



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

# **CONSULTATION PAPER**

**DURESS AND NECESSITY**

**(LRC CP 39-2006)**

**IRELAND**

**The Law Reform Commission  
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 78 Reports containing proposals for reform of the law; 11 Working Papers; 38 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 26 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at [www.lawreform.ie](http://www.lawreform.ie).

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# INTRODUCTION

## A Background

1. This *Consultation Paper on Duress and Necessity* is part of a series on defences to criminal charges.<sup>1</sup> The first of these, the *Consultation Paper on Homicide: The Plea of Provocation*, was published in 2003 and a third, a Consultation Paper on Legitimate Defence is forthcoming. As noted in the Consultation Paper on Provocation, this series is intended to provide a comprehensive review of defences in this jurisdiction with the eventual aim of codification.<sup>2</sup>

2. The pleas of duress and necessity usually provide a defence to an individual who is constrained or coerced into committing a crime by reason of serious threats (duress) or dire circumstances (necessity). In many cases the defences are discussed in relation to homicide, but it is important to note that these defences have a more general application, ranging from receiving stolen property to unlawful possession of firearms.

3. While the Commission discusses duress and necessity as separate defences it is clear that there is considerable overlap between them. The defence of duress *per minas* (referred to in this Consultation Paper as duress) applies when a person's choice is constrained by threats to do an act which would otherwise be a crime. Necessity concerns a situation where a person's choice is constrained due to the circumstances. As with duress, the person acts because they are compelled to do so, not by threats from a person, but by threats arising from the circumstances in which they find themselves.

## B Outline of this Paper

4. Chapter 1 outlines briefly the defences of duress and necessity and introduces the concept of constrained choice to provide a general framework for discussion of the defences.

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<sup>1</sup> The Commission's *Second Programme of Law Reform 2000-2007*, identified defences including provocation, legitimate defence and duress and necessity as areas for examination.

<sup>2</sup> Law Reform Commission *Consultation Paper on Homicide: the Plea of Provocation* (LRC CP 27-2003) at 1. See also *Report of the Expert Group on the Codification of the Criminal Law: Codifying the Criminal Law* (Department of Justice, Equality and Law Reform 2004).

5. Chapter 2 deals with the general scope of and limitations to the defence of duress. It considers whether duress should be regarded as an excusatory or a justificatory defence. It discusses whether the threat should be of 'death or serious bodily harm' and whether the test for this should be objective or subjective. It also deals with the target and the effect of the threat. The chapter also includes a discussion of the reasonableness requirement in relation to both the belief in the threat and the response to the threat. It goes on to discuss the requirement of imminence of the threat and how this relates to the requirement that the accused seek official protection. The chapter then examines whether a person ought reasonably to have foreseen the likelihood of being subjected to threats and, if so, whether this should be a reason to disallow the defence. It goes on to discuss the defence of marital coercion which existed at common law and its existence in other jurisdictions. Finally, the burden of proof that applies where duress is raised as a defence is discussed.

6. Chapter 3 discusses the application of the defence of duress to murder. Under current Irish law, it appears that duress is a general defence to all crimes except murder, attempted murder and treason.

7. Chapter 4 reviews the scope of the defence of necessity and its relationship with duress. It also deals with the relatively new defence of duress of circumstances in English law, including a comparison between this defence and both duress and necessity.

8. Chapter 5 contains a summary of the Commission's provisional recommendations.

9. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations made are provisional in nature. Following further consideration of the issues and consultation with interested parties, the Commission will make its final recommendations. Submissions on the provisional recommendations contained in this Consultation Paper are welcome. In order that the Commission's final Report may be made available as soon as possible, those who wish to do so are requested to send their submissions in writing by post to the Commission or by email to [info@lawreform.ie](mailto:info@lawreform.ie) by **30 September 2006**.

# CHAPTER 1      OVERVIEW OF THE DEFENCES OF DURESS AND NECESSITY

## A            Introduction

1.01        In modern legal systems the defences of duress and necessity cater for cases where the defendant breaks the law in circumstances where his freedom of choice was constrained by serious threats. Typically the defendant breaks the law rather than see the threats carried out. The plea of duress applies in cases where the threats emanate from a human source and have the form 'Do this or else'; whereas the plea of necessity covers situations where the threats are circumstantial or non-human in origin.

## B            Constrained Choice

1.02        Most common law systems stress the element of constrained choice as the conceptual or theoretical basis for the defences of duress and necessity. Emphasis on the element of constrained choice highlights the gravamen or inner nature of the defendant's predicament, while at the same time underlining the essential difference between the pleas of necessity and duress and those of physical coercion or force majeure.<sup>1</sup> In a situation of physical coercion the defendant has no choice;<sup>2</sup> as would be true, for example, where he causes the death of a pedestrian as a result of his car being blown off course by a sudden storm. In contrast, in situations of duress and necessity the defendant faces a moral dilemma. Through no fault of his own, he is placed in the difficult predicament 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 mortal danger.

### (1)        *Duress per minas*

1.03        In cases of duress *per minas*<sup>3</sup> the defendant admits both the material and mental elements of the offence charged but claims that he acted

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<sup>1</sup>        McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) Chapter 17.

<sup>2</sup>        *Ibid.*

<sup>3</sup>        Duress *per minas* may be translated as duress by menaces and is referred to in this Consultation Paper as duress.

under the compulsion of threats made by another person.<sup>4</sup> In most legal systems, the threats must be of death or serious injury to the accused or another person; and must be sufficiently serious to overwhelm the powers of resistance of an ordinary person.<sup>5</sup>

1.04 Perhaps the best-known example of duress in Irish law arose in *Attorney General v Whelan*.<sup>6</sup> There the defendant admitted that he had knowingly received stolen property, but claimed that he acted under pressure of serious threats. The Court of Criminal Appeal held that he was entitled to the defence of duress in these circumstances and set out the essential conditions of the plea in Irish law.

1.05 If successful, the plea of duress affords a complete defence.

## (2) *Necessity*

1.06 Strictly speaking, duress is a species of the larger genus of necessity. Indeed, it might be said that the two pleas are identical in every respect bar one: in necessity the threat to the defendant comes from natural or circumstantial rather than human sources. Typically the defendant breaks the law in order to spare himself or another from an impending calamity. For example, he forces his way into private property in order to rescue elderly residents from a blaze.<sup>7</sup>

1.07 The defence of necessity has never been recognised as such in English law, but the Commission notes that the English courts have fashioned a plea of duress of circumstances which functions as a defence of necessity in all but name.<sup>8</sup> The new plea was developed by analogy with the traditional defence of duress and, accordingly, attracts all of the limiting conditions attached to the original. Thus the circumstantial threat must be one of death or serious injury, and such that a person endowed with ordinary human fortitude would have been unable to resist.

## C Lesser Evils

1.08 It is useful to distinguish cases where the defendant chooses the lesser of two evils from those in which he is faced with a choice of

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<sup>4</sup> See paragraphs 2.25-2.49. For a more detailed discussion of duress, see Chapters 2 and 3 below.

<