads to an acquittal rather than merely a reduction in the crime for which a person is convicted. Where, however, a defence is described as justificatory, such as legitimate defence, it is extremely important that the precise ingredients of that defence are clearly set out. While all defences, whether based on “justification” or “excuse” should be clear in terms of their content and scope, it is crucial that the nature and scope of a justification-based defence should be set out in the clearest possible language.

#### **D The connected characteristics of the defences in this Report**

18. As already mentioned, the defences discussed by the Commission in this Report are: legitimate defence (often referred to as self-defence or private defence); public defence (in particular the use of force by law enforcement officers; provocation; and duress and necessity. Although in some respects these defences involve quite different elements, they each have a core characteristic: they are reactive in nature. Each of the defences concerns

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<sup>16</sup> See Chalmers *Criminal Defences and Pleas in Bar of Trial* (Thomson, 2006) at Chapter 1.

<sup>17</sup> See further McAuley & McCutcheon *Criminal Liability* (Roundhall Sweet & Maxwell, 2000).

situations where a person acts in response to some external factor, whether the actions or words of another person or the circumstances in which the person finds themselves. In the case of legitimate defence, defendants act in response to unlawful force by another person in order to protect themselves, or someone else (such as a family member) or their home. The defence of provocation involves a violent response to provocative actions or words, and assumes that an ordinary person would lose self-control in that setting. The defence of duress concerns the reaction to threats of death or serious violence by another person; whereas the defence of duress of circumstances (necessity) involves a reaction to threats that do not originate from another person, but rather arise from emergency, or dire circumstances.

## **E Outline of this Report**

### **(1) Overview of defences in the criminal law**

19. In Chapter 1, the Commission explores the nature of the defences discussed in this Report, in particular the distinction between justification-based and excuse-based defences. As already discussed, the justification/excuse dichotomy is a useful classification tool and also provides an insight into the historical development of the defences. The Chapter also discusses another major issue: how the law should assess the accused's reactive conduct. A key point is whether this should be based on an objective criterion, whereby the conduct is measured against a community or "ordinary person" standard; or whether it should be based on a subjective standard, where the particular person's circumstances and characteristics are taken into account; or whether it should be a combination of both. For the sake of completeness, and to place this Report in the wider context of codification of the criminal law, Chapter 1 ends with a brief overview of the defences not specifically discussed in this Report.

### **(2) Legitimate defence (self-defence)**

20. In Chapter 2, the Commission examines the law on legitimate defence (currently referred to as self-defence), building on the provisional recommendations made in the *Consultation Paper on Legitimate Defence*.<sup>18</sup> Legitimate defence covers the use of force by a person in response to unlawful force by another person who poses a direct threat to the life and physical integrity of the person, to someone else (such as a family member) or to the person's home.

21. Because the rationale for this defence is justification-based, the Commission emphasises that it should not be reduced to a single issue of

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<sup>18</sup> *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

whether a person acted reasonably in all the circumstances. In this respect, the Commission's analysis and recommendations are based on assessing four key components of the defence: (1) a threshold requirement concerning the type of unlawful attack on the person, especially where lethal force is used in response; (2) the imminence or immediacy of the attack; (3) the necessity of the person's use of force, including a duty to retreat where it is safe to do so; and (4) the proportionality of the force used, including where disproportionate lethal force is used. These four elements form the basis of the relevant provisions that describe the defence in detail.

### **(3) Defence of the dwelling**

22. Chapter 2 also discusses a particular setting in which legitimate defence applies, the defence of a person's own home, including the difficult questions of the use of lethal force and whether there is a duty to retreat in this context. The Commission is especially conscious that these issues have given rise to considerable debate in recent years, both in terms of actual criminal trials and appeals and in proposals for reform which have been debated in the Oireachtas. On these questions, the Commission confirms the view it took in the *Consultation Paper on Legitimate Defence* that a defendant may, subject to meeting the other criteria set out for the defence, use lethal force, and should not be required to retreat from an attack in their own dwelling even if they could do so with complete safety.

### **(4) Public defence**

23. In Chapter 3, the Commission discusses the law on public defence, which the Commission had also examined in the *Consultation Paper on Legitimate Defence*.<sup>19</sup> Public defence deals with the use of force to prevent a crime or in the context of a lawful arrest. It involves a response to threats to societal interests rather than personal interests. The use of force to prevent a crime or to make an arrest is usually associated with public officials such as the Garda Síochána, but may also include other persons. In this respect, the Commission's proposals emphasise the important crime-prevention role of the Garda Síochána, while at the same time underlining the need for limits on the use of lethal force in particular.

### **(5) Provocation**

24. In Chapter 4, the Commission discusses the law on provocation, on which it had made provisional recommendations in the *Consultation Paper on Homicide: The Plea of Provocation*.<sup>20</sup> Provocation is a partial defence which

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<sup>19</sup> *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

<sup>20</sup> *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003).

applies only where a person has been charged with murder, and it operates to reduce murder to the lesser charge of manslaughter. The basis for this is that the accused lost self control in response to provocation. The defence of provocation has often been criticised as complex and unclear, and there have been calls in a number of States for its reform, and even its abolition.

25. Having reviewed the question of whether the defence should be abolished or retained, the Commission recommends that it should be retained, but subject to significant reform. In particular, the Commission recommends that the subjective-oriented approach found in current Irish law should be reformed and replaced by a, primarily, objective approach. Under the Commission's proposals, juries would, however, be allowed to take account of the accused's personal characteristics insofar as they affect the gravity of provocation but that, with the exception of age and sex, personal characteristics should not feature in relation to the question of self-control.

#### **(6) *Provocation and immediacy***

26. The Commission analyses in detail a key aspect of provocation, the requirement of immediate or sudden loss of self-control. This has been discussed extensively in recent years, notably in the context of domestic homicides occurring after long periods of cumulative violent abuse, but where the killing has not occurred immediately after a specific violent incident. The Commission notes that, while women are often the victims and survivors of such cumulative violence, it may, equally, apply to men who are in an abusive relationship, and similarly to parents and children who suffer from domestic violence and abuse. In the Consultation Paper, the Commission provisionally recommended that, while the main elements of the defence should apply in these settings, some allowance concerning the requirement of suddenness or immediacy should be included in the reformed defence. In the Report, the Commission refines that approach by recommending that the presence or absence of a sudden response is an evidential matter to which the jury should have regard.

#### **(7) *Duress and necessity***

27. In Chapter 5, the Commission examines the law on duress, on which it made provisional recommendations in the *Consultation Paper on Duress and Necessity*.<sup>21</sup> Duress arises when a person is compelled, or constrained, by threats from another person to do an act, which would otherwise be a crime, believing that the threats will be carried out. Due to the threats, the defendant is placed in a situation of having to choose between abiding by the law, and thereby become a victim of violence, or breaking the law in order to protect

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<sup>21</sup> *Consultation Paper on Duress and Necessity* (LRC CP 39-2006).

himself or another from the threat of serious assault or even death. The Commission recommends that, subject to specific conditions, the defence of duress should be retained.

28. In Chapter 6 the Commission discusses the defence of necessity, sometimes referred to as duress by necessity (duress per *necessitatum*). The Commission had also made provisional recommendations on this defence in the *Consultation Paper on Duress and Necessity*.<sup>22</sup> The Commission considers that it is not possible to recommend a general defence of necessity but that those very limited instances in which it has already developed, such as in medical necessity, should continue on a case-by-case basis. The Commission recommends that a defence of duress of circumstances should be given general recognition because duress by threats, as described in Chapter 5, and this defence both involve situations in which a person is constrained to do something that would otherwise be a crime. In the case of duress, the threat comes from another person, whereas with duress of circumstances the threat arises from the dire circumstances or emergency situation in which a person finds himself or herself. Because of the similarities between them, the Commission recommends that the boundaries of the defence of duress of circumstances should be the same as those for duress by threats.

29. Chapter 7 is a summary of the recommendations made by the Commission in the Report.

30. The Appendix to this Report contains a draft *Criminal Law (Defences) Bill* which is intended to give effect to the Commission's recommendations on the defences discussed.

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<sup>22</sup> *Consultation Paper on Duress and Necessity* (LRC CP 39-2006).



## CHAPTER 1 CRIMINAL DEFENCES – AN OVERVIEW

### A Introduction

1.01 This Chapter examines the nature of and themes central to criminal law defences, including their classification, their rationale (whether they involve justification or merely excuse) and objective and subjective perspectives. This provides a backdrop against which to analyse the defences discussed in the Report.

1.02 In Part B, the Commission examines the classification of criminal defences. In Part C, the discussion surrounding the concepts of justification and excuse is set out. In Part D, the Commission examines whether defences should be based on assessing the accused's conduct from a subjective or an objective perspective. In Part E, the Commission provides, for the sake of completeness, a brief overview of other defences to illustrate where the defences analysed in this Report sit within a broader discussion of defences.

### B Classification of defences

1.03 There are many ways in which criminal defences can be classified. As outlined in the Introduction to this Report, the distinction between justification-based defences and excuse-based defences has often been used for this purpose. This method, though useful, is not totally satisfactory as it fails to encompass all types of defences.

1.04 Robinson,<sup>1</sup> in attempting to classify criminal law defences in the United States, identified five categories: failure of proof defences; offence modifications; justifications; excuses; and non-exculpatory public policy defences.

1.05 Chalmers and Leverick<sup>2</sup> on the other hand classify the defences according to whether they are complete or partial; whether they are general or specific; whether they are common law or statutory defences; whether there are special procedural rules governing when a defence can be pleaded; and

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<sup>1</sup> Robinson *Criminal Law Defenses* (West Publishing Co.1984).

<sup>2</sup> Chalmers *Criminal Defences and Pleas in Bar of Trial* (W. Green: Scottish Universities Law Institute 2006) at 1.

according to the rationale for admitting the defence, in other words the justification/excuse distinction.

1.06 Other attempts at classification have resulted in just two categories: one which deals with defences or pleas based on a denial of capacity including insanity, intoxication, mistake and infancy; and the other which deals with defences in what might be described as the true sense, that is, where the defendant had the required physical element (*actus reus*) and fault element (*mens rea*) at the time of the crime but is acquitted of criminal liability because of some justifying or excusing circumstances.<sup>3</sup> The defences discussed by the Commission in this Report all fall into the second category of this classification system. Where a defendant raises the defence of legitimate defence, provocation or duress, both the *actus reus* and *mens rea* required to commit the alleged offence are present.

**(1) A Classification Scheme**

1.07 To provide a more complete picture, it may be useful to set out a suggested classification scheme<sup>4</sup> that incorporates all defences, including those not analysed in this Report.

**(a) Failure of proof defences**

1.08 Failure of proof defences arise where the prosecution is unable to prove all of the elements of the defence. Defences that could be placed in this category include those that negate *the mens rea* (including mistake of law or fact and non-insane automatism) and defences that negate the *actus reus* (such as consent in sexual offences, alibi and incrimination).

**(b) Justification defences**

1.09 Justification-based defences arise where the conduct of the accused is considered acceptable – the right action to take in the circumstances. Legitimate defence could be placed in this category (provided that the force used is not disproportionate).

**(c) Excuse defences**

1.10 An excuse-based defence arises where the conduct of the accused is deemed wrong and unacceptable but for some reason is forgiven. This category holds the individual morally responsible for his or her actions but does not

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<sup>3</sup> Ormerod *Smith & Hogan Criminal Law* (11<sup>th</sup> ed Oxford University Press 2005) at 248.

<sup>4</sup> Chalmers and Leverick *Criminal Defences and Pleas in Bar of Trial* (W. Green : Scottish Universities Law Institute 2006) at 14.

blame them for the act in question. Provocation and duress and are generally regarded as excusatory defences.

**(d) Lack of capacity defences**

1.11 As the title suggests, lack of capacity defences arise where the accused is regarded as incapable of being held accountable for his or her behaviour at the time of the alleged offence. The primary defence in this category is that the person has not reached the age of criminal responsibility. Insanity may also fit into this category. The premise on which such defences is based is that, in a civilised society, only those who have the intellectual and moral capacity to understand the significance of their conduct should be judged by rules of criminal responsibility.

**(e) Non-exculpatory defences**

1.12 This category caters for defences that for reasons other than blameworthiness or a lack of capacity, a trial is unable to continue. Included here are, renunciation of a right to prosecute, entrapment, other pleas in bar of trial (such as pre-trial publicity or insanity), time bars, delay and *res judicata*.<sup>5</sup>

**(2) Hierarchy of Defences**

1.13 There is no clear analytical basis on which to place in hierarchical order all the defences that operate within the criminal law. It has, however, been suggested that justification-based defences are seen as the most preferable type of defence to claim, followed by excuse-based defences and then lack of capacity defences.<sup>6</sup> This approach is based on the view that it is preferable to be seen as having been justified in one's actions as opposed to being "merely" excused. It has also been argued that it is more acceptable to be excused for an action than not having the capacity to make a reasoned judgement at all; although in the case of a defence based on the accused being 7 years of age, it is at least arguable that an acquittal on that ground is likely to be regarded as being at least on a par with an adult's acquittal based on an excusatory defence.

**C Defences based on justification and excuse**

1.14 Justification defences and excuse defences are similar in the sense that the *actus reus* and *mens rea* for the offence has been established but they are distinct in other important respects.

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<sup>5</sup> See Chalmers *Criminal Defences and Pleas in Bar of Trial* (W. Green : Scottish Universities Law Institute 2006) at 14.

<sup>6</sup> Gardner "The Mark of Responsibility" (2003) 23 OJLS 157-71; Gardner "The gist of excuses" (1998) 1 *Buffalo Criminal Law Review* 575-98.

1.15 Justification-based defences imply that the conduct of the accused was the right thing to do – it was acceptable – even though it satisfied the definition of the offence. By contrast, excuse-based defences deem the conduct of the accused as unacceptable and wrong, but there is a reason why the accused should not be blamed – he or she should be excused or forgiven.

1.16 Ormerod provides two useful hypothetical scenarios to illustrate the difference between a justification based defence and excuse based defence:

“A nine year old child who deliberately kills is excused but no one would say he is justified. In contrast, nearly everyone would approve of the conduct of a man who saves the lives of his family despite committing a criminal act of criminal damage, say, or self defence”.<sup>7</sup>

1.17 The philosopher HLA Hart refers to justified conduct as “something the law does not condemn or even welcomes” while excuse is claimed when “what has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out public condemnation and punishment of individuals.”<sup>8</sup>

1.18 Hence, a claim of justification focuses primarily on the act while a claim of excuse focuses on the conduct of the individual. Fletcher’s work reflects similar definitions where he asserts the view that:

“Claims of justifications concede that the definition of the offence is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seeks to avoid the attribution of the act to the actor. A justification speaks to the rightness of an act; an excuse, to whether the actor is accountable for a concededly wrongful act.”<sup>9</sup>

1.19 In general, few disagree with Fletcher’s definition – disagreement arises regarding what defences fall into each category. Nowhere is the justification/excuse debate more prevalent than with the defence of provocation. Since its origins there has been much debate as to whether the defence operates as a defence of partial justification or partial excuse. Originally provocation was defined as a defence of partial justification, in other words, it was regarded as acceptable behaviour. Over time, however, the rationale for the defence has shifted to an excuse based defence with the focus on the

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<sup>7</sup> Ashworth *Principles of Criminal Law* (Oxford University Press 2006) at 248.

<sup>8</sup> Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) at 212-222.

<sup>9</sup> Fletcher *Rethinking Criminal Law* (Boston: Little, Brown, 1978) at 759.

accused's loss of self-control rather than justifiable retribution. The reaction of the accused is no longer seen as justified, but rather it is seen as excusable and forgiven.

1.20 Similarly, there has been much discussion on the issue of whether the defence of duress is one of excuse or justification. Generally speaking, the defence is seen as excusatory; although the act was a crime, no criminal sanction should follow due to the constrained choice the person was faced with. The defence of legitimate defence is generally regarded as justificatory in nature; however, where the force used is regarded as excessive force, it is regarded as an excusatory defence. Furthermore, it should be pointed out that the category that a particular defence falls into can depend on the way in which the defence is formulated in a particular jurisdiction.<sup>10</sup>

1.21 In summary, defences can be classified in a number of ways. For the purposes of this Report the defences are distinguished primarily using the justification and excuse classification whilst acknowledging that the system is not complete and suffers from a number of drawbacks. Thus, there is no consensus as to what category each defence fits into and, more importantly, there seems to be little agreement as to what difference, if any, such classification has in practical terms.<sup>11</sup>

1.22 There are conflicting views as to whether it really matters whether a defence is a justification or an excuse. Robinson notes that there is little difference so far as the acquittal of the person relying on the defence is concerned.<sup>12</sup> The defendant is not concerned whether the defence is labelled as a justification or an excuse, but rather is only concerned with whether the defence frees them of criminal liability.

1.23 However, he also makes the point that, if the law provides a justification, this in effect changes the law.<sup>13</sup> In the case of a man shooting his neighbour's dog following an attack on his child, if the court finds this to be a justified action Robinson argues that the law should be changed to the extent that it would be lawful for a person to shoot a dog which was attacking a baby.<sup>14</sup> In contrast, if someone's action is seen to be excused, this is of no wider

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<sup>10</sup> Chalmers *Criminal Defences and Pleas in Bar of Trial* (Thomson 2006) at 9.

<sup>11</sup> Ormerod *Smith & Hogan Criminal Law* (11<sup>th</sup> ed Oxford, 2005) at 248.

<sup>12</sup> Robinson "Criminal Law Defenses: A Systematic Analysis" (1982) 82 Col LR 199.

<sup>13</sup> *Ibid.*

<sup>14</sup> Herring *Criminal Law: Text, Cases and Materials* (2<sup>nd</sup> ed Oxford University Press 2006) at 741.

significance. Thus the distinction is useful and can be insightful in terms of viewing how society views particular defences in comparison to others.

1.24 Similarly Horder argues that justification seeks to offer guidance to defendants while excuses assess the culpability of offenders once they have acted.<sup>15</sup>

1.25 Robinson also goes one step further to say that when a jury acquits a defendant they should be required to make it clear that they are acquitting the defendant because they thought he was excused or because he was justified or because the prosecution failed to establish the *mens rea* or *actus reus*. This would clarify the basis of the defendant's acquittal and enable the law to send a clear message about the requirements of the criminal law.

#### **D Assessing the conduct of the accused; subjective or objective?**

1.26 One of the major issues with regard to criminal defences is how the law should assess the accused's conduct. Should it be based on a subjective or an objective test or criterion? A subjective perspective focuses on the state of mind of the defendant, the intentions and foresight of the defendant. By contrast, an objective perspective, while focusing on the state of mind of the defendant, asks the question whether an ordinary reasonable person would have behaved in a similar manner. Reasonableness is determined by an objective test: whether a hypothetical ordinary reasonable person would have responded in the same way. It has been suggested that purely subjective standards can result in an increase in acquittals.<sup>16</sup>

1.27 In general terms, the defences discussed in this Report retain strong objective elements. With the defence of legitimate defence, for example, the behaviour of the accused must be 'reasonable'. In terms of this Report, the Commission advocates that the defence of legitimate defence follow a number of strict requirements, including that the threat of unlawful force must be imminent and that the response of the defendant to this must be necessary and proportionate. Such requirements are gauged on objective lines. In other words the defence will not cloak an outrageous assault with the justification that it was done lawfully.

1.28 In the case of provocation, by contrast, current Irish law has been based primarily on subjective lines whereby each person is judged by the standard of what was in their own mind at the time of the offence. In Chapter 4, the Commission discusses provocation in detail and central to the

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<sup>15</sup> *Ibid.*

<sup>16</sup> Charleton, McDermott, Bolger *Criminal Law* (Butterworths 1999) at 1022.

recommendations made is that the test for provocation should be reformed on objective lines.

1.29 Judges and legislators have repeatedly applied restricting requirements and conditions to the defences and, as Ashworth has noted, there are strong social arguments for such restrictions.<sup>17</sup> Subjective principles have their foundation in the principle of individual autonomy, and its emphasis on choice, control and fair warning. However, modern liberal philosophy also emphasises that individuals should be viewed as members of society with mutual obligations rather than abstracted and isolated individuals.<sup>18</sup> On this basis individuals have a duty to acquaint themselves with the limits of the criminal law.

1.30 However, if legislators expect citizens to acquaint themselves with the contours of criminal law they have a duty to make laws clear and consistent. The law on defences, as already noted, has been marred by inconsistency and a lack of clear guidelines. In that respect, the Commission has approached this Report with a view to providing an increased level of clarity and coherence.

## **E Other Defences**

1.31 The defences of legitimate defence, public defence, provocation, duress and duress of circumstances (necessity) form the subject matter of this Report. While constituting a significant group of defences in criminal law, it may also be useful to provide a brief overview of other defences to illustrate where the defences discussed in this Report sit within the broader discussion of defences.

### **(1) Children and the age of criminal responsibility**

1.32 Being under the age of criminal responsibility is a clear example of a lack of capacity defence, whereby a child under a certain age is held to be incapable of committing a crime.

1.33 Under the common law, three categories of child offenders were recognised for the purposes of criminal liability. The first category covered those who were presumed irrebutably incapable of committing a crime, those presumed to be incapable of committing a crime but which could be rebutted and finally those capable of committing a crime.

1.34 The first category, that is the presumption of incapability or *doli incapax* applied to children under 7 years of age. The second category was

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<sup>17</sup> Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed Oxford University Press 2003) at 250.

<sup>18</sup> Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed Oxford University Press 2003) at 251.

occupied by children between the ages of 7 and 14 and the third category was for children over the age of 14.

1.35 The age of criminal responsibility has been reviewed a number of times in this jurisdiction, for example, in the 1970 (Kennedy) *Report on Reformatory and Industrial Schools Systems* and the 1980 *Report of the Task Force on Child Care Services*. Both reports criticised the common law categorisation. Until recently, the response had been piecemeal in nature. Thus, section 6 of the *Criminal Law (Rape) (Amendment) Act 1990*, removed the presumption that children under 14 could not commit rape.

1.36 More recently, fundamental reform was enacted in section 52 of the *Children Act 2001*, as amended by section 129 of the *Criminal Justice Act 2006*. Section 52 of the 2001 Act (as amended) provides that, in general, a child under 12 years of age shall not be charged with any criminal offence. In respect, however, of murder, manslaughter, rape, rape under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990* or aggravated sexual assault, a child aged 10 or 11 years may be charged with those offences. Section 52(3) abolished the rebuttable presumption under the common law that a child who is not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong. In addition, section 52(4) provides that, in respect of a child under 14 years of age, no legal proceedings (other than remand in custody or on bail) shall be taken without the consent of the Director of Public Prosecutions.

## **(2) Insanity**

1.37 In Ireland, the defence of insanity has been substantially reformed by the *Criminal Law (Insanity) Act 2006*. The 2006 Act not only reforms the substantive law but also the procedural law in the area, such as the law relating to fitness to plead, thereby covering the two areas where the defence of insanity comes into play.

1.38 Broadly speaking, an accused person's sanity may be relevant to the criminal law in two ways. Firstly, the accused may claim to be insane at the time of the commission of the crime. Secondly, the accused may claim to be insane at the time of the trial and therefore 'unfit to plead to the charge'. The second category is technically a matter of procedure but given its close relationship with the first category it is appropriate that the 2006 Act deals with both.

1.39 The common law defence of insanity was set out definitively in the English case *R v M'Naghten*<sup>19</sup> in 1843. The accused was labouring under the belief that he was being persecuted by the Tory party and hence had to kill the British Prime Minister. At his trial, the judges set down what became known as

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<sup>19</sup> (1843) 4 St Tr (ns) 817.

the M'Naghten Rules. Firstly, it must be clearly shown that, at the time of committing the act, the defendant was labouring under a defect of reason caused by a disease of the mind and, secondly, that the defect of reason must mean that either the defendant was not aware of what he was doing or he was not aware that what he was doing was wrong.

1.40 The concept of 'disease of the mind' has been considered in a number of cases. In *R v Kemp*<sup>20</sup> the defendant argued that he suffered from arteriosclerosis which had, on the occasion in question, caused a lack of blood to the brain, in turn causing a lack of consciousness so that he had no control over his actions. The prosecution argued that this was not a disease of the mind as there was no evidence of brain damage and in fact it was a physical condition. This was rejected by the court, however, which held that the mental faculties of reason, memory and understanding are engaged by the term 'disease of the mind' and hence this physical condition which affected these faculties was in fact a disease of the mind. Therefore, any physical or mental condition that impacted on the working of the defendant's mind at the time the act was committed could be classified as a disease of the mind.

1.41 In *Bratty v Attorney General for Northern Ireland*<sup>21</sup> epilepsy was held to be a disease of the mind, the accused claiming that he had no knowledge of events due to experiencing a blackout. Similarly in *R v Sullivan*<sup>22</sup>, a case also concerning a person having an epileptic fit, it was held that the effect on the relevant faculties can be of a temporary nature. In *R v Burgess*<sup>23</sup>, sleepwalking was held to be a disease of the mind.

1.42 This wide definition of insanity means that epilepsy and conditions caused by diabetes can be classified as forms of insanity. Diabetics however can also make a person an automaton. The crucial distinction depends on whether the impairment of mental facilities was caused by an 'external factor' or an 'internal factor'. In *R v Quick*<sup>24</sup>, the accused suffered from hypoglycaemia, which is a deficiency in blood sugar levels. In order to maintain the appropriate level of blood sugar he should have taken a certain amount of insulin. In the event he took too much, which meant the blood level was too low. As a result, the assault with which he was charged occurred while he was suffering from an external factor (the injection of insulin) and so the appropriate defence was

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<sup>20</sup> [1957] 1 QB 399.

<sup>21</sup> [1963] AC 386.

<sup>22</sup> [1983] 2 All ER 673.

<sup>23</sup> [1991] 2 QB 92.

<sup>24</sup> [1973] QB 910.

automatism. By contrast, in *R v Hennessy*<sup>25</sup>, a case that also involved diabetes, the defendant suffered from hyperglycaemia (when the blood sugar level is too high). Here, it was held that the offence occurred while the accused suffered from a purely internal factor, and hence the appropriate defence was insanity. According to Ashworth, this distinction between external and internal factors, determining whether someone can plead insanity or automatism, shows that the policy of social protection has gained the upper hand and that the judiciary is prepared to overlook the gross unfairness of labelling these people as insane in order to ensure that the court has the power to take measures of social defence against them.<sup>26</sup>

### **(3) Diminished Responsibility**

1.43 The defence of diminished responsibility is a relatively new defence in Irish law and was introduced by the *Criminal Law (Insanity) Act 2006*. As in other States where it was introduced, this defence is a partial defence to murder, reducing the verdict of murder to manslaughter. Section 6 of the 2006 Act provides that a verdict of guilty of manslaughter on the ground of diminished responsibility shall be returned where the jury find that the accused:

- did the act alleged;
- was at the time suffering from a mental disorder; and
- the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act.

### **(4) Automatism**

1.44 Automatism occurs where a defendant suffers a complete loss of self-control caused by an external factor such as being hit on the head and then losing all awareness of their actions. Essentially automatism involves more than a claim that the individual lacked *mens rea* (which he or she did); it involves a claim that he or she is not acting – it is a complete denial of the *actus reus*.

1.45 Therefore, in order for a defendant to plead automatism it is necessary to show that they suffered a complete loss of voluntary control, that this loss of self-control was caused by an external factor and finally that they were not at fault in losing capacity.

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<sup>25</sup> [1989] 1 WLR 287.

<sup>26</sup> Ashworth *Principles of Criminal Law* (Oxford University Press 2006) at 208.

1.46 With regard to the first requirement, some commentators argue that *complete loss* of self-control appears to be very harsh. It would deny a defence to a person who had a vague awareness of what was happening.<sup>27</sup>

1.47 As mentioned above, the requirement of loss of self control being caused by an external factor is an important aspect and ultimately distinguishes inanity from automatism. If the loss of self-control is caused by an internal factor the person is classified as insane. It can be extremely difficult at times to distinguish between internal and external factors. Examples of external factors include a blow to the head or the taking of prescribed medication.

1.48 Finally, as regards, the third requirement, a defendant cannot plead automatism if he or she is responsible for causing the condition. For example, if the defendant's mental state is caused by taking alcohol or an illegal drug he or she cannot plead automatism.<sup>28</sup> Similarly, if the defendant is a diabetic and is aware that if he or she does not eat an adequate amount of food he or she may enter a state of lack of awareness, and may still be held responsible for their actions.<sup>29</sup>

## **(5) Intoxication**

1.49 Traditionally, the "intoxication excuse" provided no defence for the criminal offender and, as far back as 1551, it was held in *Reniger v Fogossa*:<sup>30</sup>

'if a person that is drunk kills another this shall be a felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but in as much as that ignorance was occasioned by his own act and folly, he shall not be privileged thereby'.

1.50 From this early decision, the rule or defence of intoxication has evolved and may provide a defence to the committal of a criminal act in stringent circumstances. As McCutcheon has noted, "the law has evolved from its original stance where intoxication afforded no excuse for wrongdoing to the

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<sup>27</sup> Herring *Criminal Law: Text, Cases and Materials* (2<sup>nd</sup> ed Oxford University Press 2006) at 709.

<sup>28</sup> *R v Lipman* [1970] QB 152.

<sup>29</sup> See also Herring *Criminal Law: Text, Cases and Materials* (2<sup>nd</sup> ed Oxford University Press 2006) at 710.

<sup>30</sup> (1551) 1 Plowd. 1, at 19; 75 ER 1, at 31.

current position where the fact of intoxication may give rise to a number of exculpatory conditions”.<sup>31</sup>

1.51 In the English case *DPP v Beard*<sup>32</sup> it was held that intoxication may negate intention in an offence involving specific intent, thus laying the foundations for the modern position of classifying offences for the purposes of the plea. This approach was confirmed and became settled in the landmark UK decision *DPP v Majewski*<sup>33</sup>. There the UK House of Lords unanimously decided that the plea of intoxication is available in all crimes of specific intent but, reaffirming the traditional rule on self-induced intoxication, held that it is generally no answer to crimes of basic or general intent, for example assaulting a police officer, as was the case here. It must be noted that in one vital respect *Majewski* went further than earlier decisions.<sup>34</sup> Until then the plea operated as a rule of evidence, where evidence of intoxication could negate specific intent. In contrast, the House of Lords in *Majewski* made a significant shift to the basis of the rule, when it held that the rule was one of substantive law not of evidence.

1.52 Although this is an important aspect in the *Majewski* decision, much of the debate surrounding the case focuses on the so-called ‘mysterious distinction’, the differentiation between crimes of specific and basic intent. According to one commentator, “the specific/basic intent distinction has no logical underpinning that explains why one crime is afforded the benefit of the intoxication defence and why another will not.”<sup>35</sup> The distinction has become the basis used to convict persons of a lesser or fall-back offence.<sup>36</sup> Since it was decided, commentators have criticised the ‘inherent illogicality’ of the decision and, indeed, the Commission exposed the decision to critical analysis in its 1995 *Report on Intoxication*.<sup>37</sup> Despite significant criticisms, *Majewski* has

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<sup>31</sup> McCutcheon, “Criminal Law and the Defence of Intoxication” in Kilcommins and O’Donnell (eds) *Alcohol, Society and Law* (Chichester: Barry Rose Publishers Ltd) at 212.

<sup>32</sup> [1920] AC 479.

<sup>33</sup> [1977] AC 443.

<sup>34</sup> McCutcheon, “Criminal Law and the Defence of Intoxication” in Kilcommins and O’Donnell (eds) *Alcohol, Society and Law* (Chichester: Barry Rose Publishers Ltd) at 219.

<sup>35</sup> Spencer, “The Intoxication Defence in Ireland”, (2005) *Irish Criminal Law Journal*, Vol. 15(1) at 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> LRC 51-1995.

proved to be hugely influential, and was applied by the Court of Criminal Appeal in *The People (DPP) v Reilly*.<sup>38</sup>

1.53 In *Reilly*, the Court held that voluntary consumption of alcohol could not afford a defence in a homicide prosecution. The Court considered that if a person, by consuming alcohol, induces in himself a situation in which the likelihood that he will commit acts of violence is increased, particularly to the stage where he commits an act which he would not have committed had he not consumed the alcohol, the courts would be failing in their obligations to the public if they allowed the cause of his violence, namely the alcohol, to excuse his actions. The Court stated that it must have regard to the rights of an accused person, but that it must also have regard to the interest of the public at large who are entitled to be protected from acts of violence.

1.54 The reasoning of the Court in *Reilly* has been criticised on the basis that, while public protection is a laudable goal, empirical evidence does not support the conclusion that intoxicated violence increases where a *Majewski*-like rule is not followed.<sup>39</sup> Nonetheless, it appears clear that the *Majewski* rule is now part of Irish law.<sup>40</sup>

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<sup>38</sup> [2005] 3 IR 111.

<sup>39</sup> Dillon, "Intoxicated Automatism is no Defence: *Majewski* is Law in Ireland" (2004) *Irish Criminal Law Journal* Vol. 14 (3) at 9.

<sup>40</sup> For a detailed discussion of the defence of Intoxication, see Coonan and Foley *The Judge's Charge in Criminal Trials* (Thomson Round Hall 2008) Chapter 20.



## CHAPTER 2      LEGITIMATE DEFENCE (SELF-DEFENCE)

### A            Introduction

2.01        In the *Consultation Paper on Legitimate Defence*<sup>1</sup> the Commission discussed in detail the law surrounding the lawful use of force. To encompass the wide range of instances where the use of force can be deemed lawful, the Commission used the term legitimate defence. In this Report, the Commission also uses the term legitimate defence, which underlines the justification-based nature of the defence. Legitimate defence, as opposed to the term self-defence (which is the term currently used in this context), is not specifically limited to the defence of the person; it also includes the defence of others as well as public defence. It thus involves the lawful use of force by a person in response to an unlawful threat to private interests (for example, a person, their family or their property) or public interests (in particular in the context of law enforcement).

2.02        In this Chapter, the Commission analyses the general scope of legitimate defence, in particular as it applies to private defence (commonly called self-defence). In Chapter 3, the Commission discusses the defence in the context of public interests, notably in the law enforcement setting.

2.03        In Part B of this Chapter, the Commission discusses the parameters of legitimate defence including its historic background and the rights associated with the defence, including those protected under the Constitution of Ireland and the European Convention on Human Rights. The Commission also outlines how the remainder of the Chapter analyses the defence by reference to two essential elements, the nature of the unlawful threat - comprising a threshold and imminence requirement - and the response to that threat - comprising a necessity and a proportionality requirement.

2.04        In Part C, the Commission examines the threshold requirement, and the Commission focuses in particular on what threshold is required where lethal defensive force is used. In Part D, the Commission discusses the imminence requirement. Part E deals with the necessity requirement, in which there is a particular focus on what is involved in defending one's property. In Part F, the Commission examines the requirement of proportionality.

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<sup>1</sup>            *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

## **B General Principles**

2.05 Legitimate use of force is a well established defence “embedded in the ordinary standards of what is fair and just”.<sup>2</sup> In past centuries, the use of force and violence was far more widespread than it is today; the development of organised police forces has reduced the occasions in which individuals are obliged or permitted to use force and “take the law into their own hands.” The State’s protection, however, is not absolute; the Gardaí or police force cannot guarantee protection at every moment and therefore cannot guarantee everyone’s safety and protection. Accordingly, the law has always recognised that in certain situations individuals may have to use force: to protect themselves or others; to protect property; to prevent the commission of a crime or assist in a lawful arrest. Such force, however, cannot be equated with the level of force that existed in earlier societies and retribution is not regarded as acceptable. Legitimate use of force represents a balance between the needs of an ordered society and the right of individuals to ensure their own protection.<sup>3</sup> By providing for this, the criminal law respects the autonomy of the individual.<sup>4</sup>

### **(1) *Legitimate defence as a general defence and specific issues involving lethal force***

2.06 The Commission emphasises that legitimate defence operates as a general defence, in that it applies to all criminal offences. In that respect, therefore, the Commission’s analysis and recommendations for reform apply to the entire scope of criminal liability, including all the offences against the person, ranging from assault through to murder. It is apparent, nonetheless, that the case law concerning the defence discussed in this Report has often arisen in the context of homicide charges. In that respect, the discussion of legitimate defence has often involved determining whether the use of *lethal force* in a specific situation was justified. This is, naturally, understandable since the cases involve life or death situations. It is important to note, therefore, that while some of the Commission’s focus is on the permissible limits to the use of lethal force, the defence is one of general scope and also operates where non-lethal force is used.

2.07 There are two specific examples where the Commission has paid particular attention to the need for specific rules concerning the use of lethal force: the minimum threshold of unlawful force required to justify the use of lethal force; and the use of disproportionate, excessive, lethal force which an accused honestly believes was proportionate. This second issue involves the

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<sup>2</sup> *R v Zecevic* (1987) 162 CLR 645 at 675.

<sup>3</sup> Hanly *An Introduction to Irish Criminal Law* (2<sup>nd</sup> ed Gill & Macmillan 2006) at 121.

<sup>4</sup> Ashworth *Principles of Criminal Law* (5<sup>th</sup> ed Oxford 2006) at 136.

need to examine whether a subjective, excuse-based, approach is required in that situation, an approach favoured by the Supreme Court in *The People (Attorney General) v Dwyer*.<sup>5</sup>

## **(2) Justification and Excuse**

2.08 In Chapter 1, the Commission discussed the classification of defences by reference to justification and excuse. It was noted that, in general, legitimate defence is regarded as justificatory on the basis that a person should not be punished for the commission of a crime for defending himself or others against an “unjustified attack”, for protecting property, or for preventing a crime or assisting in an arrest.

2.09 As already indicated above where, as in *The People (Attorney General) v Dwyer*,<sup>6</sup> disproportionate or excessive force was used because the accused is mistaken in his or her perception of the threat or the use of force he or she faced, the law cannot justify this, but may take the view that while the killing is unlawful the force used can, in part, be excused, resulting in a conviction for manslaughter rather than murder.

## **(3) Rights Discussion**

2.10 In the specific context of the use of lethal force, a strong argument can be advanced for treating legitimate defence as a justificatory defence by reference to a rights-based analysis. A number of rights recognised under the Constitution of Ireland and the European Convention on Human Rights may be referred to in this context.

2.11 The Constitution of Ireland requires the State to protect, as far as practicable, the right to life and also the integrity of the person. Article 40.3 provides:

“1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate *the life, person, good name, and property* rights of every citizen.” [emphasis added]

2.12 In addition, in the specific context of one’s home, Article 40.5 states:

“The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”

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<sup>5</sup> [1972] IR 416, discussed at paragraph 2.XX, below.

<sup>6</sup> [1972] IR 416.

2.13 The provisions of Article 40.3 and of Article 40.5 have direct relevance to legitimate defence. While the reference to the right to life might arguably be linked to the use of lethal force only, the right to life should not be equated simply with the need to protect against death, but also engages with the quality of life. In any event, Article 40.3 also refers to the right to personhood, and Article 40.5 is in no sense limited to protecting a dwelling from lethal attacks.

2.14 The European Convention on Human Rights does not contain directly equivalent provisions, but Article 2 of the Convention, which deals with the right to life, contains specific references to the link between that right and the use of defensive lethal force. Article 2 states:

“1. Everyone’s right to life shall be protected by law...

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than *absolutely necessary*:

a in defence of any person from unlawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.” [emphasis added]

2.15 In the context of this Report, Article 2.2.a refers to private defence, while Article 2.2.b and Article 2.2.c refer to public defences. It is worth pointing out that there is no reference to the defence of property in Article 2.2 as a purpose for which lethal force is permissible and, as a result, it could be argued that killing to protect property may risk contravening the Convention. Ashworth’s analysis of the situation in England and Wales suggests that “legislative provisions on justifiable force are terse and vague, and the appellate courts have not yet had an opportunity to adapt their reasoning to the requirements of the European Convention and its jurisprudence”.<sup>7</sup> He questioned whether English law adheres to Article 2 of the Convention regarding the use of lawful force, on the basis that relevant legislation and judicial decisions analyse the law in terms of ‘reasonableness’ or ‘reasonable and necessary’ while Article 2 adopts the terms ‘absolutely necessary and ‘strictly proportionate’.<sup>8</sup>

2.16 In Ireland, the constitutional dimension to legitimate defence was addressed by the Court of Criminal Appeal in *The People (DPP) v Barnes*,<sup>9</sup> in

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<sup>7</sup> Ashworth *Principles of Criminal Law* 5<sup>th</sup> ed (Oxford, 2006) at 137.

<sup>8</sup> *Ibid* at 139.

<sup>9</sup> [2006] IECCA 165, [2007] 3 IR 130.

which the defendant had been charged with and convicted of murder and burglary, having unlawfully entered the deceased's home. The defendant admitted that he had killed the deceased but that this had been by way of self-defence in response to a violent attack by the deceased. Having reviewed the circumstances of the case, the Court of Criminal Appeal rejected the defendant's appeal against conviction. For present purposes, the Commission notes that the Court, in addition to reviewing the common law authorities on self-defence, also made extensive references to the constitutional dimension to the law. In particular, the Court quoted in full the text of Article 40.3 and of Article 40.5, already cited.

2.17 As to the position of a person in his dwelling, the Court alluded both to the personal rights guaranteed by Article 40.3 and to the inviolability guarantee in Article 40.5:<sup>10</sup>

"An occupier in the presence of a burglar (whether the burglar knows that he is there or not), is in a position of very acute difficulty. Firstly, his *dwellinghouse has been violated* and this is not merely a crime at law but an *invasion of his personal rights*... The offence of burglary committed in a dwellinghouse is in every instance an act of aggression, *an attack on the personal rights of the citizen* as well as a public crime and is *a violation of him or her*."<sup>11</sup>

2.18 The Court added that a burglar:<sup>12</sup>

"is an aggressor and may expect to be lawfully met with retaliatory force to drive him off or to immobilise or detain him and end the threat which he offers to the personal rights of the householder and his or her family or guests."

2.19 The Court also reinforced the constitutional dimension to the law, stating:<sup>13</sup>

"The propositions just set out derive from the nature of the dwellinghouse itself, and its constitutional standing as a place required by the dignity of the human person to be inviolable except in accordance with law."

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<sup>10</sup> *Ibid.*, at 147, para 52.

<sup>11</sup> The emphasis has been added in respect of allusions to the text of Article 40.3 and Article 40.5.

<sup>12</sup> [2006] IECCA 165, [2007] 3 IR 130, at 148, para 57.

<sup>13</sup> *Ibid.*, at 148, para 58.

2.20 In *Barnes* the Court also examined the position of the burglar by reference to his or her right to life under Article 40.3. The Court stated:<sup>14</sup>

“It seems an elementary proposition, in light of such provisions [in Article 40.3], that a person cannot lawfully lose his life simply because he trespasses in the dwelling house of another with intent to steal. In as much as the State itself will not exact the forfeiture of his life for doing so, it is ridiculous to suggest that a private citizen, however outraged, may deliberately kill him simply for being a burglar.”

2.21 Therefore even where one’s home is entered by a burglar which the Court recognised as “an act of aggression”, the force one uses in response is not without any limitation. In this respect the Commission also notes that, for the purposes of the European Convention on Human Rights, the response of the victim must “be no more than absolutely necessary.”

#### **(4) General scope of the defence**

2.22 The general principle of legitimate defence is that the law allows the accused to use such force against a threat that is ‘reasonable’ and necessary in the circumstances, as the accused believes them to be. However, this causes a number of difficulties. What is reasonable? How should “lethal defensive force” be defined? Should lethal defensive force be defined at all - should a generalised test of “reasonableness” prevail? How do the elements of proportionality, imminence and necessity apply?

2.23 In its *Consultation Paper on Legitimate Defence*<sup>15</sup> the Commission recommended that lethal defensive force should be defined so as to be consistent with the intent requirements identified in the Commission’s *Report on Homicide and Involuntary Manslaughter*<sup>16</sup> and also to achieve certainty and precision for the benefit of eventual codification of the law. One way to achieve this would be to amend sections 18 to 22 of the *Non Fatal Offences Against the Person Act 1997*, which set out a number of specific rules concerning the use of force and how this relates to defences in general. The 1997 Act certainly covers cases involving non-fatal offences; it is not clear to what extent the 1997 Act covers homicide, including murder and attempted murder. Because of this, there is a need for ultimate codification of all the defences. In this Report, the Commission has concluded that, because its analysis does not extend to all defences, it is not possible to propose the replacement in their entirety sections

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<sup>14</sup> *Ibid.*, at 146-7, para 49.

<sup>15</sup> LRC CP 41-2006 at paragraph 1.12.

<sup>16</sup> *Report on Homicide and Involuntary Manslaughter* (LRC 87-2008).

18 to 22 of the 1997 Act, as this should await full codification. Instead, the Commission refers, where appropriate to the relevant provisions of the 1997 Act and adapts them, where appropriate in the draft bill appended to this Report. Section 7 of the draft Bill contains the necessary saver for those provisions to the extent that they may apply to defences, such as intoxication or insanity, which are not dealt with in this Report. Once full codification of the defences occurs, the Commission envisages that sections 18 to 22 of the 1997 Act would be suitable for repeal and replacement in their entirety.

2.24 The proposed codification process is important for another reason. The 2004 *Report of the Expert Group on Codification of the Criminal Law*<sup>17</sup> stated that general principles of criminal liability need to be defined in a manner which is compatible with the principal of legality and “citizens are entitled to clear notice as to what the law expects of them and to be given a fair opportunity to act in conformity with its provisions”. This is especially important for justificatory defences. The lawful use of force should be clearly defined so that citizens are aware what they may and may not lawfully do. In the words of Ashworth, “legal certainty is important from the point of view of producing consistent and principled court decisions, as well as guiding the conduct of citizens.”<sup>18</sup>

2.25 In general, the current test for the use of legitimate force has been based on ‘reasonableness’. The general direction for juries has been based on a question of whether the ‘response’ by the defendant was reasonable. In the Consultation Paper, the Commission was of the opinion that although this approach has its merits, in terms of being a term easily understood, it is too vague and unstructured. The Commission took the view that the substantive requirements traditionally embedded in the defence, namely a minimum threshold requirement, imminence, necessity and proportionality must be incorporated into the law on legitimate defence. In the Commission’s view, these would help to achieve certainty in this area.

2.26 Placing these requirements on a specific legislative footing will help guide the courts and ultimately juries; it is the opinion of the Commission that juries should be provided with direction with regard to these elements rather than simply being asked to base their decision on a test of reasonableness. By introducing a more structured test to the defence of legitimate defence and in particular to the defence of the person, rather than the generalised

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<sup>17</sup> *Codifying the Criminal Law*, Report of the Expert Group on the Codification of the Criminal Law (Department of Justice, Equality and Law Reform 2004), paragraph 2.90.

<sup>18</sup> Ashworth *Principles of Criminal Law* 5<sup>th</sup> ed (Oxford 2006) at 139.

'reasonableness' approach, court decisions will prove to be more consistent and principled, as well as guiding citizens in terms of their conduct.

2.27 The Commission has therefore concluded that, on the basis of the rights-based analysis above and subject to the specific conditions of the defence of legitimate defence to be set out below, it should be clearly stated that a person does not commit an offence where he or she uses force by way of defence to the use of unlawful force by another person. The Commission also recommends that, pending the completion of the codification of all the defences in criminal law, this general statement of the defence should be without prejudice to the provisions in sections 18 to 22 of the *Non-Fatal Offences Against the Person Act 1997*.

2.28 *The Commission recommends that, subject to the specific conditions of the defence of legitimate defence set out below, it should be clearly stated that a person does not commit an offence where he or she uses force by way of defence to the use of unlawful force by another person. The Commission also recommends that, pending the completion of the codification of all the defences in criminal law, this general statement of the defence should be without prejudice to the provisions in sections 18 to 22 of the Non-Fatal Offences Against the Person Act 1997.*

2.29 In the remainder of this Chapter (and in Chapter 3), the Commission analyses legitimate defence by reference to the threat stage and the response stage, dividing these into four specific requirements.

2.30 In addressing the *threat* stage, the two issues that arise are:

- i) whether the threatened interest was of sufficient importance to warrant a response (the threshold requirement) and
- ii) whether the threat was imminent (the imminence requirement).

Under the *response* stage of the test, the two issues that arise are:

- iii) whether the threat of force was necessary to protect the threatened interest (the necessity requirement) and
- iv) whether the use of force was proportionate to the level of harm threatened (The proportionality requirement).

## **C A Threshold Requirement for Legitimate Defence**

2.31 This Part discusses whether the law on legitimate defence should be subject to a threshold test.

2.32 Traditionally, before the defence of 'self-defence' was deemed justifiable, the response had to be imminent, necessary, proportionate to the threat and only to be used against an unjustified attack. Over time, these

requirements came to be interpreted according to a general test of “reasonableness”. This approach has been applied in the majority of jurisdictions.

2.33 Given the inconsistencies that arise due to the varied sources of law governing self-defence, one of the primary purposes of this Report is to provide clarity. Certainty and precision can be achieved by clearly setting out rules of conduct through legislation. The primary recommendation is that we should move away from a generalised rule and establish clear and concise guidelines to deal with the law on the lawful use of force whether dealing with the defence of the person, property, preventing a crime or assisting in an arrest. Citizens have a right to clear guidance as to their conduct and more specifically; conduct that will not be tolerated. Everyone in society is aware of the general concept of ‘self defence’ and that everyone has a right to protect themselves from attack. However, society is less clear on the boundaries of that right; it is those boundaries that need to be set down in legislation. Providing clear legislative guidelines by implementing a threshold test and clearly setting down jury direction with regard to the elements of imminence, necessity, proportionality will, hopefully, achieve that aim.

2.34 This view is based on the principle of legality; namely that conduct should not be punished unless it has been clearly and precisely prohibited by the terms of a pre-existing rule of law. The legality principle is a foundational principle of modern criminal law. Legality is usually associated with offences but can equally be applied to defences, by setting out what a citizen may or may not do. As with the offences in criminal law, there is a need for greater certainty in the law of criminal defences. Certainty in law provides security for citizens to rely on the law to be enforced for their protection and not to their detriment provided they keep within its boundaries.<sup>19</sup> In this section, the Commission considers the arguments in favour and against setting a clear minimum standard for lawful use of force against a threat.

**(a) Consultation Paper Recommendation**

2.35 In the Consultation Paper, the Commission provisionally recommended that a minimum threshold requirement should be imposed on the use of private defensive force, with particular emphasis on the use of lethal force.

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<sup>19</sup> See Simmonds *Central Issues in Jurisprudence* 2<sup>nd</sup> ed (Sweet & Maxwell 2002) Chapter 7.

**(b) Discussion**

**(1) Defence of the Person**

2.36 Lawful use of force is primarily used to defend oneself from an attack; resulting in the term 'self-defence'. As mentioned above, the law on 'self-defence' is deeply entrenched in concepts of justice and equality. If a person is attacked or threatened unlawfully, he or she has the right to defend against that attack. This right is based on the fundamental right to life and physical security, which as the courts have already noted is protected by Article 40.3 of the Constitution of Ireland. The idea of physical security is regarded as a 'natural right' and an 'absolute right' and without recognition of that right; we would be unable to live together in society.<sup>20</sup>

2.37 The question to be answered here is whether it is possible to identify a minimum level of threat to the person which would justify, in particular, lethal defensive force? For example, does the threat have to be one of death or serious harm or is a threat of confinement for example, a sufficient threat to justify lethal defensive force? Broadly speaking two approaches to the issue of physical threats and a threshold requirement can be set out. The first approach involves defining a threshold test, while the second approach involves a generalised test of "reasonableness".

2.38 The Irish courts have tried to maintain a minimum threshold requirement for the lawful use of lethal defensive force, although this test has varied from time to time.<sup>21</sup> In *The People (Attorney General) v Keatley*<sup>22</sup> (a case involving two brothers in a dispute following a game of pitch and toss), the Supreme Court approved the direction of the trial judge and held that lethal defence force to repel "some felony involving violence" or "some forcible and atrocious attack" was justifiable; an attack amounting to, for example, assault only would be insufficient.<sup>23</sup> In the later Supreme Court decision *The People (Attorney General) v Dwyer*<sup>24</sup>, Walsh J indicated that there must be a *threat endangering life* (emphasis added).<sup>25</sup>

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<sup>20</sup> Ashworth "Self-Defence and the Right to Life" (1975) 34 (2) *Cambridge Law Journal* 282.

<sup>21</sup> LRC CP 41-2006, at paragraph 2.13.

<sup>22</sup> [1954] IR 12.

<sup>23</sup> [1954] IR 12 at 16.

<sup>24</sup> [1972] IR 416.

<sup>25</sup> [1972] IR 416 at 420.

2.39 Similarly, the Scottish courts have sought to impose a minimum threshold level taking the view that the sanctity of the attacker's life demands that lethal defensive force may be resorted to *only in the event that the defender's life is endangered*.<sup>26</sup> The Draft Criminal Code for Scotland produced by the Scottish Law Commission also sets a minimum threshold test by demanding that lethal defensive force is only permissible "for the purpose of saving one's life or protection from serious injury".<sup>27</sup>

2.40 Statutory threshold tests are also in force in Canada, Queensland and Western Australia whereby lethal defensive force is only permitted in response to a threat of death or grievous bodily harm.<sup>28</sup> The US *Model Penal Code* (developed by the American Law Institute and which has formed the basis for many of the statutory penal codes in the 50 US states) applies a similar test. Section 3.04(2)(b) of the US *Model Penal Code* permits the use of lethal force in defence of the person only where necessary to repel threats of "death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat".

2.41 By contrast, the "reasonableness" approach has been adopted in a number of States. A classic pronouncement of the approach can be found in the decision of the UK Privy Council (formerly the final court of appeal from many British Commonwealth states) in *Palmer v R*<sup>29</sup>:

"Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation...Of all these matters the good sense of the jury will be the arbiter."<sup>30</sup>

2.42 This approach was also adopted in the Australian case *Zecevic v DPP*<sup>31</sup> where no specified lower threshold of violence for legitimate defence was held to exist. The test in *Zecevic* was based on whether the accused believed

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<sup>26</sup> In *McCluskey v HM Advocate* (1959) JC 39, at 43, Lord Justice Clyde held that the accused must observe "due restraint" in defending himself and that he must not use force that was "cruelly excessive."

<sup>27</sup> See clause 23 of the Code, published under the auspices of the Scottish Law Commission *A Draft Criminal Code for Scotland with Commentary* (2003) at 64-65.

<sup>28</sup> Canadian *Criminal Code*, section 34(2); Queensland *Criminal Code*, section 271(2); Western Australia *Criminal Code*, section 248.

<sup>29</sup> [1971] AC 814.

<sup>30</sup> [1971] AC 814 at 831-832.

<sup>31</sup> (1987) 71 ALR 641.

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, he is entitled to an acquittal.<sup>32</sup> Thus the approach adopts a subjective element – what the accused believed at the relevant time.

2.43 The ‘reasonableness’ approach was placed on a statutory footing in both Tasmania and New Zealand, in the Tasmanian *Criminal Code*<sup>33</sup> and the New Zealand *Crimes Act 1961*<sup>34</sup> respectively. The New Zealand Court of Appeal held in *R v Kneale*<sup>35</sup> that the threshold requirement had been abolished in favour of a reasonableness approach whereby the “seriousness of the threat or attack is relevant at the point of determining the *reasonableness of the response*.”<sup>36</sup>

2.44 The Commission’s proposed recommendation to abandon the generalised ‘reasonableness’ test in favour of a threshold test, was subject to critique during the consultation process. The principal argument against such a requirement was that it does not allow a person to react to the prevailing circumstances, as the person perceives or understands them to be. It was suggested that a person must be allowed to react reasonably to the threat he or she perceives or understands it to be, regardless of how another might perceive or understand the threat to be. Thus a subjective approach should be adopted on the basis that people’s responses to threats or perceived threats differ.

2.45 Such concerns are also evident in recommendations made by some of the Canadian law reform bodies who have recommended that a specific threshold test for lethal defensive force should be abandoned in favour of a general provision that applies to fatal and non-fatal force.<sup>37</sup>

2.46 Nonetheless, the Commission believes the argument in favour of setting a minimum threshold requirement is persuasive. The Commission believes that limitations should be specified in clear rules rather than based on a concept of “reasonableness”. Citizens are entitled to detailed guidance on the

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<sup>32</sup> (1987) 71 ALR 641 at 661.

<sup>33</sup> Section 46 Tasmanian *Criminal Code*.

<sup>34</sup> Section 48 New Zealand *Crimes Act 1961*.

<sup>35</sup> *R v Kneale* [1998] 2 NZLR 169.

<sup>36</sup> *R v Kneale* [1998] 2 NZLR 169 at 178.

<sup>37</sup> See the Law Commission of Canada *Working Paper on Criminal Law: the general part – liability and defences* (No. 29 1982); *Law Commission of Canada Report on Recodifying Criminal Law* (No 31 1987).

proper limits of what he or she can lawfully do. Setting a minimum threshold to the law on legitimate defence goes someone to achieving that.

(I) *Threats of Rape and other Sexual Offences*

2.47 In the Consultation Paper, whilst discussing threats against the person, the Commission also addressed the threat of rape and other sexual assaults and whether such threats fall within the same category. Though rape and other sexual assaults may present a risk of death or serious injury they could also fall into a category of threats that do not threaten serious long term physical harm. The Commission acknowledges, however, that very few cases will arise whereby a threat of rape will not be accompanied by a threat of serious injury. Where a person is faced with the threat of rape or sexual assault the person is deprived of calm deliberation and thought and overwhelmed with the need to escape. Therefore, the Commission believes that lethal defensive force should be permissible in such a setting.

2.48 Another sub issue that arises under this heading is the question of whether a person should be entitled to use lethal force to escape from unlawful imprisonment. In the Consultation Paper the Commission acknowledged that similar to threats of rape and sexual assault, threats of unlawful imprisonment rarely arise in isolation. The Commission believes that lethal defensive force is permissible in such a situation provided that all other requirements are also present primarily necessity and proportionality.

(II) *Defence of Others*

2.49 Historically, the use of force to protect another person was restricted to the protection of those “in a special relationship to the defender such as a wife, child or master.”<sup>38</sup> However, such historical limitations are now regarded as “obsolete” and “irrelevant” at least in this jurisdiction.<sup>39</sup> The language of the *Non-Fatal Offences Against the Person Act 1997* may, however, give rise to some confusion. Section 18 of the 1997 Act permits the use of force by a person for the protection of “himself or herself or a *member of the family* of that person or *another* from injury”.

2.50 In some jurisdictions, restrictions on the protection of others from attack continue to be recognised in some form.<sup>40</sup> In general, however, the

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<sup>38</sup> *People (Attorney General) v Keatley* [1954] IR 12 at 17.

<sup>39</sup> *Ibid.*

<sup>40</sup> The Canadian *Criminal Code* restricts the use of defensive force to those “under [the defender’s] protection”. It must be noted however, that such provisions are of little practical consequence given the broader provisions relating to the prevention of crime.

defence of others is not limited by any “special nexus” or relationship. Statutory provisions in New Zealand, Australia and in the American Law Institute’s *Model Penal Code* do not require any special relationship between parties to justify the use of force to protect others.<sup>41</sup>

2.51 The Commission is of the opinion that there should be no restriction on the persons whom an individual may defend. Individuals should intervene to protect others who are in danger where necessary in the interest of crime prevention and public policy. Such a view is in accordance with the views of the Court of Criminal Appeal in *People (Attorney General) v Keatley*.<sup>42</sup> However, the Commission does make the point that lethal defensive force for the protection of a third party should only be lawful where the person who is being defended could also have used such force. Any hardship caused in this regard would be alleviated by allowing for mistakes in this respect.<sup>43</sup>

2.52 It should also be noted that in *The People (DPP) v Barnes*,<sup>44</sup> the Court of Criminal Appeal held that it is “impossible to lay down any formula with which the degree of force can be instantly calculated”. When assessing the force used by a victim of a burglar, there must be both a subjective and an objective component in the assessment of that force. In that case, the Court of Criminal Appeal drew an analogy with the use of non-lethal force in section 18 of the *Non-Fatal Offences against the Person Act 1997* and the objective element of section 1(2) of the 1997 Act which requires a court or jury to have regard to the presence or absence of reasonable grounds. The Commission also notes that, in the Government’s *Criminal Law (Defence of Life and Property) Bill 2007* a subjective element was proposed, whereby no offence would be committed where a person uses force which is reasonable in the circumstances as he or she believes them to be.

### **(c) Conclusions and Recommendations**

2.53 Despite arguments in favour of a generalised test of “reasonableness” the Commission recommends that a minimum threshold requirement should be imposed on the use of lethal defensive force. Members

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<sup>41</sup> See generally section 48 of the New Zealand *Crimes Act 1961*; Queensland *Criminal Code*, section 273; Western Australian *Criminal Code*, section 250; Tasmanian *Criminal Code*, section 46; Northern Territory *Criminal Code*, sections 27(g) and 28(f); South Australian *Criminal Law Consolidation Act 1935*, section 15(3)(a); Commonwealth *Criminal Code*, section 10.4(2)(a) and (b); Australian Capital Territory *Criminal Code 2002*, section 42(2)(a)(i); section 3.05 of the US *Model Penal Code*.

<sup>42</sup> [1954] IR 12 at 17.

<sup>43</sup> LRC CP 41-2006, at paragraph 2.61.

<sup>44</sup> [2006] IECCA 165; [2007] 3 IR 130. See paragraph 2.16ff above.

of society have a right to clear criteria by which they can judge their conduct when making “spur of the moment” decisions. The Commission believes that the general test of “reasonableness”, as it currently stands, fails to achieve this. The Commission recognises that the term ‘reasonable’ has its merits in terms of a general understanding of the word, when directing a jury, where self defence is raised. However, without clearly setting out the substantive requirements of the defence and imposing a minimum threshold test before the defence is raised, the Commission believes undeserving cases will continue to benefit from the defence.

2.54 Threshold tests in their own right operate as a useful guide and a signpost for the whole community (including potential attackers, defenders as well as those who have to judge the actions of the defendant) as to the types of conduct that *might* warrant a lethal defensive response. By implementing a threshold test, potential defenders are put on notice as to the minimum requirements for successful pleas; juries are provided with a useful starting point for assessing claims of legitimate defence; and this supports the democratic function of drawing a clear line dividing acceptable and unacceptable defensive conduct.<sup>45</sup>

2.55 Furthermore, the Commission believes it is important to send out a clear message regarding the sanctity of life. Imposing a minimum threshold requirement protects the right to life of the attacker as set out in the Article 40.3 of the Constitution by demanding that lethal defensive force may not be resorted to in response to minor threats and attacks.

2.56 In line with jurisdictions which have adopted a threshold requirement<sup>46</sup> the Commission recommends that lethal defensive force should only be permitted in order to repel threats of death or serious injury; rape or aggravated sexual assault and false imprisonment by force. In all other situations the Commission recommends that lethal defensive should only be permissible where all the requirements of the defence are made out. There is no relationship restrictions imposed; such force is permissible whether it is applied in defence of oneself or of a third party.

2.57 *The Commission recommends that a minimum threshold requirement should be imposed on the use of private defensive force.*

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<sup>45</sup> LRC CP 41-2006, at paragraph 6.54.

<sup>46</sup> Under Sections 3.04 (2)(b) of the US *Model Penal Code* the use of lethal force is permitted in defence of the person only where necessary to repel threats of “death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat”.

2.58 *The Commission recommends that lethal defensive force by oneself or in protection of a third party should only be permitted to repel threats of:*

- *death or serious injury,*
- *rape or aggravated sexual assault,*
- *false imprisonment by force,*
- *and, then only if all the requirements of legitimate defence are made out.*

## **(2) Defence of Property**

2.59 Having dealt with arguments in favour and against a threshold test for the defence of the person and others, the Commission turns to discuss whether a minimum threshold requirement should also apply to the law surrounding defence of property.

2.60 Defence of property can be divided into two types; defence of personal property and defence of dwelling houses. In the *Consultation Paper on Legitimate Defence* the Commission acknowledged that it is generally accepted that lethal defensive force may not be deployed in defence of personal property.<sup>47</sup> Where lethal defensive force is permissible in order to protect personal property the threat must be accompanied by a threat of “serious bodily injury”.<sup>48</sup>

### *(1) The Defence of the Dwelling-House*

2.61 However, the defence of one’s dwelling house is more problematic and requires a more detailed discussion. On the one hand many people would not consider that the preservation of property is sufficiently important to warrant taking a human life. On the other hand, a person’s dwelling house is considered a place of refuge, a place of safety, and there should be no limitation on the force which a person may use to protect the place where a person resides.

2.62 The Commission fully acknowledges the need to provide clarity in this area, in particular against the background of recent high profile cases such as *The People (DPP) v Nally*<sup>49</sup> and *The People (DPP) v Barnes*.<sup>50</sup>

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<sup>47</sup> See generally LRC CP 41-2006, at paragraphs 2.65-2.70.

<sup>48</sup> Section 3.06 (3)(d)(ii) of the United States *Model Penal Code*. See generally LRC CP 41-2006, at paragraph 2.68.

<sup>49</sup> [2006] IECCA 128.

<sup>50</sup> [2006] IECCA 165.

**(a) Consultation Paper Recommendations**

2.63 In the Consultation Paper, the Commission provisionally recommended that lethal defensive force may not be used in defence of personal property.

2.64 However, the Commission did not recommend that any upper limit be placed on the force that may be used to defend one's dwelling house.<sup>51</sup> In other words, one should be allowed to defend themselves from attack within one's dwelling home.

2.65 Furthermore, the Commission provisionally recommended that a defender should not be required to retreat from an attack in their dwelling home even if they could do so with complete safety. In this regard, all occupants of dwelling houses should be entitled to the benefit of the so-called "Castle Doctrine", it is irrelevant if the defender is attacked by an intruder or non-intruder and the "dwelling house" should be defined as including the area immediately surrounding the home.<sup>52</sup>

**(b) Discussion**

2.66 As mentioned above, there has been extensive discussion of home protection since the decision in *The People (DPP) v Nally*,<sup>53</sup> in which the defendant was ultimately acquitted in circumstances in which he had shot a person who had entered his dwelling. The trial judge in *Nally* had noted that it had been "an exceptional trial in which the people of Ireland divided themselves on social lines".<sup>54</sup>

2.67 Section 18 of the *Non-Fatal Offences Against the Person Act 1997* provides that a person may lawfully use force:

- to protect his or her *property* from appropriation, destruction or damage caused by a criminal act or from trespass or infringement;
- to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of that other) from trespass or infringement.<sup>55</sup>

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<sup>51</sup> LRC CP 41-2006, at paragraph 2.94.

<sup>52</sup> LRC CP 41-2006, at paragraph 5.133.

<sup>53</sup> *The People (DPP) v Nally* [2006] IECCA 128.

<sup>54</sup> *The People (DPP) v Nally* [2006] IECCA 128, quoting transcript of Central Criminal Court, 5 December 2005.

<sup>55</sup> Section 18(1)(c).

2.68 Section 20(4) of the 1997 Act provides, however, that “the fact that a person had an opportunity to *retreat* before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable”. This suggests that a person has to retreat if they have an opportunity to do so and where a person fails to do so the defence of self-defence is not absolute.

2.69 As discussed previously the 1997 Act deals specifically with non-fatal offences thus there is currently no statutory provision to say it is lawful to kill another person in order to protect one’s property.

2.70 However, case law does suggest that it may be lawful to use a lethal force response to protect a person’s dwelling house. In the leading Irish case on self defence, *People (Attorney General) v Dwyer*<sup>56</sup>, Walsh J stated:

“A homicide is not unlawful if it is committed in the execution or advancement of justice, or in reasonable self-defence of person *or property*, or in order to prevent the commission of an atrocious crime, or by misadventure.”<sup>57</sup>

2.71 The decision in *The People (DPP) v Nally*<sup>58</sup> would also support the assertion that killing in order to protect one’s property and dwelling home is lawful in some circumstances. In his first trial, the defendant in *Nally* was convicted of manslaughter and sentenced to six years imprisonment.<sup>59</sup> The defendant’s conviction for manslaughter was appealed to the Court of Criminal Appeal on the basis that the trial judge had misdirected the jury by allowing them to consider self defence only as a partial defence.

2.72 Before the jury had returned a verdict at trial, the trial judge had directed that he would accept either a verdict of murder or manslaughter, and would not acquit the accused. The basis for this direction was that the force used by the defendant was so excessive that it destroyed the notion that it was reasonable. In doing so, he removed the option of a full self-defence verdict from the jury leaving them with the option of a partial defence thereby convicting of manslaughter or else a murder conviction. The Court of Criminal Appeal quashed the conviction and ordered a retrial. The impact of the Court of Criminal Appeal decision in *Nally* cannot be underestimated in terms of procedural issues regarding self-defence and in terms of the relationship

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<sup>56</sup> [1972] IR 416.

<sup>57</sup> [1972] IR 416 at 420.

<sup>58</sup> [2006] IECCA 128, [2007] 3 IR 130.

<sup>59</sup> For a more detailed account see LRC CP 41-2006, at paragraph 2.73.

between judge and jury,<sup>60</sup> but the Commission considers that this is not within the scope of this Report, which focuses on the substantive content of the defence.

2.73 In allowing the appeal and ordering a retrial, the Court of Criminal Appeal held that the trial judge had over-stepped the duties of the jury and, in effect, directed a conviction. The Court cited the Supreme Court decision *The People (DPP) v Mark Davis*<sup>61</sup> where it was held that “a fundamental characteristic of the jury is to deliver a verdict, and that while there was a right and duty vested in the trial judge, to withdraw the case from the jury and direct them to enter a verdict of not guilty, there was no corresponding right or duty to direct a jury to enter a verdict of guilty.”<sup>62</sup>

2.74 The Court also referred to the House of Lords decision in *R v Wang*<sup>63</sup>, where it was decided that the decision of all factual questions, including the application of law as expanded by the trial judge, was a matter for the jury and the jury has “a right to be wrong.” Thus even where a trial judge is of the opinion that a certain result would be perverse, he or she has no right to interfere with the jury’s direction. In a trial by jury it is for the judge to direct the jury on the law and insofar as he/she thinks necessary on the facts, but the jury whilst they must take the law from the judge, are the sole judges on the facts.<sup>64</sup>

2.75 The Court in *Nally* concluded that:

“The authorities, both in this and the neighbouring jurisdiction, make it abundantly clear that the jurors, who swear an oath to deliver a verdict in accordance with the evidence, must retain the ultimate power to determine issues of guilt or innocence. That must of necessity, include the power to return a verdict which conflicts with the opinion of the learned trial judge, however experienced that judge may be. The question whether the amount of force used is objectively reasonable is quintessentially a matter of fact for the jury.”

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<sup>60</sup> See Caplow, S. “The Gaelic Goetz: A Case of Self-Defense in Ireland” (2008) Brooklyn Law School, Legal Studies Paper No. 114 Available at SSRN: <http://ssrn.com/abstract=1189497>.

<sup>61</sup> *People (DPP) v Davis* [1993] 2 IR 1.

<sup>62</sup> *People (DPP) v Davis* [1993] 2 IR 1 at 14-15.

<sup>63</sup> [2005] 1 W.L.R.661

<sup>64</sup> *Joshua v The Queen* [1955] AC 121, 129-130. Cited in *People (DPP) v Nally* [2006] IECCA 128.

2.76 The defendant was subsequently acquitted on the manslaughter charge.<sup>65</sup>

2.77 By contrast, the English case *R v Martin*<sup>66</sup> (which involved broadly similar facts) produced a different result. Here the defendant was a farmer who lived in an isolated country house. When confronted with burglars one night he shot and killed one and seriously injured the other. At trial he was convicted of murder; his plea of self-defence being rejected. On appeal, he sought to adduce fresh evidence that he was suffering from a paranoid personality disorder exacerbated by depression and, as a result, it was claimed by his defence counsel that he would have perceived the breaking into his house as presenting an even greater threat to his safety. The English Court of Appeal rejected this argument on the basis that the assessment of the defendant's response is an objective matter. Furthermore, the Court held that when considering whether the defendant's view about the dangerousness of the act was a reasonable one, personal characteristics such as personality disorders are to be disregarded.

2.78 It may be noted that the English Court of Appeal in *Martin* contrasts with a Privy Council direction on self defence, given a few months earlier. In *Shaw v R*<sup>67</sup>, the Privy Council set out the test for self-defence as follows:

“it is... necessary for the trial judge to pose two essential questions (however expressed) for the jury's consideration. (1) Did the appellant honestly believe or may he honestly have believed that it was necessary to defend himself? (2) If so, and taking the circumstances and the danger as the appellant honestly believed them to be, was the amount of force which he used reasonable?”<sup>68</sup>

2.79 This Privy Council decision raises the issue of the appropriate test in determining what level of force a householder is permitted to use against a perceived threat.

2.80 In the earlier threshold discussion regarding the defence of the person, the Commission recommended a minimum threshold test to be introduced. By contrast, the Commission did not recommend that any upper limit be placed on the force that may be used to defend one's dwelling house. During the consultation process a number of submissions were made to the Commission regarding the use of the phrase 'no upper limit,' which suggested that an analogy could be made with this recommendation and 'licences to kill'

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<sup>65</sup> *The Irish Times*, 15 December 2006.

<sup>66</sup> *R v Martin* (2002) 1 Cr App Rep 27 at 326.

<sup>67</sup> [2001] 1 WLR 1519.

<sup>68</sup> *Ibid* at 1527.

legislation from the United States. In response, the Commission suggests that such a view does not take into account the full scope of the requirements set out in this Report, notably that the defence is only available where all the requirements of the defence are present.

2.81 In short, the Commission does not support any such 'licence to kill' legislation. Although the Commission has recommended that no upper limit be placed on the amount of force that could be used to protect one's home, defendants are still required to adhere to the other elements of legitimate defence namely imminence, proportionality and necessity.

2.82 It is the opinion of the Commission that allowing for no upper limit simply means that lethal force can be used where it is necessary and proportionate to protect one's dwelling-house acknowledging the importance of the home as a place of refuge. Furthermore, protecting your home in such a situation will most probably include the protection of yourself or others.

2.83 By putting these safeguards in place, the Commission also considers that the constitutional rights to life of both the householder and the burglar or the intruder are given protection to an appropriate level, as identified by the Court of Criminal Appeal in the *Barnes* case, discussed above.

### **(c) Recommendations**

2.84 *The Commission recommends that lethal defensive force may be used where necessary and where it is not disproportionate to ensure a person's own safety, the safety of another or the safety of the person's property.*

2.85 *The Commission recommends that lethal defensive force may not be used in defence of personal property.*

## **D The Imminence Requirement**

2.86 The Commission now moves on to discuss the requirement of imminence. The Commission considers that imminence should form part of the test of the defence of lawful use of force.

2.87 Historically, the law on self-defence required that before force was used, an attack was taking place or was imminent.<sup>69</sup> The imminence requirement is identified as a substantive requirement for the defence of legitimate defence. It refers to the time period between the harm the accused was faced with and the defensive action taken by the accused to prevent harm materialising. In some jurisdictions, a strict approach is adopted to imminence; the defence will only apply where the harm prevented was imminent.

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<sup>69</sup> Law Reform Commission of Western Australia, *Review of the Law on Homicide* (2007 Project 94) at 166.

2.88 From the outset, it should be noted that the term ‘imminent’ is often used interchangeably with the term ‘immediate’ though their meanings are not necessarily congruent.

2.89 It should also be noted that the imminence rule is closely related to the requirement of necessity and the opportunity to retreat.<sup>70</sup> If harm is not imminent, the accused is likely to have a reasonable opportunity to retreat and avoid the harm. However, despite the relationship between imminence and necessity, the requirement of imminence is generally considered as a ‘stand alone’ rule in the plea of self-defence.

2.90 Furthermore, as with the requirement of immediate loss of control in the defence of provocation, the imminence rule in self-defence has been widely criticised because it fails to deal with cases of domestic homicide where women who have killed their abusive partners in non-confrontational situations.<sup>71</sup> Again, it is important to point out that such situations of domestic violence are not confined to women and may include men, parents, grandparents or children. In the Consultation Paper, the Commission discussed those difficult cases. The Commission revisits this area here and make its final recommendations.

**(a) Consultation Paper Recommendations**

2.91 In the Consultation Paper, the Commission provisionally recommended that the ‘imminence’ requirement should be retained.<sup>72</sup>

**(b) Discussion**

2.92 The purpose of the imminence rule is to deny the defence of self defence where there were alternative courses of action available to the accused. It is assumed that if the threat is not imminent the accused has the opportunity to retreat, summon assistance or find another means of protection. The root of the imminent requirement is based on the right to life of all human beings, including potential attackers.

2.93 Some jurisdictions take a strict approach to the imminence requirement while other jurisdictions merely view imminence as an element to be taken into account in assessing whether, in particular, lethal defensive force can be justified or excused in the circumstances.

2.94 In the *Consultation Paper on Legitimate Defence*, the Commission explored the imminence rule in great depth by examining the historic origins of the rule. As pointed out by McAuley & McCutcheon, “there is an abundant

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<sup>70</sup> See discussion below.

<sup>71</sup> See Chapter 4.

<sup>72</sup> See LRC CP 41-2006, paragraph 3.112.

authority for the proposition that the use of defensive force must be based on a reasonable apprehension of imminent danger to life and limb.<sup>73</sup> For example, in the Scottish case *Owens v HM Advocate*<sup>74</sup>, the Court of Session held that self defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds.

2.95 This does not, however, mean that an attack must actually be under way before the accused person is permitted to use force in defence of the threat accounting for the difference between imminence and immediacy. To cite Hume, “it cannot be exacted of anyone, to wait till the pistol is in the act of being fired at him; or if the enemy have drawn, and by rushing towards him, he may meet him with his fire, before the point be at his breast”.<sup>75</sup>

2.96 In this jurisdiction, however, “there is scant reference to the requirement of imminence in reported authorities”.<sup>76</sup> The two leading authorities on self-defence, *People (Attorney General) v Keatley*<sup>77</sup> and *People (Attorney General) v Dwyer*,<sup>78</sup> do not mention the imminence rule at all. The imminence rule did, however, feature in two more recent cases, *The People (DPP) v Kelso*<sup>79</sup> and *The People (DPP) v Clarke*<sup>80</sup>. In *Kelso* the Special Criminal Court appeared to indicate that imminence was an absolute requirement for legitimate defence. The case dealt with the question of whether RUC officers who ventured across the border into the State for recreational purposes had possession of their firearms for an unlawful purpose. The officers claimed it was necessary to carry their guns to protect their lives should the necessity arise. In contrast to *Kelso*, the Court of Criminal Appeal in *Clarke* appeared to indicate that there was no imminence requirement in this jurisdiction but that imminence was merely a factor to be taken into account.<sup>81</sup> Thus, the views articulated in *Kelso* and *Clarke* appear contradictory.

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<sup>73</sup> McAuley & McCutcheon *Criminal Liability* (Roundhall Sweet & Maxwell 2000) at 749.

<sup>74</sup> (1946) JC 119.

<sup>75</sup> Hume *Commentaries on the Law of Scotland Respecting Crimes* (4<sup>th</sup> ed 1844).

<sup>76</sup> LRC CP 41-2006, at paragraph 3.18.

<sup>77</sup> [1954] IR 12.

<sup>78</sup> [1972] IR 416.

<sup>79</sup> [1984] ILRM 329.

<sup>80</sup> [1994] 3 IR 289.

<sup>81</sup> For more detailed discussion see LRC CP 41-2006, at paragraphs 3.22-3.23.

2.97 In a similar vein, the English courts have also taken contradictory views on the rule, at times suggesting that imminence is an absolute requirement, and at other times suggesting that it is merely a factor to be taken into account in the broader inquiry as to ‘reasonableness’.<sup>82</sup>

2.98 Thus, both the Irish and English courts appear to be unclear as to whether the imminence rule is a requirement or merely a factor to be taken into account and offer little guidance as to the precise meaning of the rule.

2.99 Furthermore, the Commission also recognised that the majority of other Commonwealth jurisdictions do not have a unified approach to the role of the imminence rule.<sup>83</sup> With the exception of the United States of America, the majority of Criminal Code jurisdictions contain no express imminence requirement. The American Law Institute’s *Model Penal Code* restricts the use of defensive force to occasions when it is “immediately necessary”.<sup>84</sup> It must be noted, however, that attempts have been made to provide some definition for the imminence requirement particularly because of the growing reliance on the flexible concept of “reasonableness” as well as the challenge presented by cases involving domestic homicide.

#### **(1) The imminence rule and domestic violence**

2.100 As pointed out earlier, the primary purpose of the imminence rule is to preserve the right to life of all human beings. However, the rule has come under considerable attack in recent years from those “who feel that it places undue emphasis on the time measurement between harm and defensive response at the expense of the underlying principle of necessity.”<sup>85</sup> Literature on this issue focuses primarily on women who have been involved in a violent relationship. The controversy arises because most women who kill their partners do so in non-confrontational situations, thus failing to satisfy the

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<sup>82</sup> In *Palmer v R* [1971] AC 814, the UK Privy Council held that imminence like the retreat rule was merely a factor to be taken into account by the jury in determining the reasonableness of the defender’s actions. In the words of the Court, “everything will depend upon the particular facts and circumstances... if an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. The Court stressed, however, that “of all these good matters the good sense of the jury will be the arbiter.” By contrast, in *Devlin v Armstrong* [1971] NI 13, the Northern Ireland Court of Appeal rejected the defendant’s appeal on the basis that the danger she had anticipated was not “sufficiently specific or imminent.”

<sup>83</sup> LRC CP 41-2006, at paragraph 3.39.

<sup>84</sup> Sections 3.04 (self defence); 3.06 (defence of property); 3.07 (law enforcement).

<sup>85</sup> Leverick *Killing in Self-Defence* (Oxford University Press 2006) at 89.

imminence rule. In addition and closely associated with the imminence rule is the proportionality requirement and the barrier this causes for women who kill. The proportionality rule suggests that killing in defence is only permissible where the accused is faced with the threat of death or serious injury.<sup>86</sup> In cases involving women who kill their abusive partners, this threshold is rarely met. Women usually kill their abusive partners in situations where the violent partner is in a vulnerable position for example asleep or intoxicated.

2.101 Thus, as with the arguments against the immediate loss of control requirement in provocation, some writers suggest that the imminence rule in self-defence imports sexism into the law.<sup>87</sup> Requiring an imminence rule discriminates against women because it is confined to masculine norms.<sup>88</sup>

2.102 In the Consultation Paper, the Commission examined the approach adopted by Canada, Australia, New Zealand and the United States to these difficult cases.<sup>89</sup> From this examination it becomes apparent that the approach adopted by the common law courts remains ambiguous. On the one hand, it is suggested that the only option available to a battered woman in a situation of domestic violence is to kill her aggressor to ensure protection whether the threat is imminent or not and therefore the defence of legitimate defence should be available to the female accused. On the other hand, it is suggested that there are other options available to the female accused and should be sought. However, the Law Commission of New Zealand, who dedicated a full Paper to 'Battered Defendants' explains that peaceful and effective avenues for self-defence are not always available to victims of domestic violence.<sup>90</sup>

2.103 In a study of the Canadian approach a number of cases indicated that the 'presumption of imminence' may be rebutted in any case where there is an inequality between the strengths of the parties. In the leading Canadian case *Lavallee v R*<sup>91</sup> the Supreme Court of Canada held that in the case of a 'battered woman', there was no strict requirement of imminence stating that:

"Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of

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<sup>86</sup> See below.

<sup>87</sup> Leverick *Killing in Self-Defence* (Oxford University Press 2006) at 89.

<sup>88</sup> Law Reform Commission of Western Australia *Review of the Law of Homicide: Final Report* at 166.

<sup>89</sup> See generally LRC CP 41-2006, at paragraphs 3.41-3.84.

<sup>90</sup> New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper* (PP41 2000) at paragraph 43.

<sup>91</sup> *Lavallee v R* (1990) 55 CCC (3d) 97.

danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker.”

2.104 However, the more recent case of *R v Charlebois*<sup>92</sup> would tend to suggest that the Supreme Court of Canada may be retreating from that position. *Charlebois* involved a case where the accused was charged with first degree murder for the shooting of a man in the back of the head while he was sleeping. At trial, the accused argued that he committed the homicide in self-defence. His defence was based on an overwhelming fear of the victim that he had developed over the course of their long and difficult relationship. However, it was held by the Court that there was no evidence which justified extending the scope of *Lavallee* to cases of this kind.

2.105 As with the Canadian position, Australian case law appears to be inconsistent. In *R v Secretary*<sup>93</sup> the Court adopted a pragmatic approach whereby the matter of imminence was held to be a matter for the jury recognising the difficulties that can arise in discriminating between a defensive response and a response that simply involves a deliberate desire to exact revenge for past and potential – but unthreatened – future conduct.

2.106 However, in the more recent case *R v PRFN*<sup>94</sup> the Supreme Court of New South Wales held that self-defence was properly withheld from the jury on the basis that there was no imminent threat to the appellant in this case.<sup>95</sup>

2.107 In the leading New Zealand case on the issue, *R v Wang*<sup>96</sup>, the New Zealand Court of Appeal upheld the appellant’s conviction for manslaughter and refused to allow self defence to go to the jury. In the Court’s view:

“having regard to society’s concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self defence of the defence of another.”<sup>97</sup>

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<sup>92</sup> [2000] 2 SCR 674.

<sup>93</sup> (1996) 107 NTR 1.

<sup>94</sup> [2000] NSW CCA 230.

<sup>95</sup> The case concerned a young male who had been raped by his neighbour (the deceased) at the age of 14 years. Following this, the deceased man continued to make overtures to the appellant but there was no further sexual contact. Approximately a year and a half after being raped, the appellant lured the deceased to his home and fatally shot him.

<sup>96</sup> [1990] 2 NZLR 529.

<sup>97</sup> [1990] 2 NZLR 529 at 539.

2.108 This would suggest that the New Zealand courts demand the imminence requirement as a prerequisite for self defence. However, elsewhere, in the Court's judgment, it was indicated that pre-emptive strikes may be permissible and the key question is whether there were alternate non-violent options open to the accused. It would seem that this case turned on the fact that the deceased was asleep and intoxicated at the time of the attack and the accused was not being held hostage.

2.109 The New Zealand Law Commission has recommended that legislative changes are needed to permit force to be used when the threatened harm is "inevitable" notwithstanding that the threat of harm may not be imminent.<sup>98</sup>

2.110 In the United States, the majority of States contain an express imminence requirement in their penal codes, requiring that legitimate defence may be resorted to only when "immediately necessary" or in response to an "imminent" or "immediate" threat. Thus, the primary question in the United States is not whether there *is* an imminence requirement, but to what extent the imminence requirement provides an impediment to a plea of self-defence in cases of non- confrontational violence such as the "battered woman" scenario. Some courts have accepted that self-defence may be permitted as a defence to a killing in a non-confrontational situation; in general, however, the courts are reluctant to allow self-defence where there is no objective imminent threat.<sup>99</sup>

2.111 In a recent report from the Law Reform Commission of Western Australia, it was recommended that when the defence of self defence is raised under section 248 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."<sup>100</sup>

2.112 From this examination, it becomes evident that although there has been a relaxation of the rule in some jurisdictions to acknowledge cases of the 'battered woman' and other cases where there has been an inequality of strengths, there is still a strong sense that women who have killed their abusive partners are unable to plead self-defence successfully. Consequently, there have been a number of alternative approaches suggested to replace or vary the imminence requirement to accommodate deserving claims of legitimate defence

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<sup>98</sup> New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (R73 2001) at paragraphs 23-24.

<sup>99</sup> See generally LRC CP 41-2006, at paragraphs 3.78 -3.84.

<sup>100</sup> Law Reform Commission of Western Australia *Review of the Law on Homicide: Final Report* (Project 97, 2007), at 169.

by those who kill in response to threats of non-imminent harm and yet maintain the integrity of the defence.

## **(2) Options for Reform**

2.113 In the Consultation Paper, seven options for reform<sup>101</sup> of the imminence requirement in legitimate defence to cater for 'difficult cases' such as those of killing in domestic violence were discussed. The first option for reform mentioned by the Commission was a Presidential pardon, where the President could grant a pardon where there has been a miscarriage of justice by virtue of Article 13.6 of the Constitution. The Commission also recognised, however, that while this approach may be "superficially convenient" it did not involve a change in the substantive law.

2.114 The second option advocated a broadening of the imminence definition recognising that imminence is an extremely difficult concept to define with precision. Leverick in her recent text suggests there are a number of ways to do this.<sup>102</sup> Firstly, it could be presumed that the threat of harm faced by a battered woman is *always* imminent. Leverick notes that this is the preferred view of Diamond but that it has not found favour in the case law of any common law jurisdiction. In a more reasoned manner, Ripstein asserts that what is needed is a 'different understanding of the concept of imminence'. For Ripstein, the requirement of imminence is itself an expression of an underlying requirement of unavoidability.<sup>103</sup>

2.115 This approach is similar to the 'inevitability test' addressed by the Commission in the Consultation Paper. In 2001 the New Zealand Law Reform Commission, recommended that the requirement of imminence should be abandoned and replaced with a test of "inevitability". The Commissioners noted that in many domestic violence situations, further assaults are inevitable, thus even if help is sought on one occasion or another and 'immediate' danger is avoided it is highly probable that the threat continues; danger is inevitable. However, such an approach, it is argued sets too high a threshold for any deserving non-imminent cases to succeed and as a result, the Commission does not advocate that such an approach should be adopted in this jurisdiction.

2.116 Another option is to abandon the imminence requirement and regard imminence merely as a factor to be considered in determining whether the force was necessary. However, with this approach like the 'inevitability' test it may be

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<sup>101</sup> See generally paragraphs 3.85-3.117.

<sup>102</sup> Leverick *Killing in Self-Defence* (Oxford University Press, 2007), at 95.

<sup>103</sup> Cited in Leverick *Killing in Self-Defence* (Oxford University Press, 2007), at 95-96.

difficult to screen out the undeserving claims of legitimate defence from genuine claims.

2.117 The fifth option addressed by the Commission was the ‘immediately necessary’ approach which modifies the imminence rule to permit defensive force only where there was an immediate necessity to act, regardless of whether the threatened harm was imminent or not. This approach focuses on the proximity of the act, whereas the conventional imminence requirement focuses on the proximity of the threatened harm.<sup>104</sup> The United States of America *Model Penal Code* adopts this ‘immediately necessary’ test but it should be noted that the majority of States have declined to modify their conventional imminence requirements to adopt this test.<sup>105</sup>

2.118 In the opinion of the Commission, the most appropriate approach to imminence would be to retain the requirement for the majority of cases as it provides a useful guide to the jury but that, in ‘difficult cases’ such as domestic violence killings, the rule should be adapted to provide that the circumstances as the accused reasonably believed them to be are taken into account. The Commission also draws attention in this respect to two related recommendations made later in this Report. First, that where disproportionate lethal force is used, this may reduce what would otherwise be murder to manslaughter. Second, that in the context of provocation, the current requirement of immediacy should, in future, be solely a matter of evidence for the jury to consider, rather than an absolute requirement.

**(a) Recommendations**

2.119 *The Commission recommends that the imminence rule should remain a requirement of legitimate defence. The Commission also recommends that, in assessing imminence, the court or jury as the case may be may take account of the circumstances as the accused reasonably believed them to be.*

**E The Necessity Requirement**

2.120 The next requirement to be discussed is the requirement of necessity, often referred to as the duty to retreat. The necessity rule and the retreat rule are inextricably linked. Strict interpretation of the necessity rule goes hand in hand with a strict application of the retreat rule and vice versa. The basis for the rule is that lethal defensive force should *only* be used if it is *necessary*; if it is not necessary, for example if a person had an opportunity to escape or get help then he or she should avail of that option. Legitimate defence cannot be used ‘as a veil’ to disguise an unlawful use of force. This

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<sup>104</sup> LRC CP 41-2006, at paragraph 3.100.

<sup>105</sup> See generally LRC CP 41-2006, paragraphs 3.100 – 3.106.

point ties in with the ancillary issue of self-generated necessity, which is also examined here. The rule regarding “self-generated necessity” asserts that a person should not be allowed claim the benefit of the defence when the ‘conflict’ was initiated by that person.

**(a) Consultation Paper Recommendations**

2.121 In the Consultation Paper, the Commission provisionally recommended that innocent defenders may only resort to lethal defensive force in response to a threat where they are unable to retreat with complete safety from the threat.

2.122 With regard to ‘public defenders’, such as the Garda Síochána, the Commission recommended that there should be no requirement to retreat in any instance.

**(b) Discussion**

2.123 The necessity principle requires that the force used in legitimate defence must be necessary. Thus if an opportunity to retreat or escape arises the use of force is considered to be no longer necessary and a defender must take the opportunity to retreat to avoid the attack. In simple terms, the defender must adopt the least harmful means of achieving his or her defence; in particular, lethal defensive force should only be used as a last resort. Although the rule appears straightforward, it has not escaped controversy. As Leverick points out, “the question of whether the accused has a duty to retreat before killing in self-defence is one that has long troubled the law.”<sup>106</sup> On the one hand, it can be argued that the victim of a threatened attack has the right to stand their ground but on the other hand the criminal law is concerned with minimising violence and protecting human lives. Thus the victim of a threatened attack should seek to retreat and escape before using force where possible and a reasonable, practicable, opportunity of escape exists. On this basis the necessity requirement forms an integral component of the test for legitimate defence. It embraces the earlier discussion of the relevant fundamental rights guaranteed protection by Article 40.3 of the Constitution and under Article 2 of the European Convention on Human Rights.

2.124 There is no single approach to the interpretation of the necessity rule. In the Consultation Paper, the Commission examined a number of approaches. The first was the ‘absolute retreat approach’ whereby defenders would be obliged to exhaust every non-lethal method of defence including verbal negotiation and complying with attackers’ demands. It has been noted, however, that although the ‘absolute retreat approach’ accords most closely with the common understanding of the meaning of the word necessity it

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<sup>106</sup> Leverick *Killing in Self Defence* (Oxford University Press, 2007) at 69.

arguably sets an unrealistic standard for defenders to achieve and as a result has not found favour in many common law jurisdictions.

2.125 An alternative approach, tempering the strictness of the absolute retreat approach, is the 'safety retreat approach' whereby defenders are obliged to exhaust non-lethal options only to the extent that they may do so in safety. In 1903, the American jurist Beale strongly advocated this approach.<sup>107</sup> For him, innocent defenders were required to exhaust all of the safe opportunities of retreat available to them before using deadly force in defence. However, Beale's guiding principle of absolute necessity did not dictate that defenders retreat in *all* cases of legitimate defence. Public defence and defence against burglars were excluded from the duty of the safe-retreat approach.

2.126 As one might expect, Beale's analysis is not without controversy primarily because of his position with regard to non-deadly attacks and the defence of property. In relation to non-deadly attacks he asserts that retreat is not required because lives are not at stake. According to Beale, "ordinary defence and the killing of another evidently stand upon different footing."<sup>108</sup> Although this may seem logical it is unclear why the use of non-lethal defensive force can be labelled as "necessary" in the absence of retreat, when the use of lethal defensive force in the same circumstances would be "unnecessary".

2.127 For Beale, retreat is not required in the defence of the home (the Castle doctrine) as it would expose the defender to increased danger. Despite criticisms, the safe-retreat approach has been adopted in a number of jurisdictions most notably by a number of US state legislatures who have adopted the American Law Institute's *Model Penal Code*. The *Model Penal Code* states that lethal defensive force may not be used if the defender "knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he can abstain from any action that he has no duty to take".<sup>109</sup>

2.128 By contrast, the 'stand fast approach' asserts that defenders should have the right to stand their ground against a threat and fight, except in cases of self generated necessity which is examined below. This approach is also, consistently, adopted in relation to the public defences of crime, which involve assisting or effecting an arrest and preventing a crime. In the words of the renowned English writer Glanville Williams:

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<sup>107</sup> Beale "Retreat from a Murderous Assault" (1903) 16 Harv L Rev 567.

<sup>108</sup> *Ibid.*

<sup>109</sup> Section 3.04 (2)(b)(ii) of the *Model Penal Code*.

“A person who is arresting a criminal or preventing a crime cannot retreat without abandoning his purpose.”<sup>110</sup>

2.129 The American jurist Foster is recognised as one of the first to articulate the ‘stand-fast’ approach. For Foster, “the right of self defence... is founded in the law of nature. In cases of necessity the law of society fails: and the victim is remitted to his natural rights.”<sup>111</sup> In his opinion, emphasis should be placed on the individual’s right to bodily integrity and autonomy (which the Commission notes are protected by Article 40.3 of the Constitution of Ireland) as opposed to just the need to uphold the law for public policy reasons. As recognised in the Consultation Paper, Foster’s analysis and approach to necessity was adopted by the majority of commentators until the 20th century, but in terms of the common law courts the retreat issue received very little attention, with the exception of the United States of America.<sup>112</sup>

2.130 Despite support for both the safe retreat approach and the stand fast approach in the United States, the majority of common law jurisdictions have favoured a less structured “compromise” approach to the issue of necessity and retreat. This involves the necessity rule being subsumed under the broad umbrella of the test of ‘reasonableness,’ where retreat is not considered compulsory but merely a factor to be taken into account.

2.131 Examples of the compromise approach can be found in Australia, Canada and England and were discussed in depth by the Commission in the Consultation Paper. In the 1985 English decision *R v Bird*, the compromise approach was clearly set out, indicating that a court or jury, as the case may be, merely needs to take ‘retreat’ as one of the factors to be taken into account:

“Evidence that the defendant tried to retreat or tried to call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that.”<sup>113</sup>

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<sup>110</sup> Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 459-460.

<sup>111</sup> See a summary of Foster’s position in Perkins & Boyce *Criminal Law* (3<sup>rd</sup> ed Foundation Press 1982) at 1121, McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 737-738. See generally LRC CP 41-2006, at paragraphs 5.19 - 5.27.

<sup>112</sup> For a review of the American approach see LRC CP 41-2006, at paragraph 5.22 - 5.27.

<sup>113</sup> *R v Bird* [1985] 2 All ER 513 at 516.

2.132 As regards Ireland's approach to the retreat rule, the decisions in *People (Attorney General) v Dwyer*<sup>114</sup> and *People (DPP) v Clarke*<sup>115</sup> are important as well as the more recent case of the *People (DPP) v Barnes*.<sup>116</sup> *Barnes* is particularly valuable in terms of discussing the issue of the Castle doctrine (where there is no duty to retreat in one's home) and self-generated necessity. These cases indicate that, as with the majority of other common law jurisdictions, Ireland has favoured the less structured 'compromise' approach. Indeed, the compromise approach was implemented in Irish law to deal with non-fatal offences in section 20(4) of the *Non-Fatal Offences Against the Person Act 1997*.<sup>117</sup>

**(c) Conclusions and Recommendations**

2.133 From this discussion it becomes evident that the principle of necessity has important implications for the overall test of legitimate defence. In the opinion of the Commission, the current 'compromise' approach is not satisfactory, offering very little guidance and instruction. The Commission agrees with Ashworth who advocates "articulating certain general principles which can be used for the guidance of both individuals and the courts" rather than relying on vague concepts of reasonableness.<sup>118</sup>

2.134 The stand fast approach, founded on the individual's right to bodily integrity and autonomy is not favoured by the Commission. Though it is arguable that this approach most readily recognises that defenders are often required to act instinctively in dangerous situations, it ignores the attacker's right to life and physical security.

2.135 On this basis, the Commission is of the opinion that the safe retreat approach is a preferable approach. This approach recognises the right to life of both the defender and the attacker. Furthermore, this approach maintains public policy considerations by encouraging the avoidance of conflict. This is not to say that the rule should be interpreted in an unduly strict manner. It is recognised that many individuals have a tendency to act in the 'heat of the moment' and in such situations are unlikely (and understandably so) unwilling to

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<sup>114</sup> [1972] IR 416.

<sup>115</sup> [1994] 3 IR 289.

<sup>116</sup> [2006] IECCA 165, [2007] 3 IR 130.

<sup>117</sup> Section 20(4) provides: "The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable."

<sup>118</sup> Ashworth "Self-Defence and the Right to Life" (1975) Cambridge Law Journal 282-287.

place themselves in further risk. Therefore, the safe-retreat rule only obliges an individual to retreat where it is completely safe to do so, in other words it is practicable to do so. The Commission realises that in the majority of situations of attack, retreat may be inapplicable but nonetheless the Commission believes that the principle of necessity and the duty to retreat *safely* is important and should be incorporated into Irish law.

2.136 As regards public defences and the duty to retreat, the Commission maintains the view expressed in the Consultation Paper that there should be no duty to retreat in respect of public defences. It would be impossible for a law enforcement officer effecting an arrest or preventing a crime to retreat without abandoning his or her purpose.

2.137 *The Commission recommends that the necessity rule should remain a requirement of legitimate defence. The Commission also recommends that, in assessing whether the use of force was necessary, the court or jury as the case may be may take account of the circumstances as the accused reasonably believed them to be.*

2.138 *The Commission recommends that innocent defenders may only resort to defensive force in response to a threat where they are unable, as a matter of practicability, to retreat without complete safety from the threat. The Commission also recommends that public defenders are not required to retreat from a threat in any instance.*

#### **(1) Self Generated Necessity**

2.139 Self generated necessity as mentioned above is an ancillary issue to the principle of necessity. Self generated necessity arises where the defender is wholly or partly to blame for the original conflict. Understandably, in these circumstances the common law has always been reluctant to allow the full rights of the defence of legitimate defence and has imposed stringent requirements on the defender over and above those normally required. The two main requirements on a defender in a situation of self generated necessity are firstly, that the person who set the attack in motion is precluded from raising the defence of legitimate defence unless the reaction from the victim was disproportionate. Secondly, there is a more onerous duty on the self induced defenders to retreat from the attack.

#### **(a) Consultation Paper Recommendations**

2.140 In the Consultation Paper, the Commission provisionally recommended that a person, who has provoked or initiated the conflict which is threatening their safety, is only entitled to use, in particular, lethal defensive force in the face of a disproportionate response from the original victim and where they are unable to retreat in complete safety.

**(b) Discussion**

2.141 In the Consultation Paper, it was recognised that, at that time, there was no clear judicial statement of Irish law on self generated necessity and therefore much of the discussion involved an analysis of other jurisdictions and also a study of proposals to impose differing retreat obligations as advocated by Joseph H. Beale. Since then, the Court of Criminal Appeal considered this issue in *People (DPP) v Barnes*.<sup>119</sup> Before reviewing the Court of Criminal Appeal decision, it is necessary to briefly review the Consultation Paper findings.

2.142 Firstly the Commission agrees that there are sound and logical reasons for making a distinction between provoked attacks and unprovoked attacks when establishing the boundaries for the duty to retreat. It is clearly desirable to impose greater retreat obligations on those who create the need to use self defence than on innocent defenders.

2.143 Assessing the fact that greater clarification was required in this area, the Commission set out to explore the options for reform. One way to achieve this would be to draw a distinction between provoked and unprovoked attacks, through Beale's classification system.<sup>120</sup>

2.144 In his writings, Beale outlined three broad categories of cases involving self generated necessity. The Commission adopted a similar tripartite distinction in the Consultation Paper. The first category can be referred to as "deadly original aggressors" and involves cases where the accused has deliberately initiated or provoked the conflict in order that they might kill their victims under the pretext of legitimate defence. The second category referred to as "non-deadly original aggressors" involves cases where the accused has also deliberately initiated or provoked the conflict but with the intention of using only less than lethal force. The third category involves cases where the accused did not necessarily initiate the conflict but has willingly joined in. This category is referred to as "mutual aggressors".<sup>121</sup>

2.145 In this system, "deadly original aggressors" would be subject to an absolute requirement of withdrawal, while "non-deadly original aggressors" and "mutual aggressors" would be required to 'retreat to the wall' before using lethal force in their defence. Such approaches impose retreat obligations on defendants that are commensurate with their original culpability.

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<sup>119</sup> [2006] IECCA 165, [2007] 3 IR 130.

<sup>120</sup> Beale "Retreat from a Murderous Assault" (1903) 16 Harv L Rev 567.

<sup>121</sup> For a detailed discussion see Beale "Homicide in Self-Defence" (1903) 3 Columbia Law Review 525 and more generally LRC CP 41-2006, at paragraphs 5.134 -5.221.

2.146 Although setting out such categories is a desirable objective, it is questionable whether such division could ever be achieved in reality. It is extremely difficult to draw a distinct line between each category of aggressor.

2.147 The Commission noted that another option would be to simply draw a distinction between provoked and unprovoked attacks whereby there would be a duty to retreat on those who provoke attacks. This position has been adopted in the Canadian *Criminal Code*<sup>122</sup> and the Queensland *Criminal Code*.<sup>123</sup> The Commission does not recommend this approach given that a duty to retreat has already been imposed in cases involving unprovoked attacks.

2.148 Another approach option that could be adopted is the 'compromise approach'. This approach takes into account the original aggression of the defender as a factor to be considered in assessing the overall 'reasonableness' of the defender's actions. Again, the Commission believes that this approach offers little guidance to the jury and draws little distinction between provoked and unprovoked attacks and accordingly does not recommend its' adoption.

2.149 In *The People (DPP) v Barnes*<sup>124</sup> the Court of Criminal Appeal considered the issue of self-generated necessity. The Court drew on the *Non-Fatal Offences Against the Person Act 1997* by way of analogy. The Court held that since a burglary is an act of aggression, analogous to an assault or trespass to the person, a burglar during the course of the burglary can never be wholly blameless. The Court held that the killing of a householder by a burglar during the course of burglary can never be less than manslaughter by reason of the burglar's initial grave aggression.

2.150 The Court did, however, allow for one exception to this rule; a burglar can be permitted to use force in self-defence where there is an attempt by the householder to kill the burglar simply for being a burglar; in cases where there is no (perceived) threat to the life of the householder or other residents. The basis for this argument is grounded in the constitutional right to life of all citizens (including burglars) enshrined in Article 40.3 of the Irish Constitution.

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<sup>122</sup> Section 35 of the Canadian *Criminal Code*. However, this distinction is undermined by the fact that in lethal defensive force cases, the "provoked attacks" provision has been interpreted broadly enough to cover cases of "provoked attacks": see Stuart *Canadian Criminal Law* 3<sup>rd</sup> ed (Carswell 1995) at 444.

<sup>123</sup> Section 272 of the Queensland *Criminal Code*.

<sup>124</sup> [2006] IE CCA 165; [2007] 3 IR 130. See the discussion at paragraph 2.16ff, above.

2.151 This argument has not escaped criticism and it has been argued that “the conclusion the Court reaches by virtue of this route – that a jury must find a burglar who kills, guilty of manslaughter, subject to one exception – appears to contradict explicit and implicit Court of Criminal Appeal jurisprudence.”<sup>125</sup>

**(c) Conclusions and Recommendations**

2.152 With regard to self-generated necessity, the Commission recommends that no classification system should be put in place; rather an aggressor should be entitled to use lethal defensive force only when confronted with a disproportionate response from the original victim. The defender who initiated the attack in the first instance can only use lethal defensive force to defend himself or herself where the response from the victim has been wholly disproportionate.

2.153 In the Commission’s opinion, this strikes a balance between the relevant competing rights and interests. In the first place, it upholds the public policy of avoiding further conflict, as in the case of unprovoked attacks by ensuring that the lethal defensive force may only be used by the self generated defender when the response from the victim is disproportionate. Furthermore, this approach guarantees protection against the person who wishes to kill by provoking an attack, responding with a lethal blow and then seeking to raise the defence. Finally, the right to life of both the victim and the aggressor is upheld through this approach. It safeguards the right to life of the victim by allowing the victim to respond to the attack without facing prosecution, while in the case of the aggressor, his or her right to life is protected by allowing the use of lethal force in reaction to a disproportionate response by the victim.

2.154 The Commission discusses in Part F in the context of the proportionality requirement the factors that should be taken into account to assess whether a response is proportionate or disproportionate.

2.155 In conclusion, the Commission recommends that there should be a differentiation made between attacks of a provoked and unprovoked nature and further restrictions should be imposed on those who provoke attack while still upholding their right to life.

2.156 *The Commission recommends that a person who has provoked or initiated the conflict which is threatening their safety is only entitled to use defensive force in the face of a disproportionate response from the original victim and where they are unable to retreat in complete safety.*

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<sup>125</sup> O’Sullivan “The Burglar and the Burglarised: Self-Defence, Home-Defence and Barnes” (2007) Vol. 17 (4) ICLJ 10-14, at 12.

**(2) Defence of Property and the Duty to Retreat – the Castle Doctrine**

2.157 Necessity and the duty to retreat is central to a discussion on defence of property and is known generally as the Castle Doctrine. The Castle Doctrine asserts that defenders are entitled to 'stand their ground' when attacked in their home, and as such represents a significant exception to the normal obligation to retreat.

**(a) Consultation Paper Recommendations**

2.158 In the Consultation Paper the Commission provisionally recommended that a defender should not be required to retreat from an attack in their dwelling home even if they could do so with complete safety. In this regard, all occupants of dwelling homes should be entitled to the benefit of the Castle Doctrine, and it is irrelevant if the defender is attacked by an intruder or non-intruder and the "dwelling house" should be defined as including the cartilage, or the area immediately surrounding the home.<sup>126</sup>

**(b) Discussion**

2.159 The castle doctrine was originally formulated in the 17<sup>th</sup> Century *Semayne's case* to the effect that "the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose..."<sup>127</sup>

2.160 In essence, the effect of the castle doctrine is that while there may be an obligation on a person who is attacked in the street to retreat before they use lethal force, this obligation to retreat does not exist where the person is in their own home; defenders are entitled to stand their ground when attacked in their own home.<sup>128</sup> The special status granted to the protection of the home is related to "[mankind's] fundamental physical and psychological need for some sort of shelter and sanctuary."<sup>129</sup> Similarly, McAuley and McCutcheon note that the home is the most important source of personal protection from felonious attack.<sup>130</sup> In *The People (DPP) v Barnes*<sup>131</sup> the court stated that a person's

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<sup>126</sup> LRC CP 41-2006, at paragraph 5.133.

<sup>127</sup> (1604) 77 Eng. Rep 194 at 195.

<sup>128</sup> For a detailed discussion on the Castle Doctrine see (LRC CP 41-2006), paragraphs 5.75-5.133.

<sup>129</sup> Katheder, "Lovers and Other Strangers - State v Bobbit" (1983) 11 Fla St U L Rev at 484.

<sup>130</sup> McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 761.

dwelling house is far more than bricks and mortar; it is the home of a person and his or her family, dependants or guests (if any) and is entitled to a very high degree of protection by the law. However, the Court also made it clear that this does not mean that a householder has a 'licence to kill' with impunity any person whom he finds in his home.

2.161 The Court acknowledged that many social and historical reasons could be cited to support this view, but no more than the Constitution was needed. The protection given to the home by virtue of Article 40.5 could not be outweighed by the duty of the State under Article 40.3.1 to protect and vindicate, so far as practicable, the life of every citizen. The Court stated:<sup>132</sup>

“It seems an elementary proposition, in the light of such provisions, that a person cannot lawfully lose his life simply because he trespasses in the dwelling house of another with intent to steal. In as much as the State itself will not exact the forfeiture of his life for doing so, it is ridiculous to suggest that a private citizen, however outraged, may deliberately kill him simply for being a burglar.”

2.162 However, the Court accepted that “this is by no means the end of the matter”. In reviewing the relevant case law and having regard to section 20(4) of the *Non-Fatal Offences Against the Person Act 1997*, the Court pointed out that every burglary in a dwelling house is an act of aggression and every burglar is an aggressor. Although a burglar is not liable to be killed by the householder simply for being an aggressor, the Court held that force may be used to immobilise or detain a burglar to end the threat to the personal rights of the householder or family or guests. The rationale for the acceptance of the castle doctrine was clearly set out in *Barnes* when the Court noted that, by virtue of Article 40.5 of the Constitution, the dwelling house has a higher value, “legally and constitutionally”, than other forms of property. The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwelling house, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family.

2.163 As a result of the *Barnes* decision, it would seem that the castle doctrine now forms part of Irish law. However, the Court stressed that this does not amount to a licence to kill. The amount of force used must be reasonable in the circumstances.

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<sup>131</sup> [2006] IECCA 165, [2007] 3 IR 130. See the discussion at paragraph 1.16ff, above.

<sup>132</sup> [2007] 3 IR 130, at 146-7, para 49.

2.164 Arising out of the *Barnes* case, and influenced by similar cases such as *The People (DPP) v Nally*<sup>133</sup> and the English case *v Martin*<sup>134</sup> case, the Commission is conscious that the Oireachtas has debated this matter on a number of occasions. This has included debates on Private Members Bills in 2006, the *Criminal Law (Defence of Life and Property) Bill 2006* and the *Criminal Law (Home Defence) Bill 2006*. Both Bills proposed to amend the law in relation to the protection of those who are faced with confronting intruders or trespassers home occupiers. In 2007, the Government introduced a *Criminal Law (Defence of Life and Property) Bill 2007*, which remains at Second Stage on the Dail Eireann Order Paper at the time of writing (December 2009).

2.165 The principal provisions of these Bills include the right to use reasonable force by a person in their dwelling or in the curtilage of the dwelling in which the person was residing or normally resided to protect their dwelling, themselves, their family or others. They also proposed amending section 20(4) of the *Non-Fatal Offences Against the Person Act 1997* so that there would be no duty on householders to retreat from their homes.

2.166 When a further Private Members Bill, the *Criminal Law (Home Defence) Bill 2009*, was debated in 2009, the Government indicated that it would await this Report by the Commission before proceeding further in this area.<sup>135</sup>

2.167 A number of critical issues which influence the ambit of the castle doctrine need to be mentioned. Firstly, in the drafting of legislation in this area, the question of what constitutes a “dwelling house” is extremely important in order to avoid uncertainty. Traditionally, the castle doctrine was limited in its application to the four walls of the home and the “curtilage”, namely the area immediately surrounding the home. In the Consultation Paper, the Commission noted that it is appropriate that the word dwelling is not defined too narrowly yet also places some definite limits on what actually constitutes the “dwelling”. A terms such as “curtilage” or “vicinity” is a useful phrase which can be interpreted with regard to the particular area within which the dwelling is located. Different considerations need to be taken into account when discussing houses in rural areas as opposed to urban areas.

2.168 In the *Criminal Law (Defence of Life and Property) Bill 2007*, a dwelling was given a broad definition to include permanent and temporary structures. Curtilage of a dwelling was described as any driveway, access path, garden, yard, area, space, building, store, garage and passage in the close

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<sup>133</sup> 2006] IECCA 128, [2007] 4 IR 145.

<sup>134</sup> *R v Martin* [2003] QB 1.

<sup>135</sup> Vol.689 *Dail Debates* 586 (17 September 2009).

vicinity of the dwelling and usually used in conjunction with it. The Commission considers that this type of definition is suitable in this context and, for ease of understanding, considers that the word “vicinity” might be regarded as a more modern term.

2.169 Another question raised by the Commission regarding the ambit of the doctrine was whether the doctrine applied to ‘sanctuaries’ other than the home. In the United States, there is some support for the extension of the doctrine to include places of work but the Commission submits that the doctrine should not be extended to places of work. As noted in the Consultation Paper, if the doctrine is extended to an individual’s place of work, there is no rationale for not extending it to a defender’s club or organisation. If the doctrine was extended in this manner, it would be difficult for its precise parameters to be identified and it could be extended to such an extent that it would no longer constitute a coherent doctrine.<sup>136</sup>

2.170 Another important issue is who should be entitled to the benefit of the doctrine. Should the doctrine be confined to the owners of the house or should all occupants be entitled to avail of it? In the United States, courts in general have been content to afford all occupants with the benefit of this doctrine. The Commission believes this is a sound approach; there is no sensible basis for distinguishing between householders and occupants in this regard. The true rationale for the defence is that the home is a place of sanctuary. It is totally irrelevant if the dwelling is a temporary or permanent one once it constitutes the person’s sanctuary for the time being.

2.171 Furthermore, the Commission is of the opinion that no distinction should be placed between an intruder and non-intruder. Again, there is no logical reason why the doctrine should only apply where the attacker is an intruder.

**(c) Conclusions and Recommendations**

2.172 *The Commission recommends that a defender should not be required to retreat from an attack in their dwelling (which should be defined to include a permanent or temporary structure) even if they could do so with complete safety.*

2.173 *The Commission also recommends that this non-retreat rule should apply to all occupants of dwellings, and that it is irrelevant that the defender is attacked by an intruder or non-intruder. The Commission also recommends that “dwelling” should be defined as including the vicinity or the area immediately surrounding the home, including any access path, garden or yard ordinarily used in conjunction with the dwelling.*

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<sup>136</sup> LRC CP 41-2006, at paragraph 5.131- 5.132.

## **F The Proportionality Requirement**

2.174 The fourth requirement to be discussed with regard to the test for legitimate defence is proportionality. The concept of proportionality is central to a discussion of legitimate defence. As the title suggests, the proportionality rule provides that defensive force may only be used when the response is proportionate to the harm sought to be avoided.

2.175 Proportionality can be closely associated with the threshold rule discussed earlier as well as imminence and necessity. As McAuley and McCutcheon point out, “the rule that defensive force must be proportionate to the unlawful attack can be regarded as an alternative way of stating the requirement that force must be necessary in the circumstances.”<sup>137</sup> If no more than necessary force may be used, it adds nothing to say that defensive force must also be proportionate.<sup>138</sup> The role of the proportionality rule, in combination with the threshold test, is to ensure that defensive force is deployed *only* where the threat is sufficiently serious to warrant a deadly response. Therefore, proportionality is “a balancing of competing interests”, the interests of the defender and those of the aggressor.”<sup>139</sup>

### **(a) Consultation Paper Recommendations**

2.176 In the Consultation Paper, the Commission provisionally recommended that defensive force, in particular lethal defensive force, should be prohibited where it is grossly disproportionate to the threat for which the defence is required.

2.177 Accordingly, the Commission provisionally recommended the adoption of the proportionality rule and the threshold test.

2.178 To achieve these recommendations, the Commission provisionally recommended that the factors relevant to the assessment of proportionality should be clearly and concisely set down in legislation.

### **(b) Discussion**

2.179 As identified in the Consultation Paper, the concept of “proportionality” has long been intertwined with the test for legitimate defence,

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<sup>137</sup> McAuley & McCutcheon *Criminal Liability: A Grammar* (Round Hall Sweet & Maxwell 2000) at 754.

<sup>138</sup> *Ibid.*

<sup>139</sup> Fletcher *Basic Concepts of Criminal Law* (Oxford University Press 1998) at 136.

whether in the form of a proportionality rule or a “threshold test”.<sup>140</sup> The 19<sup>th</sup> century Australian case *R v Ryan*<sup>141</sup> demonstrates this aspect well:

“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 manning him with an axe or other deadly weapon.”<sup>142</sup>

2.180 However, in more recent times it can also be seen that the rule has been diluted and it no longer enjoys the status of a stand-alone requirement.<sup>143</sup>

2.181 The difficulty with the proportionality rule is that although it would seem relatively straightforward in application, problems arise because of the balancing process involved. In essence, the proportionality rule is equal to the “choice of evils” test associated with the defence of necessity (duress of circumstances).<sup>144</sup> Where the interest threatened by the attacker is equal to that threatened by the defender, for example life; there is little difficulty. The problems arise when the ‘threats’ differ. For example, how does one gauge the attacker’s right to life against a defender’s right not to be seriously injured; or in the case of an attack on property, the defender’s right to defend his or her home, against the burglar’s right to life? In the case of public defences, the difference may be between preventing a non-deadly crime and society’s interest in upholding the law; or in the case of assisting or effecting an arrest, society’s interest in apprehending criminals. Furthermore what one person deems proportionate may not be proportionate to another. As a consequence, it is understandable why giving a clear definition of proportionality has proved troublesome.

2.182 One approach would be to prohibit the use of lethal defensive force in all cases in which the threat by the attacker is not life threatening. However, this approach has been deemed too simplistic. The Commission considers that determining whether a lethal response is proportionate to the threat can only be achieved with the assistance of detailed legal guidelines, an approach which has proved elusive to date.

2.183 For example in Irish law, proportionality was well established in the vocabulary of the law of legitimate defence up until the 1950s but in the course of the latter half of the 20<sup>th</sup> century its position became increasingly obscure. In

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<sup>140</sup> See generally LRC CP 41-2006, at paragraphs 6.09 -6.12.

<sup>141</sup> (1890) 11 NSW 171.

<sup>142</sup> (1890) 11 NSW 171 at 182 per Windeyer J.

<sup>143</sup> See generally LRC CP 41-2006, at paragraphs 6.08ff.

<sup>144</sup> See generally Chapter 5, below.

two of the leading criminal cases on legitimate defence *The People (Attorney General) v Keatley*<sup>145</sup> and *The People (Attorney General) v Dwyer*<sup>146</sup> proportionality was not referred to at all. In *Keatley* legitimate defence was defined solely in terms of “necessity” whilst in *Dwyer* a test of “reasonable necessity” was adopted. It should be noted, however, that in *Dwyer* Walsh J’s judgment substituted a threshold test in lieu of the proportionality requirement, thus restricting the use of lethal force to cases of life threatening attack.<sup>147</sup>

2.184 In later decisions, the position of proportionality appeared to be elevated to a more prominent role once again. In *The People (DPP) v Clarke*<sup>148</sup> the Court of Criminal Appeal appeared to adopt the approach that had been taken in the UK Privy Council case *Palmer v The Queen*<sup>149</sup> whereby the jury was entitled to take into account the defender’s use of grossly disproportionate force as part of the overall assessment of reasonableness. By contrast, in *The People (DPP) v Cremin*<sup>150</sup> the Court stated that the issue for the jury was whether the defender’s response to aggression was a reasonably proportionate reaction.

2.185 In the Consultation Paper, the Commission took the view that a negative finding on this point would be fatal to a successful plea. Furthermore, it could also be said that proportionality was now elevated from being a mere factor to be taken into account to a stand-alone test because of *Cremin*.

2.186 Whilst expounding this view, however, the Commission also acknowledged that this conclusion might involve reading too much into the wording of the judgment and the fundamental question of what is actually meant by the “reasonable proportionality” of the *Cremin* test remains. On the one hand, it may indicate that proportionality is to be judged by an objective standard. On the other hand, it may mean that the proportionality rule is not to be applied in the strictest sense; only grossly disproportionate defensive force would fail to achieve this standard.

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<sup>145</sup> [1954] IR 12.

<sup>146</sup> [1972] IR 416.

<sup>147</sup> [1972] IR 416 at 420.

<sup>148</sup> [1994] 3 IR 289.

<sup>149</sup> [1971] AC 815.

<sup>150</sup> Court of Criminal Appeal, 10 May 1999.

2.187 Under section 18 of the *Non Fatal Offences Against the Person Act 1997*, the role of proportionality is even more obscure. The test for legitimate defence under the 1997 Act is solely based on reasonableness.<sup>151</sup>

2.188 As regards the approach of other common law jurisdictions to the question of proportionality, it becomes clear that similar to other elements of private defence, proportionality too has become enveloped into the amorphous test of reasonableness.

2.189 In the English case *Beckford v R*<sup>152</sup>, for example, the test to be applied in self-defence is “that a person may use such force as is reasonable in the circumstances.” But how is this test of reasonableness is to be interpreted?

2.190 From the Commission’s in depth examination in the Consultation Paper, it can be seen that this test has been interpreted with varying approaches. Examples of a broad interpretation, whereby proportionality is not to be understood in the strict sense but given a rough approximation, can be witnessed in a number of decisions.<sup>153</sup> In *Palmer v The Queen*<sup>154</sup>, the UK Privy Council indicated that the prosecution would need to show something more than mere disproportionality:

“If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation.”<sup>155</sup>

2.191 In Australia, a number of cases also illustrate a “minimising” approach towards proportionality.<sup>156</sup> In the well known case of *Zecevic v DPP*<sup>157</sup>, the High Court of Australia clearly warned against “elevating matters of evidence to rules of law”; proportionality was only to be a factor taken into account as part of “the whole of the circumstances”.<sup>158</sup> In their commentary on

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<sup>151</sup> Section 18(1) provides: “The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence...”

<sup>152</sup> (1987) 85 Cr App Rep 378.

<sup>153</sup> See generally LRC CP 41- 2006, paragraphs 6.25- 6.28.

<sup>154</sup> [1971] AC 814.

<sup>155</sup> *Palmer v the Queen* [1971] AC 814 at 831 per Lord Morris of Borth-y-Gest.

<sup>156</sup> See generally LRC CP 41-2006, at paragraph 6.29 and *R v Viro* (1978) 141 CLR 88.

<sup>157</sup> (1987) 71 ALR 641.

<sup>158</sup> (1987) 71 ALR 641 (Wilson, Dawson and Toohey JJ, Mason CJ concurring).

this case, O'Connor and Fairall concluded emphatically that "there is no separate requirement of proportionality in self-defence", other than its evidentiary significance, "it has no life of its own."<sup>159</sup>

2.192 By contrast, proportionality arguably plays a greater role in some jurisdictions such as Australia, Canada and New Zealand, whether by imposing a proportionality requirement or alternatively a threshold test. In general however, the comparative survey demonstrates that the most common approach to legitimate defence is an amalgam of the "reasonableness" and the "gross disproportionality" approaches; proportionality is relevant to the question of reasonableness but only in so far as there has been a gross departure from the standard.

2.193 A number of possible options for reform were outlined in the Consultation Paper. Firstly, proportionality as an element of private defence could be abandoned altogether. The Commission does not approve of this approach. The proportionality rule like the threshold requirement places a limitation on the right to use force and in doing so safeguards both the right to life of the defender and the attacker.

2.194 Whilst the threshold test and the proportionality rule seek to achieve the same end – ensuring that defensive force is deployed only where the threat is sufficiently serious to warrant a deadly response – the means by which they do so differ. A threshold test sets out in advance an exhaustive list of threats, where (in particular, lethal) defensive force can be used in response. By contrast, the proportionality rule seeks to calculate the harm that would flow from the response against the harm that would flow if the attack were allowed to proceed. As such, the threshold test is cruder than the proportionality rule.

2.195 The Commission takes the view that the implementation of both the threshold test and the proportionality rule would be appropriate. Threshold tests in their own right operate as a useful guide and a signpost for the whole community (including potential attackers, defenders as well as those who have to judge the actions of the defendant) as to the types of conduct that *might* warrant a lethal defensive response. As already noted, by implementing a threshold test, potential defenders are put on notice as to the minimum requirements for the successful pleas; juries are provided with a useful starting point for assessing claims of legitimate defence; and law reformers are squarely confronted with the democratic function of drawing a clear dividing acceptable and unacceptable defensive conduct.<sup>160</sup>

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<sup>159</sup> O'Connor & Fairall *Criminal Defences* 3<sup>rd</sup> ed (Butterworths 1996) at 184.

<sup>160</sup> LRC CP 41-2006, at paragraph 6.54.

2.196 Therefore, adopting both a proportionality rule and a threshold test would be an important step towards achieving certainty in the law of legitimate defence, and in doing so would satisfy the principle of legality. On this basis, the Commission recommended the adoption of both the proportionality rule and the threshold test.

2.197 The second option for reform involves taking proportionality as just one factor to be considered in assessing the overall reasonableness, in other words the current approach of most common law jurisdictions. This approach does not see proportionality as a requirement in its own right. Undoubtedly the advantage of this approach is its flexibility in that it allows courts and juries a broad discretion to tailor verdicts to suit the circumstances of each case.

2.198 In the opinion of the Commission, however, this approach leads to a greater risk that views will differ in borderline cases. To cite Williams, “in the absence of rules of law, an element of arbitrariness is unavoidable, offering defenders little practical guidance when making split-second decisions and exposes them to the ‘vagaries of juries’ and... gust of public opinion”.<sup>161</sup>

2.199 The two remaining options include “a strict proportionality” or a “gross proportionality” test. The “strict proportionality” test has its advantages by incorporating certainty and precision to the law on legitimate defence. Furthermore, the test is a simple test for the jury to apply; it involves simply assessing whether the good effects outweigh the bad effects of the force used. In the Commission’s view, a strict test is also inflexible and unduly onerous. This approach has no regard for human impulses of panic and fear.

2.200 The “gross proportionality” test in contrast is much less onerous, offering courts and juries discretion to tailor their verdicts yet still with guidance and limitation. The gross proportionality test is one which the jury can be provided with adequate guidance whereby they should be informed that any force must be proportionate to the threat but that this requirement need not be interpreted strictly. In the opinion of the Commission the discretion offered by this approach is necessary to cater for cases in which defenders are understandably over-exuberant in their response.

2.201 Furthermore, the Commission believes that this test is most adequately suited to finding the correct balance and also acknowledges ‘indeterminate community standards’.

2.202 It must be noted however, that the implementation of both the proportionality rule in the form of the “gross proportionality test” and the threshold test is not favoured by all. The Commission received a number of submissions in the consultation process disagreeing with this approach in

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<sup>161</sup> Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456-7.

favour of a more subjective approach. It was argued that the more appropriate way to deal with such cases is on the basis of a reasonable response to the circumstances, as perceived or understood by the accused rather than by a limitation through a proportionality rule and threshold test. Once the use of force is proportionate in the circumstances (as perceived and understood by the accused), he or she should not be guilty of an offence. It was argued that to suggest otherwise does not adequately protect the rights of those in society who are of a less robust disposition than others.

2.203 In response, the Commission accepts that no two cases regarding private defence are the same and account must be taken of the individual circumstances that arise. However, the Commission advocates the view that it is precisely for this reason that citizens are entitled to clear rules so that they can be aware of the limitations that arise under the law of legitimate defence. It is imperative that citizens are aware of the boundaries of their response in legitimate defence.

2.204 Another issue that requires mention here is the use of disproportionate defensive force used by a woman in response to domestic violence. The Commission dealt with this issue under the “imminence requirement” but proportionality is also an aspect of the defence that causes difficulties in cases, such as the ‘battered woman’. In a similar approach to the imminence rule, the Law Reform Commission of Western Australia recently recommended that a trial judge must direct the jury on these factors. In regard to proportionality, the recommended jury direction reads as follows:

“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.”<sup>162</sup>

2.205 In this respect, the Commission also accepts that, as with the imminence requirement, it is important to assess proportionality from the perspective of the person as he or she reasonably believes them to be.

2.206 In the Commission’s opinion the implementation of a threshold test coupled with a general proportionality test, both based on of the circumstances as the person reasonably believes them to be would best achieve the overall aim of certainty whilst still allowing for a certain degree of discretion to a court or jury as the case may be. By implementing such a rule, the Commission is limiting those cases in which the defensive force is deemed to be excessive; in cases where the response by the victim is *proportionate* the defence of

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<sup>162</sup> Law Reform Commission of Western Australia *Review of the Law on Homicide: Final Report* at 169.

legitimate defence is available. The Commission considers that this approach would apply in the case of non-lethal force.

2.207 *The Commission recommends that the proportionality rule should remain a requirement of legitimate defence. The Commission also recommends that, in assessing whether the use of non-lethal force was proportionate, the court or jury as the case may be may take account of the circumstances as the accused reasonably believed them to be.*

**(2) *The problem of disproportionate, excessive, lethal force***

2.208 As already mentioned, an example where the Commission needs to pay particular attention to the use of lethal force is where disproportionate or excessive lethal force is used. It is important to note in this context that, as a general rule, legitimate defence acts as a complete defence. When raised successfully, it results in a justification-based acquittal. Where, however, the use of force is deemed disproportionate or excessive, in particular where lethal force is used resulting in a death, many States have taken the view that such use of force cannot be justified.

2.209 In Ireland, the leading Supreme Court decision on legitimate defence, *The People (Attorney General) v Dwyer*<sup>163</sup> involved this argument and the Court held that, in such cases, an acquittal is not permitted but that a partial defence applies by which a charge of murder may be reduced to manslaughter. In *Dwyer* the defendant had been charged with murder. He and a friend had become involved in a street fight involving a number of people. At his trial, the defendant said that at some point in the fight he saw his friend being knocked down and kicked on the ground. The crucial setting was summarised as follows:<sup>164</sup>

The [defendant] himself was afraid of being killed and took a knife from his inside pocket. He says that he merely brandished the knife. There is other evidence that he struck with it. When the fighting ended, [the deceased] had fallen fatally stabbed... While there was evidence which would justify a jury in holding that the [defendant] came out [to fight] unnecessarily and acted aggressively with full knowledge of what he was doing so that a verdict of guilty of murder would be justified, equally there was evidence that he only reacted to being attacked and because he feared serious injury or even death.”

2.210 The trial judge had directed the jury that if the defendant used “more force than was reasonably necessary” they should find him guilty of murder, and

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<sup>163</sup> [1972] IR 416.

<sup>164</sup> *Ibid*, at 427-8.

that was the verdict at which they arrived. On appeal, the Supreme Court was asked to answer this question:<sup>165</sup>

“Where a person, subjected to a violent and felonious attack, endeavours, by way of self-defence, to prevent the consummation of that attack by force, but, in doing so, exercises more force than is necessary but no more than he honestly believes to be necessary in the circumstances, whether such person is guilty of manslaughter and not murder.”

2.211 In answering this, the Supreme Court held that, if the jury is satisfied that the “honest belief” test has been met, the appropriate verdict is manslaughter rather than murder. In that respect, the Court followed the approach taken by the High Court of Australia in *R v Howe*.<sup>166</sup> This has been described as a “half-way house” approach in which, in the case of disproportionate, or excessive, lethal force, rather than the “reasonable belief” test which the Commission has just recommended in the case of non-lethal force, a subjective “honest belief” test is applied which results in a conviction for manslaughter. In the Supreme Court, Butler J summarised the distinction between legitimate defence and this “half-way house” position:<sup>167</sup>

“A person is entitled to protect himself from unlawful attack. If in doing so, he uses no more force than is reasonably necessary, he is acting lawfully and commits no crime even though he kill[s] his assailant. If he uses more force than may objectively be considered necessary, his act is unlawful and, if he kills, the killing is unlawful.”

2.212 Similarly, Walsh J stated:<sup>168</sup>

“In the case of full self-defence the accused intends to kill or intends to cause serious injury but he does not commit any offence because the homicide is a lawful one. Therefore, his intention was to commit a lawful homicide or lawfully inflict serious injury... Full self-defence permits such a degree of force, up to and including the infliction of death, as may be regarded as being reasonably necessary... If [the prosecution establishes] that the force used was more than was reasonably necessary it has established that the killing was unlawful as being without justification and not having been by misadventure. In those

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<sup>165</sup> *Ibid*, at 426.

<sup>166</sup> (1958) 100 CLR 448.

<sup>167</sup> [1972] IR 416, at 429.

<sup>168</sup> *Ibid*., at 423-4.

circumstances the accused in such a case would be guilty of manslaughter.”

2.213 In *Dwyer* the element of ‘reasonableness’ in the accused’s use of force served as the point of distinction between what may be termed ‘lawful self-defence’ (or ‘full self-defence’ as Walsh J described it in *Dwyer*) and ‘unlawful self-defence’ (or ‘partial self-defence’ as described in *Dwyer*).<sup>169</sup> This ‘half-way’ house approach was also adopted in the Court of Criminal Appeal decisions in *The People (DPP) v Nally*<sup>170</sup> and *The People (DPP) v Barnes*.<sup>171</sup>

**(a) Conclusions and Recommendations**

2.214 The continued use of the ‘half-way’ house approach in recent cases indicates to the Commission that, where the circumstances give rise to a finding that, although the force used was disproportionate from an objective, reasonable, perspective, it is appropriate that while the death cannot be justified, a court or juries may consider that the defendant’s honest (but unreasonable) belief that lethal force was required should be given some weight, even if only to reduce a charge of murder to manslaughter.

2.215 In the specific context of lethal force, therefore, the Commission has concluded that the ‘half-way’ house approach adopted to disproportionate force in *The People (Attorney General) v Dwyer*<sup>172</sup> should be retained in the law concerning legitimate defence. Once this approach is placed within the proposed parameters of a minimum threshold, the imminence requirement, and the necessity requirement, the specific issue of disproportionate lethal force can only lead to a limited defence: it cannot be seen as justified. The ‘half-way’ house allows the court or jury, however, to take account of the specific circumstances of the accused. The Commission therefore recommends that where the defendant used disproportionate lethal force, but no more force than he or she honestly believed to be proportionate in the circumstances, unlawful homicide that would otherwise be murder may be reduced from murder to manslaughter.

2.216 *The Commission recommends that where the defendant used disproportionate lethal force, but no more force than he or she honestly believed to be proportionate in the circumstances, unlawful homicide that would otherwise be murder may be reduced from murder to manslaughter.*

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<sup>169</sup> See Dwyer “Homicide and the plea of Self-Defence” (1992) 2 ICLJ 73-93.

<sup>170</sup> [2006] IECCA 128, [2007] 4 IR 145.

<sup>171</sup> [2006] IECCA 165, [2007] 3 IR 130.

<sup>172</sup> [1972] IR 416.



## **CHAPTER 3      PUBLIC DEFENCE**

### **A            Introduction**

3.01      Public defence is the branch of legitimate defence which regulates the use of force to effect a lawful arrest or prevent a crime. Public defences involve a response to threats to societal interests rather than personal interests. The use of force to prevent a crime or to make an arrest is usually associated with public officials such as the Garda Síochána and the Defence Forces. Therefore, in this Chapter, the focus is on situations where private defence or legitimate defence is not applicable.

3.02      Part B examines the use of force to effect an arrest, while in Part C the Commission considers the use of lawful force to prevent a crime. In Part D the Commission examines the law surrounding the lawful use of force in the Defence Forces. For the reasons discussed there (in particular that this area is currently under review by the Defence Forces), the Commission recommends that this aspect of public defence should not, for the present, be included in the Commission's proposed legislative framework for legitimate defence. The Commission nonetheless discusses the current position and guidelines for members of the Defence Forces.

### **B            The Use of Force to Effect an Arrest**

3.03      In essence lawful use of force in the context of public defence is linked to the principle of welfare, whereas use of force in private defence can be linked directly to the principle of autonomy and self- preservation.

3.04      In all jurisdictions, law enforcement officials are permitted to use a level of force when necessary for the purposes of securing the peace, upholding the law, deterring crime and bringing criminals to justice. Such a position is permissible given the situations that law enforcement officers are routinely placed in; situations where there is a high risk of violence. In this jurisdiction law enforcement officers are for the most part members of the Garda Síochána. The

Garda force operates with a largely unarmed force. Currently, the only members of the Gardaí who are armed are the Emergency Response Unit (ERU).<sup>1</sup>

3.05 Public defence, however, is not the exclusive remit of law enforcement officials. As with private defence scenarios, the law recognises that certain powers also need to be granted to private citizens in order to carry out public defence; to effect or assist in an arrest or to prevent a crime, where necessary. Such powers whether granted to a private citizen or a law enforcement official are greatly intrusive and it is imperative as with private defences that the law is clear as to the degree of force that can be used by arrestors and in particular when lethal force can be used.

3.06 From the outset it must also be pointed out that in many cases public defence scenarios will overlap with those of private defence or legitimate defence. In many situations the use of defensive force might be categorised as an example of public defence, for example, to prevent a crime of attempted murder or even effect an arrest, but may be better understood primarily as a case of self-defence. In looking at the legitimate use of force, the protection of the lives of innocent victims is viewed as the paramount consideration while individual interests in personal property or societal interests in upholding the law are secondary considerations.

3.07 In relation to the use of force in effecting or assisting in a lawful arrest, typical cases include those in which force is used to overcome resistance and secondly where lethal force is used to prevent the flight of a suspect.

3.08 As noted in the Consultation Paper, the use of defensive force to overcome resistance is typically governed by the rules of private defence or self-defence, given that the arrestor would be repelling a threat to his or her person. As a consequence the problematic cases for the purposes of this section are those involving fleeing suspects where there is no physical threat posed to the arrestor and as a result the issue of self-defence does not arise.

**(a) Consultation Paper Recommendations**

3.09 In the Consultation Paper the Commission made a number of recommendations with regard to the use of force to effect an arrest.

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<sup>1</sup> In recent years there have been calls for an armed Garda force to respond to the increased level of violent crimes and in particular gangland crime. To date, however, there has been no change in legislation to allow a fully-armed force in Ireland and the Commission is led to believe that this is to continue. At the 2008 Annual Conference of the Garda Representative Association, the current Garda Commissioner Fachtna Murphy made it clear that he is “committed to maintaining an unarmed uniformed presence in our towns, cities and countryside.”

3.10 Firstly, the Commission provisionally recommended that the power to use lethal defensive force in effecting arrests should be restricted to law enforcement officers.

3.11 Secondly, the Commission provisionally recommended that the use of lethal force in effecting the arrest of a fleeing suspect should be prohibited except where the arrestee is suspected of an “arrestable offence” or it is necessary to protect a person from an imminent threat of death or serious injury.

3.12 Thirdly, the Commission provisionally recommended that a prison officer should be entitled to assume that every escaping prisoner is dangerous and consequently resort to lethal force, where all other requirements for legitimate defence are met (namely imminence, necessity and proportionality), unless he is aware that the escapee is not in fact dangerous.

**(b) Discussion**

3.13 In the Consultation Paper, the Commission recognised that historically, the common law placed very little value on the lives of fleeing felons. Under what became known as the “fleeing felon rule”, lethal force was authorised to effect the arrests of felons.<sup>2</sup> However, by the end of the 19<sup>th</sup> century it was suggested that the broad powers to use lethal defensive force should be curbed<sup>3</sup> and elements of the test for private defence should be incorporated into the test for public defences. Permitting a person to use lethal force to effect an arrest without any limitations to stop a “fleeing felon” fails to have any regard for the right to life of the felon.

3.14 To match public perception and shed the harshness associated with the “fleeing felon rule”, efforts were made throughout the 20<sup>th</sup> century to abandon or alter the rule substantially with alternative approaches being suggested and legislation implemented. In the Consultation Paper, the Commission outlined four models that have been used throughout common law jurisdictions to deal with the ‘fleeing felon’.<sup>4</sup>

3.15 The first is the “reasonableness” rule which effectively abandons any threshold requirement. The second model can be described as the “specified-crimes” rule which focuses on specific qualifying offences. The “violent-crimes” rule focuses on the violent nature of the offending and finally the “dangerous suspect” rule focuses on the future risk of offending posed by the arrestee.

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<sup>2</sup> LRC CP 41-2006, at paragraph 2.104-2.109.

<sup>3</sup> McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 770.

<sup>4</sup> See generally LRC CP 41-2006, at paragraphs 2.111-2.195.

From the outset it must be pointed out that these tests are not mutually exclusive and combinations of the tests have been and continue to be employed in many jurisdictions.<sup>5</sup>

3.16 In Ireland the preferred approach to deal with the use of lethal force to effect arrests is the “reasonableness” approach. As mentioned above and as with the discussion on private defence, the reasonableness rule abandons a threshold test in that it does not attempt to specify the types of threats that warrant the use of lethal force. Both case law and legislation in this jurisdiction illustrate this approach.

3.17 In the Consultation Paper, the Commission recognised that in Ireland there was little case law outlining the ambit of the power to use defensive force to effect arrests. Nonetheless, a number of judgments can be referred to which state that a member of the Garda Síochána, and any citizen, can use such force as is reasonably necessary to effect or maintain an unlawful arrest.

3.18 In the leading Irish case *The People (Attorney General) v Dwyer*<sup>6</sup> the Supreme Court stated that lethal defensive force could be used “in the execution or advancement of justice”.

3.19 In *Dowman v Ireland*<sup>7</sup> Barron J explained the test in terms of reasonableness explaining that:

“An arresting officer is entitled to use such force as is reasonably necessary to effect an arrest. Once the arrest has been effected, then he is also entitled to use such force as is necessary to ensure that the arrest is maintained”.<sup>8</sup>

3.20 Determining whether there is a risk of the suspect attempting to escape is based on the honest and reasonable belief of the arresting officer. Therefore, use of force will not necessarily be held to be unlawful where the arresting officer mistakenly believed the suspect was attempting to escape or was about to use force to resist the arrest. But merely because the use of force was necessary to effect an arrest, it does not follow that any degree of force

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<sup>5</sup> The Model Penal Code employs the violent-crimes rule and the dangerous-suspect rule as alternative tests for the use of non-lethal force to effect an arrest.

<sup>6</sup> [1972] IR 416, at 420. See the general discussion of the case at paragraph 2.209ff, above.

<sup>7</sup> [1986] ILRM 111.

<sup>8</sup> [1986] ILRM 111 at 115. In this case, it was held that the Garda officer was doing neither of those things, rather he was denying the plaintiff the right to concern himself with the welfare of his children who had accompanied him and were in his care.

may be used. Adhering to the reasonableness test, the use of force has to be reasonably necessary in the circumstances. The use of force must be proportionate. For example, use of force which causes serious injury or even death to a suspect “shop-lifter” is totally disproportionate to the gravity of the crime.

3.21 In summary, the broad principles that emerge from case law are firstly that the arresting officer may only use such force as is necessary to effect the arrest and is justified by the need to protect others from violence. This justification is determined by the honest and reasonable belief of the officer. Lethal use of force is not permitted where there is no immediate threat of harm to anyone if the suspect escapes nor where the amount of force used is disproportionate to the threat sought to be averted. Walsh points out that these common law principles appear to be consistent with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>9</sup>

3.22 The use of force to effect an arrest has been dealt with in section 19 of the *Non-Fatal Offences Against the Person Act 1997*. However, as with private defence, it is not clear whether the 1997 Act should be interpreted as a complete statement of the lawful use of force in this context or only as statement limited to the offences dealt with in the 1997 Act. By contrast, section 3 of the English *Criminal Law Act 1967* states clearly that when the use of force in the prevention of a crime or in effecting an arrest is considered reasonable, no civil action or criminal proceedings will lie against the person using it. The *Non-Fatal Offences Against the Person Act 1997* is, of course, concerned primarily with criminal liability. In addition, it is not clear whether the provisions are confined to the use of non-lethal force or extends to the uses of lethal force.<sup>10</sup> Section 19 of the 1997 Act states:

“(1) The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence...

(3) For the purposes of this section the question as to whether the arrest is lawful shall be determined according to the circumstances as the person using the force believed them to be.”

3.23 Section 19 thus stipulates that the use of force by a *person*<sup>11</sup> to effect an arrest shall not constitute an offence in certain circumstances. As with the

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<sup>9</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2000) at 189.

<sup>10</sup> See Walsh *Criminal Procedure* (Thomson Round Hall 2000) at 186.

<sup>11</sup> It is useful to point out that the 1997 Act refers to person, not law enforcement officials only. The Commission discusses below, at paragraph 3.XX, whether the

common law approach, section 19 provides a test of “reasonableness”; if the force is reasonable in the circumstances as he or she believes them to be, no offence is committed. However, this subjective standard approach has been criticised for lacking precision. Unlike the common law approach there is no reference to proportionality or necessity in this statutory provision. As Walsh points out:

“It is by no means clear how far a police officer can go in using force to effect an arrest. Should there, for example, be some proportion between the degree of force used and the gravity of the suspected offence? Should there be some proportion between the degree of force used and the strength of the grounds for suspecting the victim?”<sup>12</sup>

3.24 In the Consultation Paper the Commission recognised that there are no clear Irish authorities to give an unequivocal answer to these questions.<sup>13</sup> However, it has been argued that an analogy can be made with case law dealing with the prevention of crime or breaches of the peace whereby “there must be some proportion between the degree of force used and the importance of making the arrest.”<sup>14</sup>

3.25 Further analogies can be made with force used during civil disturbances. In *The Garda Síochána Guide*<sup>15</sup> reference is made to *Lynch v Fitzgerald (No. 2)*<sup>16</sup> where the Supreme Court examined the use of force during a civil disturbance. There, the Court expressed the view that the level of force used must always be moderate and proportionate to the circumstances of the case.

3.26 Such principles are in line with the requirements of the European Convention on Human Rights but it has been said that the Convention adopts a “stricter and more compelling test of necessity”. The Commission is of the opinion that this approach should be adhered to in the Irish context. As pointed out in Chapter 2, Article 2 of the European Convention on Human Rights

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use of force and more specifically lethal force should be limited to law enforcement officers.

<sup>12</sup> Walsh *The Irish Police: A Legal and Constitutional Perspective* (Round Hall Sweet & Maxwell 1998) at 150.

<sup>13</sup> LRC CP 41-2006, at paragraph 2.210.

<sup>14</sup> Walsh *The Irish Police: A Legal and Constitutional Perspective* (Round Hall Sweet & Maxwell 1998) at 150.

<sup>15</sup> *The Garda Síochána Guide* 7<sup>th</sup> ed (Stationary Office 2008) Vol.1 at A-191.

<sup>16</sup> [1938] IR 382.

permits the use of lethal force to effect arrests where such force is “absolutely necessary”. Although the Convention standard does not make any express reference to the requirement of proportionality, the European Court of Human Rights has interpreted the test of “absolute necessity” as incorporating both necessity and proportionality components. In *Farrell v United Kingdom*<sup>17</sup> the Court held that only moderate and proportionate force may be used in effecting an arrest.

3.27 The majority of the decisions of the European Court of Human Rights that have dealt with public defence have concerned the use of lethal force in response to threats, or perceived threats, of imminent harm. However, a number of cases have also dealt with fleeing suspects. In *Kelly v United Kingdom*<sup>18</sup> (a case which involved a shooting by the security services at a car that had attempted to break through a checkpoint in Northern Ireland) the European Commission on Human Rights concluded that the use of lethal force was justified as it was necessary and proportionate given the soldiers’ reasonable belief that the occupants of the car were in fact terrorists.<sup>19</sup>

3.28 Furthermore, in *McCann and Others v United Kingdom*<sup>20</sup> the European Court of Human Rights held that the UK had violated the right to life guaranteed protection in Article 2 of the European Convention on Human Rights in respect of three suspected IRA terrorists who were shot dead by British security services in Gibraltar. Critically, the Court held that Article 2 requires law enforcement operations to be organised so as to “minimise, to the greatest extent possible, recourse to lethal force”. The Court held that the planning and control of the operations by the UK authorities amounted to a breach of Article 2; use of force in any incident “must be strictly proportionate to the achievements of the aims set out” in Article 2.<sup>21</sup>

3.29 The standards set down in *McCann* were subsequently endorsed in *Andronicou and Constantinou v Cyprus*<sup>22</sup> where the European Court of Human Rights indicated that the taking of life must be strictly proportionate to the

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<sup>17</sup> (1983) 5 EHRR 466. In this case the SAS shot dead an IRA suspect in Gibraltar while trying to effect an arrest.

<sup>18</sup> (1993) 16 EHRR CD20 CD 21.

<sup>19</sup> See generally LRC CP 41-2006, at paragraph 2.141-2.143. See also Smith “The Right to Life and the Right to Kill in Law Enforcement” (1994) 144 NJL 354.

<sup>20</sup> (1996) 21 EHRR 97. See generally Leverick “Is English Self-Defence Law Compatible with Article 2 of the ECHR?” [2002] Crim LR 347.

<sup>21</sup> (1996) 21 EHRR 97, 201.

<sup>22</sup> (1998) 25 EHRR 491.

achievement of the objectives of Article 2(2) in order to comply with the Convention.

3.30 Another case which deals with the issue of a fleeing suspect is *Nachova v Bulgaria*<sup>23</sup> concerning the killing of two men by a military policeman who was attempting to arrest them. Relatives of the deceased men alleged that the actions of the policeman were in violation of Article 2 and that the investigation into the killings was in violation of Article 13.

3.31 In discussing the alleged breach of Article 2, the European Court of Human Rights reinforced the point that the use of force had to be “absolutely necessary”: that is to say it must be strictly proportionate in the circumstances. There can be no ‘necessity’ where it is known that the person or persons to be arrested pose no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.<sup>24</sup>

3.32 Here, the Court held that there had been a breach of Article 2 and that Bulgaria had failed in its duty to protect the right to life by not having in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and fire-arms. The Court found that the force used by the arresting officer had been “grossly excessive”.

3.33 The 1979 Code of Conduct for Law Enforcement Officials<sup>25</sup>, adopted by the United Nations General Assembly, is also worth noting. The Code specifies under Article 3 that: “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duties.” This provision emphasises that use of force by law enforcement officials should only be exceptional; law enforcement officials may be authorised to use force as is reasonably necessary under the circumstances for the prevention of a crime or in effecting or assisting in an arrest but no force beyond ‘their duty’ may be permitted. In other words the use of force must be necessary and proportionate.

3.34 The United Nations has also set out minimum standards to be observed by law enforcement officials when using force or firearms. The standard for the use of lethal force to stop a suspect under international law can also be viewed in terms of the basic principles of necessity and proportionality.

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<sup>23</sup> [2005] ECHR 465.

<sup>24</sup> [2005] ECHR 465.

<sup>25</sup> *Code of Conduct for Law Enforcement Officials*, Resolution 34/169 December 1979, adopted by the United Nations General Assembly.

The 1990 United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, provides in Article 9 that “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”<sup>26</sup>

3.35 At a national level, in England and Wales and Northern Ireland the use of force is governed by the *Criminal Law Act 1967*. Section 3 states that a “person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.”

3.36 This provision has been considered on many occasions most notably in cases involving shootings carried out by members of the security forces in Northern Ireland.<sup>27</sup> In *R v Clegg*<sup>28</sup> a soldier had shot dead two persons in a stolen car which had been driven through an army vehicle checkpoint. The soldier claimed self-defence but was convicted of murder of one of the passengers of the car. He appealed to the Northern Ireland Court of Appeal but it was held that such a defence could not be established on the facts of the case: “the use of force to kill or seriously wound the driver of the car was totally disproportionate to the mischief to be averted.”<sup>29</sup> This conclusion was upheld on further appeal to the UK House of Lords. Thus the dual necessity and proportionality test would seem to apply under the *Criminal Law Act 1967* in England and Wales and Northern Ireland.

3.37 In Australia the accepted view is also that the dual necessity and proportionality test governs the use of lethal force in effecting arrests. However, the Commission did point out in the Consultation Paper that the courts of

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<sup>26</sup> *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>27</sup> See generally LRC CP 41-2006 at paragraphs 2.127-2.136.

<sup>28</sup> *R v Clegg* Northern Ireland Court of Appeal, 30 March 1994; [1995] 1 AC 482 (House of Lords).

<sup>29</sup> [1995] 1 AC 482 (House of Lords).

Australia have come closest to defining the rule to include a threshold in prohibiting the use of lethal force against a fleeing felon.<sup>30</sup>

3.38 The Commission is of the opinion that the “reasonableness approach” as outlined above is not a suitable approach in the application of a test for public defence. As in the case of private defence, the Commission asserts the view that citizens including law enforcement officials have a right to clear guidance as to their conduct. Allowing a “reasonableness approach” to dominate the test for public defence fails to achieve this. Law enforcement officers are confronted on a frequent basis with the need to use force in effecting arrests and of course in preventing crime. Consequently, they need to be presented with a clear legal protocol and guidance outlining the precise circumstances in which they may resort to force especially lethal force. As outlined above one approach in determining whether lethal force can be adopted is the reasonableness approach. The Commission asserts the view that this approach lacks clarity and offers little guidance to juries.

## **(2) Alternatives to the “Reasonableness Approach”**

3.39 A number of alternatives to the reasonableness approach can be outlined. Under the “specified-crimes rule” lethal force is permissible to effect the arrest of a fleeing arrestee suspected of having committed one of a specified category of offences. This approach has its origins in the historical classification of felony and misdemeanour used to identify more serious crimes against minor offences. The specified-crimes rule is used in a similar fashion to categorise offences.

3.40 In the Consultation Paper the Commission identified a number of jurisdictions which use this approach. The New York *Penal Code*, for example specifies certain offences which, if believed to have been committed, justify the use of deadly force to effect an arrest of the alleged felon.<sup>31</sup> Included in the New York list of qualifying offences are the offences of: kidnapping, arson, escape in the first degree and burglary in the first degree or any attempt to commit such a crime.

3.41 Examples of the specified-crimes rule can also be found in a number of the criminal codes in Australia<sup>32</sup> while the Canadian Criminal Code incorporates a “specified-crimes” rule in combination with the “dangerous-suspect” rule. Under the Queensland and Western Australian Criminal Codes,

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<sup>30</sup> LRC CP 41-2006 at paragraphs 2.148-2.161.

<sup>31</sup> New York *Penal Law* 35.30 (1)(a)(ii).

<sup>32</sup> Section 256 of the Queensland *Criminal Code* and section 233 of the western Australian *Criminal Code*.

lethal force is only permissible where “reasonably necessary” to prevent the flight of arrestees who are reasonably suspected of having committed an offence punishable with life imprisonment. Furthermore, provision is made in Western Australia for the use of lethal force where “reasonably necessary” to prevent the escape and rescue of a person who is already in custody for an offence punishable by at least 14 years imprisonment.<sup>33</sup> In Queensland lethal force may be used to effect an arrest where the offence rendered the person arrestable without warrant.<sup>34</sup> Such a class is very broad given that suspects are generally arrestable without warrant for any crime.<sup>35</sup>

3.42 In Canada, the *Criminal Code* incorporates a “specified-crimes” rule in combination with a “dangerous-suspect” rule. The specified-crimes component provides that lethal force may only be used to prevent the flight of an arrestee where he or she is arrestable without a warrant.<sup>36</sup>

3.43 The second alternative to the reasonableness approach is the “violent-crimes” rule. The violent-crimes rule focuses on the nature of the alleged offending for which the arrestee is sought. The distinguishing feature of the violent-crimes rule is that lethal force is only permissible when the alleged offending involves an element of violence.

3.44 In the Consultation Paper, the Commission identified a number of jurisdictions which have incorporated the violent-crimes rule into their criminal codes.<sup>37</sup> In doing so the Commission recognised that the degree of violence required before lethal force can be used varies. In the US states of Alaska<sup>38</sup> and Oregon<sup>39</sup>, for example, a low threshold level is adopted whereby lethal force may be used to apprehend those suspected of committing felonies involving the use of *any force*. However, this approach has been criticised on the basis that it grants arrestors undue discretion to resort to lethal force.<sup>40</sup>

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<sup>33</sup> Section 235 of the Western Australian *Criminal Code*.

<sup>34</sup> Section 258 of the Queensland *Criminal Code*.

<sup>35</sup> Section 5(2) of the Queensland Criminal Code provides that an offender may be arrested without warrant when an offence is defined as a crime (except where otherwise stated).

<sup>36</sup> Section 25(4) of the Canadian *Criminal Code*.

<sup>37</sup> See generally LRC CP 41-2006 at paragraphs 2.171- 2.181.

<sup>38</sup> Alaska Stat 11.81.370 (a) (1) (1990).

<sup>39</sup> Or Rev Stat 161.239 (1) (a) (1996).

<sup>40</sup> Smith “Police Use of Deadly Force: How Courts and Policy Makers Have Misapplied *Tennessee v Garner*” (1998) 7 Kan J L & Pub Pol’y 100 at 100-102.

3.45 By contrast, under the American Law Institute's *Model Penal Code*, lethal force is only permissible to effect the arrest of a fleeing felon when the alleged offending "involved" conduct including the use or threatened use of deadly force.<sup>41</sup>

3.46 The violent-crimes rule can be criticised on a number of grounds. Firstly, the rule can be over-inclusive. To quote Harper, "the fact that a suspected fleeing felon used force in committing an alleged offence does not necessarily indicate that he or she is dangerous."<sup>42</sup>

3.47 Secondly, the violent crimes rule may also be under inclusive. As pointed out in the Consultation Paper, some crimes, such as robbery and rape may not always involve the use of threatened use of deadly force, yet the offenders may nevertheless be a real danger to society.

3.48 Finally, the violent-crimes rule places the arrestor in an extremely difficult position whereby they have to assess whether the arrestee's alleged offending involved "serious" or "deadly" force.

3.49 On the basis of such failings the Commission continues to hold the position that the violent-crimes rule should not be adopted.<sup>43</sup>

3.50 The final alternative approach in creating a more structured test for the use of lethal force to effect arrests is the "dangerous-arrestee rule". Under this rule lethal force is permissible to apprehend a fleeing suspect where it is believed that the suspect poses a future threat of harm. Thus the focus of this rule is on the potential future conduct of the suspected felon: the question is not whether the use of deadly force is proportionate to the evil done, but to the evil to be prevented.<sup>44</sup> Harper points out that the focus on the future harm concentrates the minds of arrestors on their task of law enforcement and minimises the risk they will be improperly motivated to use lethal force by the desire to punish arrestees for their alleged past crimes.<sup>45</sup>

3.51 This approach has found favour in a number of jurisdictions. In the US States of Idaho and New Mexico, for example, the use of lethal force is

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<sup>41</sup> Section 3.07 (2) (b)(iv)(A) of the *Model Penal Code*.

<sup>42</sup> Harper "Accountability of Law Enforcement Officers in the Use of deadly Force" (1983) 26 How L.J 119 at 132-133.

<sup>43</sup> LRC CP 41-2006, at paragraph 2.181.

<sup>44</sup> Elliot "The Use of Deadly Force in Arrest: Proposals for Reform" [1979] 3 Crim LJ 50 at 87.

<sup>45</sup> Harper "Accountability of Law Enforcement Officers in the Use of deadly Force" (1983) 26 How L.J 119 at 141.

authorised to apprehend felons who threaten to cause future death or serious injury.<sup>46</sup> While in the *Criminal Code* of the Australian Northern Territory, lethal force is permissible where the arrestor believes that unless the arrestee is arrested they “may commit an offence punishable with imprisonment for life”.<sup>47</sup>

3.52 It is also important to mention the US Supreme Court decision *Tennessee v Garner*<sup>48</sup> in discussing this approach. In that case a civil action was taken against a police officer who had shot and killed a fleeing burglary suspect. It was the first occasion on which the Supreme Court had been asked to address the use of lethal force against a fleeing suspect. It is important to note that prior to this case, as many as 24 states still retained the “fleeing felon rule” which allowed the use of lethal force whether the suspect posed a threat or not. In the Supreme Court, the majority held that the use of deadly force to apprehend an unarmed fleeing suspected felon was unconstitutional pursuant to the Fourth Amendment on Search and Seizure<sup>49</sup> “unless it is necessary to prevent escape and where the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”.<sup>50</sup>

3.53 In the aftermath of the *Tennessee v Garner* decision, despite some reluctance from US States to adopt the rule as set down by the Supreme Court, significant changes to police guidelines and practice were witnessed.<sup>51</sup>

3.54 In the Consultation Paper, however, the Commission pointed out that the *Tennessee v Garner* formulation and other dangerous-arrestee rules do not specify with sufficient clarity how *immediate* a threat must be in order to warrant, in particular, lethal force. For the Commission this is an important question to answer. As with the Commission’s discussion on private defence or legitimate defence, the Commission asserted the view that the imminence

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<sup>46</sup> LRC CP 41-2006, at paragraph 2.184. Idaho Code 18-4011 (2) (1997) and NM Stat Ann 30-2-6(B) (Michie 1997).

<sup>47</sup> Section 28 (a) and (b) of the Northern Territory *Criminal Code*.

<sup>48</sup> 471 US 1 (1985).

<sup>49</sup> This provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

<sup>50</sup> *Tennessee v Garner* 471 US 1, 3 (1985).

<sup>51</sup> Tennenbaum, “The Influence of the Garner Decision on Police Use of Deadly Force” (1994) 85 J Crim L & Criminology 241 at 257.

requirement in legitimate defence should be retained: force should only be permissible where the threat is imminent. In the situation of effecting arrests, use of force, including lethal force, should only be permissible where the suspect is imminently posing a threat. The Commission believes such an approach gives the Gardaí much more guidance on when lethal force is to be permitted.

3.55 On this basis the Commission advocated a combination of the “specified-crimes rule”, the “dangerous-crimes rule” and the requirement of imminence. In essence such an approach mirrors that of private defence. The combination of the specified-crimes rule and the dangerous-suspect approach can be viewed in terms of a threshold test along with the requirements of necessity and proportionality. Lethal force can only be used where it is suspected that certain crimes have been committed or where there is an imminent threat of death or serious injury.

3.56 During the consultation process some concern was raised about this recommendation. It was suggested that the first part of this recommendation failed to take into account that many arrestable offences are relatively speaking minor. For instance, any thief is in fact arrestable and it could be envisaged that a set of circumstances could arise wherein the use of lethal force could be justified to arrest a suspect in connection with the theft of food, for example.

3.57 In a similar vein it was argued that only the second limb of the Commission’s recommendation should be retained, namely, that where there is an imminent threat of death or serious injury law enforcement officials may use lethal force in defence.

3.58 Furthermore, it was also suggested during the consultation process that although Article 2 of the European Convention on Human Rights provides a defence to use force where a person is suspected of committing an arrestable offence, in practice it is highly unlikely that the European Court of Human Rights would allow an offence that was not of a serious nature to be a justification for the use of lethal force. The Commission acknowledges that there is merit to these arguments.

3.59 Before making final conclusions and recommendations on the matter of the fleeing suspect, two other ancillary issues need to be examined briefly. In the Consultation Paper, the Commission made an important distinction between the use of lethal force in ‘flight from arrest’ and the use of force to prevent the ‘escape or rescue of prisoners’.<sup>52</sup> Generally speaking, prison escapees are viewed as more serious than flight from arrest, given the fact that inmates have already been convicted of a serious offence and are perceived as being more

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<sup>52</sup> LRC CP 41-2006, at paragraph 2.196.

dangerous than a fleeing suspect. It has been suggested that a prisoner desperate enough to attempt to escape from prison may use whatever means possible in order to carry out that escape.

### **(3) *Distinction between Flight and Arrest***

3.60 In the Consultation Paper, the Commission acknowledged that given the different status of prisoners compared to suspects, questions arise as to whether a less stringent test should apply to the use of force to prevent their escape.

3.61 One way of addressing the problem is to assume that “any given escapee may be armed or pose a danger to society.”<sup>53</sup> Such an approach has been adopted in Canada. While arrestors are required to assess whether fleeing suspects pose a serious threat or not, they are permitted in using “as much force as is necessary” against an escaping prisoner if there is reason to believe that he or she poses a threat.<sup>54</sup>

3.62 Similarly a number of other jurisdictions have also drawn a distinction between the standards applicable to fleeing suspects and escaping prisoners. In the Australian States of Queensland and Western Australia, for example, a police officer may use lethal force to apprehend a fleeing escapee where he has reason to believe that the latter has committed an offence punishable with life imprisonment.<sup>55</sup>

3.63 In addition, under the American Law Institute’s *Model Penal Code* there is even greater scope for the use of lethal force to prevent the escape of a prisoner compared to flight during arrest. Under the Model Penal Code authority to use lethal force to prevent the escape of prisoners is subject only to a requirement that the prison guard or peace officer believes it to be “immediately necessary” in order to prevent the escape of the prisoner. The American Law Institute, which drafted the Code, commented: “the public interest in prevention of escape by persons lawfully in custody of penal institutions is regarded by the

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<sup>53</sup> *Newby v Serviss* (1984) 590 F Supp 591 at 596, cited in Lydon, “Escape: A Deadly Proposition? Prisoners and Pre-trial Detainees” (1995) 21 NE J on Crim & Civ Con 203, text at fns 198-199.

<sup>54</sup> Section 25 (4) of the Canadian *Criminal Code*.

<sup>55</sup> Section 256 (2) of the Queensland *Criminal Code* and Section 233 (2) of the Western Australia *Criminal Code*.

provision as sufficient to warrant the use of deadly force when the guard believes that only such force can prevent the escape.”<sup>56</sup>

3.64 In the Consultation Paper, the Commission also advocated that a different standard should be applied to the use of force regarding escaping prisoners in comparison to the flight of an arrestee. The Commission suggested that in the case of an escaping prisoner, it is reasonable to assume that the inmate is dangerous, and where necessary use of lethal force is permitted. In this regard, the dangerous-suspect rule should be held to apply in every case in which a prisoner is endeavouring to escape, unless the prison officer is aware that the prisoner is not dangerous.

3.65 The Commission points out that it is likely that the dangerous-suspect rule would be held to apply anyway, given that escaping prisoners in general pose an immediate threat to the community. Consequently, the Commission provisionally recommended that it makes practical sense to provide for this situation in legislation.

3.66 On this basis the Commission provisionally recommended that a prison officer should be entitled to assume that every escaping prisoner is dangerous and consequently should be entitled to resort to lethal force, where all the other requirements for legitimate defence are met, unless he or she is aware that the escapee is not in fact dangerous.

3.67 During the consultation process however, this recommendation was criticised on the basis that prisoners should be entitled to a presumption that they are not dangerous, unless there is evidence to the contrary. Furthermore, questions were raised as to whether the term “lethal force” is intended to imply the use of firearms by prison officers or whether it implies the use of a baton or ordinary physical force.

3.68 In response, the Commission points out that use of lethal force in this context is still subject to the essential elements of private defence namely, imminence, necessity and proportionality.

#### **(4) Restriction on Lethal Force to Law Enforcement Officers**

3.69 The second recommendation made by the Commission with regard to force used in effecting arrests concerned restricting the use of lethal force to law enforcement officers. As outlined above, in the Consultation Paper the Commission provisionally recommended restricting the use of force to law enforcement officials.

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<sup>56</sup> American Law Institute, *Model Penal Code and Commentaries* (1985) Part 1 Vol 2 at 126. Many American States also require that the escapee is a felon or that the escape is from a maximum security institution: *ibid* at 127.

3.70 The Commission recognised that at common law, lethal force may be used in public defence by both private citizens and public officers.<sup>57</sup> However, under modern conditions there is an argument to be made that lethal force to effect arrests and prevent escapes should be restricted to the use of law enforcement officials including the Gardaí, prison officers and private citizens called upon to assist. This approach was also adopted in the US *Model Penal Code*<sup>58</sup> on the grounds that it achieves “an appropriate balance between the needs of effective law enforcement and the desirability of discouraging private resort to violence”.<sup>59</sup> The American Law Institute also argued that by limiting the use of lethal force to trained personnel minimises the risks associated with its use.<sup>60</sup>

3.71 A number of other jurisdictions including New Zealand, Canada and the Australian States of Queensland, Western Australia and Northern Territory and Tasmania also *only* authorise law enforcement officers to use lethal force to effect arrests.

3.72 In Ireland neither the common law nor the *Non-Fatal Offences Against the Person Act 1997* draws any express distinction between the use of lethal force by law enforcement officers and private citizens. Similarly, there is no distinction made under the United Kingdom’s section 3 of the *Criminal Law Act 1967* and section 3 of the *Criminal Law Act (Northern Ireland) 1967*.

3.73 However, in the opinion of the Commission and for the reasons outlined above by the American law Institute there should be a prohibition on the use of lethal defensive force by private citizens in effecting arrests. The primary basis for this argument is that private individuals lack appropriate training in the use of force and, under pressure, may inadvertently injure bystanders or use lethal force unnecessarily.

3.74 On this basis the Commission believes that the power to use lethal defensive force in effecting arrests should be restricted to law enforcement officials.

#### **(a) Conclusions and Recommendations**

3.75 This section examined the issue of use of force to effect an arrest. In the Consultation Paper, the Commission made three recommendations under this heading. Those recommendations were revisited here.

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<sup>57</sup> LRC CP 41-2006, at paragraph 2.208.

<sup>58</sup> Section 3.07(2)(b)(ii) and (3) of the *Model Penal Code*.

<sup>59</sup> American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 116.

<sup>60</sup> *Ibid* at 129.

3.76 The primary recommendation made by the Commission was that lethal force should be prohibited in effecting the arrest of a fleeing suspect except where the arrestee is suspected of an “arrestable offence” or it is necessary to protect a person from an immediate threat of death or serious injury. This recommendation finds its origins in the belief by the Commission that it is essential that a threshold on the use of force in public defence should be adopted. In line with the Commission’s arguments made with regard to private defence, law enforcement officers should have clear guidance as to their use of force in effecting arrests. They need to be provided with clear protocol outlining the precise circumstances in which they may resort to force and in particular where they may resort to lethal force.

3.77 The Commission has outlined above the different approaches that have been taken in providing a test for the use of force in effecting an arrest. There are essentially four models. The first of those is the “reasonableness rule” which provides that lethal force may be used to effect an arrest where it is reasonable to do so. This approach is currently adopted in Ireland in section 19 of the *Non-Fatal Offences Against the Person Act 1997*. The Commission considers that this approach lacks clarity and offers little guidance to juries.

3.78 The alternatives to this approach include the “specified-crimes rule”, the “violent-crimes rule” and the “dangerous-suspects rule”. For reasons outlined above, the Commission does not recommend that the violent-crimes rule should be adopted. The violent-crimes rule is both over-inclusive and under-inclusive and is lacking in clarity; it is extremely difficult to determine what is meant by ‘violent’.

3.79 Thus the Commission advocates a combination of the specified crimes rule and the dangerous crimes rule. Allowing lethal force to effect an arrest of a fleeing suspect *only* where they are suspected of committing certain crimes has its benefits. In particular, such an approach brings clarity and certainty to the law providing the Gardaí with a clear standard by which they could regulate their conduct.

3.80 In applying the specified-crimes approach the Commission acknowledges that it is difficult to prescribe a list of offences which are neither over inclusive nor under inclusive. However, the Commission points out that this difficult can be diverted by setting the threshold at “arrestable offences” and in addition to that the Commission suggests that the dangerous-suspects rule should also be applied simultaneously with the specified-crimes rule. Such an approach would then cover situations where the suspect may be suspected of a minor crime but may nonetheless pose a danger to society.

3.81 With this approach however, questions arises as to whether the threat or the ‘danger’ should be imminent. The Commission believes that the

threat should be imminent before lethal force is permissible. Again such an approach would the Gardaí clear guidance on when lethal force is permitted.

3.82 In conclusion then the Commission maintains the position held in the Consultation Paper with regard to its primary recommendation. The use of lethal force in effecting an arrest needs to be set out clearly in legislation, so that law enforcement officers are provided with a clear protocol on their use of force. Such force as in the case of private defence needs to be subject to certain limitations and controls. A simple test of reasonableness is unsatisfactory. The Commission recommends that the test for public defence should also be subject to the requirements of imminence, necessity and proportionality. On this basis the Commission recommends that the use of force in effecting the arrest of a fleeing suspect should be prohibited except where the arrestee is suspected of an “arrestable offence” or it is necessary to protect from an imminent threat of death or serious injury.

3.83 *The Commission recommends that a person may use non-lethal force in effecting the arrest of a fleeing suspect where the arrestee is suspected of an “arrestable offence” or to prevent a breach of the peace or to prevent a crime.*

3.84 *The Commission recommends, consistently with its approach to private defence, that law enforcement officers should have clear guidance as to their use of force in effecting arrests, in particular where they may resort to lethal force.*

3.85 *The Commission recommends that the use of lethal force in effecting the arrest of a fleeing suspect should be prohibited except where the arrestee is suspected of an “arrestable offence” or to prevent a breach of the peace or to prevent a crime.*

3.86 *The Commission recommends that a prison officer should be entitled to assume that every escaping prisoner is dangerous and consequently should be entitled to resort to lethal force, where all the other requirements for legitimate defence are present (proportionality, necessity and imminence), unless he or she is aware that the escapee is not in fact dangerous.*

## **C The Prevention of Crime**

3.87 This category of public defence authorises the use of force to prevent a crime from occurring, eliminating the threat of a future harm. Therefore unlike the reactive nature of effecting or assisting in an arrest, the prevention of a crime involves proactive defensive action prior to the commission of a threatened offence.

3.88 Given that no offence has actually taken place, historically the common law kept a tighter rein on the use of lethal force under this defence

rather than for arrests. Over time however, the approach adopted to crime prevention has mirrored that of effecting an arrest and also private defence; the general criterion of 'reasonableness' has been applied as the test. In a similar vein to the discussion on arrests and also private defence, the Commission once again advocates a more structured approach whereby citizens and law enforcement officials alike would be clear as to the boundaries of their conduct. On this basis the Commission provisionally recommended that lethal force should only be permitted in the prevention of a crime where the crime is imminent or where there is a serious risk of death or injury. Furthermore, the Commission recommended that lethal force in this category of public defence should be limited to law enforcement officials. Where individuals use force for the protection of others, the Commission believes that this type of force is better dealt with under the remit of private defence.

**(a) Consultation Paper Recommendations**

3.89 As referred to above, the Commission made two provisional recommendations under the heading of crime prevention.

3.90 In the first of those recommendations, the Commission provisionally recommended that lethal force should be prohibited to prevent crimes other than those which are imminent and cause death or serious injury.

3.91 Secondly, the Commission provisionally recommended that the power to use lethal force in preventing crimes should be restricted to law enforcement officers. As a consequence, the Commission believes that it is more appropriate for individuals who use lethal force to protect others to be dealt with under the law on private defence.

**(b) Discussion**

3.92 As discussed in the case of arrests, there is often an overlap between public and private defence and this is also true in the case of crime prevention. Situations which could potentially fall within the category of crime prevention may be more correctly dealt with under private defence and defence of the person. Given the greater status accorded to the protection of human life, one would expect self-defence to be the primary defence; crime protection is secondary in nature.

3.93 Therefore in the context of crime prevention, it is the cases in which private defence are inapplicable that are of greater interest in determining the boundaries of the limits of the authority to use lethal force to prevent crime.

3.94 In the Consultation Paper, the Commission began the discussion of crime prevention with a brief overview of its historical evolution, followed by an examination of the alternative models adopted to the test for lethal force in this situation and finally the Commission questioned whether the use of force to

prevent crime should be limited to law enforcement officials. In this Report a similar outline will be adopted, followed by final recommendations and conclusions.

3.95 Historically the common law attempted to place restrictions on the use of force to prevent a crime in comparison to the apparent lack of restrictions on the use of force to effect arrests prior to the twentieth century.<sup>61</sup> In the Consultation Paper, the Commission pointed to a clear example of this contrast whereby lethal force was permissible to arrest a pickpocket but not to *prevent* the commission of the felony of pick pocketing.<sup>62</sup>

3.96 Against this historical background attempts were made to distil a single and general rule for the use of force in legitimate defence. In 1879, the English Criminal Code Commissioners advocated a dual test of necessity and proportionality.<sup>63</sup> It will be seen however, as with the case of private defence and arrests that the Commissioners' statement would become overshadowed by a more generalised test of reasonableness in the majority of jurisdictions.

3.97 In the Consultation Paper, the Commission examined the generalised rule of "reasonableness" along with two other tests; the "specified-crimes" rule and the "dangerous-suspect" rule which have been adopted by some jurisdictions in determining the level of force to be used in preventing a crime.

3.98 As noted in the Consultation Paper, the Commission points out that these tests replicate those discussed in the arrests section of this chapter but it must be clearly pointed out that in the case of crime prevention, the tests are prospective rather than retrospective; they are concerned with crimes that may be committed in the future rather than with offences which have been committed in the past.

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<sup>61</sup> See generally paragraph 4.84 and (LRC CP 41-2006) at paragraph 2.241. See also Lantham "Killing the Fleeing Offender" [1977] 1 Crim LJ 16 at 17.

<sup>62</sup> Lantham "Killing the Fleeing Offender" [1977] 1 Crim LJ 16 at 17-18.

<sup>63</sup> (1879) C2345 at 11. The Commissioners were Lord Blackburn, and Stephen, Lush and Barry JJ: "We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used must be necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent."

3.99 In the Consultation Paper, the Commission examined these approaches, noting the dominance of the ‘reasonableness’ approach but concluded by advocating a more structured approach. This approach, though it can be merited on the basis of its flexibility, is too vague and offers little specific guidance, neither to citizens or law enforcement officials or juries. Here the Commission will briefly outline the three tests currently in force, analyse submissions made and conclude with its final recommendations.

3.100 As with force used to effect arrests, in this jurisdiction the reasonableness approach has been adopted to the question of crime prevention both under common law and by statutory provision.

3.101 At common law, in the leading self-defence case *People (Attorney General) v Dwyer*<sup>64</sup>, Walsh J suggested that lethal force may be warranted “to prevent the commission of an atrocious crime”. However, a more in depth discussion can be found in the Supreme Court decision *Lynch v Fitzgerald*<sup>65</sup>. Although the case was civil in nature and dealt with the issue of riot prevention and suppression<sup>66</sup>, it remains relevant today to the broad topic of crime prevention.

3.102 In the High Court, Hanna J indicated that the use of lethal force in public defence must be subject to the principles of necessity and proportionality. Such a view was in line with the view of the law at that time.<sup>67</sup> However, Hanna J also added a further threshold requirement, namely human life:

“[T]he armed forces can fire upon an unlawful or riotous assembly only where such a course is necessary as a last resort *to preserve life...*”<sup>68</sup>

3.103 He went on to say that this principle “goes back to the common law principle that it is lawful to use only a *reasonable degree of force* for the protection of oneself or any other person against the unlawful use of force, and that such repelling force is not reasonable if it is either greater than is requisite for the purpose or disproportionate to the evil to be prevented.”<sup>69</sup>

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<sup>64</sup> [1972] IR 416.

<sup>65</sup> [1938] IR 382.

<sup>66</sup> In this case the plaintiff brought a civil action against the Gardaí in relation to the shooting of his son during a demonstration that took place in 1934.

<sup>67</sup> See generally LRC CP 41-2006 at paragraph 2.252.

<sup>68</sup> [1938] IR 382 at 405.

<sup>69</sup> [1938] IR 382 at 405.

3.104 In the Supreme Court, the majority considered that the law was well settled and were content to cite with apparent approval both Hanna J's legal conclusions and the authorities upon which he purported to rely.<sup>70</sup> Meredith J however, though concurring with the majority view, proposed a different legal approach. However, the principles of proportionality still remained an integral part of the proposal he advocated that "there must be due proportion between the means adopted and the end to be attained and the danger of it not being secured."<sup>71</sup>

3.105 In terms of statutory provisions, crime prevention is dealt with in section 18(1)(e) of the *Non-Fatal Offences Against the Person Act 1997*. This allows a person to use a level of force "as is reasonable" in the circumstances, to prevent crime or a breach of the peace. In general terms, the same criticisms made with regard to the ambiguity of the reasonableness rule in the arrests section can be made here. The 'reasonableness' approach as adopted in the 1997 Act lacks clarity and as McAuley and McCutcheon have pointed out, the general criterion of reasonableness "is not easy to reconcile with the normal requirement of precision and certainty in criminal statutes."<sup>72</sup> In accordance with this view, the Commission recommends that the 'reasonableness' approach should be replaced with a more structured guided test.

3.106 The generalised 'reasonableness' approach to crime prevention has also been evident in England and Wales and Northern Ireland as well as a number of state courts in Australia.<sup>73</sup> In terms of the Australian approach, in the Consultation Paper the Commission discussed the Victorian Supreme Court decision of *R v McKay* at length.<sup>74</sup> This case was also referred to in the arrests section. The case concerned a farmer who fatally shot an intruder in order to prevent the theft of his chickens. By the time the crime had been committed the first shot had been fired and, therefore, it could be argued that the issue of crime prevention does not arise. However, the defence of lawful force for the purposes of crime prevention was raised before the court and consequently discussed in detail.

3.107 In adopting what purported to be a dual test of necessity and proportionality, the court indicated that lethal force may be permitted to prevent

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<sup>70</sup> [1938] IR 382, 411 and 414. See generally LRC CP 41-2006, at paragraph 2.255.

<sup>71</sup> [1938] IR 382 at 422.

<sup>72</sup> McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell, 2000) at 773.

<sup>73</sup> See generally LRC CP 41-2006, at paragraphs 2.261-2.273.

<sup>74</sup> [1967] VR 560.

“forcible and atrocious crime” but seemed to leave open the question of whether lethal force could be used to prevent a non-violent crime.

3.108 In England and Wales and Northern Ireland, crime prevention as with the use of force to effect an arrest, is dealt with in section 3 of the *Criminal Law Act 1967*. Again, the test is determined on the basis of “use of force as is reasonable in the circumstances in the prevention of crime”. One of the leading cases dealing with the use of lethal force to prevent crime under the 1967 Act is *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975)*.<sup>75</sup> Here, the accused was a soldier on foot patrol in an area where the IRA was believed to be active. He shot and killed a person whom he mistakenly (but reasonably) believed to be a member of the IRA. When the deceased who was unarmed failed to stop after being asked to do so, the soldier shot at him. At trial, he was acquitted of murder. On appeal, the UK House of Lords though reluctant to endorse positively shooting a fleeing suspect upheld the acquittal.

3.109 In the most detailed analysis of the law in the area, Lord Diplock held that the only defence in issue was the defence of crime prevention, which was governed by the reasonableness rule, and that this rule required a balancing process weighing up the “risk of harm to which others might be exposed if the suspect were allowed to escape” against “the risk of harm to [the suspect] that might result from the kind of force that the accused contemplated using.”<sup>76</sup>

3.110 In the Commission’s view, although the relevant case law and legislation provide some useful discussion of the law on crime prevention, the reasonableness approach fails to answer a number of questions. For example what type of crimes should be prevented? Should lethal force be permitted to prevent violent or non-violent crimes? Should lethal force only be permitted to prevent imminent crimes from being committed? The reasonableness approach fails to answer those questions and it is on that basis that a more structured test is advocated.

3.111 Two alternative approaches include the “specified-crimes” rule and the “dangerous-suspect” rule. Under the specified-crimes rule, lethal force is permitted to prevent any offence on a specified list. Today, however, few jurisdictions attempt to define comprehensive lists of qualifying offences. Nevertheless, the rule has survived to a degree in some jurisdictions. One example can be found in the US *Model Penal Code* which specifically authorises the use of lethal force for the suppression of riot and mutiny.<sup>77</sup>

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<sup>75</sup> [1976] NI 169 (Northern Ireland Court of Appeal); [1976] 2 All ER 937 (House of Lords). See LRC CP 41-2006, at paragraph 2.265-2.270.

<sup>76</sup> [1976] 2 All ER 937 at 947.

<sup>77</sup> Section 3.07 (5) (ii) (B) of the Model Penal Code.

Special provision is also made for the suppression of riots and mutinies in the criminal codes of Western Australia,<sup>78</sup> Queensland,<sup>79</sup> Northern Territory,<sup>80</sup> Tasmania,<sup>81</sup> New Zealand<sup>82</sup> and Canada.<sup>83</sup>

3.112 The specified-crimes rule has also found favour with a number of academics. Williams argues that the reasonableness approach as under the English and Welsh *Criminal Law Act 1967* “gives no clear guidance on what we are allowed and not allowed to do”.<sup>84</sup> He acknowledges that complete precision is not possible, but claims that the law could specify the offences that are so serious that lethal force may lawfully be used to prevent them, leaving the prevention of other offences to be governed by the general test of reasonableness.<sup>85</sup>

3.113 However, as identified in the Consultation Paper, it would be extremely difficult to identify a comprehensive list of qualifying offences, which would neither be over inclusive nor under inclusive. In this regard, the dangerous-suspect rule may be a more suitable approach. Under this rule, lethal force is permissible to prevent crimes which threaten to cause harm to persons or property. Thus the authorisation of lethal force rests not only on the nature of the crime but on the manner of its perpetration. In contrast to the simplicity of the specified crimes rule, the dangerous-suspect rule is a more comprehensive test focusing on the actual danger posed by the suspect.

3.114 In the Consultation Paper, the Commission outlined a number of variations of the dangerous-suspect rule.<sup>86</sup> In the US Model Penal Code, for example, lethal force is prohibited to prevent crimes other than those that “will cause death or serious bodily injury to another.”<sup>87</sup> In implementing the dangerous-suspect rule, the American Law Institute, drafters of the Code, sought to employ a concrete standard for the use of lethal force to prevent

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<sup>78</sup> Sections 237-242 of the Western Australian Criminal Code.

<sup>79</sup> Sections 260-265 of the Queensland Criminal Code.

<sup>80</sup> Section 28 (d) of the Northern Territory Criminal Code.

<sup>81</sup> Sections 34-38 Tasmanian Criminal Code.

<sup>82</sup> Sections 42-47 of the New Zealand *Crimes Act 1961*.

<sup>83</sup> Sections 30-33 of the Canadian Criminal Code.

<sup>84</sup> Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 444-445.

<sup>85</sup> *Ibid.*

<sup>86</sup> See generally LRC CP 41-2006, at paragraph 2.285.

<sup>87</sup> Section 3.07 (5) (a) (ii) (A) of the Model Penal Code.

crime, namely “the criterion of peril to life or serious injury, including, of course, sexual outrage, rather than the abstract concept of prevention of a felony.”<sup>88</sup>

3.115 Examples of the dangerous-suspect rule can also be found in the Australian Northern Territory as well as a less stringent standard in Canada, New Zealand and the Australian State of Tasmania, whereby a person may use force which is reasonably believed to be necessary to prevent the commission of a crime that is “likely to cause immediate and serious injury to any person or property”.<sup>89</sup>

3.116 From these illustrations it can be seen that there is a wide variety of standards even for this rule; at one level there must be a threat to life while on the other, the threat need only be to property. Furthermore, as with ‘arrests’, the issue of immediacy needs to be dealt with. Consequently, the Commission pointed out in the Consultation Paper that if the dangerous-suspect rule was to be adopted in this jurisdiction, it would need to be more certain.

3.117 In relation to the Commission’s second provisional recommendation with regard to crime prevention, the Commission is still of the view that the power to use lethal force should be restricted to law enforcement officials. The reasoning for this argument is primarily based on training. The Commission believes that law enforcement officials are better trained and equipped to deal with crime prevention.

3.118 The Commission accepts that not all commentators would agree with this approach. The drafters of the Model Penal Code, for example, were of the opinion that “in modern conditions, the arrest of suspected criminals is peculiarly for the concern of the police” while “the prevention of crime, on the other hand, is properly the concern of everyone.”<sup>90</sup>

3.119 Despite such arguments, the Commission still considers that crime prevention should be restricted to law enforcement officials. Where a citizen uses lethal force in the protection of others which may involve preventing a crime, it is suggested that this is better dealt with under the law of private defence.

3.120 Finally, for consistency it is also important to mention one other issue. In the Consultation Paper, as with the section on arrests, the Commission

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<sup>88</sup> American Law Institute, *Model Penal Code and Commentaries* (1985) Part 1 Vol 2 at 133.

<sup>89</sup> Section 39 of the Tasmanian Criminal Code. Similar wording is adopted in section 41 of the New Zealand Act and section 27 of the Canadian Criminal Code.

<sup>90</sup> American Law Institute *Model Penal Code and Commentaries* (1985) Part 1 Vol 2 at 132.

discussed the issue of ‘warnings’ in relation to crime prevention. As with arrests, the Commission advocates that law enforcement officials should give appropriate warnings before using lethal force or else use less-than-lethal options before resorting to lethal force.<sup>91</sup>

**(c) Conclusions and Recommendations**

3.121 In conclusion, three tests could be adopted to place some limit on the amount of force used in the prevention of crime. The first test is the reasonableness test and as pointed out previously the Commission does not recommend the continued adoption of this approach. This test is vague, unstructured and places no limit on the force that can be used to prevent a crime. The second approach set out by the Commission in the Consultation Paper was the specified-crimes rule. As regards this rule, although the Commission recommends that this rule should be adopted along with the dangerous-suspect rule in relation to arrests, the Commission does not recommend that this approach should be used in crime prevention. If the specified-crimes rule was applied in the context of crime prevention, law enforcement officials would have to know the precise nature of the crime he or she was preventing.

3.122 On the basis of the arguments outlined above, the Commission has concluded that the dangerous-suspect rule is a more appropriate approach to crime prevention. Although the dangerous-suspect rule does not achieve the level of certainty associated with the specified-crimes rule, it allows public defenders the latitude to take into account not only the type of offence the suspect is likely to commit, but also the manner in which it is likely to be committed, as well as the danger likely to be created.

3.123 Furthermore, the Commission has concluded that it is necessary to adopt the dangerous-suspect rule to crime prevention in order to avoid disparity between the law in respect of arrests and the law in respect to crime prevention. The Commission is of the opinion that an appropriate rule for both effecting arrests and crime prevention should be set down in legislation. By setting out the precise circumstances in which lethal force can be used to effect arrests and prevent crime, law enforcement officials will be more clear and certain about the boundaries of their conduct.

3.124 Finally, as in the case of arrests, the Commission is of the view that lethal force should only apply to prevent crimes that are ‘imminent’ *and* cause death or serious injury. The Commission submits that the Model Penal Code provides useful guidance in this regard.

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<sup>91</sup> See generally LRC CP 41-2006, at paragraph 2.309- 2.311.

3.125 As regards the second recommendation, the Commission strongly advocates that the use of lethal force for the purposes of crime prevention should be restricted to law enforcement officials primarily on the basis of training and expertise. Furthermore, law enforcement officials should be required to give warnings before using lethal force and where appropriate resort to less-than-lethal options. The Commission acknowledges that such recommendations place an onus on law enforcement training schools to ensure that such training is implemented but believes such recommendation are necessary.

3.126 *The Commission recommends that lethal force should be prohibited to prevent crimes other than those which are imminent and cause death or serious injury.*

3.127 *The Commission recommends that the use of lethal force for the purposes of crime prevention should be restricted to law enforcement officials primarily on the basis of training and expertise.*

3.128 *Furthermore, law enforcement officials should be required to give warnings before using lethal force and where appropriate resort to less-than-lethal options.*

3.129 *The Commission recommends specific training for law enforcement officers in the area of lawful use of force.*

## **D The Defence Forces**

3.130 This Report has discussed the use of force, including lethal force, by persons in general, by the Garda Síochána and prison officers. As is clear from this discussion, the use of force in the context of public defence in the criminal law involves a number of complex and situation-specific issues. In the case of the Defence Forces, these issues must also be considered in the context of the constitutional nature of the role of the Defence Forces and the detailed statutory framework contained in the *Defence Acts 1954 to 2007* under which the Defence Forces must operate. The Commission notes the many varied functions which the Defence Forces must perform, whether in aid of the civil power or in the context of its national and international duties. In this respect, the Commission notes that the use of force by the Defence Forces is governed by a number of function-specific and detailed guidance documents. These documents mirror to a large extent those applicable to the Garda Síochána and, in that respect, the use of force by the Defence Forces, could, arguably, be dealt with under the statutory framework being proposed by the Commission in this Report.

3.131 The Commission is conscious, however, that the use of force by the Defence Forces is made especially complex by the nature of the different

overseas deployments in which it is engaged, notably those involving the United Nations, in the context of which different rules of engagement will apply, depending on the precise nature of the deployment, such as peace keeping or peace enforcement. The Commission also understands that the Government and the Defence Forces are currently (December 2009) engaged in a general review of the rules concerning use of force provisions. For these reasons, the Commission has concluded that the statutory framework being proposed in this Report should be without prejudice to the position of the Defence Forces carrying out their duties and functions under the *Defence Acts 1954 to 2007*. The Commission considers that this position should be reviewed in the aftermath of the review of the use of force by the Defence Forces being carried out by the Government.

3.132 *The Commission recommends that the statutory framework being proposed in this Report should be without prejudice to the position of the Defence Forces carrying out their duties and functions under the Defence Acts 1954 to 2007. The Commission recommends that this position should be reviewed in the aftermath of the review of the use of force by the Defence Forces being carried out by the Government.*



## **CHAPTER 4      PROVOCATION**

### **A            Introduction**

4.01        In this chapter the Commission discusses the law governing provocation. Provocation can be described as some act or series of acts (or words), done by the deceased to the accused which causes the accused to temporarily lose his or her self control at the time of the wrongful act. Loss of self control is a key element in the defence of provocation and fundamental to distinguishing the defence from other defences, notably legitimate defence. In Irish law, provocation is a partial defence applicable only to murder. When raised successfully it operates to reduce murder to manslaughter. Thus, even where the defence is successfully raised, the defendant will still be held criminally liable for the lesser charge of manslaughter.

4.02        In Part B of this chapter, the Commission briefly examines the history of provocation by tracing the evolution of the defence from its emergence in the 16th century up to the appearance of the “reasonable man” criterion in the 19<sup>th</sup> century. In Part C, the Commission sets out a definition for provocation. In Part D, the Commission examines the arguments surrounding the retention or abolition of the defence, and concludes that it should be retained, albeit in a modified form. In Part E, the Commission discusses the rationale for the defence; whether provocation should be treated as a partial justification or as a partial excuse. In Part F, the Commission reviews the test for provocation, in particular focusing on the issue of personal characteristics of the accused. In Part G, the Commission examines a number of specific issues, namely, the requirement of sudden and temporary loss of self control, proportionality, the relationship between provocation and diminished responsibility and the application of provocation in the context of domestic violence.

### **B            Historical Overview**

4.03        Since its emergence in medieval times, provocation has proved to be a contentious defence. A 2007 Report by the New Zealand Law Reform Commission noted that the defence of provocation is mired in “legal, conceptual

and practical difficulties.<sup>1</sup> Some jurisdictions have recently abolished the defence and others have recommended its abolition on the basis that the defence is irretrievably flawed.<sup>2</sup> In order to assess these proposals, the Commission briefly examines the history of the defence,<sup>3</sup> in particular to determine whether it can stand up to such criticism.

4.04 Provocation is not a new concept in law; its roots lie as far back as Anglo-Saxon and Norman times. From the medieval period, it is bound up with the 16<sup>th</sup> century division of felonious homicide into murder and manslaughter.<sup>4</sup> The avoidance of the death penalty provided the genesis for the provocation plea while the benefit-of-clergy exemption provided the catalyst. In medieval times defendants could escape the death penalty for an unlawful killing by demonstrating their status as a member of the clergy.<sup>5</sup> As one might expect, the clergy exemption was widely abused by defendants who successfully convinced the court that they were members of the clergy. Due to this abuse, the benefit was removed by statute in 1512 and no longer provided a defence to homicides carried out with 'malice aforethought'.<sup>6</sup>

4.05 During the 17th century, provocation took on a more recognisable form. Murder was presumed to proceed from malice aforethought, which was seen to be lacking in cases of provoked killings. In the 18th century, the use of provocation increased and the rules on its application became clearer.<sup>7</sup> In *R v Mawgridge*,<sup>8</sup> Holt LCJ set out four categories of provocation which operated to reduce murder to manslaughter including a grossly insulting assault, seeing a friend attacked, seeing an Englishman unlawfully deprived of liberty and catching someone in the act of adultery with one's wife. This focus on the

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<sup>1</sup> New Zealand Law Commission *The Partial Defence of Provocation* (NZLC R98, Wellington, 2007) at 11.

<sup>2</sup> New Zealand Law Commission *The Partial Defence of Provocation* (NZLC R98, Wellington, 2007) at 10.

<sup>3</sup> For a detailed account on the history of provocation see LRC CP 27-2003 at 3-19; and Horder *Provocation and Responsibility* (Clarendon Press 1992).

<sup>4</sup> Horder *Provocation and Responsibility* (Clarendon Press Oxford 1992) at viii.

<sup>5</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 853. See also Horder *Provocation and Responsibility* (Clarendon Press 1992).

<sup>6</sup> At that time malice aforethought or "malice prepensed" simply meant premeditated killing. See LRC CP 27-2003, at 4.

<sup>7</sup> Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 73.

<sup>8</sup> *R v Mawgridge* (1706) Kel 119.

intrinsic nature of the provocative conduct influenced later thinking about the defence of provocation, but the defence underwent a radical transformation in the 19th century.

4.06 The concept of the 'reasonable man' was introduced in *R v Welsh*<sup>9</sup>, in which it was accepted that a killing should not be reduced from murder to manslaughter unless the provocation from the deceased was sufficient *to deprive a reasonable man of self control*, thereby laying the foundation for the basis of the defence today. In *Welsh* Keating J stated:

“[T]here must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion”.

4.07 *Welsh* represented a shift in focus from the nature of the act to its *potential* in relation to a reasonable man.<sup>10</sup> The movement from *Mawgridge*<sup>11</sup> to *Welsh* thus marked a transition from the particular to the general. *Mawgridge* had set out the specific instances in which the plea of provocation could be invoked, while *Welsh* established a general principle applicable to provocative conduct in whatever form it might arise.<sup>12</sup> In other words, it represented a shift in favour of an 'objective standard'.

4.08 The objective 'reasonable man' standard became central to the development of the defence in the 20th century. Recent developments have, however, eroded the 'reasonable man' principle to the extent that subjective standards have also become important. Hence cases in the second half of the 20th century saw the objective proportionality test introduced in *Welsh* take on a subjective character where a wide variety of traits, including sex, age and mental condition, have been taken into account.

4.09 The swing from the objective 'reasonable man' standard to a standard that takes personal characteristics into account (or a combination of both) underlines the need for clarity in the defence of provocation. This development also reflects the changing nature of society. The law is not static and it alters to match public perception and policy. As one writer puts it provocation is “mired in a history of cultural complexity and change”<sup>13</sup> and “its

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<sup>9</sup> *R v Welsh* (1869) 11 Cox CC 674.

<sup>10</sup> O' Connor and Fairall *Criminal Defences* 3<sup>rd</sup> ed (Butterworths 1996) at 197

<sup>11</sup> *R v Mawgridge* (1706) Kel 119.

<sup>12</sup> LRC CP 27 2003, at paragraph 1.29

<sup>13</sup> Power “Provocation and Culture” (2006) *Criminal Law Review* 871, at 876.

doctrinal development is partly testimony to the cultural (and historical) relativity of perceptions of normality”.<sup>14</sup> The provocation defence emerged at a time where it was acceptable to defend an attack on one’s honour; it was seen to be a justified action. The defence then took on an objective standard in the 19th century, in an attempt to instil a community standard of behaviour by which provocation could be gauged. As can be seen in the English case *Bedder v DPP*<sup>15</sup> this standard proved to be too harsh and as a result the defence moved towards a subjective test where characteristics of the accused could be taken into account in assessing the gravity of provocation; in other words a more sympathetic approach towards the defendant. This broadening of the defence, as will be addressed later in the chapter, reached its high water mark in England in *R v Smith*,<sup>16</sup> where the characteristics of the defendant were taken into account in assessing both elements of the defence, gravity of provocation and self control. The discussion of the rationale for the defence in Part D, below, also illustrates this point.

4.10 The history of the defence of provocation partly explains the fraught nature in which the defence now finds itself. In recent times many jurisdictions as well as law reform bodies around the globe have sought to abolish the defence, due to the complex nature of its rationale and in particular arguments of gender bias. In the Commission’s view these arguments at the very least further demonstrate the dire need for reform in this area of law.

### **C What is provocation?**

4.11 Before considering selected aspects surrounding the defence of provocation, it is useful at this stage to present a definition for provocation.

4.12 In the English case *R v Duffy*,<sup>17</sup> Devlin J summarised the defence in a sentence which is now regarded as a classic direction in provocation cases:

“Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind”.<sup>18</sup>

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<sup>14</sup> Wells “Provocation: The Case for Abolition” in Andrew Ashworth and Barry Mitchell, (eds) *Rethinking English Homicide Law* (OUP, Oxford, 2000) at 89.

<sup>15</sup> [1954] 2 All ER 801. See the discussion below.

<sup>16</sup> *R v Smith* [2001] 1 AC 146.

<sup>17</sup> [1949] 2 All ER 932.

<sup>18</sup> *R v Duffy* [1949] 2 All ER 932, 932.

4.13 The test for provocation was also well laid out in the more recent Australian case *Masciantonio v The Queen*<sup>19</sup> where it was held that provocation must be such that it is capable of causing the ordinary person to lose self control and act in the way the accused did. The act of the accused must be carried out whilst deprived of provocation and before he or she had an opportunity to regain composure.<sup>20</sup>

4.14 Thus, provocation exists where it is possible to answer the following three questions in the affirmative:

Did the provocation cause the defendant to lose self-control?

Did the defendant kill the victim while still out of control?

Having accessed the gravity of the provocation to the particular defendant by reference to his or her personal characteristics, could an ordinary person be driven by provocation of that degree to act as the defendant did, that is, to kill?<sup>21</sup>

4.15 In essence, provocation is made up of two requirements. First, the provocation had to be such as to temporarily deprive the person provoked of the power of self-control, as a result of which he or she committed the unlawful act which caused death. Secondly, the provocation had to be such as would have made a reasonable man act in the same way.

4.16 In modern times, these two requirements have come to be known as the subjective and objective elements or tests of the defence of provocation. The test for provocation as it has evolved through case law is discussed at greater length below.

## **D Retention or abolition?**

4.17 In this section, the Commission will discuss the opposing arguments for retention or abolition of the defence of provocation.

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<sup>19</sup> *Masciantonio v The Queen* (1995) 69 ALJR 598.

<sup>20</sup> *Ibid* at 602.

<sup>21</sup> Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 71.

**(a) Consultation Paper Recommendation**

4.18 In the Consultation Paper, the Commission provisionally recommended that the defence of provocation should be retained, albeit in a modified form.<sup>22</sup>

**(b) Discussion**

4.19 In recent decades a number of arguments have been put forward for the abolition of the defence of provocation as a partial defence to murder. Neal and Bagaric summarise the difficulties with the defence in the following way:

“[T]he defence is frequently criticised on the grounds that it is redundant; confusing (in relation to both the subjective and objective elements); involves fictitious concepts (the ordinary person); male orientated; and favours the dominant Anglo-Saxon Celtic culture to the exclusion of minority groups.<sup>23</sup>

4.20 Despite this, there are strong and sound reasons to retain provocation as a partial defence to murder. Most notably, that it would be fundamentally wrong in principle for the criminal law to fail to recognise a lesser degree of culpability.

4.21 When analysing the arguments for abolition and, equally, for retention, the general context of the law on homicide as well as changing norms in society must be taken into account. The law of homicide varies considerably between States. In particular, the mandatory penalty for murder or the lack of appropriate defences to accommodate, in particular, women in violent relationships has greatly influenced recommendations to retain the defence. Similarly, jurisdictions that have abandoned the mandatory penalty for murder are more likely to recommend abolition.<sup>24</sup>

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<sup>22</sup> LRC CP 27-2003, at paragraph 7.28.

<sup>23</sup> Neal and Bagaric “Provocation: The Ongoing Subservience of Principle to Tradition” (2003) 67 *Journal of Criminal Law* 237, at 238.

<sup>24</sup> The defence of provocation has been abolished in the Australian States of Victoria and Tasmania. The defence was abolished in Victoria in 2005 by the *Crimes Homicide Act 2005* (Vic) s.3. Provocation was abolished as a defence in Tasmania in 2003 by s.4 of the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

**(i) Arguments in favour of abolition**

4.22 The New Zealand Law Reform Commission's 2007 Report on the Partial Defence of Provocation<sup>25</sup> recommended abolition of the defence in favour of viewing evidence of alleged provocation at sentencing stage.

"The partial defence of provocation should be abolished in New Zealand by repealing s.169 of the *Crimes Act 1961*. The defendants who would otherwise have relied upon that partial defence should be convicted of murder; and evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise."<sup>26</sup>

The basis for the abolition recommendation is premised on the belief that the defence is "irretrievably flawed"<sup>27</sup> and such are those flaws "that the defence does not in fact fulfil its policy purposes".<sup>28</sup>

4.23 Also in favour of viewing culpability at sentencing stage is the Australian Model Criminal Code Officers Committee ("MCCOC") who recommended abolition in its *Discussion Paper on Fatal offences Against the Person* in 1998.<sup>29</sup> According to the MCCOC, the principal argument in favour of abolishing the defence lies in the fact that provoked killings are intentional; and in the invalidity of the assumption that hot-blooded killers are less culpable than their cold-blooded counterparts.<sup>30</sup>

4.24 These Reports are not alone in their view of the defence being 'flawed'. In the UK Privy Council decision *Attorney General for Jersey v Holley*, Lord Nicholls of Birkenhead agreed "that the law relating to provocation is flawed to an extent beyond reform by the courts".<sup>31</sup>

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<sup>25</sup> New Zealand Law Commission *The Partial Defence of Provocation* (NZLC R 98, Wellington, 2007).

<sup>26</sup> *Ibid*, at 13.

<sup>27</sup> *Ibid*, at 10.

<sup>28</sup> *Ibid*.

<sup>29</sup> Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 87. See also LRC CP 27-2003, at paragraph 6.33.

<sup>30</sup> Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 87.

<sup>31</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23 at paragraph 27.

4.25 Much of the complexity with the provocation defence arises as a result of its historic origins. The partial defence of provocation emerged over 400 years ago to express tolerance for human frailty, at a time when men bore arms and retaliated to affronts to their honour.<sup>32</sup> Violent retaliation to breaches of honour was commonplace and widely accepted. However, one must question whether this is still a suitable rationale for the defence given the society we live in today. Coss makes the point that, while the historical foundations of the provocation defence are fascinating their relevance for justifying the defence today is questionable.<sup>33</sup> Society today has much greater intolerance of violence, and it may be argued that the defence of provocation “should be abolished as a legal anachronism which perpetuates excuses for violence.”<sup>34</sup> Defending one’s honour by killing is no longer an accepted norm in society and therefore abolitionists argue that a person who is ‘sane’ and who kills another person unlawfully with intent, whether provoked or not, should be found guilty of murder.

(I) *Gender Bias*

4.26 The nature of the historic origins of the provocation plea has also contributed to the argument of gender bias. It has been suggested that the foundations of the defence “reveal it to be a reaction to the prevalence of certain forms of male aggression such as drunken brawls and duels”.<sup>35</sup> The defence emerged to defend retaliation to breaches of men’s honour. Thus it has been said that provocation has served men well but not women, bearing in mind that it was never designed for them.<sup>36</sup>

4.27 The partial defence of provocation is seen to be discriminatory against women as it fails to provide for the natural pattern of female aggression. In the words of Power, the defence is gendered and heterosexist and thus cultural, in so far as it privileges paradigmatically heterosexual, male violence.<sup>37</sup> In her opinion, the:

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<sup>32</sup> Horder *Provocation and Responsibility* (Clarendon Press 1992).

<sup>33</sup> Coss “The Defence of Provocation: An Acrimonious Divorce from Reality” (2006-2007) 18 *Current Issues in Criminal Justice* 51, at 52.

<sup>34</sup> Law Reform Commission New South Wales *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at paragraph 2.35

<sup>35</sup> Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 89.

<sup>36</sup> *Ibid.*

<sup>37</sup> Power “Provocation and Culture” (2006) *Criminal Law Review* 871, at 877.

“[S]udden and temporary loss of control requirement favours the kind of explosive rage more typical of men, and leaves the – usually – female victims of domestic violence unprotected as defendants to murder charges when their rage is internalised and thus not manifested in angry outbursts, yet excuses defendants’ lethal expression of outraged manhood against their gay male victims”<sup>38</sup>

4.28 A female defendant suffering from battered woman’s syndrome often kills her partner after years of abuse in a method which is premeditated in the true sense of the word (a battered woman frequently waits until her abuser is drunk or asleep before striking) and thus has no hope of securing the benefit of the plea of provocation.<sup>39</sup> In a similar vein to Power, the Australian Model Criminal Code Officers Committee (MCCOC) suggests that “any argument that is murder for a battered woman driven to desperation to kill her partner, but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense”.<sup>40</sup> The MCCOC claims that because this problem is so deeply entrenched within the architecture of the defence the only solution is abolition.

4.29 In its *Consultation Paper on Provocation*, the Commission also referred to arguments advanced by Horder and Wells for abolition. Wells has strongly criticised the operation of the defence declaring it to be sexist, homophobic, racist and defamatory of the deceased whereby the victim is placed in an unfavourable light<sup>41</sup> while Horder believes the defence is gender biased both in its formal structure and actual operation.<sup>42</sup>

4.30 On the issue of gender bias, in the opinion of the Commission the defence needs to be reformed rather than abolished. Thus in the Consultation Paper, the Commission provisionally recommended that “the traditional requirement of immediacy should be diluted in order to allow greater flexibility in dealing with cases of domestic homicide”.<sup>43</sup>

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<sup>38</sup> *Ibid.*

<sup>39</sup> LRC CP 27-2003, at paragraph 6.37.

<sup>40</sup> Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 91.

<sup>41</sup> See generally LRC CP 27-2003, at paragraph 6.39 and Wells “Provocation: The Case for Abolition” in Ashworth and Mitchell (eds.) *Rethinking English Homicide Law* (Oxford University Press 2000) at 86.

<sup>42</sup> Horder *Provocation and Responsibility* (Clarendon Press 1992) at 192.

<sup>43</sup> LRC CP 27-2003, paragraph 6.44.

4.31 Closely related to arguments based on gender biased is the general discussion about the moral qualities of emotions. It has been suggested that anger has been placed in a special position by the defence of provocation. The defence of provocation was developed “in a violent age when men bore weapons for their own protection”.<sup>44</sup> However, today, in western countries which are governed by the rule of law and where citizens enjoy a high level of personal security, there is positive role for anger.<sup>45</sup> On this basis, the defence of provocation is inconsistent with ‘current notions’ of a civilised society. Neal and Bagaric suggest that the defence of provocation should be abolished because “the concession to human frailty is misguided. We are not that frail after all. Angry impulses do not so overwhelm us to the point that we become enslaved by them.”<sup>46</sup> They suggest that by recognising provocation as a partial defence to the most serious crime known tolerates unchecked displays of anger.

**(ii) Arguments for Retention**

4.32 Despite the unsound historical rationale of the defence and the continuous difficulties facing the judiciary and legislators alike, there are strong and sound reasons to retain provocation as a partial defence to murder. There may also be merit in the view that jurisdictions should think long and hard before abolishing or significantly narrowing a doctrine that is centuries old.<sup>47</sup>

**(I) Labelling**

4.33 The principal argument in favour of retention is that it would be fundamentally wrong for the criminal law not to recognise reduced culpability in cases of homicide. The moral perception is that provoked killings are less heinous than unprovoked ones, and that this difference cannot adequately be catered for by adjusting the quantum of punishment at sentencing stage. The provocation defence is considered a suitable method to recognise reduced culpability for a number of reasons.<sup>48</sup>

4.34 Firstly, it is morally right that a defendant should not be stigmatised with the label of murderer in a situation of less culpability. It is believed that a reduced sentence but with the murderer label (in a case where provocation arose) does not adequately achieve the same tangible acknowledgement of

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<sup>44</sup> *DPP v Camplin* [1978] AC 705, at 713-714.

<sup>45</sup> Neal and Bagaric “Provocation: The Ongoing Subservience of Principle to Tradition” (2003) 67 *Criminal Law Journal* 237, at 244.

<sup>46</sup> *Ibid*, at 247.

<sup>47</sup> Dressler “Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject” (2002) Vol. 86 *Minnesota Law Review* 959, at 963.

<sup>48</sup> (NZLC R 98, Wellington, 2007) at 51.

mitigating circumstances.<sup>49</sup> The label of murder carries a unique stigma and there is an assumption that the label of manslaughter, when attached to a provoked killer, does in fact label that person accurately and fairly in light of society's understanding of the concept of manslaughter.<sup>50</sup> In a similar manner the New South Wales Law Reform Commission claim that provoked killings should not be labelled as murder; to do so would be both misleading and unfair stigmatisation.<sup>51</sup>

4.35 In contrast, however, the Canadian Law Reform Commission questions whether the label is in fact misleading. In the view of the Canadian Commission:

“[I]f ‘murder’ seems an appropriate 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)”.<sup>52</sup>

4.36 More recently, the Law Commission for England and Wales has recommended that the partial defence of provocation be retained but only so far as reducing first degree murder to second degree murder. Thus a provoked killing would now be labelled as murder rather than manslaughter.<sup>53</sup>

(II) *Jury*

4.37 Secondly, provocation is a liability issue which must be determined at trial stage. Dealing with provocation at trial rather than at sentencing allows the jury to make a judgement about whether the defendant was provoked to the extent that a reasonable person would be. In the Commission's view, this is a more appropriate approach given the serious nature of a homicide charge. In 2004, the Law Commission for England and Wales stated:

“a short sentence (or even in some circumstances a non-custodial) for a provoked killing will be more understandable by, and acceptable to, the public, if it results from a conviction by a jury of an offence not

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<sup>49</sup> (NZLC R 98, Wellington, 2007) at 52.

<sup>50</sup> (NZLC R 98, Wellington, 2007) at 12.

<sup>51</sup> Law Reform Commission New South Wales *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at paragraph 2.33.

<sup>52</sup> Law Reform Commission of Canada, *Homicide*, Working Paper No.33 (1984) at 74.

<sup>53</sup> Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) at paragraph 2.50.

carrying the title of murder, than a decision by a judge after a conviction of murder”.<sup>54</sup>

4.38 Similarly, the New South Wales Law Reform Commission has stated that “the defence remains vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder.”<sup>55</sup>

4.39 Another argument in favour of retention is that there is potential for perverse consequences that are not in the overall interests of justice if the defence is abolished. Thus, “if jurors are faced with the stark choice of acquitting or convicting of murder, in cases where they feel some sympathy for the defendant they may prefer to acquit, or find themselves unable to reach a verdict which would require another trial”.<sup>56</sup>

**(c) Conclusions and recommendations**

4.40 Proposals for abolition, set out above, rest on the assumption that provocation can be dealt with appropriately at sentencing; that it is gender biased and discriminatory and that the underlying rationale for the defence is distorted. Certainly, the Commission accepts that the defence is in an unsatisfactory state but does not agree that abolition is the best course of action. The Commission considers there are compelling reasons for retaining the plea, primarily that the distinction between murder and manslaughter marks an important moral boundary and that this would be greatly compromised by abolition of the plea of provocation.<sup>57</sup>

4.41 The Commission accordingly recommends that provocation should be retained as a partial defence to murder in this jurisdiction. While recommending its retention, however, the Commission has also concluded that the defence of provocation should be modified and reformed. Elements of the defence that are not in a satisfactory state and in need of reform are set out in the remainder of this Chapter.

*4.42 The Commission recommends that the defence of provocation should be retained as a partial defence to murder, subject to specified conditions.*

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<sup>54</sup> Law Commission (England and Wales), *Partial Defences to Murder* Final Report (LC 290) at paragraph 3.37.

<sup>55</sup> Law Reform Commission New South Wales *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at paragraph 2.33.

<sup>56</sup> New Zealand Law Commission *The Partial Defence of Provocation* (NZLC R 98, Wellington, 2007) at 52.

<sup>57</sup> LRC CP 27-2003, paragraph 7.06

## **E The rationale for the defence of provocation – justification or excuse**

4.43 The Commission now turns to discuss the rationale for the defence of provocation. In the introductory discussion to the defences of criminal law in Chapter 1, it was acknowledged that criminal defences are generally categorised as a justification or as an excuse. Justification based defences imply that the conduct of the accused was right and deemed lawful whereas excuse based defences deem the conduct of the accused as wrong but forgiven.

4.44 Much effort has been directed at debating whether the rationale underpinning the plea of provocation should be one of partial justification or partial excuse. Whether provocation should be seen as a partial justification (which has its focus on the wrongful conduct of the deceased) or as a partial excuse (which concentrates on the accused's loss of control) has important implications for the operation of the defence in terms of the educative role of the criminal law. It must also be noted that, in terms of the actual operation of the defence and the modern approach to the subject, it has been said that the distinction is of no benefit and has no bearing on the conviction.<sup>58</sup> However, the Commission remains of the opinion that there is merit in reflecting on the rationale of the defence if not only to understand the historical origins of the defence but also to recognise the educative role of the criminal law and the importance of categorisation and clarity.

### **(a) Consultation Paper Recommendations**

4.45 In its Consultation Paper on Provocation, the Commission provisionally recommended the introduction of a justification-based model of the defence of provocation tempered by excuse considerations.<sup>59</sup>

### **(b) Discussion**

4.46 Traditionally provocation was viewed as a defence of partial justification with the focus being on the magnitude of the provocation rather than on the self control of the accused. Over time, however, the defence witnessed a shift towards an excuse based defence where the focus is now concentrated on the self control of the accused rather than on the provocative conduct of the deceased.

4.47 The partial justification rationale is based on the view that the actions of the accused were to some extent warranted because of the provoking words or acts of the deceased. In other words, the actions of the accused are deemed

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<sup>58</sup> Charleton, McDermott, Bolger *Criminal Law* (Butterworths 1999) at 1018.

<sup>59</sup> LRC CP 27 2003, paragraph 6.14 and 7.30-31

'lawful' or in the case of provocation partially lawful. The idea is that a portion of the responsibility for the killing lies with the deceased on the basis that he or she was partially to blame for his or her own demise. Remodelling the defence so as to view the defence in justificatory terms shifts the focus away from the accused's loss of self control and draws our attention towards the conduct of the deceased.

4.48 In its Consultation Paper, the Commission recommended the partial justification-based model on the reasoning that "it is vital not to lose sight of the original basis for the defence: that "wrongful" conduct on the part of the deceased triggered the accused's lethal response".<sup>60</sup> Early authorities clearly pointed to partial justification as being the underlying rationale of the plea of provocation whereby a wrongful act; typically a criminal or tortious act assault was required on the part of the deceased.<sup>61</sup> In medieval times, the plea of provocation was often raised in cases of men 'defending their honour'. This justificatory theme continued to be the dominant rationale right up until the nineteenth century and is strongly reflected in the leading 19th century decision *R v Welsh*<sup>62</sup>, where it was made clear that the central element of the defence is not the fact that the accused acted in the heat of passion but rather it is a question of whether the conduct of the deceased was sufficient provocation.<sup>63</sup> To focus on the conduct of the deceased is clearly justificatory in nature, however it has recently been suggested that the plea is best viewed as a combination of justificatory and excusatory elements.<sup>64</sup> Loss of control, for example, is one of the fundamental elements in the defence of provocation and has been since the origins of the defence. This requirement is certainly excusatory in nature. In the Consultation Paper, the Commission noted that many writers are now cautious about placing undue emphasis on one rationale over the other as "there has always been a key justificatory element or condition bound up with the excusatory element".<sup>65</sup>

4.49 It is also fair to say that there has been a significant shift towards the excusatory theme of the defence of provocation, that is to say the focus is on

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<sup>60</sup> LRC CP 27 2003, paragraph 7.30

<sup>61</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 854.

<sup>62</sup> *R v Welsh* (1869) 11 Cox CC 336.

<sup>63</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 854.

<sup>64</sup> LRC CP 27 2003, paragraph 2.01.

<sup>65</sup> LRC CP 27-2003, paragraph 2.05- 2.06.

the accused's loss of self control; the actions of the accused are not deemed legal but will be excused. To view the rationale for the defence of provocation as a partial excuse recognises that the action of the person is a crime, but that the person should be partially excused.

4.50 To decipher why there has been a stronger alliance with the excusatory rationale for the defence of provocation in more recent decades and a move away from what could be called the traditional rationale, of justification, requires a discussion of changing values in society. To reiterate, justification involves the claim that the action of the defendant was not wrong but was acceptable or even the right thing to do. It is understandable that the traditional rationale for the defence of provocation was one of justification. Society was built on the basis where revenge, defending honour and male authority through force were deemed an acceptable form of behaviour. In the English case *R v Smith* Lord Hoffman captured this notion well in his historical description when he said:

“The doctrine comes from a world of Restoration gallantry in which gentlemen habitually carried lethal weapons, acted in accordance with a code of honour which required insult to be personally avenged by instant angry retaliation... To show anger ‘in hot blood’ for a proper reason....was not merely permissible but the badge of a man of honour”.<sup>66</sup>

4.51 Clearly, this is no longer the case. Society no longer accepts violence as a basis to defend honour. At the Commission's 2007 seminar on *Criminal Law Defences* it was suggested that to present provocation in terms of justification, albeit part-justification, could potentially lead to a situation where defence counsel make impassioned pleas that the defendant was ‘justified’ for causing the death because of the deceased's conduct. The Commission notes the historical roots of the provocation defence in a justification-based rationale, but acknowledges that the partial-excuse rationale more accurately reflects its current effect. Where a defence is labelled as partial justification, it conveys a message of approving human reactions; the focus is on the wrongful conduct of the deceased. Where a defence is labelled as partial excuse it conveys a message to society that the act was wrong, the focus being on the accused's lack of control, but the actor is only partially to blame.<sup>67</sup>

4.52 The partial excuse theory is more adequately suited to the social environment we live in today. The Commission accepts that the current basis for the defence of provocation is that the accused lost control in circumstances

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<sup>66</sup> *R v Smith* [2001] 1 AC 146 (Lord Hoffman).

<sup>67</sup> Yeo *Compulsion in Criminal Law* (The Law Book Company Limited 1990) at 1-10

where an ordinary person would have done likewise. The fact that the killing was preceded by a provoking act does not remove the wrongful nature of the accused's actions. Thus, the accused is liable for the lesser crime of manslaughter. The accused is held responsible because he or she has displayed a character defect by not resisting the urge to kill.

4.53 This does not mean that if an excuse-basis is seen as the rationale for the defence, the law cannot consider the severity of the provoking act. The gravity of the provocation is still relevant when assessing the credibility of the accused's claim that he or she lost self-control in the circumstances.

4.54 The test recommended by the Commission later in this chapter is consistent with a partial excuse based rationale. The test put forward by the Commission allows the jury to decide which of the accused's characteristics they wish to take into account when they are evaluating the standard of self control that an ordinary person would have exhibited.

4.55 It remains consistent with the excuse-based model of provocation, where the focus of the enquiry shifts to the mental state of the accused, to insist that there be something intelligible as provocation to begin with. Insisting that the provoking act be of a level of gravity above a certain threshold not only guards against abuse of the defence but also guards against things qualifying as provocation what might be considered morally offensive. In order to amount to provocation the act or words spoken should be wrong when measured by the ordinary standards of the community.

### **(c) Conclusions and Recommendations**

4.56 The debate as to whether provocation should be deemed as a partial justification (which has its focus on the wrongful conduct of the deceased) or partial excuse (which concentrates on the accused's loss of control) or whether the plea should be seen as a combination of both rationales is ongoing, and seems likely to continue. Although it is argued that the rationale discussion has no bearing on the conviction, the Commission believes the issue of whether the defence should be viewed as partial justification or partial excuse has important implications for the educative role and function of criminal law. The Commission, accordingly, recommends that the defence of provocation should be viewed and referred to, as a defence of partial excuse.

4.57 *The Commission recommends that the defence of provocation should be viewed and referred to as a defence of partial excuse.*

## **F The test for provocation**

4.58 Similar to the rationale for the defence of provocation, the test for provocation causes continuing difficulties for the courts. In particular, the courts have been troubled with the objective test of provocation; the reasonable man

standard. Coss questions whether in fact the 'ordinary person' test is a fallacy. The objective test presumes that an ordinary person could lose self control and deliberately kill as a consequence to provocative conduct but in fact 'ordinary' people, when affronted, do not resort to lethal violence.<sup>68</sup> This struggle has been most apparent in recent decades with an extraordinary number of appellate decisions. The lack of consensus apparent in those decisions is a clear illustration of the fraught nature of the defence.

4.59 The test for provocation is a dual one. For the defence to succeed the alleged provocative conduct must be such as to:

- (1) Actually cause in the defendant, a sudden and temporary loss of self-control making him so subject to passion that he or she is not the master of his/her mind.
- (2) Make a reasonable person (ordinary person) do as the defendant did.

These two elements are now more generally recognised as the subjective and objective tests or "ingredients" of the provocation defence.

4.60 In the Consultation Paper on Provocation, the Commission noted that this terminology in itself has resulted in the greatest confusion and acknowledged that judges are faced with an uphill task when directing juries along the lines of a mixed subjective/ objective test.<sup>69</sup> In the Commission's view, it would be preferable if the expressions "objective" and "subjective" were avoided. It would be better to view the first element as nothing more than a factual inquiry, namely, whether the accused was in fact provoked. The second element (the reasonable person test) invites an evaluation of the quality of the accused's fatal response and can therefore be seen as the evaluative ingredient. This is to be judged by the application of generally accepted norms of appropriate conduct.<sup>70</sup>

4.61 While both the subjective and objective conditions have led to much case law and comment the second ingredient, the reasonable or ordinary person standard, has "generated most of the academic heat and much of the modern case law at senior appellate levels."<sup>71</sup> The objective test has two elements. The first element calls for the assessment of the gravity of the provocation; the second element calls for the application of the external

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<sup>68</sup> Coss "Provocative Reforms: A comparative critique" (2006) 30 *Criminal Law Journal* 138, at 142.

<sup>69</sup> LRC CP 27 2003, paragraph 7.32.

<sup>70</sup> LRC CP 27 2003, paragraph 7.32.

<sup>71</sup> Power "Provocation and Culture" (2006) *Criminal Law Review* 871

standard of self-control: whether the provocation was enough to make a reasonable person do as he or she did.<sup>72</sup>

4.62 For the purposes of the law on provocation the reasonable person means:

“[A]n ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self control as everyone is entitled to expect that his fellow citizens will exercise as it is today”.<sup>73</sup>

The use of the words ‘reasonable person’ has not been regarded as the best choice of words. For the majority, in the Privy Council decision in *Holley*, Lord Nicholls noted that it is difficult to conceive circumstances where it would be reasonable for a person to respond to a taunt by killing his tormentor.<sup>74</sup> Similarly in *R v Morhall*, Lord Goff commented that to speak of the degree of self control attributable to the ordinary person is “certainly less likely to mislead” than to do so with reference to the reasonable person.<sup>75</sup> The phrase the ‘reasonable person’ is intended to refer to an ordinary person, that is, a person of self control.

4.63 In broad terms two contrasting approaches have been adopted by the courts in determining provocation, thereby revealing the difficulty in achieving a settled standard. The first involves taking into account all the personal characteristics of the accused in assessing the gravity of the provocation and loss of self control. The second involves taking into account the accused’s characteristics only so far as to assess the gravity of the provocation; loss of self control should be judged by a community standard.

4.64 Thus, the pendulum has swung between subjective and objective tests and also an amalgamation of both. It would now seem that the pendulum has stopped somewhere in the middle with the weight of opinion favouring a fusion of both the objective and subjective approaches.<sup>76</sup>

4.65 In this Part, the provisional recommendations made in the Consultation Paper on Provocation regarding the test for provocation are reviewed as well as recent developments since it was published. Finally, the

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<sup>72</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 6.

<sup>73</sup> *R v Camplin* [1978] AC 705, 717 (Lord Diplock).

<sup>74</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 7.

<sup>75</sup> *R v Morhall* [1996] AC 90, 98.

<sup>76</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23.

Commission's conclusions and recommendations on an appropriate test for provocation are set out.

**(a) Consultation Paper Recommendations**

4.66 In its Consultation Paper the Commission provisionally recommended a withdrawal from a purely subjective test which is dominant in Ireland and the introduction of a defence remodelled on objective lines. This would allow juries to take account of the accused's personal characteristics insofar as they affect the gravity of provocation but that (with the possible exception of age and sex) personal characteristics should not feature in relation to the question of self-control.<sup>77</sup>

4.67 The Commission recommended the following draft provision in the Consultation Paper;

- Anything said or done may be provocation if-
  - (i) it deprived the accused of the power of self control and thereby induced him or her to commit the act of homicide; and
  - (ii) in the circumstances of the case it would have been of sufficient gravity to deprive an ordinary person of the power of self-control
- (3)(i) In determining whether anything done or said would have been of sufficient gravity to deprive an ordinary person of the power of self-control the jury or court, as the case may be, may take account of such characteristics of the accused as it may consider relevant.
- (ii) A jury or court, as the case may be, shall not take account of an accused's mental disorder, state of intoxication or temperament for the purposes of determining the power of self-control exhibited by an ordinary person.<sup>78</sup>

**(b) Discussion**

4.68 This approach as recommended by the Commission marks a shift away from the current subjective approach in Ireland towards a community standard based approach adopted in other common wealth jurisdictions. To fully acknowledge this proposed shift it is useful to begin by reviewing the existing position in this jurisdiction.

**(i) The Irish position**

4.69 In the Consultation Paper, the Commission noted that there was no Irish case law on provocation until the 1977 decision of the Court of Criminal

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<sup>77</sup> LRC CP 27 2003, paragraph 7.31.

<sup>78</sup> LRC CP 27 2003, paragraph 7.36.

Appeal in *The People (DPP) v MacEoin*<sup>79</sup>. The decision in *MacEoin* established a predominantly subjective test for provocation in Ireland in contrast to the position in most common law jurisdictions where, although legislative alterations to provocation differed on some points, a remarkable unity in approach was evident.<sup>80</sup> In the majority of jurisdictions a “purely objective test” was adopted following *R v Welsh* and subsequent to that, a modified test which took account of the personal circumstances of the accused in assessing the gravity of provocation. It has been noted that, in adopting a subjective test, the law in Ireland “has allowed sentiment to overrule a reasoned consideration of the appropriate scope of the defence”.<sup>81</sup>

4.70 The Court of Criminal Appeal in *MacEoin* can be commended for not following the much criticised test in *Bedder v DPP*<sup>82</sup> but, by going far beyond the modified objective standard laid down in *Camplin*, Irish law entered a territory that would ultimately shape the law on provocation in this jurisdiction. The Court in *MacEoin* set out a new subjective standard where the trial judge was expected to take into account the accused’s characteristics in assessing loss of control. The Court held that the test for provocation is as follows:

“[T]he trial judge at the close of evidence should rule on whether there is any evidence of provocation which having regard to the accused’s temperament, character and circumstances, might have caused him to lose control of himself at the time of the wrongful act and whether the provocation bears a reasonable relation to the amount of force used by the accused”.<sup>83</sup>

4.71 In introducing this new subjective standard, that is, taking into account the personal characteristics of the accused in deciding on the gravity of the provocation, the Court of Criminal Appeal relied on the minority judgment in the Australian case *Moffa v The Queen*.<sup>84</sup> In that case, Murphy J rejected the objective test (the reasonable man standard) because it was “not suitable even for a superficially homogenous society, and the more heterogeneous our

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<sup>79</sup> [1978] IR 27.

<sup>80</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 872-3.

<sup>81</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 873

<sup>82</sup> [1954] 2 All ER 801.

<sup>83</sup> [1978] IR 27, at 34.

<sup>84</sup> *Moffa v The Queen* (1977) 138 CLR 601.

society becomes, the more inappropriate the test is.”<sup>85</sup> Although the dissenting judgement in *Moffa* was the only common law authority supporting the adoption of the subjective test, the Court of Criminal Appeal relied on it in *MacEoin*. The Court of Criminal Appeal asserted that the objective test was “profoundly illogical” and there were inherent inconsistencies in its application up to that time, the late 1970s, in the courts in England and Wales and elsewhere.<sup>86</sup> The Court also reinforced this approach by reference to the approach of the Supreme Court in *People (Attorney General) v Dwyer*<sup>87</sup>, which dealt with self-defence in murder. In *MacEoin*, the Court asserted that the analysis in *Dwyer* “seems to us to have been a decisive rejection of the objective test in a branch of law closely allied to provocation.”<sup>88</sup>

4.72 Subsequent decisions in Ireland struggled to apply and understand the ‘reasonable relation’ component of *MacEoin*. The confusion arises from what appears to be an incorporation of an element of objectivity in a “purely subjective test.” Stannard described the test in *MacEoin* “as no less illogical than the objective standard it sought to replace.”<sup>89</sup> It has also been said that the deliberate inclusion of the proportionality requirement casts doubt on the depth of the Court of Criminal Appeal’s commitment to the wholesale subjective standard.<sup>90</sup>

4.73 In the Consultation Paper, the Commission noted that subsequent interpretations of *MacEoin* appeared to reduce the proportionality part of the test (the reasonable relation component) as a factor to be considered in the context of the evidence as a whole<sup>91</sup> but the precise role of the proportionality component remains unclear. On this basis two interpretations of the test laid down in *MacEoin* are possible. The first is a partly subjective/partly objective test; the second is a purely subjective test which only takes the proportionality of the accused’s reaction into consideration when weighing up the overall evidence.

4.74 This lack of clarity on the proportionality issue in *MacEoin* proved to be a source of considerable difficulty for the Court of Criminal Appeal in cases

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<sup>85</sup> *Moffa v The Queen* (1977) 138 CLR 601, 626.

<sup>86</sup> LRC CP 27 2003, at paragraph 4.07.

<sup>87</sup> [1972] IR 416, at 422. See generally paragraph 2.XX, above

<sup>88</sup> [1978] IR 27, at 34. See also LRC CP 27 2003, paragraph 4.08.

<sup>89</sup> Stannard “Making sense of MacEoin” (1998) 8 ICLJ 20.

<sup>90</sup> McAuley “Anticipating the Past” (1987) 50 MLR 133, 153-154.

<sup>91</sup> LRC CP 27 2003, paragraph 4.10.

that followed. In *People (DPP) v Mullane*<sup>92</sup> the Court of Criminal Appeal discussed whether *MacEoin* had in fact intended to retain an element of objectivity in the test for provocation by including the “reasonable relation” component. In *Mullane*, the Court concluded that it had not been the intention of the Court of Criminal Appeal in *MacEoin* to maintain such an element; the reference to proportionality was, rather, designed to test the accused’s credibility:

“[T]he impugned sentence in *MacEoin* really comes down to credibility of testimony rather than to any suggestion that the accused’s conduct is to be once more judged by an objective standard. That latter construction would go contrary to everything else that is contained in the judgment.”<sup>93</sup>

4.75 Thus the Court in *Mullane* rejected the view that the objective test is part of the test for provocation in Irish law. But this view is not supported by all authorities.<sup>94</sup> For Stannard, *Mullane* “tries valiantly to make sense of *MacEoin*, but only succeeds in making matters more obscure than they already were.”<sup>95</sup>

4.76 The confusion surrounding the proportionality matter was again discussed in *People (DPP) v Noonan*<sup>96</sup>. Here the applicant argued that that the trial judge had misdirected the jury by referring to English case law, in such a way that the jury might have believed they should apply an objective test. The Court of Criminal Appeal acknowledged the confusion that surrounded *MacEoin* due to the proportionality requirement; “whether the provocation bears a reasonable relation to the amount of force used by the accused.”<sup>97</sup> Nonetheless, the Court went on to affirm the decision in *Mullane* and held that proportionality only went to the issue of credibility.

4.77 In this climate of inconsistency, in *People (DPP) v Davis*<sup>98</sup> the Court of Criminal Appeal attempted to re-examine the law, noting that it did so with some trepidation.<sup>99</sup> In *Davis* the Court observed that the decision in *MacEoin*

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<sup>92</sup> Court of Criminal Appeal, 11 March 1997.

<sup>93</sup> *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997 at 7. See also LRC CP 27 2003, paragraph 4.13.

<sup>94</sup> LRC CP 27 2003, paragraph 4.14.

<sup>95</sup> Stannard “Making Sense of *MacEoin*” (1998) 8 ICLJ 20.

<sup>96</sup> [1998] 2 IR 439.

<sup>97</sup> *People (DPP) v MacEoin* [1978] IR 27, at 34.

<sup>98</sup> [2001] 1 IR 146.

<sup>99</sup> [2001] 1 IR 146, at 157.

diverged markedly from other common law countries by establishing a subjective test in Irish law. The Court also identified the difficulties involved in applying the *MacEoin* test most notably the difficulty facing the prosecution: “It is almost impossible for the prosecution to satisfy a jury that words or acts alleged by the defence to constitute provocation were not reasonably capable of causing the accused to lose his self-control”.<sup>100</sup>

4.78 Although the Court of Criminal Appeal in *Davis* acknowledged that it was not appropriate to discuss the merits or drawbacks of the subjective test, the Court did suggest that the position of the defence may ‘require restatement’. From this it may be suggested that *Davis* represented the first tentative step away from the purely subjective approach and placed some restriction or community standard on the test for provocation particularly in cases that would “allow the promotion of moral outrage”.<sup>101</sup> It was also observed that factors less common at the time of *MacEoin* may now have important bearings on the limits of the defence. In citing *McAuley* and *McCutcheon*<sup>102</sup>, the Court mentioned road rage and other comparable types of “socially repugnant violent reaction” as examples of the sort of conduct that might be excluded from the ambit of the plea on policy grounds.<sup>103</sup>

4.79 It most also be recognised that although the Irish position marks a divergence from most common law jurisdictions, the classic ingredients of the defence still have a foothold in Irish law. In *The People (DPP) v McDonagh*<sup>104</sup>, the Court reiterated the need for “a sudden and temporary loss of control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind” before provocation can be raised. Although the remarks made in *Davis* were obiter, it may be suggested that there is support for the introduction of a test founded on a community standard basis where society has a right to expect minimal self control from its members and in turn this is how it should be gauged at trial.

#### **(ii) Community standard approach**

4.80 In the *Consultation Paper on Provocation*, the Commission examined the evolution of the modern law of provocation in England and Wales,<sup>105</sup>

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<sup>100</sup> *Ibid*

<sup>101</sup> [2001] 1 IR 146,159.

<sup>102</sup> *McAuley Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 877.

<sup>103</sup> LRC CP 27-2003, at paragraph 4.24.

<sup>104</sup> [2001] 3 IR 201.

<sup>105</sup> LRC CP 27 2003, Chapter 3.

beginning with *R v Welsh*<sup>106</sup> and concluded with the controversial case *R v Smith (Morgan)*<sup>107</sup>. Here, the Commission briefly reviews this case law.

4.81 In *DPP v Camplin*<sup>108</sup> the UK House of Lords considered the effect of section 3 of the British *Homicide Act 1957* and also discussed for the first time the distinction between the gravity of the provocation and the self control required. This distinction is now regarded as part of the settled law on provocation.<sup>109</sup>

4.82 Section 3 of the British *Homicide Act 1957* was a legislative response to the UK House of Lords decision in *DPP v Bedder*<sup>110</sup>. In *Bedder* an 18 year old sexually impotent man was convicted of murdering a prostitute who had ridiculed and kicked him after he failed in his attempt to have sexual intercourse with her. On appeal, it was argued that the trial judge had misdirected the jury by telling them to assess the provocation by reference to the “reasonable man” standard alone; and that he should have told them to invest the “reasonable man” with the accused’s physical peculiarities (in this particular case, impotence) before making this assessment.<sup>111</sup> The House of Lords rejected this argument. Lord Simmonds stated:

“It would be plainly illogical not to recognize an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another”.<sup>112</sup>

4.83 The decision in *Bedder* was regarded as being unduly harsh and, according to Ashworth, represented bad law.<sup>113</sup> In *DPP v Camplin*<sup>114</sup>, the accused was 15 years of age and the question was whether the law should reduce the harshness of *Bedder* by taking into account certain characteristics of the accused in order to decide the effect that provocation may have on the

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<sup>106</sup> (1869) 11 Cox CC 336.

<sup>107</sup> *R v Smith* [2001] 1 AC 146.

<sup>108</sup> *DPP v Camplin* [1978] AC 705.

<sup>109</sup> (NZLC R 98, Wellington, 2007) at 29.

<sup>110</sup> *DPP v Bedder* [1954] 2 ALL ER 801.

<sup>111</sup> LRC CP 27 2003, paragraph 3.09.

<sup>112</sup> *DPP v Bedder* [1954] 2 ALL ER 801.

<sup>113</sup> Ashworth “The Doctrine of Provocation” (1976) Cambridge Law Journal 292, at 311.

<sup>114</sup> *DPP v Camplin* [1978] AC 705.

“reasonable man” endowed with particular traits. The House of Lords concluded that it should. Lord Diplock said that the reasonable man should not be defined exclusively in terms of the adult male; the law should not require “old heads upon young shoulders”.<sup>115</sup> He proposed the following direction for the jury:

“[The reasonable man] is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they [the jury] think would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did”.<sup>116</sup>

4.84 It is arguable that Lord Diplock may have been influenced by an article written by Ashworth<sup>117</sup> two years prior to *Camplin*, although he did not refer to the article in his Opinion. Ashworth had stated that the characteristics of the accused should be taken into account to assess the gravity of the provocation but not self-control; this would strike an appropriate balance between concession to human frailty and objectivity in the interests of the community as a whole.

“To be meaningful, the “gravity” of provocation must be expressed in relation to persons in a particular situation or group. For this reason it is essential and inevitable that the accused’s personal characteristics should be considered by the court. The proper distinction, it is submitted, is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused’s level of self control should not”.<sup>118</sup>

4.85 In response to the “illogical” argument of this test as put forward by Lord Simmonds LC in *Bedder*, Ashworth stated that “to lay down a test of a man with reasonable self-control and with an unusually excitable temperament would indeed be illogical; but a test of “an impotent man with reasonable self-control” contains no logical contradiction, for the two characteristics can co-exist and the reference to impotence assists in interpreting the gravity of the provocation”.<sup>119</sup>

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<sup>115</sup> *DPP v Camplin* [1978] AC 705, 717.

<sup>116</sup> *Ibid*, at 718.

<sup>117</sup> Ashworth “The Doctrine of Provocation” (1976) Cambridge Law Journal 292.

<sup>118</sup> *Ibid* at 300.

<sup>119</sup> Ashworth “The Doctrine of Provocation” (1976) Cambridge Law Journal 292 at 301.

4.86 Following *Camplin*, a number of decisions of the English Court of Appeal broadened the test for provocation and a shift towards a subjective test began to emerge, in which the relevance of the defendant's characteristics was no longer confined to the gravity of provocation but could incorporate the defendant's power of self-control.

4.87 These decisions focused in particular on mental infirmity.<sup>120</sup> In *R v Ahluwalia*<sup>121</sup> and *R v Dryden*<sup>122</sup> the English Court of Appeal held that a battered wife and a person whose mental capacity was below normal were characteristics that could be taken into consideration in assessing provocation but without being specific about what limb of the two-limb *Camplin* test (gravity as opposed to self control) to which the characteristics should apply.<sup>123</sup>

4.88 The central question was whether an accused's mental infirmity could be taken into account both in relation to the question of gravity of provocation and to that of self control. Conditions such as eccentric and obsessional personality, depressive illness, paranoia, abnormal personality with immature, explosive and attention seeking traits, battered woman syndrome and personality disorders were held to be relevant. As pointed out by the Commission in the Consultation Paper, this had two effects. First, it created an overlap between the plea of provocation and the mental condition defences, especially diminished responsibility. Secondly, it meant that in contrast with other relevant characteristics, mental infirmity could also be taken into account when assessing the question of self-control, thereby weakening the normative dimension of the defence of provocation.<sup>124</sup>

4.89 In *Luc Thiet Thuan v Queen*<sup>125</sup> the Privy Council disapproved of this approach of taking into account factors in so far as they affected the power of self control and sought to re introduce the objective reasonable man standard element to the test. The Privy Council held that the accused's mental infirmity, which reduced his powers of self control below that of a normal person, could not be attributed to the reasonable person when considering the objective element of the defence of provocation.<sup>126</sup>

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<sup>120</sup> See further LRC CP 27 2003, at paragraph 3.28.

<sup>121</sup> [1992] 4 All ER 889 (CA).

<sup>122</sup> [1995] 4 All ER 987 (CA).

<sup>123</sup> (NZLC R 98, Wellington, 2007) at 31.

<sup>124</sup> LRC CP 27 2003, at paragraph 3.29.

<sup>125</sup> [1977] AC 131.

<sup>126</sup> LRC CP 27 2003, at paragraph 3.30.

(I) *R v Smith (Morgan)*

4.90 In *R v Smith (Morgan)*<sup>127</sup>, the House of Lords attempted to resolve the conflict between these competing views. *Smith* represented a broadening of the scope of the defence of provocation. In *Camplin* a distinction was drawn between characteristics that affect the gravity of provocation and those that relate to the question of self-control.

4.91 In *Smith*, by a majority of 3 to 2, it was held that the jury should take account of the accused's particular characteristics in assessing both the gravity of provocation and self-control alike. Lord Hoffman stated that it was futile to distinguish between characteristics going to the gravity of provocation and those going to a defendant's powers of self-control, not least because it was too complex for jurors to apply:

“The jury is entitled to act upon its own opinion of whether the objective element of provocation has been satisfied and the judge is not entitled to tell them that for this purpose the law requires them to exclude from consideration any of the circumstances or characteristics of the accused.”<sup>128</sup>

4.92 However, despite the widening of the defence in *Smith*, the House of Lords expressed concern regarding the element of objectivity being eroded. On that basis, Lord Hoffman stated that “for the protection of the public, the law should continue to insist that people must exercise self-control”.<sup>129</sup> To illustrate this point, he stated that “a person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his anti-social propensity as even a partial excuse for killing”.<sup>130</sup>

4.93 The decision marked a direct shift toward subjectivism and apparently represented a milestone in English provocation law. The milestone was short lived however. The majority in the Privy Council decision of *Attorney General for Jersey v Holley*<sup>131</sup> rejected *Smith* and reverted to the approach adopted in *Camplin*.

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<sup>127</sup> *R v Smith* [2001] 1AC 146.

<sup>128</sup> *R v Smith* [2001] 1AC 146,166 per Lord Hoffman.

<sup>129</sup> *Ibid* at 169.

<sup>130</sup> *R v Smith* [2001] 1AC 146,169.

<sup>131</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23.

(II) *Attorney General for Jersey v Holley*

4.94 In *Holley*<sup>132</sup>, both the accused and the deceased were alcoholics. They cohabited in a volatile relationship. The accused had served multiple prison sentences for assaulting the deceased. On the day of the killing both parties had been drinking heavily and had been arguing. The accused returned to the flat and continued to drink lager, and to chop wood. The deceased told Holley that she had just had sex with another man. Holley picked up an axe with the intention of going outside to chop more wood. After seeing this, the deceased said “you haven’t got the guts”, and in response *Holley* struck her 7 or 8 times with the axe killing her. He was convicted of murder. In the Privy Council it was noted that, in *Smith*, Lord Clyde said that the expected standard of self control was to be gauged by the “position” of the accused person. By “position”, all the characteristics which the particular individual possessed and which may in the circumstances “bear on his power of control other than those influences which have been self-induced”, must be included.<sup>133</sup>

4.95 However, in the Privy Council, Lord Nicholls stated that there is one compelling reason why this view cannot be regarded as an accurate statement of English law<sup>134</sup>:

“The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should henceforth be. In these circumstances it is not open to judges now to change (“develop”) the common law and thereby depart from the law as declared by Parliament”.<sup>135</sup>

4.96 The Court went on to say that the majority view in *Smith* represented a significant relaxation and departure from the law as declared in section 3 of the *Homicide Act 1957* whereas the correct test as adopted by parliament is one based on the standard of the reasonable man. The question for the jury is:

“Whether the provocative act or words and the defendant’s response met the ordinary person” standard prescribed by the statute... not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable”.

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<sup>132</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23.

<sup>133</sup> *R v Smith* [2001] 1 AC 146, at 149.

<sup>134</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 22.

<sup>135</sup> *Ibid*

Finally, Lord Nicholls for the majority in *Holley* reaffirmed that the statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is "excusable".<sup>136</sup>

4.97 On this basis, by a 6-3 majority, the Privy Council ruled that the decision in *Smith* did not represent English law and was an unauthorised departure from the law in section 3 of the *Homicide Act 1957*. It has been argued that the Privy Council in *Holley* used the façade of the *Homicide Act 1957* when, in truth, the majority had serious misgivings about the evaluative "free for all" invited by *Smith*.<sup>137</sup> Thus *Holley* can be seen as a return and reinforcement of the objective standard test as laid down in *Camplin* following "a significant relaxation of this standard in *Smith*."

4.98 The Privy Council also set out the approach to be adopted in English law in cases of women who may be less prone to self control because they are suffering from post natal depression, "battered woman syndrome" or a personality disorder. In those instances, the Privy Council held that the evidence of the woman's condition may be relevant on two issues: whether she lost her self-control and the gravity of provocation for her. After this the jury should answer the objective element of the provocation defence by asking whether, having regard to the actual provocation, and their view of its gravity for the defendant an ordinary person of the defendant's age having ordinary power of self-control might have done what the defendant did. In addition, Lord Nicholls pointed out that, in each of these cases, the defence of diminished responsibility was available and to have a balanced view of the law in this field it is important not to view the defence of provocation in isolation from diminished responsibility; these two defences must be read collectively.

4.99 Lord Nicholls dismissed the view that it might be confusing for jurors to take the defendant's characteristics into account for one purpose of the law of provocation but not the other. He referred to the dissenting opinion of Lord Hobhouse in *Smith*, in which he had stated that "if attributes of the defendant are going to be taken into account, then it may be necessary to categorise attributes and hold that they must cross a threshold: they must amount to characteristics of the defendant, not potentially transient states. He also referred to the New Zealand case *R v McGregor*<sup>138</sup> where North J said:

"The characteristic must be something definite....and have also a sufficient degree of permanence to warrant it being regarded as

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<sup>136</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 22.

<sup>137</sup> Power "Provocation and Culture" (2006) *Criminal Law Review* 871.

<sup>138</sup> [1962] NZLR 1069.

something constituting part of the individual's character or personality. A disposition to be unduly suspicious or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility".<sup>139</sup>

4.100 It is clear that the Privy Council in *Holley* took a public policy decision to set a community standard of self control that would not vary between defendants. In referring to *R v Morhall*<sup>140</sup>, the Privy Council said the test in one "of general application" and accepted that not all individuals may be able to achieve this standard.<sup>141</sup>

(III) *Minority decision*

4.101 The judges in the minority in the Privy Council decision in *Holley* maintained that it is a question for the jury, having taken all matters into account, whether the defendant should have controlled himself. To do this, "the jury must take into account matters relating to the defendant, the kind of man he is and his mental state, as well as the circumstances in which the death occurred".<sup>142</sup> Furthermore, the judge should not tell the jury that they should, as a matter of law, ignore any aspect. For the minority, leaving the jury at liberty to decide which characteristics attribute to the ordinary person when deciding what level of self-control he or she should be expected to exhibit allows the jury to do justice in the individual case before it. This approach is in contrast to the approach of the majority of a more consistent inflexible standard allowing the jury to take cognisance of only age and perhaps gender when evaluating the level of self-control that would have been displayed by the hypothetical 'ordinary person' in the circumstances.

4.102 In *Holley* Lord Carswell stated that, in developing the criminal law, the courts should strive to meet three important criteria. Firstly, its principles should fit a logical pattern. Secondly, it should be capable of explanation to the jury and most importantly it should achieve justice. In his opinion the approach as adopted by the majority in *Holley* failed to meet these criteria.<sup>143</sup> Thus, the distinction between individual characteristics being taken into account when assessing gravity of provocation but not self control is "illogical" and "opaque". Furthermore, he stated that "if one finds the dichotomy illogical, inexplicable and

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<sup>139</sup> [1962] NZLR 1069 at 1081.

<sup>140</sup> [1996] AC 90.

<sup>141</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 12

<sup>142</sup> *R v Weller* [2003] EWCA Crim 815, at paragraph 16, 17. Cited in *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 67.

<sup>143</sup> *Attorney General for Jersey v Holley* [2005] UKPC 23, at paragraph 71.

unjust... in order to achieve an acceptable standard of justice” one must “agree with the conclusion reached by the majority in *R v Smith*”.<sup>144</sup>

(IV) *The future of R v Smith (Morgan)*

4.103 Given that the *Holley* case was one delivered by the Privy Council<sup>145</sup>, some unrest followed as to whether the House of Lords would follow *Smith* or *Holley* in subsequent cases. The unrest is now deemed settled as a result of the English Court of Appeal decision in *R v James; R v Karimi*<sup>146</sup> where it was accepted that *Holley* had, in effect, overruled the House of Lords in *R v Smith (Morgan)*. In *R v James; R v Karimi* it was accepted that “the issue in this appeal” is whether, under English law, the test for provocation as a partial defence to the charge of murder was that laid down by the majority of the House of Lords in *R v Smith (Morgan)* or the subsequent decision of the Privy Council in *Attorney General for Jersey v Holley*. On the basis that all nine Law Lords agreed that the effect of the majority judgment in *Holley* was to resolve the question of provocation in English law, the Court of Criminal Appeal in *R v James; R v Karimi* concluded that:

“In these unusual circumstances this Court has decided to prefer the decision of the Privy Council (*Holley*), rather than the earlier decision of the House of Lords.”<sup>147</sup>

4.104 The English case law discussed here exposes the many problems associated with the defence and it also sets out the different reform options available. Reform might involve either laying down an unvarying community standard of self control by which all accused persons are judged or assess the accused on a personalised standard of self-control. A middle-ground between these two approaches is to allow the jury to choose what characteristics they wish to take into account when deciding what level of self control the accused person should have exhibited.

4.105 The Commission, in its draft provision for provocation in the Consultation Paper, gives considerable leeway to the jury to take into account any characteristics of the accused which it considers relevant when assessing

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<sup>144</sup> *Ibid* at paragraph 75.

<sup>145</sup> The Judicial Committee of the Privy Council is not strictly part of the UK legal System and its decisions are not binding on English courts. However, its decisions are persuasive precedent which courts in England and Wales may decide to follow. See generally [www.privacy-council.org.uk](http://www.privacy-council.org.uk).

<sup>146</sup> [2006] EWCA Crim 14.

<sup>147</sup> *Ibid* at paragraph 65.

the gravity of provocation. When considering the second enquiry relating to the level of self-control of an ordinary person, the Commission provisionally provided that the jury should be precluded from considering an accused's mental disorder, state of intoxication or temperament for the purpose of determining the power of self-control exhibited by an ordinary person.

4.106 This would leave the jury free to weigh up the significance of other characteristics and leaves them the choice of attributing such characteristics to the ordinary man in deciding the level of self-control to be expected. This approach is more restrictive than the approach adopted by the majority in *Smith* and the minority in *Holley* where the jury were free to consider an accused's mental disorder in relation to the self-control issue. It is, on the other hand, also more expansive than the approach adopted by the majority in *Holley* where the jury could only attribute the age and gender of the accused to the hypothetical ordinary person in making this enquiry.

4.107 During the consultation process the Commission received submissions which highlighted the difficulties associated with the test for provocation.

**(iii) Submissions**

4.108 The test for provocation as recommended in the Consultation Paper involves a two part inquiry.<sup>148</sup> First, the jury would be asked whether the accused was in fact provoked by the conduct (or words) of the deceased. In relation to this issue, the accused's characteristics would be relevant on the grounds that they would help to explain the provocative quality of the deceased's actions. Secondly, the jury would be required to consider whether the accused ought to have responded in the way he or she did. This part of the test will be judged by ordinary standards of self control, rather than a vague, individualised criterion derived from the personal characteristics of the accused.

4.109 During the consultation process the Commission received submissions voicing concerns about the application of the community standard as in the second part of the test. It was submitted that in applying the community standard approach there is a serious potential for abuse. What about persons who have a disability in controlling their behaviour? If the community standard is applied to such persons, they may not be able to avail of the defence of provocation.

4.110 Concerns were also raised regarding the first branch of the test. In the first part of the test, individual characteristics can be taken into account to assess the gravity of provocation. But the problematic question is what characteristics should be taken into account? Where this two pronged test has

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<sup>148</sup> LRC CP 27-2003, at paragraph 7.32.

been adopted elsewhere, determining what characteristics are to be taken into account has caused difficulty. Furthermore, it was suggested during the consultation process that, taking characteristics into account for one part of the test but ignoring them for the other, is unrealistic in nature. Finally, it has also been advocated, that taking personal characteristics into account could lead to a situation of a spurious defence; taking into account individual characteristics to such an extent that there is no community standard at all.

**(iv) Commission's Response**

4.111 In response, the Commission acknowledges that certain members of society have a disability which may limit their capacity to control their behaviour. However, the Commission believes that a community standard approach to provocation needs to be incorporated into the test for provocation. The current test in Ireland has allowed a situation to occur where it is most difficult to disprove the defence. Furthermore, it is important to apply a community test to reflect a reasonable standard of behaviour in society. The Commission also points out that the provocation plea may not be the best framework to treat such cases (disability in controlling behaviour) and would be better dealt with under mental health defences such as diminished responsibility. In terms of concerns regarding the first limb of the test, the Commission believes that allowing personal circumstances to be assessed with regard to gravity of provocation but not self control creates a balanced approach between compassion for the individual frailty and the interests of the community. As for the workability argument, it is contended that case law from other jurisdictions illustrates that the two pronged approach can work in practice.

**(c) Conclusions and Recommendations**

4.112 Much of the effect of having such a heavily subjective defence of provocation is visible at trial, and the prosecution, aware of the ease with which provocation can be established, and the difficult task they face in rebutting it, often prefer to charge with manslaughter rather than murder in cases where the facts are suggestive of the defence.

4.113 The test for provocation contained in the draft provision of the Consultation Paper includes a normative standard and yet gives the jury considerable leeway to decide this standard. The first enquiry that must be made is whether the accused actually lost self control in the circumstances. In assessing the gravity of provocation, the jury may take into account the accused's characteristics. The second enquiry that must be made is whether the provocation was sufficient to overcome the powers of self control of an ordinary person. The standard must remain constant to a greater extent than the standard by which the gravity of the provocation is to be judged.

4.114 *The Commission recommends a withdrawal from a purely subjective test which is dominant in Ireland and the introduction of a defence remodelled on objective lines.*

4.115 *The Commission recommends that the jury should be entitled to take into account all of the characteristics of the defendant when considering the gravity of the provocation but that the factors to be taken into account when considering the level of self control of the ordinary person should be limited.*

4.116 *The Commission recommends that, intoxication, mental disorder, and temperament should not be taken into account in assessing the latter enquiry. In this context the jury may be seen as the best safeguard against abuse of the doctrine and so should be at liberty to decide what remaining factors are relevant to the question of self control. The jury should however be directed to apply a community standard.*

## **G Elements of the defence**

4.117 In this Part, a number of the fundamental elements of the provocation defence are discussed.

### **(1) Provocative Conduct**

4.118 Before a plea of provocation can go to the jury, the judge must be satisfied that there is some evidence of provocative conduct that might have caused the defendant to lose his self-control. In this jurisdiction, this element was confirmed as central to the plea in the test formulated in *People (DPP) v MacEoin* where it was held that at the close of evidence “the trial judge should rule on whether there is any evidence of provocation.”<sup>149</sup> If there is no evidence of provocation, the plea cannot be presented to the jury. Traditionally, provocation had to emanate from some form of unlawful act, such as an assault.<sup>150</sup>

### **(a) Consultation Paper Recommendations**

4.119 In the Consultation Paper, the Commission considered that the plea of provocation should not entail a requirement that the deceased must have acted “unlawfully”. The Commission considered it should be enough that the provocation was unacceptable by the ordinary standards of the community.<sup>151</sup>

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<sup>149</sup> *People (DPP) v MacEoin* [1978] IR 27, at 34.

<sup>150</sup> See further LRC CP 27-2003, at paragraph 5.48.

<sup>151</sup> LRC CP 27-2003, at paragraph 5.50.

**(b) Discussion**

4.120 Over time the concept of provocative conduct has expanded. Historically, the defence of provocation was confined to a number of acts. As set out earlier, in the 1706 case *R v Mawgridge*<sup>152</sup>, Lord Holt CJ ruled that provocation could only be pleaded in four circumstances. They included a grossly insulting attack, an assault upon a friend or relative, finding one's wife engaged in an adulterous act with another man or witnessing an Englishman being deprived of his liberty. It has been noted that in each of these circumstances "the defendant's violent reaction was deemed to be an almost justified response".<sup>153</sup>

4.121 Since then, the defence has not been so confined "and it seems that conduct does not have to be discreditable in any sense in order to constitute provocation".<sup>154</sup> In *R v Duffy*<sup>155</sup>, Devlin J referred to "any act or series of act", suggesting that any kind of act could give rise to provocative conduct. *R v Doughty*<sup>156</sup> pushed out the boundaries of provocative conduct, so that "a baby's crying" was deemed to be provocative conduct.

4.122 For provocative conduct to be in some way unlawful reflected the early modern view that provocation was a species of partial justification. However, society has evolved and now that certain forms of conduct are now legalised and the historical rules no longer apply.<sup>157</sup> Recent developments are more consistent with an excuse based theory of provocation. Society's conception of what is wrongful for the purposes of provocation has greatly changed. It is no longer necessary that provocative conduct is wrongful in the sense that it violates the law; lawful conduct can now constitute provocation. As will be seen from the discussion below, conduct is now seen as provocative if it breaches ordinary community standards.

4.123 In *R v Thibert*<sup>158</sup> the Canadian Supreme Court interpreted the wrongful act or insult requirement to entail, among other matters, "injuriously

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<sup>152</sup> *R v Mawgridge* (1869) 11 Cox CC 674.

<sup>153</sup> Hanly *An Introduction to Irish Criminal Law*(2<sup>nd</sup> ed (Gill & Macmillan 2006) at 223.

<sup>154</sup> *Ibid.*

<sup>155</sup> *R v Duffy* [1949] 1 All ER 932.

<sup>156</sup> (1986) 83 Cr App R 319.

<sup>157</sup> It must be noted however, that a number of statutory formulations have retained the wrongfulness requirement. See generally LRC CP 27 2003, paragraphs 5.48-5.49.

<sup>158</sup> *R v Thibert* [1996] 1 SCR 37.

contemptuous speech or behaviour...scornful utterance or action intended to wound self-respect; an affront; indignity.”<sup>159</sup> The Court held that, for the purposes of provocation, an act may be wrongful if it is not authorised by the law; and that provocative conduct need not necessarily be specifically prohibited by law. A broadly similar conclusion has been reached in Australia, albeit in the context of non fatal force, where the Codes in the Northern Territory, Queensland and Western Australia require a “wrongful act or insult”: it has been held that “wrongful” is not confined to acts that are contrary to law but includes conduct that is wrong by the ordinary standards of the community.<sup>160</sup>

4.124 Furthermore, words alone were not considered to form sufficient provocation unless they were threatening in nature and accompanied by physical blows. This was explained on the basis that the law expected a reasonable man to endure insults without retaliation. However, section 3 of the British *Homicide Act 1957* provided for “things done or things said or both together” thereby providing the catalyst for the modification of the objective test.<sup>161</sup> Other jurisdictions followed by introducing similar legislation. In Canadian law<sup>162</sup> words are capable of amounting to provocation, as in New Zealand by virtue of section 169 of the *Crimes Act 1961*. As can be seen from the test set out in *MacEoin*, words were included as amounting to provocative conduct by the Court of Criminal Appeal.

**(c) Conclusions and Recommendations**

4.125 In line with current judicial interpretation, the Commission believes the plea of provocation need not be limited to an unlawful action. An action including insulting words and gestures which are unacceptable by the ordinary standards of the community are capable of amounting to provocation.

4.126 *The plea of provocation should not entail a requirement that the deceased must have acted “unlawfully”; it should be enough that the provocation was unacceptable by the ordinary standards of the community.*

4.127 *The Commission recommends that insulting words and gestures which are unacceptable by the ordinary standards of the community should be capable of amounting to provocation for the purposes of the defence.*

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<sup>159</sup> *Ibid* at 44-45.

<sup>160</sup> *Roche v The Queen* [1988] WAR 278; *Jabarula v Poore* (1989) 68 NTR 26.

<sup>161</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 878.

<sup>162</sup> Canadian Criminal Code , section 232 (2).

## **(2) Sources of provocation**

4.128 As a general rule at common law, provocation had to emanate from the deceased directly. In *R v Duffy*, Devlin J clearly stated that “provocation is some act, or series of acts, done to the dead man by the accused”. Such a rule is consistent with viewing provocation as a partial justification and is desirable in terms of social policy. On the other hand, viewing provocation as excusatory accommodates provocation emanating from sources other than the deceased victim.<sup>163</sup>

### **(a) Consultation Paper Recommendations**

4.129 In the Consultation Paper, the Commission provisionally recommended that the plea should be available only if (a) the deceased is the source of the provocation or (b) the accused, under provocation kills another, by accident or mistake.<sup>164</sup>

### **(b) Discussion**

4.130 Authorities have differed in their approach to this common law rule that provocation had to emanate from the deceased directly. Viewing the defence as a partial justification whereby the provocative conduct must emanate from the deceased has been preserved in the Criminal Code of the Northern Territory of Australia<sup>165</sup> and in the New South Wales Crimes Act.<sup>166</sup>

4.131 Under section 169 of the New Zealand *Crimes Act 1961*, provocation must come from the person killed, save in the situations of mistaken identity or accident coming within section 169 (6) of that Act.

4.132 By contrast, authorities in Canada and the Australian State of Victoria have held the view that provocation need not come from the victim.<sup>167</sup> In the Canadian case *R v Manchuk*<sup>168</sup>, the Supreme Court of Canada affirmed the Ontario Court of Appeal’s decision that provocation need not come from the victim: it was enough that the accused believed that the victim had participated in the provocation, regardless of whether his belief was reasonable or not. Similarly, the Supreme Court of Victoria ruled in *R v Terry* that “the mere fact

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<sup>163</sup> See also LRC CP 27-2003, at paragraph 5.56 and O’Regan “Indirect Provocation and Misdirected Retaliation” [1968] Crim LR 319.

<sup>164</sup> LRC CP 27 2003, paragraph 5.62.

<sup>165</sup> Section 34. See LRC CP 27 2003, paragraphs 5.11 and 5.56.

<sup>166</sup> Section 23(2). See LRC CP 27 2003, paragraphs 5.09 and 5.56.

<sup>167</sup> See LRC CP 27 2003, paragraphs 5.57-5.59.

<sup>168</sup> [1937] 4 DLR 737; [1938] 3 DLR 693.

that the provocation was not offered by the deceased to the accused, but was offered to the deceased's wife and the accused's sister does not prevent the operation of the defence".<sup>169</sup> In another Victorian case, *R v Kearney*<sup>170</sup> the issue of mistaken belief on the part of the accused, that the victim had been the source of provocation was sufficient to ground the defence.

4.133 The Canadian and Victorian approaches bear an analogy with the approaches in England and Wales and in Ireland. Furthermore, section 3 of the British *Homicide Act 1957* appears to have removed this limitation on the defence as formulated in *Duffy*. It was held in *R v Davies*<sup>171</sup> that provocation does not have to emanate directly from the deceased, but may come from other sources; however, it should be noted that the deceased in *Davies* was partly implicated in the provocation. Similarly in Ireland the Court of Criminal Appeal, in *People (DPP) v Doyle*<sup>172</sup>, has suggested that provocation might emanate from a third party: Indeed the Irish rule in this regard may be more permissive than its English counterpart. In *People (DPP) v Hennessy*<sup>173</sup> it appears that "the surrounding circumstances" leading to the accused killing his wife were regarded as sufficient for the purpose of invoking the defence.

**(c) Conclusions and Recommendations**

4.134 *The Commission recommends that the plea of provocation should not be limited to provocation emanating from the deceased.*

4.135 *The plea of provocation should also be available if the accused, under provocation, kills another by accident or mistake.*

**(3) Loss of control**

4.136 In essence, provocation is a sudden loss of self-control in an accused person to the extent that he or she is unable to prevent himself or herself from intentionally killing another person. Under current law there must be sufficient evidence to show that the defendant did in fact suffer loss of control before the plea of provocation will go before the jury. Closely aligned with 'loss of control' is the notion that this loss of control should be "sudden and temporary" as set out in the classic definition of provocation in *R v Duffy*<sup>174</sup>.

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<sup>169</sup> [1964] VR 248 (Pape J).

<sup>170</sup> [1983] 2 VR 470.

<sup>171</sup> [1975] QB 691.

<sup>172</sup> Court of Criminal Appeal 22 March 2002.

<sup>173</sup> Central Criminal Court (Finnegan J) October 2000 and April 2001.

<sup>174</sup> "Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the

4.137 Here, the Commission discusses the question of whether the defendant actually lost control followed by an examination of the requirement of ‘sudden and temporary’ as it has developed from its historical origins. This ingredient of “immediacy” has particular implications for people living in situations of domestic violence (often referred to as ‘women who kill’ or battered women) and will also be discussed in this section.

**(a) Consultation Paper Recommendations**

4.138 In the Consultation Paper, the Commission provisionally recommended the following draft provision.

(2) Anything done or said may be provocation if –

(i) it deprived the accused of the power of self control and thereby induced him or her to commit the act of homicide.

4.139 Furthermore, the Commission provisionally recommended that the requirement of immediacy should be diluted in order to allow greater flexibility in dealing with cases of domestic homicide.<sup>175</sup> The relevant section provides:

(6) There is no rule of law that provocation is negated if

(i) the act causing death did not occur immediately; or

(ii) the act causing death was done with intention to kill or cause serious harm.

**(b) Discussion**

4.140 The requirement of loss of control is central to the provocation defence and can be traced to the roots of the defence. It is a necessary ingredient in all jurisdictions that hold provocation as a partial defence to murder.

4.141 This element of the test has been described as the narrative enquiry, or the factual issue. The question being asked is whether the accused was in fact provoked to the point of loss of self control.

4.142 To capture this concept, the classic definition of provocation as provided in *R v Duffy* is useful. Here Devlin J describes provocation as “some act or series of acts, done” which would cause in the accused “a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind”. These sentiments

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accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind”.

<sup>175</sup> LRC CP 27 3003, paragraphs 6.20, 7.34 and 7.40.

reflect the 18<sup>th</sup> century case *R v Oneby*<sup>176</sup> where it was held that to reduce a crime from murder to manslaughter the provocation had to arouse in the defendant “such a passion as for the time deprives him of his reasoning faculties”. In the New Zealand case *R v McGregor*<sup>177</sup> North J echoes Devlin J in *Duffy*:

“[I]t is the essence of the defence of provocation that the acts or words of the dead man have caused the accused a sudden and temporary loss of self-control, rendering him so subject to passion as to make him for the moment not master of his mind.”<sup>178</sup>

4.143 The extent to which a person is “not master of his mind” is not certain; but it is certain that there must be something less than a complete lack of capacity to control one’s actions. In other words it can not be a full loss of capacity as this could give rise to insanity or automatism.

4.144 As regards the Irish position, the Court of Criminal Appeal held in *The People (DPP) v Kelly*<sup>179</sup> that loss of control must be “total and the reaction must come suddenly”; before there has been time to cool. In addition, there must be a “sudden unforeseen onset of passion” which totally deprives the accused of his self-control, at the time of the act”.

4.145 The “sudden and temporary” ingredient can again be traced to the historical origins. Coleridge J in *R v Kirkham* captured the immediacy concept well when he said the provocative conduct must be “in a moment of overpowering passion which prevented the exercise of reason.”<sup>180</sup>

4.146 The reason “the immediacy” issue is considered so important that a delay between provocation and the response to that provocation suggests deliberation, design and retaliation. The act causing death cannot be “controlled or planned or preconceived or deliberate” but done “automatically or impulsively and at a time when there is a temporary suspension of reason.”<sup>181</sup> The greater the time lapse the less likely the defence of provocation will succeed. In *Mancini v DPP*<sup>182</sup> Lord Simon stated that “it is of particular importance to consider whether a sufficient interval has elapsed since the provocation to allow a

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<sup>176</sup> (1727) 2 Ld Ryam 1485; 92 ER 465.

<sup>177</sup> [1962] NZLR 1069.

<sup>178</sup> [1962] NZLR 1069,1078.

<sup>179</sup> [2000] 2 IR 1.

<sup>180</sup> *R v Kirkham* (1837) 8 Car & P 115, 117.

<sup>181</sup> *Parker v R* (1963) 111 CLR 610 at 681.

<sup>182</sup> *Mancini v DPP* [1942] AC 1.

reasonable time to cool". The question of how long this period should be before it is regarded as revenge is not clear. However, the issue has been brought into sharp focus in a series of cases in which wives have killed their husbands having suffered continual domestic abuse.

4.147 It is important to point out that, although the discussion that follows finds its main focus on women who kill in situations of domestic violence, the Commission recognises that there are men, parents, grandparents and children who may suffer the same abuse as 'battered women'. Therefore, this discussion is applicable to all who suffer from domestic abuse.

(I) *Provocation and domestic violence*

4.148 It is clear from preceding sections that the defence of provocation has very specific requirements. It is also clear that those requirements are firmly based upon male norms and male emotions. The fundamental element of loss of self control is a reaction associated with male behaviour rather than female behaviour. Furthermore, the traditional notion of protecting 'one's honour' is again male based. To cite Nicolson, "designation of the existence of a 'cooling off' time not simply as evidence of cooled passion but as legally precluding the provocation defence, is clearly premised upon a male-orientated view of behaviour."<sup>183</sup> With this in mind, it is acknowledged that the precise mode of retaliation of a particular person will be the "function of personality, gender or other circumstances."<sup>184</sup> In some cases, such as domestic violence, a provocative act may produce a delayed action effect. Where there has been a continuation of provoking acts instigated by the deceased but where the defendant waits for a period of time before killing the deceased is referred to as cumulative provocation.

4.149 In its simplest form cumulative provocation consists of a series of acts directed towards the accused over a period of time, that may 'be brought to boiling point' by a seemingly trivial incident; in this instance the woman (or person being battered) may wait until her tormentor is asleep or drunk before striking the fatal blow. Viewed in isolation, this kind of response is not easily accommodated within the traditional provocation doctrine. The essence of provocation is that it is carried out in 'hot blood' or in the 'heat of the moment'. It is not surprising then that arguments are put forward to suggest that the immediacy requirement is based on a male view of violence. The Law Commission for England and Wales illustrates this point in the following passage:

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<sup>183</sup> Nicolson, "Battered Women and Provocation: the Implications of Ahluwalia" [1993] Crim LR 728, at 730.

<sup>184</sup> O'Connor *Criminal Defences* (3<sup>rd</sup> ed Butterworths 1996) at 200.

“[A]n angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to “lose self control” and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off-guard.”<sup>185</sup>

4.150 Understandably, there is evidence to suggest that the courts are willing to take a lenient approach to the matter of cumulative provocation and have extended the concept of loss of self control to allow for the defence of provocation in “slow burn” cases. This aspect was pointed out in the Consultation Paper on Provocation by way of a discussion of a number of English cases whereby evidence had been accompanied by testimony of mental infirmity such as battered woman syndrome or post traumatic stress disorder.<sup>186</sup> However, it must also be noted that although English Courts have expressed the willingness to accept evidence of battered woman syndrome and post traumatic stress disorder, the requirement of sudden and temporary loss of control appears to have survived.<sup>187</sup>

(II) *Battered Woman Syndrome*

4.151 Battered Woman Syndrome was developed by the American psychologist Dr. Lenore Walker<sup>188</sup> who viewed male violence against their female partners as following a three phase pattern consisting of a tension-building stage, an acute battering incident and a loving contrition stage. As the violence goes on for a long time, the last stage tends to diminish. This continuous cycle leads to a “learned helplessness” in the female victim which explains why the woman does not leave the abusive relationship. However, the syndrome does not exist without its critics. It is suggested that the syndrome stereotypes women as being passive; not all women fail within the three phase theory and the theory diverts attention away from a society that tolerates domestic violence.<sup>189</sup> Nicolson argues that it is society’s failure to provide the

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<sup>185</sup> Law Commission *Partial Defences to Murder: Final Report* (LC 290 2004) at paragraph 3.28.

<sup>186</sup> LRC CP 27 2003, paragraphs 6.15 – 6.20.

<sup>187</sup> LRC CP 27 2003, paragraph 6.17.

<sup>188</sup> See also Walker *The Battered Woman* (Harper and Row, 1979); Donnelly “Battered Women who Kill and Criminal Law Defences” (1993) ICLJ 161; and Edwards “Battered Women Who Kill” (1992) 142 NLJ 1380.

<sup>189</sup> Nicolson “Battered Women and Provocation: The Implications of Ahluwalia” [1993] Crim LR 728.

resources necessary to enable women to leave an abusive environment that renders them being unable to leave, rather than learned helplessness.<sup>190</sup>

4.152 In the English case *R v Thornton (No 2)*,<sup>191</sup> new evidence was tendered to the effect that the accused had been suffering from “battered woman syndrome” as well as a personality disorder. This arose following the decision in *R v Ahluwalia*<sup>192</sup> where the English Court of Appeal held that ‘battered woman syndrome’ was a factor to be taken into account in assessing the provocation and in doing so, modified the sudden loss of control requirement:

“We accept that the subjective element in the defence of provocation would not as a matter of law be negated simply because of the delayed reaction in such cases, provided that there was at the time of the killing a ‘sudden and temporary loss of self control’ caused by the alleged provocation.”

4.153 This view was reiterated by the English Court of Appeal in *R v Thornton (No.2)*:

“A defendant, even if suffering from that syndrome, cannot succeed in relying on provocation unless the jury considers she suffered or may have suffered a sudden and temporary loss of self-control at the time of the killing.”<sup>193</sup>

The fact that the sudden and temporary loss of control ingredient has been maintained but modified to the extent as to render it effectively meaningless “looks suspiciously like a case of clinging to a legal form having effectively abandoned its substantive content.”<sup>194</sup>

4.154 Cumulative provocation has not been specifically recognised in Irish law but it would seem that a permissive approach to provocation in the context of domestic violence has also been adopted in this jurisdiction.<sup>195</sup> In *People (DPP) v O’ Donohoe*<sup>196</sup> the defendant had suffered physical and verbal abuse

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<sup>190</sup> *Ibid* at 735.

<sup>191</sup> [1996] 2 All ER 1023.

<sup>192</sup> *R v Ahluwalia* [1992] 4 All ER 889.

<sup>193</sup> [1996] 2 All ER 1023.

<sup>194</sup> LRC CP 27 2003, at paragraph 6.19.

<sup>195</sup> For more see (LRC CP 27 2003) at paragraph 6.15.

<sup>196</sup> Central Criminal Court Lavan J 15-18 March and 10 June 1993, reported in *The Irish Times* 16-19 March and 11 June 1993.

from her husband for a number of years, and had obtained a barring order against him. After some time she allowed him to return home because she felt sorry for him. He then verbally abused her again and taunted her that she would never get him out of the house. This caused the defendant to snap and kill him with a hammer. She was convicted of manslaughter and received a suspended sentence of imprisonment.

4.155 As with many other aspects of the defence of provocation, the concept of sudden and temporary loss of control has been troublesome and as a result has been subject to criticism. There has been a considerable amount of literature addressing the psychological and philosophical debates regarding the drivers of loss of self-control, that is, whether self-control, including the loss of it, is moderated by reason, or is a wholly biophysical and thus uncontrollable response. Some will even say that there is no such phenomenon as a loss of self-control. For the New Zealand Law Commission the assumption that an ordinary person could be overcome by loss of control to the extent that he or she would indulge in homicidal violence, “is the defence’s most telling flaw – whichever way it is drafted”.<sup>197</sup> Furthermore, they considered that this is another reason why there has been ongoing pressure to modify the ordinary person test by importing personal characteristics as “defendants are more likely to succeed with the provocation defence when they point to a personal characteristic that exacerbated the gravity of a particular provocation to them.”<sup>198</sup>

4.156 For Reilly, the provocation defence places too much emphasis on a narrative of lost self-control; if the defence is intended primarily as a vehicle for sympathy verdict, then defendants should simply be permitted to tell their stories.<sup>199</sup>

4.157 For the English Law Commission, there is no satisfactory definition for ‘loss of self control’ as the term loss of control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control.<sup>200</sup> The English Law Commission asserts that:

“[T]o ask whether a person could have exercised self-control is to pose an impossible moral question. It is not a question which a psychiatrist could address as a matter of medical science, although a noteworthy issue which emerged from our discussions with

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<sup>197</sup> (LCNZ Report 98 2007) at 45.

<sup>198</sup> *Ibid* at 90.

<sup>199</sup> Reilly “Loss of Self-Control in Provocation” (1997) 21 Crim LJ 320.

<sup>200</sup> Law Commission *Partial Defences to Murder: Final Report* (LC 290 2004) at paragraph 3.28.

psychiatrists was that those who give vent to anger by “losing self-control” to the point of killing another person generally do so in circumstances in which they can afford to do so”.<sup>201</sup>

4.158 It is clear that there are theoretical and practical difficulties with the “sudden and temporary loss of control” ingredient. Most notably, the notion of ‘immediacy’ creates a stark inequality between the angry strong person and the frightened weak person.

4.159 However, the Commission believes that the requirement of sudden and temporary loss of control serves as a useful purpose and should be maintained. If the loss of control was not temporary this would indicate that the accused suffered from a character defect when the basis for the defence is ‘a concession to human frailty’. A person whose loss of control is permanent in nature cannot be accommodated by the defence of provocation.

4.160 The Commission does acknowledge that the ‘sudden’ element could cause injustice for women in particular but not only women, for all members of society living with domestic violence. The fact that the accused’s reaction to provocation did not take place immediately upon being provoked should not deprive the accused of the benefit of the defence. Logically, the fact that a period of time elapsed in between the provoking act and the killing would suggest that there may have been time for reasoned reflection and that other motives may have been at work when the killing was carried out. However, this should be a matter for the jury.

4.161 The Commission asserts the view that the key requirements of the defence of provocation should remain but that provision can also be made for vulnerable and disadvantaged persons who have been subject to domestic abuse within legislation. By providing for situations where the defence will not be negated will allow for such people to avail of the defence. The Commission believes that such an approach provides the best solution and ultimately will still allow for the jury to decide on the culpability of the accused.

4.162 The Commission has, accordingly, concluded that the most appropriate manner in which to deal with this is to provide that the question of immediacy should be dealt with in a manner similar to that provided for in respect of belief as to consent in rape in section 2(2) of the *Criminal Law (Rape) Act 1981*. Thus, the Commission recommends that it should be provided that there is no rule of law that the defence of provocation is negated if the act causing death did not occur immediately after provocation; and that the presence or absence of an act causing death occurring immediately after

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<sup>201</sup> Law Commission *Partial Defences to Murder: Final Report* (LC 290 2004) at paragraph 3.28.

provocation is a relevant consideration which the jury or court, as the case may be, is to have regard, in conjunction with other evidence, in considering whether the accused lost self-control as a result of provocation.

**(c) Recommendations**

4.163 *The Commission recommends that it should be provided that there is no rule of law that the defence of provocation is negatived if the act causing death did not occur immediately after provocation; and that the presence or absence of an act causing death occurring immediately after provocation is a relevant consideration which the jury or court, as the case may be, is to have regard, in conjunction with other evidence, in considering whether the accused lost self-control as a result of provocation.*

**(4) Proportionality**

4.164 At common law there was also a requirement that the reaction to the provocative conduct would be proportionate. This is also an element required in the defence of self defence. In essence, for the defence of provocation to succeed, the jury had to be satisfied that the retaliation was proportionate to the provocation. Such an element ensures that a person who totally over reacts to a situation will not be able to escape liability. This principle was upheld in *MacEoin* in contrast to other jurisdictions where this independent test of proportionality has now been expressly rejected in England<sup>202</sup> Australia,<sup>203</sup> and Canada<sup>204</sup>. The favoured approach in those jurisdictions is to consider proportionality as one of the factors to be taken into account in the objective test.

**(a) Consultation Paper Recommendations**

4.165 In the Consultation Paper the Commission included the following draft provision:

Provocation is negatived if the conduct of the accused is not proportionate to the alleged provocative conduct or words.<sup>205</sup>

**(b) Discussion**

4.166 In Irish law if the trial judge does allow provocation to go to the jury, the jury must be told to consider:

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<sup>202</sup> *R v Brown* [1972] 2 QB 229.

<sup>203</sup> *R v Johnson* (1979) 136 CLR 619.

<sup>204</sup> *Squire* (1975) 26 CCC (2d) 219 Ont.CA.

<sup>205</sup> LRC CP 27 2003, paragraph 7.36.

“whether the acts or words, or both, of provocation found by them to have occurred, when related to the accused, bear a reasonable relation to the amount of force used. If the prosecution can prove beyond reasonable doubt that the force used was unreasonable and excessive having regard to the provocation, the defence of provocation fails.”<sup>206</sup>

4.167 This proportionality requirement in Irish law has caused much confusion. As has been pointed out, *MacEoin* introduced a unique and apparently, a purely subjective test of provocation into Irish law; against that backdrop however, it is illogical to read the judgment as simultaneously introducing an objective requirement of proportionality.<sup>207</sup> To view the conduct as having to be proportionate is inconsistent with viewing the conduct of the accused in terms of their personality and characteristics as proportionality is based on an objective test. It is suggested that the inclusion of this element was an attempt by the Court to reign back slightly from the outright subjective test and may perhaps been an afterthought aimed at preventing abuse of the subjective test.

4.168 As seen earlier, subsequent case law struggled with making sense of the proportionality proviso holding that it was inconsistent with the ‘new’ subjective test. The courts have instead viewed the proportionality element of *MacEoin* as an issue of credibility as can be seen from this comment in *The People (DPP) v Mullane*:<sup>208</sup>

“The Court concludes that the impugned sentence in *MacEoin* really comes down to credibility of testimony rather than to any suggestion that the accused’s conduct is to be once more judged by an objective standard.”

4.169 In a more recent attempt to clarify *MacEoin*, the Court of Criminal Appeal in *People (DPP) v Kelly*<sup>209</sup> maintained that the jury should rely upon common sense and experience of life in deciding all matters. Furthermore, “if the reaction of the accused” appears to have been strange, odd or disproportionate in totally losing his self control that is a matter for the jury to take into consideration.

4.170 It is not surprising that the Irish courts have modified their approach given the illogical nature of the proportionality requirement; the whole purpose

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<sup>206</sup> *People (DPP) v MacEoin* [1978] IR 27 at 35.

<sup>207</sup> Charleton, McDermott, Bolger *Criminal Law* (Butterworths 1999) at 1063.

<sup>208</sup> Court of Criminal Appeal, 11 March 1997.

<sup>209</sup> [2000] 2 IR 1.

of the defence of provocation is to provide a partial defence to someone who loses self-control. For a person to retain sufficient control so as to prevent an excessive reaction does not sit easily with the rationale for the defence.

**(c) Recommendations**

4.171 The Commission is of the view that any function traditionally performed by the proportionality requirement can easily be satisfied by the requirement that there must be something intelligible as provocation to begin with. Before a plea of provocation can go to the jury, the judge must be satisfied that there is some evidence of provocative conduct. The Commission does not, therefore, recommend that any express provision equiring that there be proportionality between the response of the accused and the provocative conduct.

*4.172 The Commission does not recommend that there be any express provision requiring that there be proportionality between the response of the accused and the provocative conduct.*

**(5) Provocation and Intoxication**

4.173 Intoxication is a factor that often arises in cases involving provocation. It is common knowledge that a drunken person is more susceptible to provocation than a sober person. In the Consultation Paper on Provocation, the Commission briefly addressed the relationship between provocation and intoxication. In doing so, the Commission noted that in general, intoxication is withdrawn from consideration but in the strict logic of the subjective test, intoxication could be a factor to be taken into account and acknowledged that judicial clarification on the issue was needed.<sup>210</sup>

**(a) Consultation Paper Recommendations**

4.174 In the Consultation Paper, the Commission recommended that an accused's state of intoxication should not be taken into account when assessing the power of self-control of the ordinary person.<sup>211</sup>

**(b) Discussion**

4.175 Though, it may be well established that a drunken person is more susceptible to provocation than a sober person, where the objective test is applied it is universally agreed that voluntary intoxication must be withdrawn from consideration. This rationale is based on public policy and there is a strong basis for such an approach. Many believe that a drunken accused was responsible for bringing about his or her own condition and as a result he or she

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<sup>210</sup> LRC CP 27 2003, at paragraph 4.32 and 6.30.

<sup>211</sup> LRC CP 27 2003, at paragraph 6.31.

should not be allowed to profit from its effect. In addition, it might be contended that the principle of compassion for human frailty underpinning the defence of provocation should not be extended to defendants who are clearly responsible for their own excitable state.

4.176 Judicially, intoxication has been equated with persons who are unusually excitable or pugnacious by temperament<sup>212</sup> and therefore intoxication was not deemed to be a characteristic that can be attributed to the reasonable man. In *R v Newell*<sup>213</sup> this was explained on the basis that intoxication is a transitory state and therefore lacks the degree of permanency necessary to constitute a characteristic. However, this can be contrasted with *R v Morhall*<sup>214</sup> where Lord Goff proffered a different explanation. He doubted whether the transitory nature of intoxication is the explanation for any special treatment which it receives pointing out that some physical conditions (such as eczema) might properly be attributed to the ordinary person for the purposes of provocation. Thus as a result of the *Morhall* decision, it is accepted that addiction to an intoxicant, as distinct from the fact of being intoxicated is a relevant personal characteristic. Excluding intoxication from consideration is firmly a matter of policy.

4.177 In the Irish situation where a subjective test is currently applied it would seem logical that intoxication should be relevant to the accused's circumstances. This possibility was hinted at in *People (DPP) v Kelly*<sup>215</sup> where it was observed that, while the accused's drunkenness would not be sufficient to raise the defence of provocation, it might be a factor in the situation.<sup>216</sup>

4.178 As a matter of public policy and proposals put forward to apply a more objective test in this jurisdiction, the Commission is of the opinion that voluntary intoxication should not be taken into account when assessing the power of self-control of the ordinary person.

**(c) Recommendation**

4.179 *The Commission recommends that an accused's state of intoxication should not be taken into account when assessing the power of self-control of the ordinary person.*

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<sup>212</sup> See *R v McCarthy* [1954] 2 All ER 262 at 265.

<sup>213</sup> See *R v Newell* (1980) 71 Cr. App.R.331.

<sup>214</sup> *R v Morhall* [1996] AC 90.

<sup>215</sup> *People (DPP) v Kelly* [2000] 2 IR 1.

<sup>216</sup> [2000] 2 IR 1, 11.

**(6) Self-induced provocation**

**(a) Consultation Paper Recommendations**

4.180 In the Consultation Paper, the Commission provisionally recommended that conduct incited by the accused should not count as provocation for the purposes of the plea.<sup>217</sup>

4.181 Furthermore, in the draft legislative provision, the following section was included:

Anything done or said is deemed not to be provocation if-

- (i) It was incited by the accused; or
- (ii) It was done in the lawful exercise of a power conferred by law.

**(b) Discussion**

4.182 Arguably, this exclusionary provision is somewhat harsh and it does not seem to be entirely consistent with the excusatory view of provocation where the focus of the enquiry is whether or not the accused lost self control.

4.183 Making self-induced provocation the subject of this exclusionary rule would mean that the task of deciding whether or not the provocation was incited by the accused is a matter for the trial judge who may withdraw the defence from the jury if such incitement is present on the facts. In support of this rule it may be argued that there is merit in pursuing a policy in the law of restricting excuses where the defendant has incited the provocation.

4.184 The Commission has ultimately concluded that there should be no strict rule of exclusion in relation to self-induced provocation and it may be preferable to view incitement by the accused as an evidential matter to be taken into account by the jury when assessing whether or not provocation was present in each individual case.

**(c) Conclusions and Recommendations**

4.185 *The Commission recommends that there should be no strict rule of exclusion in relation to self-induced provocation. Conduct incited by the accused should be an evidentiary matter taken into account by the jury when assessing whether or not provocation was present.*

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<sup>217</sup> LRC CP 27 2003, paragraph 5.67 and 7.39.

## CHAPTER 5     DURESS

### A            Introduction

5.01        Although traditionally treated separately, the defences of duress and necessity have much in common; both deal with unusual and difficult circumstances where a threat of harm compels or coerces the accused to commit an offence.

5.02        Duress applies when a person's choice is constrained *by threats* to do an act that would otherwise be a crime. A typical case involves the defendant being told 'do this - or else you or a member of your family will be killed or seriously injured' and fearing for his or her life, the defendant carries out the required act.

5.03        Necessity, on the other hand, concerns a situation where a person's choice is constrained due to *dire circumstances* such as breaking open a car window to rescue a choking baby. It involves a choice of evils; where the accused person deems it necessary to choose the outlawed evil in order to avoid a greater evil or fulfil a human duty.<sup>1</sup>

5.04        The element of constrained choice, where the defendant faces a moral dilemma, forms the conceptual or theoretical basis for the defences of duress and necessity. Through no fault of their own, the defendant is placed in the difficult situation of having to choose between abiding by the law and becoming a victim of violence, or breaking the law in order to protect himself or another from the threat of serious assault or deadly danger.

5.05        In the Consultation Paper, the Commission discussed duress and necessity together recognising their similarities primarily on the basis of 'constrained choice'. Here, the Commission will again refer to the parallels. The defence of duress is examined in Chapter 5 while the defence of necessity is discussed in Chapter 6.

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<sup>1</sup> Charleton, McDermott, Bolger *Criminal Law* (Butterworths 1999) at 1075.

## **B Duress**

5.06 Duress, although long recognised as being part of criminal law, has been regarded as a notoriously difficult area. It has been described as “an extremely vague and elusive juristic concept”.<sup>2</sup>

5.07 Generally speaking, if a defendant commits an act with the required *actus reus* and *mens rea*, a conviction will follow. To quote Lord Bingham in the English case *R v Hasan*, “the common sense starting point of the common law is that adults of sound mind are ordinarily to be held responsible for the crimes which they commit.”<sup>3</sup> However, where the defence of duress arises, the defendant will escape criminal liability on the basis that he or she was coerced or compelled into committing the criminal act by threats from another. To reiterate, a typical case involves the defendant being told ‘do this - or else’. Duress forms a defence to a criminal charge on the grounds of ‘concession to human frailty’; the law recognises that although a person may have had the required *actus reus* and *mens rea* to carry out the criminal act in question, the fact that the person was coerced by fear of threats of death or serious harm, allows that person to escape criminal liability. It would be impossible for a civilised system of criminal law to hold a person fully responsible where the defendant was effectively forced by threats to commit a criminal act.

5.08 As it stands, duress by threats is not a defence to all charges; it forms a defence to a charge of any offence except murder, attempted murder and some forms of treason. The principal justification for excluding the defence of duress as a defence to murder is based on the view that the law must uphold the sanctity of human life. As with the defence of legitimate defence, for example, the victim of a case where duress is raised is a completely innocent party and the criminal law must strive “to protect innocent lives”.<sup>4</sup>

5.09 In recent years the defence of duress has been relied upon more frequently particularly by those involved in gang related crime, such as drug and terrorist crime, and as a consequence has become an increasingly problematic area for the courts. In response, the courts have sought to prevent the defence becoming too readily available where there has been “a degree of prior culpability”.<sup>5</sup> The UK House of Lords decision in *R v Hasan*<sup>6</sup> provides a perfect

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<sup>2</sup> *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, at 686 (Lord Simon of Glaisdale).

<sup>3</sup> *R v Hasan* [2005] 4 All ER 685, at 693.

<sup>4</sup> *R v Howe* [1978] 1 AC 417, at 433 (Lord Hailsham).

<sup>5</sup> Ormerod *Smith & Hogan Criminal Law* (11<sup>th</sup> ed Oxford University Press 2005) at 302.

example of where the judiciary have sought to limit the availability of the defence of duress by severely limiting the circumstances in which defendants can raise the defence. On public policy grounds, Lord Bingham, who delivered the leading Opinion in the case, advocated “tightening rather than relaxing the conditions to be met before duress may be successfully relied on”.<sup>7</sup> Before the defence of duress is pleaded successfully, a high threshold level must be crossed.

5.10 In the *Consultation Paper on Duress and Necessity*, the Commission examined the general scope and limitations to the defence of duress by analysing: whether or not the defence should be regarded as excusatory or justificatory; the nature of the threats made; the target of the threats; the effects of the threats; the imminence rule and exposure to the risks of duress. The Commission also recognised that the only Irish case to discuss the law on duress in the modern era was *Attorney General v Whelan*<sup>8</sup>, so that much of the Consultation Paper involved a review of the law and literature from other jurisdictions. The defence of marital coercion which existed at common law and the burden of proof in relation to duress was also discussed in the Consultation Paper. Finally, the Commission examined whether the defence of duress should be available to a charge of murder.

## **C An Overview**

5.11 In Ireland, the Court of Criminal Appeal decision in *Attorney General v Whelan*<sup>9</sup> has governed the discussion on the law of duress. The facts involved the defendant being charged with receiving a sum of stolen money, knowing it to be stolen. The defendant admitted he had accepted the money but said that he had done so under duress from another man named Farnan, who was armed with a revolver.<sup>10</sup> At trial, the trial judge noted that there was no doubt that Farnan was the type of man to threaten to use a revolver, if not actually use it, and he left it to the jury to decide whether the defendant had acted under duress or not. In doing so however, the trial judge posed an important question to the jury (a question which now forms the basis for the defence): “In receiving the money did Peter Whelan act under threats of immediate death or serious personal violence?”<sup>11</sup> The jury answered in the affirmative to this question but

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<sup>6</sup> *R v Hasan* [2005] 4 All ER 685.

<sup>7</sup> *R v Hasan* [2005] 4 All ER 685 at 695.

<sup>8</sup> [1934] IR 518.

<sup>9</sup> [1934] IR 518.

<sup>10</sup> For a more detailed account see LRC CP 39-2006, at paragraphs 2.04 - 2.14.

<sup>11</sup> [1934] IR 518, 521.

the trial judge ruled that although the defendant had acted under duress, this was not a defence but rather a factor that would contribute to mitigation. The defendant appealed to the Court of Criminal Appeal claiming that the finding of duress by the jury merited an acquittal. The Court outlined the defence of duress as follows:

“[T]hreats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal.”<sup>12</sup>

5.12 However, the Court noted that the application of the general rule was subject to certain limitations. Before the defence is successful, it must be shown that the will of the defendant must have been overborne by the threats; the duress must be operating when the defence is committed and if there is an opportunity for the individual to escape the threat and the opportunity is not taken, the plea of duress will fail. In *Whelan*, the Court held that the appellant’s conviction should not stand and directed a verdict of acquittal.

5.13 The *Whelan* judgment is seen as setting out a classic definition of the defence of duress and has enjoyed a remarkable degree of endorsement across the common law world. Since *Whelan*, however, there has been little judicial discussion on the nature and scope of the defence in Ireland, with the exception of the Court of Criminal Appeal decision in *People (DPP) v Dickey*.<sup>13</sup> Thus case-law and literature from other jurisdictions is particularly important in the examination of the law in this area, especially the UK House of Lords decision in *R v Hasan*<sup>14</sup> which clearly sets out the limitations of the defence.

### **(1) R v Hasan**

5.14 In a *R v Hasan*<sup>15</sup>, the House of Lords reviewed the general scope of the defence noting certain distinguishing features: it is a complete rather than a reductive defence; it is excusatory; the victim is usually morally innocent and the burden of proof lies with the prosecution to prove that the defendant did not act under duress.

5.15 In *Hasan*, Lord Bingham laid out the following limitations to the defence:

The threat or danger must be of death or serious injury;

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<sup>12</sup> *Ibid* at 526.

<sup>13</sup> Court of Criminal Appeal 7 March 2003.

<sup>14</sup> [2005] 4 All ER 685.

<sup>15</sup> [2005] 4 All ER 685.

The threat must be directed against the defendant, his or her immediate family or someone close to the defendant;

The relevant tests are in general objective, with reference to the reasonableness of the defendant's perceptions and conduct;

The defence is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats relied upon;

There must have been no evasive action the defendant could reasonably have been expected to take;

The defendant must not voluntarily have laid himself or herself open to the duress relied upon;

Duress may be a defence to any crime except some forms of treason, murder and attempted murder.

5.16 In *Hasan*, the defendant had been convicted of aggravated burglary. At trial the defendant claimed that he had been coerced into committing the burglary because of threats made against him and his family, by a man known to be of a violent disposition and involved in dealing drugs. According to the defendant the person who had made the threats was a drug dealer with a violent reputation but the defendant had an association with him. At trial, the judge directed the jury that the accused could not rely on the defence of duress, if in their view; he had, freely associated with this man and had run the risk of being subjected to threats. In the English Court of Appeal, the defendant's appeal was allowed and the conviction was quashed. However, the prosecution successfully appealed to the House of Lords where the original conviction was restored based on the above limitations to the defence, primarily that self-induced duress is no defence.

## **D Justification or Excuse**

5.17 As with the law surrounding provocation and self-defence and the defences generally, there has been much debate as to whether the defence of duress operates as an excusatory or justificatory defence. Ashworth has commented that "the development of duress and necessity in the common law has been characterised by the interplay of reasons of excuse and justification, and by the conflicts between recognising the pressure to which the defendant was subject to and upholding the rights of the victims of the attack".<sup>16</sup> This debate around justification and excuse formed the subject matter of the Commission's first provisional recommendation on the law of duress.

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<sup>16</sup> Ashworth *Principles of Criminal Law* (5<sup>th</sup> ed Oxford 2006) at 219.

**(a) Consultation Paper Recommendations**

5.18 In the Consultation Paper, the Commission provisionally recommended that the status of the defence of duress as an excusatory defence in general terms should be retained.

**(b) Discussion**

5.19 In the Consultation Paper, the Commission recognised that the prevalent view in case law and in academic literature recognises that the defence of duress is seen as an excusatory defence rather than a justificatory defence. Though the defendant has the required *actus reus* and *mens rea* the defendant is 'excused' due to the element of constrained choice; the person was so limited in choice, it is deemed to be unfair to place criminal responsibility on them but still recognises that the action was in fact a crime.

5.20 Where a defence is recognised as justificatory, it is recognised that the action of the person was not a crime as it was the correct action to have taken in that particular set of circumstances.

5.21 The Commission recognises that the case law on duress firmly supports its status as an excusatory defence and agrees with this view even though Murnaghan J in *Whelan* seemed to use the words of justification and excuse interchangeably. The Commission concurs with Professor Glanville Williams who points out that the "defence of duress is not a justification of a crime (as necessity is or should be), but an excuse."<sup>17</sup> He points out that "the defence is allowed not because it achieves the greater good or lesser evil but because the exceptional circumstances make it unlikely that the law can effectively continue its prohibition, and make punishment for doing the act seem harsh and unjust"<sup>18</sup>.

5.22 In *R v Hasan*<sup>19</sup>, the UK House of Lords firmly rejected the view that the defence of duress can amount to a justification and stated that "duress is now properly regarded as a defence which if established, excuses what would otherwise be criminal conduct."<sup>20</sup>

5.23 To reiterate, a justificatory defence suggests that the conduct of the defendant was 'rightful in the eyes of society'; whereas an excusatory defence is still considered wrong, but the circumstances dictate that it would be unjust to punish the defendant.

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<sup>17</sup> Williams *Textbook of Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1983) at 626 and 627.

<sup>18</sup> Williams *Textbook of Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1983) at 626 and 627.

<sup>19</sup> *R v Hasan* [2005] 4 All ER 685.

<sup>20</sup> *R v Hasan* [2005] 4 All ER 685, 693.

5.24 If a defence is successfully raised and whether the defence is deemed excusatory or justificatory the defendant will be acquitted and will escape punishment. Thus it can be argued that there is no practical relevance on whether a defence is seen as an excuse or a justification. Herring captures this point when he said:

“Another danger of putting too much emphasis on whether defences fall into the philosophical categories of justification or excuse is that practical considerations, policy factors and the need to make the law readily comprehensible to juries (should) also influence the rules relating to defences.”<sup>21</sup>

5.25 However, having said that, and as already mentioned with regard to legitimate defence and provocation, whether an accused is acquitted on the basis of justification rather than excuse sends out a particular message to society; it is particularly important to possible victims whether the actions of the accused are deemed justificatory or excusatory as it “communicates a great deal about the actions of the defendant.”<sup>22</sup> The commonly held view is that a justificatory defence ‘justifies’ the criminal act whereas an excusatory defence operates to ‘excuse’ the actor rather than to validate the criminal act.

5.26 The Commission acknowledges the educative value associated with the question of whether to categorise a defence as a justification or an excuse but also recognises that the rationale of duress or indeed any of the defences in question should not be the sole influence on the development of the law of defences. The Commission considers that the emphasis in this Report should be placed on the elements and limitations of the defences with a view to drafting legislation in this area.

5.27 In the Consultation Paper, the Commission adopted the concept of ‘constrained choice’ as the underlying principle for the defences of both duress and necessity. This view is prevalent in case law and much of the academic literature in the area. During the consultation process, however, it was suggested that two possible alternatives could be provided as a basis for the rationale of both duress and necessity and therefore should form a part of the Commission’s discussion.

5.28 The first rationale put forward favoured the Canadian approach, where the defence is based on the *morally involuntary* nature of the defendant’s actions rather than on constrained choice. The concept of morally

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<sup>21</sup> Herring *Criminal Law* 4<sup>th</sup> ed (Palgrave MacMillan 2005) at 388.

<sup>22</sup> Spain “Duress and Necessity in Ireland: Reform on the Horizon” (2008) *Irish Criminal Law Journal* Vol. 18 (3): 70-76, 73/

involuntariness was introduced into Canadian law in *R v Perka*<sup>23</sup> a case involving a claim of necessity, often referred to (as the Commission discusses in Chapter 6) as “duress of circumstances”. In *Perka* the Supreme Court of Canada held that “realistically... his act is not a ‘voluntary’ one”. The Court held that, where necessity arises, the defendant’s choice “to break the law is no true choice at all; it is remorselessly compelled by normal human instincts”.<sup>24</sup> The concept of moral involuntariness was extended to duress in *R v Mack*<sup>25</sup> and *R v Hibbert*<sup>26</sup> and most recently in *R v Ruzic*<sup>27</sup>. The *Perka* decision drew heavily on the writings of Fletcher who argues that excuses should be founded on the conception of moral involuntariness.<sup>28</sup>

5.29 The second rationale put forward is based on emotions; the fear being experienced by the defendant at the time of the commission of the crime. It has been suggested that the focus which the Commission placed on choice, and being compelled to do an act due to circumstances or threats, does not recognise the reality of the situation of those claiming a defence of duress and necessity.

5.30 In response to these suggestions, the Commission refers to the work of Yeo and Berger who strongly oppose the defences being viewed in terms of ‘moral involuntariness’ and emotions.<sup>29</sup> Berger suggests that “emotions and the veil of voluntarism” has caused a loss of judgement in Canadian criminal defences. He suggests the view that the “voluntarist account of criminal liability is purely descriptive”.<sup>30</sup> Yeo argues that “moral involuntariness lacks sufficient precision to be a principle of fundamental justice”.<sup>31</sup> In view of the arguments made by Yeo and Berger, the Commission does not believe that moral

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<sup>23</sup> [1984] 2 SCR 232, (1984) 13 D.L.R. (4<sup>th</sup>) 1.

<sup>24</sup> (1984) 13 D.L.R. (4<sup>th</sup>) 1,14.

<sup>25</sup> *R v Mack* [1988] 2 SCR 903 at 946.

<sup>26</sup> *R v Hibbert* [1995] 2 SCR 973.

<sup>27</sup> *R v Ruzic* [2001] 1 SCR 687.

<sup>28</sup> Fletcher *Rethinking Criminal Law* (Boston: Little Brown and Company 1978).

<sup>29</sup> Yeo “Challenging Moral Involuntariness as a Principle of Fundamental Justice” (2002-03) *Queen’s Law Journal* 28: 335-351 and Berger “Emotions and the Veil of Voluntarism: The Loss of Judgement in Canadian Criminal Defences” (2005-06) *McGill Law Journal* 51: 99-129.

<sup>30</sup> Berger “Emotions and the Veil of Voluntarism: The Loss of Judgement in Canadian Criminal Defences” (2005-06) *McGill Law Journal* 51: 99-129,99.

<sup>31</sup> Yeo “Challenging Moral Involuntariness as a Principle of Fundamental Justice” (2002-03) *Queen’s Law Journal* 28: 335-351, 345.

involuntariness or emotions should form the basis for the rationale of duress or necessity.

**(c) Conclusions and Recommendations**

5.31 In keeping with the predominant view in case law and academic literature, the Commission maintains the view held in the Consultation Paper, and recommends that duress should be recognised as an excusatory defence. Where a person is coerced or compelled into committing a criminal act by threats made a person should be seen as ‘having committed’ a crime but ‘excused’ because the law recognises human frailty. Duress is not viewed as a justificatory defence primarily because of the innocence of the victim involved. The law does not view the conduct of a defendant who has acted under duress as rightful in the eyes of society. The Commission also recommends that the features referred to by Lord Bingham in *R v Hasan*, referred to above, should be incorporated into the defence, namely that the threat was imminent, there was no reasonable way to avoid the threat or make it ineffective and the conduct was a reasonable response to the threat.

5.32 *The Commission recommends that duress should be recognised as an excusatory defence. The Commission also recommends that the features of the defence should include that the threat was imminent, there was no reasonable way to avoid the threat or make it ineffective and the conduct was a reasonable response to the threat.*

**E The Threat**

**(1) Nature of the Threats: Death or Serious Injury**

5.33 As a matter of public policy the common law has placed strict limits on the type of threat or threats deemed sufficient to trigger the defence of duress. There is a minimum threshold below which the threats will never be sufficient to allow the defence to operate. That threshold level is set at a high standard where the only threat or danger that will allow the defence to arise is death or serious injury. In the Consultation Paper the Commission agreed that the common law position on the nature of threats should stand.

**(a) Consultation Paper Recommendations**

5.34 In the Consultation Paper, the Commission provisionally recommended that the threat which underpins the defence of duress should be one of death or serious harm.

**(b) Discussion**

5.35 As mentioned above, the common law placed a threshold on the threats that will never be sufficient to allow the defence of duress to arise. That

requirement is generally regarded as one of ‘death or serious injury or harm’; it forms part of the objective criterion in the test for duress.

5.36 It can be argued that the law should recognise that every type of threatened harm is capable of triggering the defence of duress but the Commission, in line with the common law approach suggests that society is entitled to expect that an individual should resist threats that fall below a minimum level given that the accused has injured an innocent victim. As pointed out in the Consultation Paper, the law must draw the line somewhere and it chooses to do so between threats to bodily integrity and threats to property.<sup>32</sup>

5.37 This view concurs with the Irish position of duress as set out in *Whelan* as well as many other common law and criminal code jurisdictions. To reiterate the words of Murnaghan J in the Court of Criminal Appeal, “threats of immediate death or serious personal injury” must be present to “overbear the ordinary power of human resistance”.<sup>33</sup>

5.38 Examples from criminal code jurisdictions such as Canada and parts of Australia also impose a threshold standard to the nature of the threats deemed sufficient. Section 17 of the *Canadian Criminal Code* for example, requires the threat to be “of immediate death or bodily harm”.<sup>34</sup> Similarly, the Western Australia Code refers to threats of “immediate death or grievous bodily harm.”<sup>35</sup>

5.39 It is interesting to note that in a recent report from the Law Reform Commission of Western Australia<sup>36</sup>, the Irish position, that only threats of death or serious harm are sufficient to raise the defence (on the basis that an innocent person has been a victim and that the law has to draw the line between bodily integrity and threats to property), was queried. The point was made that, a person acting under duress may not necessarily physically injure an innocent victim; for example, the crime committed could be theft, damage or social security fraud.<sup>37</sup> For this reason the Commission in Western Australia suggests

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<sup>32</sup> LRC CP 36-2006, at paragraph 2.47.

<sup>33</sup> [1934] IR 518, 526.

<sup>34</sup> See also LRC CP 36-2006, paragraph 2.30.

<sup>35</sup> Section 31 Criminal Code (WA).

<sup>36</sup> Law Reform Commission of Western Australia. *Review of the Law of Homicide: Final Report*, Report No. 97 (2007) at 187.

<sup>37</sup> *Ibid* at 187.

that widening the range of threats can be balanced with a requirement that the response was reasonable.<sup>38</sup>

5.40 The Queensland Code widened the range of threats applicable to the defence of duress, to include a threat 'to himself or herself, another person or the property of another person by the *Criminal Law Amendment Act (Qld) 2000*.<sup>39</sup>

5.41 In the United States, there is a tendency in some states to use a test based on proportionality whereby the gravity of the offence is taken into account such as a threat of injury to person, reputation or property.<sup>40</sup>

5.42 The Commission suggests that although a test based on proportionality where a comparison is made between the threat and the crime charged may seem fairer in theory there is a strong possibility that in practice a proportionality test would be too vague. Furthermore, the Commission believes that the other limitations to the defence discussed below would render a proportionality test superfluous.

### **(c) Conclusions and Recommendations**

5.43 On the basis of the arguments outlined above and in greater detail in the Consultation Paper, the Commission reiterates its position that the nature of the threat which underpins the defence of duress should be one of death or serious harm.

5.44 *The Commission recommends that the threat which underpins the defence of duress should be one of death or serious harm.*

### **(2) Target of the Threats**

5.45 The second provisional recommendation made by the Commission with regard to 'the threat' concerned the target of the threats. Generally speaking, where the defence of duress arises the threat will have been targeted at the accused but the threat can also be targeted at a third party thus it is necessary to establish clearly how far the 'target' can be stretched.

### **(a) Consultation Paper Recommendations**

5.46 In the Consultation Paper, the Commission provisionally recommended that the defence of duress should be available where a threat of

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<sup>38</sup> Law Reform Commission of Western Australia. *Review of the Law of Homicide: Final Report*, Report No. 97 (2007) at 187.

<sup>39</sup> Section 16.

<sup>40</sup> See also LRC CP 39-2006, paragraph 2.40, and Yeo "Private Defence, Duress and Necessity" (1991) 15 *Criminal Law Journal* 139, 143.

death or serious harm *is directed towards any person* and that there should be no restriction in the availability of the defence in relation to the target of the threats.

**(b) Discussion**

5.47 It is widely accepted that the defence of duress should not be limited on the basis of whom the threat is made against. Though there is little reference to the ‘target’ of the threats in Irish case-law, analogies can be made with self-defence and in particular the right to use self-defence in the defence of others and that no special relationship need exist.<sup>41</sup> Examples of this pragmatic approach can also be found in other jurisdictions. In the UK House of Lords decision *R v Hasan*,<sup>42</sup> for example, it was held that the threat may be directed against the defendant, his or her immediate family or someone close to the defendant.

5.48 However, it must also be borne in mind that although strong arguments can be made in favour of allowing the subject of the threats to be anyone at all, if the threats are directed against a stranger, it will prove more difficult to satisfy the requirement that the threat must be such that one could not be expected to bear. Naturally the party to whom the threat is directed at will be of relevance in establishing whether the accused had in fact been compelled to commit the crime.

5.49 However, the Commission concludes that the arguments in favour of allowing the subject of the threats ‘to be anyone at all’ outweigh arguments in favour of limiting the target. By close analogy with the law on self defence, the defence of duress should be available where a threat of death or serious harm is directed towards any person. It is possible that a threat to a close friend may be equally as compelling as a threat to a relative and on that basis the Commission maintains the position held in the Consultation Paper.

**(c) Conclusions and Recommendations**

5.50 On the basis of this discussion, the Commission recommends that no restriction should be placed on the availability of the defence in relation to the target of the threats.

5.51 *The Commission recommends that the defence of duress should be available where a threat of death or serious harm is directed towards any person and that there should be no restriction in the availability of the defence in relation to the target of the threats.*

**(3) The Effect of the Threat and Perception of the Defendant**

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<sup>41</sup> *People (Attorney General) v Keatley* [1954] IR 12.

<sup>42</sup> [2005] 4 All ER 685.

5.52 As mentioned in Chapter 1, one of the major issues in respect to criminal law defences is how the law should assess the accused's reactive conduct. Should it be based on an objective criterion whereby the conduct is measured against the community or ordinary person standard or should it be based on a subjective standard where the particular person's circumstances and characteristics are taken into account in viewing how the person reacted or should it be a combination of both?

5.53 With regard to duress similar difficulties arise with regard to the response to the threat. The crucial element in the defence of duress is that the defendant was overborne by the threats made against him. The problem with this requirement is that people differ in their response to threats; a particularly weak willed person may react to an innocuous threat, where a person of ordinary resolve, would not. The question that needs to be answered is whether a person should escape liability on account of their own subjective fear or should the law demand an ordinary standard of resistance? In *Whelan*, the Court of Criminal Appeal set down an objective test where the "threat... must be so great as to overbear the ordinary power of human resistance".<sup>43</sup> Thus the jury must be satisfied that the threats would have overborne the will of an ordinary person.

5.54 Whether the jury should have regard for the personal infirmities of the accused is not certain. However, it would seem that a degree of subjectivity was introduced into the test in *People (DPP) v Dickey*<sup>44</sup>. The trial judge told the jury that, when assessing whether the defendant has acted under duress, "it is not what you would do in the situation but what you perceive the accused's powers were, and take into account the particular circumstances and human frailties of the accused specifically."<sup>45</sup>

5.55 Other jurisdictions have adopted limitations to the test but in general it is regarded as an objective test. It is well settled that an objective test puts a limitation on the availability of criminal law defences. The purpose of this is to prevent those who lack powers of self control, or who (in the case of duress) may be particularly cowardly, from obtaining the benefit of them.

5.56 In the Consultation Paper, the Commission made two recommendations regarding the perception of the defendant and in both recommendations recommended a primarily objective approach.

**(a) Consultation Paper Recommendations**

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<sup>43</sup> [1934] IR 518, at 526.

<sup>44</sup> Court of Criminal Appeal 7 March 2003.

<sup>45</sup> Court of Criminal Appeal 7 March 2003.

5.57 Firstly, the Commission provisionally recommended that, in establishing whether the response of the accused was a reasonable one, an objective test should be applied.

5.58 Secondly, the Commission provisionally recommended that the belief in the existence, nature and seriousness of the threats should be reasonably held and that the test should be what an ordinary person with the accused's characteristics would have reasonably believed in the circumstances.

**(b) Discussion**

5.59 In relation to the Commission's first Consultation Paper recommendation, it is settled policy of the criminal law to limit the availability of the criminal law defences by using an objective test to determine whether the reactions of the defendant were reasonable or not. Such an approach prevents abuse of the defences and prevents those who lack self-control, or in the case of duress who may be particularly cowardly from obtaining the benefit of the defence. As pointed out in Chapter 4 in the context of Provocation, the law should maintain high standards in order to prevent people giving way to their fears or self-control at the expense of innocent victims.

5.60 In the Consultation Paper, the Commission mapped the case law outlining the test for duress and whether the perception of the defendant should be viewed objectively or subjectively. In the Irish case *Attorney General v Whelan*,<sup>46</sup> the Court of Criminal Appeal held that the threat must be "so great to overbear the ordinary power of human resistance"<sup>47</sup>; which is an objective test. In order to allow the defence of duress to stand, the jury must be satisfied that the defendant acceded to threats that would have similarly overborne the will of an ordinary reasonable person.

5.61 However, in the later case of *People (DPP) v Dickey*<sup>48</sup> a certain degree of subjectivity seems to have been introduced. In the Court of Criminal Appeal, the Court seemed to accept the trial judge's charge to the jury which went as follows:

"When you are considering [whether the defendant acted under duress]... it is not what you would do in the situation but what you perceive the accused's powers were, and take into account the particular circumstances and human frailties of the accused specifically."<sup>49</sup>

5.62 The test for duress has been developed to a greater extent by the English courts. In *R v Howe*,<sup>50</sup> the House of Lords was specifically asked to determine whether or not the test for duress was objective.

5.63 In *Howe*, the House of Lords approved the objective formulation set out by the English Court of Appeal in *R v Graham*<sup>51</sup> where it was held that the

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<sup>46</sup> [1934] IR 518.

<sup>47</sup> [1934] IR 518, 526.

<sup>48</sup> *People (DPP) v Dickey* Court of Criminal Appeal 7 March 2003.

<sup>49</sup> *People (DPP) v Dickey* Court of Criminal Appeal 7 March 2003.

<sup>50</sup> *R v Howe* [1987] AC 417.

defendant is required to have the steadfastness reasonably to be expected of the ordinary citizen in his situation. However, as with the development of the law on provocation in English courts, the Court of Appeal in *Graham* held that the jury determines whether duress arises by questioning whether a “sober person of reasonable firmness” sharing the same (permanent) characteristics of the defendant would have reacted in the same manner as the defendant did.

5.64 In terms of the kind of characteristics that the sober person of reasonable firmness could share the English courts have deemed age, gender and physical health to be appropriate, while pliancy, vulnerability, timidity and emotional instability have been ruled out.<sup>52</sup> The development of the ‘the test for duress’ closely resembles the development of the law on provocation in the 20<sup>th</sup> century where there seemed to be a gradual move towards subjectivity. However, the recent case *R v Hasan*<sup>53</sup> once again reinforced the view that the relevant test pertaining to duress should be objective. To enforce this point Lord Bingham<sup>54</sup> referred to the observation of Lord Morris of Borth-y-Gest in *Lynch*, that “it is proper that any rational system of law should take fully into account the standards of honest and reasonable men.” According to this approach, it is by those standards that it is fair that actions and reactions may be tested. In other words that the test for duress should be based on objective lines.

5.65 In relation to proposed reform, in the 2005 Report from the Law Commission of England and Wales, the defendant’s age and all the circumstances of the defendant other than those which bear on his capacity to withstand duress should be relevant for the purpose of the objective test as laid down in *R v Graham*.<sup>55</sup>

### **(c) Conclusions and Recommendations**

5.66 On the basis of the arguments set out above, the Commission believes that it is necessary to apply a test which is predominantly objective in nature to the defence of duress. The Commission is of the opinion that it is necessary to place some limitation on the defence, applying an objective test that is tempered with subjective elements is the most appropriate approach. For the Commission it is necessary to draw a line at conditions which affect a defendant’s capacity to resist threats. Thus a reasonable firmness test would be

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<sup>51</sup> *R v Graham* [1982]1 All ER 801.

<sup>52</sup> *R v Hegarty* [1994] Crim LR 353.

<sup>53</sup> *R v Hasan* [2005] 4 All ER 685.

<sup>54</sup> *R v Hasan* [2005] 4 All ER 685 (Lord Bingham) at [21].

<sup>55</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No.177 2005) at paragraph 7.2.

modified to take account of certain characteristics but would not include characteristics which have a bearing on the defendant's capacity to withstand duress. Such a view draws a parallel with the Commission's approach to the defence of provocation. In relation to provocation, the Commission has recommended a withdrawal from a purely subjective test, which is dominant in Ireland, and the introduction of a defence remodelled on objective lines. This would allow juries to take account of the accused's personal characteristics insofar as they affect the gravity of provocation but that (with the possible exception of age and sex) personal characteristics should not feature in relation to the question of self-control. In the case of duress, the approach as advocated by the Commission would allow juries to take account of characteristics such as age, sex and other characteristics of the defendant other than those which bear on the defendant's capacity to withstand duress.

5.67 *The Commission recommends that, in establishing whether the response of the accused was a reasonable one, an objective test should be applied tempered with subjective elements.*

5.68 *The Commission recommends that the court or jury as the case may be may take into account the age and sex of the defendant (and any other characteristics which bear upon the capacity of the defendant to withstand duress) in deciding whether a person of reasonable firmness would have acted as the defendant did.*

**(i) Belief in the existence, nature or seriousness of the threat**

5.69 The second provisional recommendation made by the Commission in relation to the threat and the perception of the defendant deals with the issue of whether the defendant's belief in the existence/nature of the threat is reasonably held.

5.70 In the Consultation Paper, the Commission again provisionally recommended an objective approach. The Commission recommended that the belief in the existence, nature and seriousness of the threats should be reasonably held and that the test should be what an ordinary person with the accused's characteristics would have reasonably believed in the circumstances.

5.71 This aspect of the defence of duress was also addressed in *R v Hasan*<sup>56</sup> and it is useful to refer to Lord Bingham's Opinion in that regard. In *Hasan* the issue was referred to in terms of 'foresight'. The question for the jury was whether the defendant loses the benefit of a defence of duress only if he actually foresaw the risk of coercion or if he ought reasonably to have foreseen the risk of coercion, whether he actually foresaw the risk or not.

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<sup>56</sup> *R v Hasan* [2005] 4 All ER 685.

5.72 The Commission considers that the belief in the existence, nature and seriousness of the threat should be reasonably held and the test should be one that is based on what an ordinary person with the accused's characteristics would have reasonably believed in the circumstances.

## **F The Imminence Rule and Official Protection**

5.73 As with provocation and legitimate defence, the issues of imminence and immediacy also arise in relation to duress. Once again, however, it should be noted that the term 'imminent' is often used interchangeably with the term 'immediate' though their meanings are not necessarily congruent.

5.74 Before the defence of duress can be raised successfully, it must be shown that the threat made must be imminent and not a remote threat of future harm. The difficulty that arises with this element of the defence is the question of how long should that interval last.

5.75 Closely aligned to the imminence rule in the context of duress is the issue of official protection and the duty on a person who has been threatened under duress to seek official protection if possible. Again, this element of the defence closely resembles the defence of self-defence and the duty to retreat.

### **(a) Consultation Paper Recommendations**

5.76 In the Consultation Paper, the Commission made two recommendations under this heading, one relating specifically to the imminence rule; the other referring to the duty to obtain official protection.

5.77 Firstly, the Commission provisionally recommended that while the threat should be imminent, there should be no requirement of immediacy in relation to the harm threatened.

5.78 Secondly, in relation to official protection, the Commission provisionally recommended that a person who is threatened should be required to seek official protection if possible. However, the Commission made the point that a failure to seek official protection should not automatically preclude a person from the availability of the defence.

### **(b) Discussion**

5.79 The reason that imminence plays a part in the test for duress is that the longer the gap in time between the threat and the criminal act being carried out suggests that there is more time for the defendant to escape from the threat and seek assistance from officials. Case law also illustrates that it may not always be possible to obtain assistance and it is for this reason that the Commission recommends that no restriction should be placed on obtaining the defence merely on the grounds of immediacy. In the English case *R v Abdul*

*Hussain*,<sup>57</sup> for example, Iraqis hijacked an aircraft because they feared they would be killed if they were returned to Iraq. In interpreting the issue of immediacy the Court held that the question for the jury was whether the defendant's response was proportionate and reasonable. However, the UK House of Lords decision in *R v Hasan*<sup>58</sup> suggests that there is an eagerness to 'reassert the primacy of the immediacy requirement'.

5.80 In the Consultation Paper discussion on imminence, the Commission set out the position in this jurisdiction and in England and Wales as well as a comparative analysis of the law on imminence in Canada, Australia and New Zealand.

5.81 In Ireland, there is scant reference on the element of imminence, with the exception of the decision in *Attorney General v Whelan* where it was stated that the threat must be of "immediate death or serious violence".<sup>59</sup>

5.82 The issue of immediacy has been discussed to a greater extent in England. In *R v Hudson and Taylor*<sup>60</sup> imminence was a central feature. There, two young girls were charged with perjury. The defendants admitted giving false evidence at a criminal trial for assault but pleaded duress, having been threatened with serious violence by men associated with the case before the trial. One of the men was present in the public gallery during the trial. At trial, the trial judge withdrew the defence from the jury on the grounds that the threats could not have been carried out in a court of law. The Court of Appeal disagreed claiming that the defence will not fail because the threatened injury may not follow instantly but after an interval. In other words the Court of Appeal recognised that a threat can still operate to neutralise the will of the accused even where they are at that stage free from the physical control of the person making the threat. The threat must be imminent but it need not be immediate.

5.83 The distinction between immediacy and imminence arose again in *R v Abdul-Hussain*<sup>61</sup>. Here the Court confirmed the decision in *Hudson and Taylor* noting that "the peril must operate on the mind of the defendant at the time when he commits the otherwise criminal act, so as to overbear his will...but the execution of that threat need not be immediately in prospect."<sup>62</sup>

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<sup>57</sup> [1999] Crim LR 570.

<sup>58</sup> [2005] 4 All ER 685.

<sup>59</sup> [1934] IR 518, 526.

<sup>60</sup> [1971] 2 QB 202.

<sup>61</sup> [1999] Crim LR 570.

<sup>62</sup> [1999] Crim LR 570.

5.84 However, more recently in *R v Hasan*<sup>63</sup>, Lord Bingham noted that, while he understood that the Court of Appeal in *Hudson and Taylor* had sympathy with the predicament of the young girls, he could not accept that a witness testifying in the Crown Court at Manchester had no opportunity to avoid complying with a threat incapable of execution then or there. He described the decision in *Hudson and Taylor* as having “had the unfortunate effect of weakening the requirement that execution of threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress”.<sup>64</sup> According to Lord Bingham:

“It should... be made clear to juries that if the retribution threatened ... is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way to avoid committing the crime which he is charged.”<sup>65</sup>

5.85 It is evident from the *Hasan* decision that the House of Lords was opposed to the drift towards the looser concept of imminence as advocated in *Hudson and Taylor* and sought to reassert the primacy of the immediacy requirement. Commenting on the House of Lords views on imminence, Ashworth suggests that “having regard to age and circumstances” should also be removed from the law on duress as a consequence. According to him, Lord Bingham’s conception of duress evidently finds no place for those who cannot measure up to reasonable expectations.<sup>66</sup>

5.86 In relation to the issue of immediacy, the Commission prefers the approach adopted by the Court of Appeal in *Hudson and Taylor* and *Abdul-Hussain* rather than the House of Lords in *Hasan*. In the Consultation Paper, the Commission cited with approval a passage from the *Abdul-Hussain* case and it is worth citing again in this Report :

“If Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of the English law would not, in our judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo’s knock on the door.”<sup>67</sup>

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<sup>63</sup> *R v Hasan* [2005] All ER 685, 698.

<sup>64</sup> *R v Hasan* [2005] All ER 685 at 698.

<sup>65</sup> [2005] All ER 685, 698.

<sup>66</sup> Ashworth *Principles of Criminal Law* 5<sup>th</sup> ed (Oxford 2006) at 223.

<sup>67</sup> [1999] Crim LR 570.

5.87 Furthermore, the Commission also pointed out that the Canadian Supreme Court in *R v Ruzic*<sup>68</sup> held that section 17 of the Canadian Criminal Code, requiring that the duressor be physically present at the scene of the offence in order for duress to be relied upon, was contrary to section 7 of the Canadian Charter for Human Rights and Freedoms.<sup>69</sup>

5.88 It is also worth referring to the recent report from the Western Australian Law Reform Commission on homicide who favours the abandonment of the requirement of immediacy in relation to duress primarily because the requirement is deemed to be particularly difficult for cases of domestic violence.<sup>70</sup> The Model Criminal Code of Australia abandons the requirement completely merely specifying that a person carries out conduct under duress if and only if he or she reasonably believes that a threat has been made and that it will be carried out unless the offence is committed.<sup>71</sup>

### **(c) Conclusions and Recommendations**

5.89 In the opinion of the Commission, the just approach to the issue of imminence in relation to the defence of duress is not to limit the availability of the defence on the basis of immediacy. Though the threat should be imminent no requirement of immediacy should exist in relation to the harm threatened. 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 especially given the place of technology) the carrying out of the threat may be inevitable. Thus the Commission re-asserts the view that although the threat should be imminent there is no requirement for the threat to be immediate.

5.90 *The Commission recommends that, while the threat should be imminent, there should be no requirement of immediacy in relation to the harm threatened.*

## **G Exposure to Risk of Duress – Self-Induced Duress**

5.91 The defence of duress is generally regarded as not being available to defendants who have knowingly exposed themselves to the threat, for example, by joining a criminal organisation voluntarily who subsequently puts pressure on them to commit offences. This is an important limitation on the defence of

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<sup>68</sup> *R v Ruzic* [2001] 1 SCR 687.

<sup>69</sup> See also LRC CP 36-2006, at paragraphs 2.118-2.120.

<sup>70</sup> Law Reform Commission of Western Australia – *Review of the Law on Homicide: Final Report*, Report No. 97 (2007) at 187.

<sup>71</sup> The Model Criminal Code (Australia), Model Criminal Code Officers Committee December 1992, see Section 10.2.

duress, given the increasing number who have sought to avail of the defence in recent decades particularly those involved in drug related (and terrorist crime), where their involvement demonstrates a degree of prior culpability.

**(a) Consultation Paper Recommendations**

5.92 In the Consultation Paper, the Commission provisionally recommended that a person who seeks to avail of the defence of duress may not do so if they ought reasonably to have foreseen the likelihood of being subjected to threats, for example, by voluntarily joining a criminal organisation which subsequently puts pressure on the person to commit offences.

**(b) Discussion**

5.93 In the examination of this aspect of the defence of duress, the Commission noted that there was no particular reference to ‘exposure to risk of duress’ in Irish case law thus once again the Commission referred to case law and code provisions from other jurisdictions in the examination of this limitation.

5.94 The defence of duress is being increasingly relied upon by defendants in cases of drug related crime and other ‘gang’ crime; therefore the Courts are now attempting to apply the restrictive elements of the defence in a more rigorous manner. The House of Lords decision in *R v Hasan*<sup>72</sup> is again particularly informative on this issue.

5.95 It is well established that an accused person cannot invoke the defence of duress where he or she has voluntarily exposed himself to the threat of which he or she now complains<sup>73</sup> and in the House of Lords, Lord Bingham who delivered the leading opinion for the majority, stressed that “the policy of the law must be to discourage association with known criminals.”<sup>74</sup> He went on to say that the law should be “slow to excuse the criminal conduct of those who do voluntarily associate themselves with criminal gangs or organisations.”<sup>75</sup>

5.96 The controversial question surrounding this limitation is whether it is sufficient for the prosecution to show merely that the accused knew that he might be compelled to participate in any form of criminal activity, or whether it

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<sup>72</sup> [2005] 4 All ER 685.

<sup>73</sup> Ryan “Resolving the Duress Dilemma: Guidance from the House of Lords” (2005) *Northern Ireland Legal Quarterly* Vol.56 (3): 421-430, 427.

<sup>74</sup> [2005] 4 All ER 685, 703.

<sup>75</sup> [2005] 4 All ER 685, 703.

must be shown that the accused was aware that he would be forced into committing a *particular type* of offence.<sup>76</sup>

5.97 In *R v Baker and Ward*<sup>77</sup> the Court of Appeal favoured the view (which is more favourable to the accused) that the defence will only be denied where the prosecution can show that the accused was aware that he would be forced into committing a particular type of offence.

5.98 In *Hasan*, however, the House of Lords has concluded that *Baker and Ward* “misstated the law”.<sup>78</sup> According to Lord Bingham, this ‘type-of-offence’ spin on voluntary association should be firmly rejected. He expressed this point in the following passage:

“The defendant is *ex hypothesi*, a person who has voluntarily surrendered his will to the domination of another. Nothing should turn on the foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant’s subservience.”<sup>79</sup>

5.99 Another difficult question in assessing exposure to risk is whether the defendant’s foresight must be judged by a subjective or an objective test. In other words does the defendant lose the benefit of a defence based on duress only if he actually foresaw the risk of coercion, or does he lose it if he ought reasonably to have foreseen the risk of coercion, whether he actually foresaw the risk of not?<sup>80</sup> On this issue, the House of Lords once again favoured the objective approach.

5.100 The House of Lords held in *R v Hasan* that if a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be subject to compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them.<sup>81</sup>

5.101 In the Consultation Paper the Commission also mentioned a number of other authorities on the issue of voluntary ‘exposure to duress’ that were relied upon in *R v Hasan* including one of the best known authorities on duress,

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<sup>76</sup> Ryan “Resolving the Duress Dilemma: Guidance from the House of Lords” *Northern Ireland Legal Quarterly* Vol.56 (3): 421-430, 429.

<sup>77</sup> [1999] 2 Cr App R 355.

<sup>78</sup> [2005] 4 All ER 685, 702.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> [2005] 4 All ER 685, 703.

*R v Fitzpatrick*<sup>82</sup>. The Commission also referred to the English Law Commission's Consultation Paper where it was noted that, in light of *R v Hasan*, it is now quite clear that a person who has voluntarily exposed himself or herself to duress will be precluded from relying on the defence.<sup>83</sup>

5.102 The Commission also referred to Criminal Code provisions which have sought to limit the availability of the defence on the basis of voluntary association or in the words of the *Queensland Criminal Code* where the threat has arisen due to the "probable result of the first person entering into an unlawful association or conspiracy; or because of a threat to anyone other than the first person that is the probable result of the first person and the threatened person having entered into an unlawful association or conspiracy".<sup>84</sup> In the Consultation Paper, the Commission pointed out that there is disparity between the common law view on this issue and the Australian Codes in relation to self-induced necessity. It would seem that the Code provisions are more stringent than common law.<sup>85</sup>

5.103 Another important point with regard to exposure to risk of duress was raised by Baroness Hale in her Opinion in *Hasan* where she stressed that the importance of establishing that the accused had indeed set up a "voluntary association with others" should not be aimed at "defendants such as battered wives or those in close personal and family relationships".<sup>86</sup>

### **(c) Conclusions and Recommendations**

5.104 It is firmly established that a person who has voluntarily exposed themselves to a threat of which they now complain should not be allowed to avail of the defence of duress. The rationale for the defence of duress is that a

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<sup>82</sup> [1977] NI 20. This case involved the accused being charged with murder, robbery and membership of a proscribed organisation. The accused was a member of the Official IRA, but testified that he had attempted to leave but had been prevented in doing so by threats of violence to himself and his family. See also LRC CP 36-2006, at paragraphs 2.141-2.146.

<sup>83</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No. 177 2005) at paragraph 7.55.

<sup>84</sup> Queensland Criminal Code (1995), section 67 (3) (b) and (c). Qualifications of similar effect can also be found in the criminal codes of Tasmania (section 20 (1)), the Northern Territory of Australia (section 41(2)), Western Australia (section 31 (4)), the Commonwealth of Australia (section 10.2 (3)), the Australian Capital Territory (section 40 (3)), Canada (section 17) and New Zealand (section 24 (1)).

<sup>85</sup> LRC CP 39-2006, at paragraph 2.150.

<sup>86</sup> [2005] 4 All ER 685, 715.

person who commits an offence due to threats from another person is morally innocent and “that innocence should be recognised by law”.<sup>87</sup> It follows from this that a person who voluntarily exposes themselves to threats is not morally innocent and should not be allowed to escape liability.

5.105 The difficulties that arise with the issue of voluntary exposure are twofold. Firstly, the question arises as to whether it is sufficient for the prosecution to merely show that the accused knew that he might be compelled to participate in any form of criminal activity, or whether it must be shown that the accused was aware that he would be forced into committing a *particular type* of offence. Secondly, should the accused’s ‘foresight’ of the exposure be judged from a subjective or objective stance?

5.106 The Commission is of the opinion that the duress should be limited in terms of reasonableness; a person who seeks to avail of the defence of duress may not do so if they ought reasonably to have foreseen the likelihood of being subjected to threats.

5.107 *The Commission recommends that a person who seeks to avail of the defence of duress may not do so if they ought reasonably to have foreseen the likelihood of being subjected to threats, for example, by voluntarily joining a criminal organisation which subsequently puts pressure on the person to commit offences.*

## **H Duress, Murder and Other Limitations**

5.108 Historically, at common law, the defence of duress has not been available as a defence to murder, attempted murder or treason. This approach has continued to the present day where many jurisdictions continue to exclude murder from the defence. Whether murder should be excluded from the ambit of the defence of duress has long been a topic of discussion and can be traced as far back to the writings of Hale and Blackstone.<sup>88</sup> In the *Consultation Paper on Duress and Necessity* the Commission discussed the issue at great length by analysing the many arguments in favour and against extending the defence of duress to murder. Given that the only modern Irish case to examine the scope of the defence is *Attorney General v Whelan*<sup>89</sup>, the Commission once again considered the application of the defence in a number of other jurisdictions including England, Canada and Australia.<sup>90</sup>

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<sup>87</sup> Hanly *An Introduction to Irish Criminal Law* 2<sup>nd</sup> ed (Gill & Macmillan) at 162.

<sup>88</sup> See LRC CP 36-2006, at paragraph 3.08.

<sup>89</sup> [1934] IR 518.

<sup>90</sup> See LRC CP 36-2006, Chapter 3.

**(a) Consultation Paper Recommendations**

5.109 In the Consultation Paper, the Commission provisionally recommended that the defence of duress should apply to all offences excluding treason, murder and attempted murder.

5.110 The Commission acknowledged however that the plea might be made available as a partial defence to those offences and that a coherent case can also be made for treating duress as a complete defence where the accused's actions can be justified on the grounds of lesser evils. In the Consultation Paper, the Commission sought submissions on this matter.

**(b) Discussion**

5.111 Although the Irish case of *Whelan* concerned a charge of receiving stolen property the Court added *obiter* that “the commission of murder is a crime so heinous that [it] should not be committed even for the price of life and in such a case the strongest duress would not be any justification.”<sup>91</sup>

5.112 Similarly in England, it has generally been accepted that duress is available as a defence to all crimes except for murder, attempted murder and some forms of treason.<sup>92</sup>

5.113 In the landmark decision of *R v Howe*<sup>93</sup> the House of Lords stated categorically that duress was not available as a defence to murder or aiding or abetting murder. In *Howe* Lord Hailsham was of the opinion that heroism is not beyond the reach of ordinary people:

“I do not accept... that an ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own.”<sup>94</sup>

5.114 Thus in *Howe* the House of Lords declined to follow the approach it had taken in *DPP for Northern Ireland v Lynch*<sup>95</sup> in which it decided, by a majority of 3-2, that on a charge of murder the defence of duress is available to a person charged in the second degree. Lord Wilberforce examined the rationale for excluding murder from the defence but nonetheless held that this does not preclude the defence operating in respect of all cases of murder.

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<sup>91</sup> [1934] IR 518, 524.

<sup>92</sup> *R v Pommell* (1995) 2 Cr App Rep 607.

<sup>93</sup> [1987] 1 AC 417.

<sup>94</sup> [1987] 1 AC 417 (Lord Hailsham).

<sup>95</sup> [1975] AC 653.

5.115 More recently, in *R v Hasan*<sup>96</sup> Lord Bingham clearly pointed out that “duress does not afford a defence to charges of murder, attempted murder and perhaps some forms of treason”.<sup>97</sup> However, he did note that the Law Commission in England had recommended that the defence of duress should be available to all offences including murder. He asserted the view that “the logic of this argument is irresistible”.<sup>98</sup> To date however, the defence of duress continues to be excluded from murder in England. In the Consultation Paper, the Commission reviewed the many proposals for reform that have been advocated by the Law Commission of England and Wales over recent decades.<sup>99</sup> In the most recent Consultation Paper from the Law Commission, a new three-tiered framework for homicide offences was proposed including “first degree murder” where the defendant intended to kill; “second degree murder” where the defendant intended to cause serious harm, killed as a result of reckless indifference or intended to kill but as a partial defence; and finally, manslaughter.<sup>100</sup>

5.116 In relation to the defences, the Law Commission proposes that duress should be a partial defence to a charge of “first degree murder” with the aim of achieving consistency. The Law Commission stated that duress should function in the same way as diminished responsibility and provocation. In relation to “second degree murder” the Law Commission suggested two options – a complete defence or a mitigating factor in sentencing since the mandatory life sentence will not apply to this offence.<sup>101</sup>

**(i) Arguments against extending duress to murder**

**(I) Sanctity of human life**

5.117 The principal justification for excluding murder from the defence of duress is based on the view that the law should uphold the ‘sanctity of life’; the highest value with which the criminal law is concerned. The Commission makes the point that extending the defence to murder may be seen as countenancing, in some way, murder. The sanctity of life of the victim is seen to be ignored by the courts in favour of compassion or ‘concession’ to someone, who although

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<sup>96</sup> [2005] 4 All ER 685

<sup>97</sup> [2005] 4 All ER 685, 694.

<sup>98</sup> [2005] 4 All ER 685, 694.

<sup>99</sup> See LRC CP 36-2006 at paragraph 3.20-3.31.

<sup>100</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005) at paragraph 7.26.

<sup>101</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005) at paragraph 7.31-7.33.

has been coerced into doing the act has nonetheless murdered an innocent person. In the view of the House of Lords in *Howe*, it was stated that there is a duty to sacrifice one's life rather than take another's.<sup>102</sup> In a submission made to the Western Australian Law Reform Commission the argument was made that a "threat to one's own life does not justify the murder of another person".<sup>103</sup>

(II) *Duress is open to abuse*

5.118 It has been suggested that the defence of duress is easy to raise and difficult to disprove because the relevant facts are only open to the accused. As a result, it is argued that it would be unwise to allow an 'easy' defence to such a serious offence. As noted by the House of Lords "the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself."<sup>104</sup>

5.119 However, it can also be said that 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 make the point that potential for fabrication was not necessarily any greater for other defences such as self defence or provocation.<sup>105</sup> Furthermore, it has also been pointed out that juries are constantly entrusted with the responsibility of separating fact from fiction and there is no reason to presume that they are less capable of doing this in the context of duress as they are in any other context.<sup>106</sup>

(III) *The threat may not eventuate*

5.120 Another argument against allowing duress as a defence to murder is that the threat may not actually eventuate.

(IV) *Deterrence*

5.121 It may also be contended that excluding duress as a defence to murder is necessary in order to deter people who might easily give in to threats.

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<sup>102</sup> *R v Howe* [1987] 1 AC 417.

<sup>103</sup> Law Reform Commission of Western Australia – *Review of the Law on Homicide: Final Report*, Report No. 97 (2007) at 193.

<sup>104</sup> *R v Howe* [1987] 1 AC 417 (Lord Lane).

<sup>105</sup> Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) [243].

<sup>106</sup> Arenson "Expanding the Defences to Murder: A more fair and logical approach" (2001) 5 *Flinders Journal of Law Reform* 129, 140 cited in Law Reform Commission of Western Australia – *Review of the Law on Homicide: Final Report*, Report No. 97 (2007) at 194.

Linked to this is the argument that allowing duress as a defence to murder may encourage terrorists and organised criminal gangs.

5.122 A number of Australian law reform bodies have found this argument to be unconvincing.<sup>107</sup> As the Law Reform Commission of Victoria has pointed out, the deterrence argument is 'unrealistic' because the threat of death is far more real than any threat of future punishment of murder.<sup>108</sup>

(V) *Prosecutorial Discretion*

5.123 Furthermore, it has been suggested that exceptional cases could be dealt with by prosecutorial discretion and on that basis the defence of duress should not be extended to murder and attempted murder.

5.124 However, this can be countered with the argument 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.<sup>109</sup> The Canadian Law Reform Commission has asserted that this approach of prosecutorial discretion "could lead to divergence of law in code and law in practice and would also lead to a lack of jurisprudence in the area".<sup>110</sup>

(VI) *Standards of Behaviour*

5.125 In the Consultation Paper, the Commission also made the point that the State should encourage high standards of human behaviour by withholding the defence of duress in situations where individuals are compelled to commit murder. In *R v Howe*<sup>111</sup> it was noted that one of the objectives of the criminal law is to set a standard which ordinary men and women are expected to observe and clearly the law cannot excuse the killing of an innocent person.

**(ii) *Arguments in favour of extending duress to murder***

5.126 Despite past resistance to extending the defence of duress to murder, in recent times, a number of jurisdictions have allowed duress to

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<sup>107</sup> Law Reform Commission of Western Australia – *Review of the Law on Homicide: Final Report*, Report No. 97 (2007) at 194.

<sup>108</sup> Law Reform Commission of Victoria, *Homicide*, Discussion Paper No 13 (1988) [166].

<sup>109</sup> Fairall and Yeo *Criminal Defences in Australia* (4th ed LexisNexis Butterworths 2005) at 155.

<sup>110</sup> LRC CP 36- 2006, at paragraph 3.80.

<sup>111</sup> [1987] 1 All ER 771.

operate as a defence to murder.<sup>112</sup> As pointed out by the Commission in the Consultation Paper, the weight of argument against the availability of the defence reveals reiteration of Hale's views which are very much based on the ethical standards of the time.

(I) *Heroism*

5.127 Following on from the point above, while it is 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.<sup>113</sup> In the words of the English Law Commission, "it is not only futile, but also wrong for the criminal law to demand heroic behaviour."<sup>114</sup>

(II) *Protecting another*

5.128 In addition to the argument on 'heroism' is the fact that one may murder someone 'under duress' in order to save another person, another innocent person. For example, a pregnant woman may kill another so that she can protect her unborn child. As Arenson points out, "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".<sup>115</sup>

(III) *Consistency in the Law*

5.129 Duress is regarded as a complete defence to most crimes thus it is argued that it is illogical to exclude certain crimes.

5.130 Furthermore, if the law recognises that on the basis of human frailty, that the defence of provocation should be available to a person who is provoked to kill, there is an argument that equally the law should make provisions for the human weakness that is at play when a person is coerced to kill.<sup>116</sup>

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<sup>112</sup> *Crimes Act 1958* (Victoria) section 9AG. Sections 10.2 and 10.3 Criminal Code Act 1995 (Commonwealth); sections 40 and 41 Criminal Code 2002 (ACT).

<sup>113</sup> Law Reform Commission of Western Australia – *Review of the Law on Homicide: Final Report*, Report No. 97 (2007) at 195.

<sup>114</sup> Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the person and general principles*, Report No. 218 (1993) [30.11].

<sup>115</sup> Arenson "Expanding the Defences to Murder: A more fair and logical approach" (2001) 5 *Flinders Journal of Law Reform* 129, 139.

<sup>116</sup> LRC CP 36-2006, at paragraph 3.72.

**(iii) Duress as a Partial Defence**

5.131 In the Consultation Paper, the Commission also discussed whether duress could operate as a partial defence.

5.132 Arguments put forward in relation to duress as a complete defence also apply to the argument that duress should be used as a partial defence. However, duress as a partial defence allows for a balance between recognising the sanctity of life and recognising the difficult situation that those who fall under duress are placed in and as a result may be the fairest method of reform in this area.<sup>117</sup>

5.133 As mentioned above, the English Law Commission recently considered the issue of allowing duress as a partial defence to “first degree murder” in its proposed three-tiered homicide framework. In allowing duress to act as a partial defence, the Commission maintains that consistency would be achieved with the partial defences of provocation and diminished responsibility and secondly that it would reflect the fact that the person, although having acted under duress, intentionally killed someone, and so this is more serious than other offences committed which result in a complete acquittal.

5.134 Other arguments in favour of allowing duress to operate as a partial defence include policy grounds, discretion in sentencing, compassion and recognising that the defendant is not fully blameworthy.<sup>118</sup> In terms of the ‘policy’ argument it seems appropriate that if duress is not available as a complete defence to murder, some provision should be made for those who kill while under serious threats.

5.135 As regards sentencing, if the defence of duress is to act as a partial defence to murder it would have the advantage of taking the particular circumstances of the case into account, as the mandatory penalty of a life sentence would not apply.

5.136 In terms of ‘compassion’, Ashworth points out that a qualified defence allows the law to recognise the sanctity of human life while still showing compassion.<sup>119</sup>

5.137 Finally, it is argued that a person who has taken the life of another under duress cannot be regarded as fully blameworthy and allowing the defendant to rely on the defence of duress as a partial defence ensures that the court recognises this lower level of blameworthiness.

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<sup>117</sup> *Ibid*, at paragraph 3.86.

<sup>118</sup> *Ibid*, at paragraph 3.88-3.93.

<sup>119</sup> Ashworth *Principles of Criminal Law* 5<sup>th</sup> ed (Oxford University Press 2006) at 227.

5.138 Clearly, arguments against applying duress as a partial defence to murder can also be made. Firstly, questions can be raised about the logic of allowing duress as a partial defence. Lord Griffiths in *R v Howe*<sup>120</sup> suggests that it is too late now to allow duress to act as mitigation for murder alone. As a counter argument, however, one can make the point that defences to murder should be treated differently in the same way that offence of murder is treated differently to other offences.

5.139 Secondly, the analogy that is often made with provocation when discussing whether duress should be a partial defence or not, may be weakened by the fact that provocation is *only* a partial defence to murder whereas duress is a complete defence to all crimes *except* murder and attempted murder.<sup>121</sup>

### **(c) Conclusions and Recommendations**

5.140 The question of whether the defence of duress should be extended to treason, murder and attempted murder is a difficult and complex one. Arguments in favour of extending duress as a defence to these crimes include self-preservation, heroism and consistency in the law. On the other hand, arguments against extending duress to murder include 'sanctity of life', prosecutorial discretion, fabrication, deterrence and the fact that the threat may never actually eventuate. The arguments from both sides are compelling but, on balance, the Commission has concluded that it is preferable not to extend the defence to these crimes. While this leaves the question of what charge to bring in homicide to prosecutorial discretion, the Commission considers that, on balance, this involves the best approach to take to these difficult cases.

*5.141 The Commission recommends that the defence of duress should be generally available as a defence, but not in the case of treason, murder or attempted murder.*

## **I Marital Coercion**

5.142 Marital coercion concerns a special defence that was afforded to a married woman who had committed certain crimes in the presence of her husband. In the *Consultation Paper on Duress and Necessity* the Commission also examined marital coercion as it is closely connected with the defence of duress.

5.143 Under the defence of marital coercion, it was presumed that if a woman's husband was present she should be excused on the basis of having

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<sup>120</sup> [1987] 1 All ER 771.

<sup>121</sup> LRC CP 36-2006, at paragraph 3.96.

acted under coercion, unless the prosecution could prove that she took the initiative in committing the offence.

5.144 Historically various foundations have been advanced for the rule, including the identity of husband and wife, the wife's subjection to her husband and her duty to obey him – but the practical reason for its application to felonies was that it saved a woman from the death penalty when her husband was able, but she was not allowed, to plead the benefit of the clergy at least until 1692.<sup>122</sup>

5.145 The defence of marital coercion has been abolished in the majority of common law jurisdictions on the basis that married woman should be placed in the same position as other defendants.

**(a) Consultation Paper Recommendations**

5.146 Given that the defence of marital coercion has been abolished in most jurisdictions because it is considered archaic and no longer deemed necessary, the Commission also advocates abolition of the defence in this State. The rule of marital coercion is based on an outdated notion that views wives as completely dominated by their husbands; there is no such defence available to husbands, for example.

5.147 In the Consultation Paper, the Commission provisionally recommended that the defence of marital coercion should be formally abolished by statute and notes that the defence of duress is available to any person who is threatened by their spouse or partner. As a result, there is no need for such a defence.

**(b) Discussion**

5.148 In the Consultation Paper, the Commission examined the law regarding marital coercion as it applies in Ireland, England and a number of other jurisdictions including Canada and the United States. As mentioned above the majority of common law jurisdictions have abolished this defence. In the words of Boyce and Perkins, “there may have been some reason for this doctrine in the ancient law but there is none today.”<sup>123</sup>

5.149 As regards marital coercion in this jurisdiction, the Commission referred to the case *State (DPP) v Walsh and Conneely*,<sup>124</sup> a contempt case

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<sup>122</sup> Ormerod *Smith & Hogan Criminal Law* 11<sup>th</sup> ed (Oxford University Press 2006) at 325.

<sup>123</sup> Boyce and Perkins *Cases and Materials on criminal Law and Procedure* 7<sup>th</sup> ed (Foundation Press 1989) at 670.

<sup>124</sup> [1981] IR 412. For a further discussion see LRC CP 39-2006, at paragraph 2.162.

which arose out of *People (DPP) v Murray*<sup>125</sup>. The issue of marital coercion arose because the second named defendant claimed that the contemptuous statement issued by her which had referring to the Special Criminal Court as being merely a 'sentencing tribunal' had been inserted into the statement at her husband's insistence.<sup>126</sup>

5.150 In the Supreme Court, Henchy J held that the facts were clearly capable of rebutting the presumption of coercion and in any event the doctrine was no longer extant in the State. The marital coercion defence, it was held, runs contrary to the concept of equality before the law in Article 40.1 of the Constitution.

5.151 In England, a move towards abolition of the presumption of marital coercion was provided for in the *Criminal Justice Act 1925*. The result of this provision seems to be that a wife may still use the defence of marital coercion, but the burden of proof is on her to prove that she was subject to coercion. Complete abolition of the rule was recommended again in 1977 by the Law Commission<sup>127</sup> but to date there has been no move to abolish the defence.

5.152 The defence has been abolished in Canada, New Zealand and some of the Australian States. Marital coercion remains as a defence at common law in the Northern Territory.<sup>128</sup>

### **(c) Conclusions and Recommendations**

5.153 The legislative trend in most common law jurisdictions is to place wives in the same position as other defendants. The Commission agrees that this is correct and that the defence of marital coercion is indeed an anachronism in today's society and should be formally abolished by statute recognising that the defence is still available to a wife who is threatened by her husband.

5.154 *The Commission recommends that the defence of marital coercion should be formally abolished by statute.*

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<sup>125</sup> [1977] IR 360.

<sup>126</sup> See LRC CP 36-2006, at paragraph 2.162.

<sup>127</sup> Law Commission of England and Wales *Criminal Law: Report on the Defences of General Application* (No 83 1977).

<sup>128</sup> LRC CP 36-2006, at paragraph 2.172.

## CHAPTER 6      NECESSITY AND DURESS OF CIRCUMSTANCES

### **A            Introduction**

6.01        In this Chapter, the Commission discusses the defence of necessity and its connection with the development of the defence of duress of circumstances.

6.02        In Part B, the Commission provides an overview of the defence. In Part C, the rationale for the defence is discussed, in particular recognising that it has been recognised as both an excusatory and a justificatory defence depending on the circumstances of the case. Part D contains the detailed discussion of the defence, by examining the defence of necessity at common law, the recent development of duress of circumstances and concludes with the Commission's particular focus on the relationship between duress by threats, as discussed in Chapter 5, and duress of circumstances.

### **B            Overview**

6.03        This defence of necessity is regarded as contentious primarily on the basis that it involves a situation where the individual autonomy of persons is compromised. Unlike legitimate defence (discussed in Chapter 3), which may be linked directly to the principle of autonomy in the sense of self preservation, in the case of necessity it may not be possible to protect the autonomy of all persons involved.<sup>1</sup>

6.04        The English writer Glanville Williams captured the complexity involved when he noted that “the peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision... it is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value.”<sup>2</sup> Similarly, McAuley and McCutcheon note that, although the distinction between acting freely and being constrained to act is central to the operation of the pleas

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<sup>1</sup>        Ashworth *Principles of Criminal Law* 5<sup>th</sup> ed (Oxford University Press 2006) at 151.

<sup>2</sup>        Williams *Textbook of Criminal Law* 2<sup>nd</sup> ed (Stevens & Sons 1983) at 728.

of necessity and duress by threats, it is an extremely difficult distinction to draw.<sup>3</sup>

6.05 Due to such intricacies, providing a definition for the defence of necessity is not an easy task but in essence it can be described as a defence which involves a claim by a defendant that he or she broke the law in order to secure some higher value or because of some external circumstances. The defendant argues that although the crime was committed with the required *actus reus* and *mens rea*, the crime committed was a necessary action: it was a situation of emergency (involving perceived danger).

6.06 According to Glanville Williams, there are essentially two views as to whether necessity is recognised as a criminal defence or not. The first view maintains that necessity is not a general defence, but is recognised within the definitions of some particular offences. The alternative view is that necessity or is a general defence in the criminal law like self-defence and duress, though subject to strict limitations.<sup>4</sup>

6.07 In the Irish context, analogies can be drawn with Williams' system of classification. Irish law also provides statutory examples of 'justifying' necessity. Section 6 of the *Criminal Damage Act 1991*, for example, states that it is a defence to a charge of criminal damage to property that intentional damage was done to avoid injury to a person or to save other property.<sup>5</sup> At common law, it is also generally accepted that necessity is a recognised defence in Irish law albeit that its application is narrowly restricted.<sup>6</sup> A clear example of common law necessity is the development of medical necessity which is discussed at length in the English case *Re A (Children)*.<sup>7</sup> It is suggested that should a case of that nature be brought before the Irish courts, a similar approach would be applied on the basis of necessity.

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<sup>3</sup> McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell 2000) at 780.

<sup>4</sup> Williams *Textbook of Criminal Law* 2<sup>nd</sup> ed (Stevens & Sons 1983) at 598, 599.

<sup>5</sup> See LRC CP 39-2006, at paragraph 4.04.

<sup>6</sup> See LRC CP 39-2006, at paragraph 4.03. The application of necessity to homicide has not been directly discussed by an Irish court, but it is suggested that the decision of the Supreme Court in *Attorney General v X* [1992] ILRM 401, could be taken as an indirect authority for allowing the defence of necessity to meet a homicide charge. See generally Charleton, McDermott, Bolger *Criminal Law* (Butterworths 1999) at 1075-1085; McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 779-822.

<sup>7</sup> [2000] 4 All ER 961.

6.08 There is a significant overlap between the defences of necessity and duress by threats in that they both involve an element of constrained choice. As with duress, necessity concerns a situation in which a person is faced with a choice between two unpleasant alternatives, one choice involves committing a crime and the other choice involves some evil to oneself or others.<sup>8</sup> The distinguishing factor between both defences is that in the case of duress, the will of the individual is overborne by *threats* whereas necessity involves the will of the individual being overborne by external *circumstances*.

6.09 An important development in English case law which underlines the connection between duress and necessity is the emergence of 'duress of circumstances'. In the Consultation Paper, the Commission made the point that duress of circumstances is a defence of necessity in all but name.<sup>9</sup> Duress of circumstances and its emergence through drink related cases is discussed further in Part D of this Chapter.

6.10 In the Consultation Paper, the Commission explored the defence of necessity by examining its historical foundations. The concept of necessity as a defence has long been recognised in law and can be traced as far back to the 16<sup>th</sup> Century decision in *Reniger v Fogossa*<sup>10</sup> where it was held that breaking the letter of the law might be justified "...to avoid greater inconveniences, or through necessity, or by compulsion..."<sup>11</sup>

6.11 However, the extent to which the defence prevails is uncertain. The law relating to necessity has been marked by uncertainty. In a recent House of Lords decision, necessity and 'duress of circumstances' was described as "vexed and uncertain territory".<sup>12</sup> The response by the courts has also contributed to this uncertainty by adapting a consistently restrictive approach and a reluctance to establish necessity as a general defence. The judiciary have been fearful of 'abuse of the defence' recognising that the defence could very easily become a 'mask for anarchy'<sup>13</sup>; defendants could simply use the defence of necessity as a veil to cover their true criminal intentions, claiming that the lesser evil was chosen and on that basis they should be exonerated.

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<sup>8</sup> Ormerod *Smith & Hogan Criminal Law* 11<sup>th</sup> ed (Oxford University Press 2006) at 315. Necessity is sometimes referred to as *duress per necessitatum* (duress by necessity or coercion).

<sup>9</sup> LRC CP 39-2006, at paragraph 4.109.

<sup>10</sup> (1551) 1 Plowd 1, 18.

<sup>11</sup> (1551) 1 Plowd 1, 18.

<sup>12</sup> *R v Shayler* [2002] UKHL, at paragraph [17].

<sup>13</sup> *London Borough of Southwark v Williams* [1971] 2 All ER 175.

6.12 In the recent Irish case *People (DPP) v Kelly*<sup>14</sup> Judge Moran was reported as stating in the Circuit Criminal Court that society at large expected him as a judge to stop and prevent the social anarchy that would prevail if people were allowed to take the law into their own hands. In a leading Canadian case on necessity, *R v Perka*<sup>15</sup> it was recognised that the defence of necessity must be “strictly controlled and scrupulously limited”.<sup>16</sup>

6.13 In recent years, however, this exclusion of necessity as a general defence has become more complex with the introduction of ‘duress of circumstances’ and the recognition of a form of necessity in medical cases.

6.14 Therefore, although the law of necessity has been characterised by a restrictive approach the law also recognises that there are certain situations and clear examples where a higher value might be secured by committing a crime or breaching a legal obligation in order to prevent a greater evil. For example breaking a car window to save a baby choking or fire fighters who deliberately knock a building in order to prevent the fire spreading to other buildings would come within this category. Old criminal textbooks contain a plethora of maxims justifying necessity as a defence.<sup>17</sup>

6.15 Thus, in summary, there are circumstances where the law does recognise the defence of necessity but because its application is so narrowly circumscribed, its status as a general defence is debatable. In the Consultation Paper, the Commission provisionally recommended that a defence of necessity should apply in certain exceptional circumstances.

## **C Necessity as a Justificatory or an Excusatory Defence**

6.16 As with all the defences discussed in this Report, there has been much debate as to whether the defence of necessity operates as an excusatory or justificatory defence. Ashworth has stated that “the development of duress and necessity in the common law has been characterised by the interplay of reasons of excuse and justification, and by the conflicts between recognising the pressure to which the defendant was subject to and upholding the rights of the victims of the attack”.<sup>18</sup> As with duress by threats, this debate around justification and excuse formed the subject matter of the Commission’s first

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<sup>14</sup> *People (DPP) v Kelly*, Circuit Criminal Court, *The Irish Times*, 29 October 2004 and 2 December 2004.

<sup>15</sup> *R v Perka* [1984] 2 SCR 232.

<sup>16</sup> *Ibid* at 250.

<sup>17</sup> Williams *Textbook of Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1983) at 599.

<sup>18</sup> Ashworth *Principles of Criminal Law* 5<sup>th</sup> ed (Oxford 2006) at 219.

recommendation on the defence of necessity in the Consultation Paper. Thus it is useful to take this as a starting point for the discussion here.

**(a) Consultation Paper Recommendation**

6.17 In the Consultation Paper, the Commission provisionally recommended that the defence of necessity should be continued on its traditional excusatory basis.

6.18 However, the Commission also accepted that there is a defensible case for treating the defence of necessity as a justification, and accordingly invited submissions on this point in particular.

**(b) Discussion**

6.19 Firstly, to reiterate, a justificatory defence suggests that the conduct of the defendant was 'right in the eyes of society'; whereas an excusatory defence is still considered wrong, but the circumstances dictate that it would be unjust to punish the defendant.

6.20 While duress has by and large been regarded as an excusatory defence<sup>19</sup> necessity has been regarded as *both* justificatory and excusatory depending on which formulation of necessity is adopted.

6.21 Furthermore, the courts have contributed to the uncertainty surrounding the basis for the rationale of necessity by using the terms justification and excuse almost interchangeably in the past.<sup>20</sup> Ashworth has noted that many statements about the ambit of the defences of duress and necessity in the courts have been ambivalent or even indiscriminate as to whether their basis lies in justification or excuse. Nonetheless, it is clear from case law that certain cases where the defence of necessity has been raised have been seen to be justified<sup>21</sup> while others excused<sup>22</sup>. Thus it is necessary to recognise the differentiating factors.

6.22 It has been suggested that, if the accused asserts a claim that his or her conduct prevented a greater harm or a greater evil, his or her actions should be seen as justified.<sup>23</sup> On the other hand, in a situation where a defendant is seen to be constrained by extreme circumstances, it is seen as an excusatory defence.

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<sup>19</sup> See Chapter 5 paragraph 5.33.

<sup>20</sup> See LRC CP 39-2006 at paragraph 4.94.

<sup>21</sup> *Re A (Children)* [2000] 4 All ER 961.

<sup>22</sup> *Perka v R* [1984] 2 SCR 232.

<sup>23</sup> See *R v Loughnan* [1981] VR 443 (Crockett J.).

6.23 In the Consultation Paper, the Commission referred to the *Report on Offences Against the Person and General Principles* by the Law Commission of England and Wales to illustrate the distinction between the defences of duress and necessity and how necessity is better described as a justificatory defence. In the case of ‘necessity’, the defendant is placed under irresistible pressure because of some external circumstances. Unlike duress, necessity claims require a comparison between the harm that the otherwise unlawful conduct has caused and the harm that the conduct has avoided; because if the latter harm was not regarded as the greater, the law could not even consider accepting that the conduct was justified.<sup>24</sup> According to Robinson, justifications arise where the harm is outweighed by the need to avoid an even greater harm or further a greater societal interest such as starting a fire to serve as a fire break and save the lives of a town.<sup>25</sup>

6.24 In the Canadian Supreme Court decision of *Perka v R*<sup>26</sup> however, the conception of necessity as a defence of justification founded on a utilitarian calculation of lesser evils was rejected. Instead the court preferred to conceptualise necessity as an excusatory defence conceding that the act was still wrong but that the criminal attribution to the person is withheld on the basis of the dire circumstances the person was placed in.<sup>27</sup>

6.25 In the Consultation Paper, the Commission also made note of the fact that some commentators argue that the distinction between justification and excuse (as in discussions of other defences) is irrelevant.<sup>28</sup> The Commission however, recognises that the basis for an acquittal can be of some importance.<sup>29</sup> This is particularly so in the case of claims of necessity.

6.26 The Commission recognises the basis for the reasoning in the *Perka v R*<sup>30</sup> judgment but now believes that the solution to the dilemma of whether necessity acts as a justificatory or an excusatory defence would be to recognise

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<sup>24</sup> See generally LRC CP 39- 2006, at paragraph 4.93; and Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993).

<sup>25</sup> Robinson “Criminal Law Defenses: A Systematic Analysis” (1982) *Columbia Law Review* Vol. 82 No.2 199-291 at 213.

<sup>26</sup> [1984] 2 SCR 232, 250.

<sup>27</sup> See LRC CP 39-2006, at paragraph 4.95.

<sup>28</sup> See LRC CP 39-2006, at paragraph 4.96.

<sup>29</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 787.

<sup>30</sup> *Perka v R* [1984] 2 SCR 232.

necessity as both a justification and an excuse depending on the circumstances. According to McAuley and McCutcheon, recognising ‘choice of evils’ as both a justification and an excuse would give a practical and symbolic expression to the fact that the law has a legitimate interest in minimising harm where some harm is inevitable.<sup>31</sup>

6.27 To illustrate the viability of this approach, in the Consultation Paper the Commission outlined the approach in German law where the German Federal Penal Code distinguished between justifying necessity and excusable necessity.<sup>32</sup> In a detailed commentary of the German Code, McAuley and McCutcheon note that the essence of justifying necessity is that an otherwise criminal act is not unlawful if it is necessary for the protection of a superior legal interest from imminent danger. By contrast, ‘excusing necessity’ arises where the defendant unlawfully damages another’s legal interest in order to avert an imminent threat to his own or a relative’s life, limb or liberty.<sup>33</sup>

6.28 The distinguishing aspect between necessity as a justification and necessity as an excuse appears to be based on the premise that a defendant should always be entitled to vindicate a superior interest in an emergency, but that anyone who exceeds the limits of lawful conduct is entitled to be excused if only if he cannot fairly be expected to withstand the pressures which drove him to do the act due to the external circumstances.<sup>34</sup> Therefore, necessity as a justificatory defence may be better understood solely in terms of the idea of ‘choice of evils’ whereas an excusatory defence of necessity concerns more neatly the notion of being constrained by threats of circumstances.

**(c) Conclusions and Recommendations**

6.29 The Commission has acknowledged 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. The Commission has therefore concluded that the most practical solution is simply to recognise that necessity can be both a justification and an excuse depending on the circumstances.

6.30 The fact that the English courts have developed a defence which has now become known as duress of circumstances also reflects the differentiating

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<sup>31</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 810.

<sup>32</sup> See generally LRC CP 39-2006, at paragraphs 4.86-4.89; and sections 34 and 35, German Federal Penal Code.

<sup>33</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 811.

<sup>34</sup> *Ibid.*

nature of claims that can arise under the broad umbrella term of necessity. Herring views this classification in English law as identifying the fact that necessity can be viewed as a case of pure justification or in cases of 'duress of circumstances' to be excusatory in nature.<sup>35</sup> The Commission notes that the justification-excuse dichotomy is likely to prove more important in the wider content of ultimate codification of the criminal law but that, pending this, it is nonetheless important to recognise this distinction.

## **D Application of the defence**

6.31 Having discussed the rationale for the defence, this Part is concerned with its scope and application. In the Consultation Paper, following a detailed discussion on the historical foundations of the defence and the application of the well known English case *R v Dudley and Stephens*<sup>36</sup>, the Commission recommended that the defence should apply in certain situations.

6.32 Here, the historical and common law application of the defence is revisited as well as references to provisions from other jurisdictions where applicable. This Part is then followed by a discussion of the Commission's final conclusions and recommendations.

### **(a) Consultation Paper Recommendation**

6.33 In the Consultation Paper, the Commission provisionally recommended that a defence of necessity should apply in those situations where duress does not apply and that it would apply in certain exceptional circumstances.

6.34 The defence would be available in situations where a person is faced with a constrained choice regarding his or her actions, the constraint arising from extraneous circumstances, and where the person, in choosing the course of action taken, breaks the law.

### **(b) Discussion**

6.35 As mentioned above, the application of the defence of necessity has generally been restricted by the courts throughout common law jurisdictions. The English case *R v Dudley and Stephens*<sup>37</sup> held that the defence of necessity does not apply to homicide but later cases have shown that the judiciary are now more willing to apply the defence of necessity to murder, albeit in certain circumstances. Thus in summary, it would appear to be the case that although

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<sup>35</sup> Herring *Criminal Law* (4<sup>th</sup> ed Palgarve MacMillan 2005) at 401.

<sup>36</sup> (1884) 14 QBD 273.

<sup>37</sup> (1884) 14 QBD 273.

the defence of necessity is not a defence of general application it may apply in certain circumstances.

**(i) R v Dudley and Stephens**

6.36 In discussing the defence of necessity it is imperative to begin with the leading and well known common law case *R v Dudley and Stephens*.<sup>38</sup> In the Consultation Paper, the Commission discussed the case in great detail<sup>39</sup> and therefore a brief summary of the facts are all that is required here.

6.37 The two defendants, a 17 year old boy and another man were in an open lifeboat after being shipwrecked from the *Mignonette*. They had been in the lifeboat for a period of 18 days without any food and the water supplies had run out. The two accused decided that, in order to survive, they had to murder the 17 year old boy (who at this stage was very weak) and eat his flesh. When they arrived in England, they were charged with murder.

6.38 In the judgment delivered by Lord Coleridge, it was held that necessity is no defence to murder; no defence of necessity is available in a case of taking another person's life. Lord Coleridge appeared to base his judgment on two grounds. The first was morality, whereby it is suggested that the only morally correct course of action in such circumstances is to sacrifice your own life for others. His second reason for denying the defence is more convincing and is based on the difficulty of judging the victim (if a similar case were to arise).<sup>40</sup>

6.39 Lord Coleridge concluded that as terrible as the temptation might be in this kind of case, the law should keep the judgement straight and the conduct pure; necessity was no defence to taking the life of another. However, the fact that the sentence of death was later reduced to six months' imprisonment illustrates the conflict faced by the courts between the desire to reaffirm the sanctity of life and the compassion that is widely felt for people placed in such an extreme situation and circumstances.

6.40 Unsurprisingly, *Dudley and Stephens* has not escaped criticism. As Simpson points out in his book *Cannibalism and the Common Law*<sup>41</sup>, the

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<sup>38</sup> (1884) 14 QBD 273.

<sup>39</sup> For a more detailed discussion see LRC CP 39-2006, at paragraphs 4.11 - 4.28.

<sup>40</sup> "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?... We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy." (1884) 14 QBD 273 (Lord Coleridge).

<sup>41</sup> Simpson *Cannibalism and the Common Law* (University of Chicago Press, 1984).

reasoning in the case reflects the view of the judicial function which is no longer widely accepted, that of laying down morally correct standards of behaviour.<sup>42</sup>

6.41 Furthermore, many critics suggest that the 1887 case was unsatisfactory on the basis that Lord Coleridge dismissed the earlier American case *United States v Holmes*<sup>43</sup> claiming it was not a “satisfactory authority” for England. In *Holmes*, Baldwin CJ in his direction to the jury accepted that the taking of another’s life may be necessary if the person was in circumstances of imperious necessity. *Holmes* again concerned a shipwreck case where it was held that those who should be cast aside should be chosen by lot.<sup>44</sup>

**(ii) The application of *R v Dudley and Stephens***

6.42 Having outlined *Dudley and Stephens* briefly, it is now necessary to reflect on the application of the case and the bearing it has had on the development of the law of necessity. The overriding view has been that the case in fact casts more of a shadow than light on the subject of necessity.<sup>45</sup>

6.43 Furthermore, even in light of the fact that *R v Dudley and Stephens* has been approved by the House of Lords in *R v Howe*<sup>46</sup> it has been suggested that it may be “premature to conclude that necessity can never be a defence to murder.”<sup>47</sup>

6.44 In the more recent high profile case of conjoined twins *Re A (Children)*<sup>48</sup>, the English Court of Appeal has shown an increased willingness to accept the defence of necessity in some situations.<sup>49</sup> Jodie and Mary were conjoined twins where Jodie was capable of independent existence following an operation but such an operation to separate the twins would have caused the

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<sup>42</sup> Cited in Herring *Criminal Law* (4<sup>th</sup> ed Palgrave Macmillan 2005) at 402.

<sup>43</sup> *United States v Holmes* 26 Fed Cas 360 (1841).

<sup>44</sup> LRC CP 339-2006, at paragraph 4.13.

<sup>45</sup> See generally LRC CP 39-2006, at paragraph 4.17; and Bennun “Necessity – yet another analysis?” (1986) 21 *Irish Jurist* 186 at 198.

<sup>46</sup> [1987] 1 All ER 771.

<sup>47</sup> Ormerod *Smith and Hogan Criminal Law* (11<sup>th</sup> ed Oxford University Press 2005) at 321.

<sup>48</sup> [2000] 4 All ER 961.

<sup>49</sup> Brooke LJ provided a number of examples: Where a commander or a ship seals off the engine room inevitably killing the people inside, in order to save the rest of the crew from fire, and the situation of a mountaineer having to cut a rope holding his fellow climber in order to save his own life: [2001] 2 WLR 480, 559-560.

death of Mary. Without any operation both would have died. The twins' parents refused to give consent to the operation, and therefore the hospital applied to the courts for a declaration that performing the operation would be lawful.

6.45 The court based the decision on the defence of necessity. In doing so however, the cases of *Dudley and Stephens*<sup>50</sup> and *Howe*<sup>51</sup> were distinguished on policy grounds. As outlined in the Consultation Paper, Brooke LJ in *Re A (Children)*<sup>52</sup> listed three requirements that must exist before the defence of necessity could be applied. Firstly, the act is needed to avoid inevitable and irreparable evil; secondly, no more should be done than is reasonably necessary for the purpose to be achieved; and thirdly, the evil inflicted must not be disproportionate to the evil avoided.<sup>53</sup>

6.46 In his judgment, he also rejected the assumptions of critics who assert the view that the recognition of the defence of necessity would give rise to people being all too ready to avail themselves of exceptions to the law which they might suppose apply to their cases (at the risk of other people's lives).<sup>54</sup> Brooke LJ emphasised the rare circumstances of the case which he claimed would thereby reduce the possibility of the necessity defence being relied upon in subsequent murder cases.

6.47 While *Re A (Children)* appears to be an acceptance of the doctrine of necessity as a defence to murder, it must be noted that the judgment itself relied heavily on the specific facts of the case, thereby precluding the general assertion that the defence can be available in all homicide cases.

6.48 Central to the reasoning in the conjoined twins case was the fact that there was no 'problem of selection' in the case – an issue that had caused some difficulty for Lord Coleridge in *Dudley and Stephens*. Ormerod provides a vivid example of where there can be no doubt that the defence of necessity would apply:

“Following the destruction of the World Trade Centre in New York by hijacked aircraft it now appears to be recognised that it would be

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<sup>50</sup> (1884) 14 QBD 273.

<sup>51</sup> [1987] 1 All ER 771.

<sup>52</sup> [2000] 4 All ER 961.

<sup>53</sup> Ormerod *Smith and Hogan Criminal Law* (11<sup>th</sup> ed Oxford University Press 2005) at 322.

<sup>54</sup> LRC CP 39-2006, at paragraph 4.22.

lawful to shoot down a plane, killing the innocent passengers and crew if this were the only way to prevent a much greater disaster.”<sup>55</sup>

6.49 He concludes on this basis that even if duress cannot be a defence to murder, it seems quite clear that necessity can.<sup>56</sup>

6.50 In terms of the application of the defence of necessity in other jurisdictions it is useful to refer to Australia where it has been recommended that necessity should be made available as a defence to a charge of murder. In the Victorian Law Reform Commission’s Report on *Defences in Homicide* it was recommended that duress and necessity should be available to the offence of murder when the defendant has been faced with “a sudden and extreme emergency”.<sup>57</sup>

6.51 More recently the Law Reform Commission from Western Australian have recommended in a Report on Homicide that a person should not be responsible for an act or omission if that person reasonably believes that the act was done in circumstances of sudden or extraordinary emergency; and it was the only way of dealing with the emergency and the response was reasonable.<sup>58</sup>

6.52 Finally, although the application of necessity has never been directly discussed by an Irish court, it has been suggested that the Irish case of *Attorney General v X*<sup>59</sup> could be taken as indirect authority for allowing necessity to meet a homicide charge.<sup>60</sup> In that case the Supreme Court ruled that abortions are not permitted under Irish law unless performed to save the life of the mother. By ruling that an abortion was permitted by Irish law to save the life of another could be taken as a basis on which a necessity defence to a charge could be developed in Irish law.<sup>61</sup>

6.53 However, despite the willingness of the English courts to broaden the application of the defence of necessity in *Re A (Children)*, the Court of Appeal

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<sup>55</sup> Ormerod *Smith and Hogan Criminal Law* (11<sup>th</sup> ed Oxford University Press 2005) at 322.

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

<sup>57</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) No. 94 at 114.

<sup>58</sup> Law Reform Commission of Western Australia –*Review of the Law on Homicide: Final Report* (2007).

<sup>59</sup> [1992] ILRM 401.

<sup>60</sup> Hanly *An Introduction to Irish Criminal Law* (2<sup>nd</sup> ed Gill & Macmillan 2006) at 170.

<sup>61</sup> Hanly *An Introduction to Irish Criminal Law* (2<sup>nd</sup> ed Gill & Macmillan 2006) at 170.

decision in *R v Quayle*<sup>62</sup> once again showed a fear of a general defence of necessity being abused. In rejecting a number of claims of necessity advanced by a number of defendants charged with offences relating to possession and importation of cannabis, the court held that:

“The pragmatic consideration that the defence of necessity, which the Crown would carry the onus to disprove, must be confined within narrowly defined limits or it will become an opportunity for almost untriable and certainly peculiarly difficult issues, not to mention abusive defences”.<sup>63</sup>

6.54 In conclusion, although it would now seem that the defence of necessity has developed considerably beyond *Dudley and Stephens*, there remains considerable tension and uncertainty as regards the scope of a general defence of necessity at common law. However, what has emerged is that there are definitely circumstances in which the defence of necessity does apply.

6.55 Before discussing the scope and application of necessity in the Irish context, a number of other factors relevant to necessity also need to be discussed in this Part including the development of duress of circumstances.

### **(iii) Duress of circumstances**

6.56 Duress of circumstances is a defence that has only emerged in recent decades in England and Wales. It has developed by way of close analogy with duress of threats. The difference between the two defences is that in the case of duress of threats (or just simply duress) someone has threatened the defendant, whereas in duress of circumstances there is no such threat but the circumstances are such that unless the defendant commits the crime, someone will be killed or will suffer death or a serious injury.<sup>64</sup>

6.57 In the Consultation Paper, the Commission examined the emergence and development of duress of circumstances in detail beginning with a discussion of the application of the defence to road traffic offences such as in the cases of *R v Willer*<sup>65</sup> and *R v Conway*<sup>66</sup> followed by a review of the

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<sup>62</sup> [2005] EWCA Crim 1415; (2005) 2 Cr. App.R. 34 at 527.

<sup>63</sup> *Ibid* at paragraph 75.

<sup>64</sup> Herring *Criminal Law* (4<sup>th</sup> ed Palgrave Macmillan 2005) at 399.

<sup>65</sup> (1986) 83 Cr App Rep 225.

<sup>66</sup> [1989] QB 290.

application of duress of circumstances to cases outside the realm of road traffic law such as in the case of *R v Pommell*<sup>67</sup>.

6.58 Central to the defence of duress of circumstances is that it is subject to the same limitations to the 'do this or else' species of duress by threats. Thus in summary, in order for the defence of duress of circumstances to apply, the following criteria need to be present:

- An imminent threat of death or serious injury
- Reasonable steadfastness in the face of such threats
- Reasonable grounds for believing in their existence; and finally
- The absence of prior fault on behalf of the defendant.

6.59 The defence of duress of circumstances is said to apply only if, from an objective standpoint, the accused can be said to have acted reasonably and proportionately in order to avoid a threat of death or serious injury.<sup>68</sup> Therefore, the defence of duress of circumstances is subject to strict limitations and restrictions. Furthermore, because duress of circumstances is seen to be a species of duress, it can be assumed that the defence should be applicable to any defence *other than murder*.<sup>69</sup>

6.60 It must be pointed out however, that the fact that the English courts have essentially used 'duress of circumstances' as a means to cover cases that would otherwise come within the scope of necessity may in fact inhibit the development of a broader defence of necessity. In the latest *Smith and Hogan Criminal Law* text, Ormerod points out a number of difficulties with the relationship between duress, duress of circumstances and necessity.<sup>70</sup>

6.61 Firstly, he notes that duress cannot be a defence to murder or attempted murder, whereas necessity may. Secondly, threats of death or serious harm are the only occasions for a defence of duress but not for necessity. Thirdly, necessity is a defence only where the evil the defendant seeks to avoid is greater than that which he knows he is causing; this is not the case with duress. Furthermore, Ormerod asserts the view that duress is (generally accepted to be) an excuse, while necessity may be deemed to be a

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<sup>67</sup> (1995) 2 Cr App Rep 607 (A case that dealt with unlawful possession of firearms and ammunition). See generally (LRC CP 39-2006) at paragraphs 4.29 -4.47.

<sup>68</sup> *R v Martin* [1989] 1 All ER 652, *R v Conway* [1989] QB 290 and *R v Graham* [1982] 1 All ER 801.

<sup>69</sup> *R v Howe* [1987] AC 417.

<sup>70</sup> Ormerod *Smith & Hogan Criminal Law* (11<sup>th</sup> ed Oxford University Press 2006) at 324.

justification. Duress of circumstances has also been described as a “conceptual innovation... towards recognising a general defence of necessity by linguistic sleight of hand.”<sup>71</sup>

**(iv) Medical Necessity**

6.62 Without expressly acknowledging it, the courts appear to recognise a special defence for doctors now labelled as medical necessity. Medical necessity has developed almost as a separate branch of the common law defence of necessity. According to Ashworth, medical necessity has developed through a stretching of established concepts.<sup>72</sup> In the Consultation Paper, the Commission referred to a number of cases that fall under the heading of medical necessity, *Re A (Children)* being the key authority.<sup>73</sup>

6.63 It should be noted that, in contrast to allowing the judges to develop a defence of medical necessity at common law, it has also been suggested that a special defence should be specifically created which would provide a justification for reasonable treatment for the promotion of the patient’s health.<sup>74</sup>

**(c) Conclusions and Recommendations**

6.64 Having briefly revisited the material discussed at length in the Consultation Paper, the Commission concludes that although the defence of necessity is certainly an area of contention there is no reason why the defence should be entirely denied an existence. The Commission accepts that necessity has a limited scope and that it is extremely difficult to define its parameters. The Commission has concluded that the defence of necessity should apply in certain exceptional circumstances, such as those already identified in legislation such as the *Criminal Damage Act 1991* and in other exceptional circumstances such as those connected with medical necessity. Given the complexity of this area, the Commission has concluded that, as a defence, it should remain to be developed on a case-by-case basis. As noted in textbooks the cases where medical necessity arises are rare and thus this area is better left to development on a case-by-case basis through common law, perhaps ultimately to be dealt with in specific legislation, such as has been done in a different setting in the *Criminal Damage Act 1991*.

6.65 The Commission has also concluded that Irish law should provide for a defence of duress of circumstances. The Commission considers that the

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<sup>71</sup> Smith “Duress and Steadfastness: In Pursuit of the Unintelligible” [1999] Crim LR 363 at 367.

<sup>72</sup> Ashworth *Principles of Criminal Law* (5<sup>th</sup> ed Oxford University Press 2006) at 153.

<sup>73</sup> LRC CP 39-2006, at paragraph 4.21.

<sup>74</sup> Robinson “Criminal Law Defenses: A Systematic Analysis” (1984) Vol.82 No.2.

development of duress of circumstances, while correctly described as an attempt to deal with the necessity cases, actually deals with cases which would be better described as having a purely excuse-based rationale. The Commission recommends that a defence of duress of circumstances should be given general recognition because duress by threats, as described in Chapter 5, and this defence both involve situations in which a person is constrained to do something that would otherwise be a crime. In the case of duress, the threat comes from another person, whereas with duress of circumstances, the threat arises from the dire circumstances or emergency situation in which a person finds himself or herself. Because of the similarities between them, the Commission recommends that the boundaries of the defence of duress of circumstances should be the same as those for duress by threats.

*6.66 The Commission recommends that the defence of necessity, to the extent that it exists, should continue to be developed on a case-by-case basis, such as in the Criminal Damage Act 1991 or in cases of medical necessity.*

*6.67 The Commission recommends that the defence of duress of circumstances be placed on a statutory footing, having the same scope and application as the defence of duress by threats.*

## CHAPTER 7 SUMMARY OF RECOMMENDATIONS

The recommendations set out in this Report may be summarised as follows.

### **A Legitimate Defence**

7.01 The Commission recommends that, subject to the specific conditions of the defence of legitimate defence set out below, it should be clearly stated that a person does not commit an offence where he or she uses force by way of defence to the use of unlawful force by another person. The Commission also recommends that, pending the completion of the codification of all the defences in criminal law, this general statement of the defence should be without prejudice to the provisions in sections 18 to 22 of the *Non-Fatal Offences Against the Person Act 1997*. [paragraph 2.28]

7.02 The Commission recommends that a minimum threshold requirement should be imposed on the use of private defensive force. [paragraph 2.57]

7.03 The Commission recommends that lethal defensive force by one self or in protection of a third party should only be permitted to repel threats of:

- death or serious injury,
- rape or aggravated sexual assault,
- false imprisonment by force,
- and then only if all the requirements of legitimate defence are made out. [paragraph 2.58]

7.04 The Commission recommends that lethal defensive force may be used where necessary and where it is not disproportionate to ensure a person's own safety, the safety of another or the safety of the person's property. [paragraph 2.84]

7.05 The Commission recommends that lethal defensive force may not be used in defence of personal property. [paragraph 2.85]

7.06 The Commission recommends that the imminence rule should remain a requirement of legitimate defence. The Commission also recommends that, in assessing imminence, the court or jury as the case may be may take

account of the circumstances as the accused reasonably believed them to be. [paragraph 2.119]

7.07 The Commission recommends that the necessity rule should remain a requirement of legitimate defence. The Commission also recommends that, in assessing whether the use of force was necessary, the court or jury as the case may be may take account of the circumstances as the accused reasonably believed them to be. [paragraph 2.137]

7.08 The Commission recommends that innocent defenders may only resort to defensive force in response to a threat where they are unable, as a matter of practicability, to retreat without complete safety from the threat. The Commission also recommends that public defenders are not required to retreat from a threat in any instance. [paragraph 2.138]

7.09 The Commission recommends that a person who has provoked or initiated the conflict which is threatening their safety, is only entitled to use lethal defensive force in the face of a disproportionate response from the original victim and where they are unable to retreat in complete safety. [paragraph 2.156]

7.10 The Commission recommends that a defender should not be required to retreat from an attack in their dwelling (which should be defined to include a permanent or temporary structure) even if they could do so with complete safety. [paragraph 2.172]

7.11 The Commission also recommends that this non-retreat rule should apply to all occupants of dwellings, and that it is irrelevant that the defender is attacked by an intruder or non-intruder. The Commission also recommends that “dwelling” should be defined as including the vicinity or the area immediately surrounding the home, including any access path, garden or yard ordinarily used in conjunction with the dwelling. [paragraph 2.173]

7.12 The Commission recommends that the proportionality rule should remain a requirement of legitimate defence. The Commission also recommends that, in assessing whether the use of non-lethal force was proportionate, the court or jury as the case may be may take account of the circumstances as the defendant reasonably believed them to be. [paragraph 2.207]

7.13 The Commission recommends that where the defendant used disproportionate lethal force, but no more force than he or she honestly believed to be proportionate in the circumstances, unlawful homicide that would otherwise be murder may be reduced from murder to manslaughter. [paragraph 2.216]

## **B Public Defence**

7.14 The Commission recommends that a person may use non-lethal force in effecting the arrest of a fleeing suspect where the arrestee is suspected of an “arrestable offence” or to prevent a breach of the peace or to prevent a crime. [paragraph 3.83]

7.15 The Commission recommends, consistently with its approach to private defence, that law enforcement officers should have clear guidance as to their use of force in effecting arrests, in particular where they may resort to lethal force. [paragraph 3.84]

7.16 The Commission recommends that the use of lethal force in effecting the arrest of a fleeing suspect should be prohibited except where the arrestee is suspected of an “arrestable offence” or to prevent a breach of the peace or to prevent a crime. [paragraph 3.85]

7.17 The Commission recommends that a prison officer should be entitled to assume that every escaping prisoner is dangerous and consequently should be entitled to resort to lethal force, where all the other requirements for legitimate defence are present (proportionality, necessity and imminence), unless he or she is aware that the escapee is not in fact dangerous. [paragraph 3.86]

7.18 The Commission recommends that lethal force should be prohibited to prevent crimes other than those which are imminent and cause death or serious injury. [paragraph 3.126]

7.19 The Commission recommends that the use of lethal force for the purposes of crime prevention should be restricted to law enforcement officials primarily on the basis of training and expertise. [paragraph 3.127]

7.20 Furthermore, law enforcement officials should be required to give warnings before using lethal force and where appropriate resort to less-than-lethal options. [paragraph 3.128]

7.21 The Commission recommends specific training for law enforcement officers in the area of lawful use of force. [paragraph 3.129]

7.22 The Commission recommends that the statutory framework being proposed in this Report should be without prejudice to the position of the Defence Forces carrying out their duties and functions under the Defence Acts 1954 to 2007. The Commission recommends that this position should be reviewed in the aftermath of the review of the use of force by the Defence Forces being carried out by the Government. [paragraph 3.132]

## **C Provocation**

7.23 The Commission recommends that the defence of provocation should be retained as a partial defence to murder, subject to specified conditions. [paragraph 4.42]

7.24 The Commission recommends that the defence of provocation should be viewed and referred to as a defence of partial excuse. [paragraph 4.57]

7.25 The Commission recommends a withdrawal from a purely subjective test which is dominant in Ireland and the introduction of a defence remodelled on objective lines. [paragraph 4.114]

7.26 The Commission recommends that the jury should be entitled to take into account all of the characteristics of the defendant when considering the gravity of the provocation but that the factors to be taken into account when considering the level of self control of the ordinary person should be limited. [paragraph 4.115]

7.27 The Commission recommends that, intoxication, mental disorder, and temperament should not be taken into account in assessing the latter enquiry. In this context the jury may be seen as the best safeguard against abuse of the doctrine and so should be at liberty to decide what remaining factors are relevant to the question of self control. The jury should however be directed to apply a community standard. [paragraph 4.116]

7.28 The plea of provocation should not entail a requirement that the deceased must have acted “unlawfully”; it should be enough that the provocation was unacceptable by the ordinary standards of the community. [paragraph 4.126]

7.29 The Commission recommends that insulting words and gestures which are unacceptable by the ordinary standards of the community should be capable of amounting to provocation for the purposes of the defence. [paragraph 4.127]

7.30 The Commission recommends that the plea of provocation should not be limited to provocation emanating from the deceased. [paragraph 4.134]

7.31 The plea of provocation should also be available if the accused, under provocation, kills another by accident or mistake. [paragraph 4.135]

7.32 The Commission recommends that it should be provided that there is no rule of law that the defence of provocation is negated if the act causing death did not occur immediately after provocation; and that the presence or absence of an act causing death occurring immediately after provocation is a relevant consideration which the jury or court, as the case may be, is to have

regard, in conjunction with other evidence, in considering whether the accused lost self-control as a result of provocation. [paragraph 4.163]

7.33 The Commission does not recommend that there be any express provision requiring that there be proportionality between the response of the accused and the provocative conduct. [paragraph 4.172]

7.34 The Commission recommends that an accused's state of intoxication should not be taken into account when assessing the power of self-control of the ordinary person. [paragraph 4.179]

7.35 The Commission recommends that there should be no strict rule of exclusion in relation to self-induced provocation. Conduct incited by the accused should be an evidentiary matter taken into account by the jury when assessing whether or not provocation was present. [paragraph 4.185]

## **D Duress**

7.36 The Commission recommends that duress should be recognised as an excusatory defence. The Commission also recommends that the features of the defence should include that the threat was imminent, there was no reasonable way to avoid the threat or make it ineffective and the conduct was a reasonable response to the threat. [paragraph 5.32]

7.37 The Commission recommends that the threat which underpins the defence of duress should be one of death or serious harm. [paragraph 5.44]

7.38 The Commission recommends that the defence of duress should be available where a threat of death or serious harm is directed towards any person and that there should be no restriction in the availability of the defence in relation to the target of the threats. [paragraph 5.51]

7.39 The Commission recommends that, in establishing whether the response of the accused was a reasonable one, an objective test should be applied tempered with subjective elements. [paragraph 5.67]

7.40 The Commission recommends that the court or jury as the case may be may take into account the age and sex of the defendant (and any other characteristics which bear upon the capacity of the defendant to withstand duress) in deciding whether a person of reasonable firmness would have acted as the defendant did. [paragraph 5.68]

7.41 The Commission recommends that, while the threat should be imminent, there should be no requirement of immediacy in relation to the harm threatened. [paragraph 5.90]

7.42 The Commission recommends that a person who seeks to avail of the defence of duress may not do so if they ought reasonably to have foreseen

the likelihood of being subjected to threats, for example, by voluntarily joining a criminal organisation which subsequently puts pressure on the person to commit offences. [paragraph 5.107]

7.43 The Commission recommends that the defence of duress should be generally available as a defence, but not in the case of treason, murder or attempted murder. [paragraph 5.141]

7.44 The Commission recommends that the defence of marital coercion should be formally abolished by statute. [paragraph 5.154]

## **E Necessity and Duress of Circumstances**

7.45 The Commission recommends that the defence of necessity, to the extent that it exists, should continue to be developed on a case-by-case basis, such as in the *Criminal Damage Act 1991* or in cases of medical necessity. [paragraph 6.66]

7.46 The Commission recommends that the defence of duress of circumstances be placed on a statutory footing, having the same scope and application as the defence of duress by threats. [paragraph 6.67]

## APPENDIX DRAFT CRIMINAL LAW (DEFENCES) BILL 2009<sup>1</sup>

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<sup>1</sup> The Commission is conscious that the draft Bill could be enacted by the Oireachtas either as a separate Bill or as part of the proposed Criminal Law Code Bill that would arise from the deliberations of the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*: see [www.criminalcode.ie](http://www.criminalcode.ie). See also in this respect the Explanatory Note to section 7 of the draft Bill. In drafting the Bill, the Commission has used a particular drafting formula, as it did in its *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87–2008), and is conscious that the precise drafting formula to be used in the context of codification is a matter for the drafters of the code.

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**DRAFT CRIMINAL LAW (DEFENCES) BILL 2009**

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ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Legitimate defence generally
3. Legitimate defence and the dwelling
4. Public defence
5. Provocation
6. Duress
7. Effect on the Non-Fatal Offences Against the Person Act 1997
8. Defence Forces

ACTS REFERRED TO

Children Act 2001	2001, No.24
Criminal Law (Insanity) Act 2006	2006, No.11
Defence Acts 1954 to 2007	
Non-Fatal Offences Against the Person Act 1997	1997, No.26

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## DRAFT CRIMINAL LAW (DEFENCES) BILL 2009

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### BILL

*Entitled*

AN ACT TO SET OUT IN STATUTORY FORM THE DEFENCE OF LEGITIMATE DEFENCE (PREVIOUSLY REFERRED TO AS SELF-DEFENCE), THE DEFENCE OF PUBLIC DEFENCE, THE DEFENCE OF PROVOCATION AND THE DEFENCE OF DURESS AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

#### **Short title and commencement**

1.—(1) This Act may be cited as the Criminal Law (Defences) Act 2009.

(2) This Act comes into operation on such day or days as the Minister for Justice, Equality and Law Reform may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

#### ***Explanatory note***

This is a standard section setting out the short title and commencement arrangements.

#### **Legitimate defence generally**

2.—(1) Subject to the provisions of this section (and without prejudice to *section 3* and *section 4*), a person does not commit an offence where he or she uses force by way of defence to the threat of, or use of, unlawful force by another person.

(2) Subject to *section 3* and *section 4*, a person is justified in using lethal force by way of defence to the threat of, or use of, unlawful force by another person, but only in order to repel the threat of—

(a) death or serious injury,

(b) rape<sup>2</sup> or aggravated sexual assault, or

(c) false imprisonment by force.

(3) A person is justified in using force by way of defence only where the threat of, or use of, unlawful force by another person is imminent.

(4) A person is justified in using force by way of defence only where it is necessary in response to the threat by the other person of the use of unlawful force.

(5) Subject to *section 3* and *section 4*, the defence provided by this section does not apply to a person who has a safe and practicable opportunity to retreat from the threat of, or use of, unlawful force by another person but does not do so.

(6) The defence provided by this section applies only where the force used is proportionate to the threat of, or use of, unlawful force by another person.

(7) Subject to *subsection (8)*, the jury or court, as the case may be, shall have regard to all of the circumstances, including the circumstances as the defendant reasonably believed them to be, in determining whether —

(a) the threat of, or use of, unlawful force by another person was imminent,

(b) the use of force was necessary, and

(c) the force used was proportionate.

(8) Unlawful homicide that would otherwise be murder may be reduced from murder to manslaughter where the defendant used disproportionate lethal force, but no more force than he or she honestly believed to be proportionate in the circumstances.

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<sup>2</sup> The Commission assumes in this context that rape would include rape within the meaning of section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*.

(9) Where a person (in this subsection referred to as the original attacker) has, by an unlawful act, initiated a conflict with an individual (in this subsection referred to as the original victim) and has thereby generated a response (which comprises a threat of, or use of, death or serious injury) from the original victim, the defence provided by this section does not apply to the original attacker unless —

(a) the response to the original attacker is disproportionate having regard to all the circumstances present at the time, and

(b) the original attacker has no safe and practicable opportunity to retreat.

(10) For the purposes of this section —

(a) “force by way of defence” includes defence of self or defence of another individual (including a member of the family of the person) against unlawful attack, and also includes defence of property against unlawful attack (but, in the case where lethal force is used, does not include defence of personal property against unlawful attack),

(b) “use of unlawful force” includes attempted use of unlawful force.

***Explanatory note***

*Subsection (1)* implements the general recommendation on legitimate defence (a justification-based defence) in paragraph 2.28 that, subject to the conditions set out in this section, a person does not commit an offence where he or she uses force by way of defence to the use of unlawful force by another person. *Subsection (2)* implements the recommendations in paragraphs 2.57 and 2.58 that there should be a minimum threshold for the use of lethal force (the threshold requirement does not apply to non-lethal force). *Subsection (3)* implements the recommendation in paragraph 2.119 that a person may use force (whether lethal or non-lethal) by way of defence only where the threat by the other person is imminent. *Subsection (4)* implements the recommendation in paragraph 2.137 that a person may use force (whether lethal or non-lethal) by way of defence only where this is necessary. *Subsection (5)* implements the recommendation in paragraph 2.138 that, in general, legitimate defence applies only where a person is unable to retreat safely. The draft Bill provides that this general requirement to retreat does not apply to legitimate defence involving a person’s dwelling (section 3) or to public defence (section 4). *Subsection (6)* implements the recommendation in paragraph 2.207 that the use of force in legitimate defence must be proportionate to the threat from the other person, taking into account all the

circumstances at the time, including whether a court or jury considered the response was a reasonably proportionate response. *Subsection (7)* implements the recommendations in paragraphs 2.119, 2.137 and 2.207 that the jury or court, as the case may be, shall have regard to all of the circumstances, including the circumstances as the defendant reasonably believed them to be in determining whether: the threat of, or use of, unlawful force by another person was imminent; the use of force was necessary; and the force used was proportionate. *Subsection (8)* implements the recommendation in paragraph 2.216 that unlawful homicide that would otherwise be murder may be reduced from murder to manslaughter where the defendant used disproportionate lethal force, but no more force than he or she honestly believed to be proportionate in the circumstances. This would put in statutory form the decision of the Supreme Court in *The People (Attorney General) v Dwyer* [1972] IR 416. *Subsection (9)* implements the recommendation in paragraph 2.156 that the defence should not, in general, be available where an attacker has, himself or herself, provoked a violent response from a victim (sometimes referred to as “self-generated necessity”). *Subsection (10)* implements the recommendation in paragraph 2.173 by defining relevant terms for the purposes of the defence.

### **Legitimate defence and the dwelling**

**3.—(1)** Without prejudice to the generality of *section 2*, a person does not commit an offence where he or she uses force, including lethal force, in his or her dwelling, or in the vicinity of the dwelling, by way of defence to the threat of, or use of, unlawful force by another person.

(2) Notwithstanding *section 2(2)*, a person is justified in using lethal force in his or her dwelling, or in the vicinity of the dwelling, by way of defence to the threat of, or use of, unlawful force by another person, but only in order to repel the threat of—

(a) death or serious injury,

(b) rape or aggravated sexual assault,

(c) false imprisonment by force,

(d) entry to or occupation of the dwelling (including forcible entry or occupation) that is not authorised by or in accordance with law, or

(e) damage to or destruction of the dwelling.

(3) Notwithstanding *section 2(5)*, the defence provided by this section applies to a person who has a safe and practicable opportunity to retreat from his or her dwelling (or from the vicinity of the dwelling) but does not do so.

(4) In this section —

(a) “dwelling” means the place where a person ordinarily resides, and includes a house, apartment, building, mobile home, caravan, vessel or other structure ordinarily used for habitation, whether movable or temporary, or a portion of such place or structure.

(b) “vicinity” means the area (including another building) near the dwelling, and includes any access path, courtyard, driveway, field, garden or yard which is ordinarily used in conjunction with the dwelling.

(5) The provisions of *section 2(3)*, *section 2(4)*, *section 2(6)*, *section 2(7)*, *section 2(8)* and *section 2(9)* apply to the defence provided by this section.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 2.84 that, subject to the general conditions applicable to legitimate defence in *section 2* of the draft Bill and the specific provisions of this section, a person does not commit an offence where he or she uses force, including lethal force, in defence of his or her dwelling. *Subsection (2)* implements the recommendations in paragraphs 2.84 and 2.173 that the minimum threshold factors for the use of lethal force in defence of the dwelling are those that apply generally under *section 2(2)* of the draft Bill, but also include protection against unlawful entry to or occupation of the dwelling and also damage to or destruction of the dwelling. *Subsection (3)* implements the recommendation in paragraph 2.172 that the general requirement to retreat in *section 2(5)* of the draft Bill does not apply in the context of defence of the dwelling. *Subsection (4)* implements the recommendations in paragraph 2.173 concerning the definition of “dwelling” and “vicinity” of the dwelling. *Subsection (5)* reinforces the recommendation in paragraph 2.58 that, subject to the specific provisions in this section, the general conditions applicable to legitimate defence in *section 2* of the draft Bill apply to legitimate defence of the dwelling.

## Public defence

4.—(1) Notwithstanding *section 2*, a person does not commit an offence where—

(a) he or she uses non-lethal force to prevent a crime or a breach of the peace, or in effecting or assisting in effecting a lawful arrest in respect of a person who is reasonably suspected of an arrestable offence, and

(b) the use of force is necessary and proportionate in the circumstances.

(2) Notwithstanding *section 2*, a member of An Garda Síochána, acting in the course of his or her duties, does not commit an offence where—

(a) he or she uses force, including lethal force, to prevent a crime or a breach of the peace, or in effecting or assisting in effecting a lawful arrest in respect of a person who is reasonably suspected of an arrestable offence, and

(b) the use of force is necessary and proportionate in the circumstances, and

(c) in the case of preventing a crime or a breach of the peace, they are imminent and would cause death or serious injury.

(3) Notwithstanding *section 2*, a prison officer, acting in the course of his or her duties, does not commit an offence where —

(a) he or she uses force, including lethal force, to prevent a prisoner absconding from a prison or place of detention, and

(b) the use of force is necessary and proportionate in the circumstances.

(4) In this section, “crime” involves an unlawful act although the person committing it, if charged with an offence in respect of it, would be acquitted on the ground that —

(a) he or she was a child within the meaning of section 52 of the Children Act 2001; or

(b) he or she acted under duress; or

(c) his or her act was involuntary; or

(d) he or she was in a state of intoxication; or

(e) he or she was insane, within the meaning of the Criminal Law (Insanity) Act 2006.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 3.83 that the defence of public defence applies where non-lethal force is used in effecting a lawful arrest for an arrestable offence (an offence carrying the possibility of 5 years imprisonment on conviction on indictment) and where the use of force is necessary and proportionate in the circumstances. *Subsection (2)* implements the recommendation in paragraph 3.85 that the use of lethal force for the purposes of crime prevention should be restricted to members of An Garda Síochána; and the recommendation in paragraph 3.126 setting out the limits. *Subsection (3)* implements the recommendation in paragraph 3.86 that prison officers may use force, including lethal force, to prevent a prisoner from absconding.

**Provocation**

5.—(1) Unlawful homicide that would otherwise be murder may be reduced from murder to manslaughter if the person who caused the death (in this section referred to as the accused) did so under provocation.

(2) Anything done or said may be provocation if —

(a) it deprived the accused of the power of self-control and thereby induced him or her to commit the act of homicide, and

(b) in the circumstances of the case it would have been of sufficient gravity to deprive an ordinary person of the power of self control.

(3) (a) In determining whether anything done or said would have been of sufficient gravity to deprive an ordinary person of the power of self-control the jury or court, as the case may be, may take account of such characteristics of the accused as it may consider relevant.

(b) A jury or court, as the case may be, shall not take account of an accused's mental disorder, state of intoxication or temperament for the purposes of determining the power of self-control exhibited by an ordinary person.

(4) (a) There is no rule of law that the defence provided for in this section is negated if the act causing death did not occur immediately after provocation.

(b) It is hereby declared that the presence or absence of an act causing death occurring immediately after provocation is a relevant consideration which the jury or court, as the case may be, is to have regard, in conjunction with other evidence, in considering whether the accused lost self-control as a result of provocation.

(5) Without prejudice to other circumstances where the defence provided for in this section applies, it applies —

(a) where the accused, by accident or mistake, kills another person under provocation, or

(b) where the provocation was incited by the accused, or

(c) where the act causing death was done with intention to kill or cause serious injury.

### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 4.42 that the defence of provocation applies only in the context of unlawful homicide, and that it operates as a partial defence which reduces what would otherwise be murder to manslaughter. *Subsection (2)* implements the recommendation in paragraphs 4.116 that the defence of provocation should be based primarily on whether the provocation was such that it was reasonable for the accused, based on the standard of an ordinary person, to have lost self-control. *Subsection (3)* implements the recommendation in paragraphs 4.117 and 4.118 that, subject to specified exclusions, some aspects of the accused's personal characteristics, such as age, may be taken into account in determining whether it was reasonable for the accused to have lost self-control. *Subsection (4)* implements the recommendation in paragraph 4.163 that the absence of an immediate response to the provocation does not, in itself, prevent the defence from being raised; but that the presence or absence of an immediate response to provocation is a relevant consideration which the jury or court, as the case may be, is to have regard, in conjunction with other evidence, in considering whether the accused lost self-control (for example, in the context of cumulative trauma or violence). *Subsection (5)* implements the recommendation in paragraph 4.135 that the defence of provocation may be available: (a) where the killing under provocation was by accident or mistake; (b) where the accused's conduct has incited provocation; or (c) where the killing was intentional.

## Duress

6.—(1) A person does not commit an offence where he or she carries out the conduct constituting the offence under duress or duress of circumstances.

(2) A person acts under duress if, and only if, he or she reasonably believes—

(a) (i) in the case of duress, a threat of death or serious injury that has been made will be carried out against that person or another person unless an offence is committed, or

(ii) in the case of duress of circumstances, a threat of death or serious injury arises from the circumstances for that person or another person unless an offence is committed,

(b) the threat is imminent,

(c) there is no reasonable way to avoid the threat or make the threat ineffective, and

(d) the conduct is a reasonable response to the threat.

(3) (a) In determining whether the conduct of the accused constitutes a reasonable response to the threat for the purposes of *subsection (2)(d)*, the jury or court, as the case may be, may take account of such characteristics of the accused as it may consider relevant.

(b) A jury or court, as the case may be, shall not take account of an accused's mental disorder, state of intoxication or temperament for the purposes of determining whether the conduct of the accused constitutes a reasonable response to the threat.

(4) The defence provided for in this section does not apply —

(a) in the case of duress, if the threat has been made by or on behalf of a person with whom the person under duress is or has been voluntarily associated with, or where the person under duress ought reasonably to have foreseen the likelihood of being subjected to threats for the purpose of carrying out conduct of the kind required for the offence, or

(b) in the case of duress of circumstances, where the person under duress ought reasonably to have foreseen the likelihood that the circumstances

giving rise to the threat would arise for the purpose of carrying out conduct of the kind required for the offence.

(5) The defence provided for in this section is applicable to all crimes, with the exception of —

(a) treason,

(b) murder, and

(c) attempted murder.

(6) To the extent that it survives and would otherwise be applicable to the defence provided for in this section, the defence of marital coercion is abolished.

### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.32 that the defence of duress should be recognised as an excusatory defence. *Subsection (1)* also implements the recommendation in paragraph 6.67 that the defence of duress of circumstances should also be recognised as an excusatory defence, having the same essential ingredients as duress. *Subsection (2)* implements the recommendations in paragraphs 5.32 and 6.67 concerning the ingredients of the defence of duress and duress of circumstances: (a) a threat of death or serious injury; (b) the threat is imminent; (c) there is no reasonable way to avoid the threat or make the threat ineffective; and (d) the conduct is a reasonable response. *Subsection (3)* implements the recommendations in paragraphs 5.67, 5.68 and 6.67 that, subject to specified exclusions, some aspects of the accused's personal characteristics, such as age, may be taken into account in determining whether the conduct of the accused constitutes a reasonable response to the threat or the circumstances. *Subsection (4)* implements the recommendations in paragraphs 5.107 and 6.67 that the defence does not apply where the accused has voluntarily created a situation where threats are likely to arise, for example by joining a criminal organisation. *Subsection (5)* implements the recommendations in paragraphs 5.141 and 6.67 that the defence should not be applicable to specified crimes. *Subsection (6)* implements the recommendation in paragraph 5.154 that, to the extent that it survives, the defence of marital coercion should be abolished.

## **Effect on the Non-Fatal Offences Against the Person Act 1997**

7.— On the coming into force of this Act, or as the case may be any section of this Act, sections 18 to 22 of the Non-Fatal Offences Against the Person Act 1997 shall not apply in respect of the defences contained in this Act, or as the case may be any section of this Act, but those sections in the Act of 1997 shall continue to apply to the extent that they apply to any other defence in any enactment or rule of law that is otherwise available.

### ***Explanatory note***

The Commission has already noted it is conscious that this draft Bill could be enacted by the Oireachtas either as a separate Bill or as part of the proposed Criminal Law Code Bill that would arise from the deliberations of the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*: see [www.criminalcode.ie](http://www.criminalcode.ie). If enacted as part of the proposed Criminal Law Code Bill, sections 18 to 22 of the *Non-Fatal Offences Against the Person Act 1997*, which contains certain provisions concerning defences, would ultimately be replaced by comprehensive codified provisions on defences in criminal law. Section 7 of this draft Bill would be required if the Oireachtas enacted the terms of this draft Bill as a separate Bill prior to codification.

## **Defence Forces**

8.— The provisions of this Act do not affect or alter the position of a member of the Defence Forces who uses force when carrying out his or her duties under the Defence Acts 1954 to 2007.

### ***Explanatory note***

This section implements the recommendation in paragraph 3.132 that the recommendations in this Report and the draft Bill are without prejudice to position of a member of the Defence Forces who uses force in carrying out his or her duties under the *Defence Acts 1954 to 2007*.





The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide of legislative changes.

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ADDRESS  
35-39 Shelbourne Road, Dublin 4, Ireland

TELEPHONE  
+353 1 6377600

FAX  
+353 1 6377601

EMAIL  
[info@lawreform.ie](mailto:info@lawreform.ie)

WEBSITE  
[www.lawreform.ie](http://www.lawreform.ie)

The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975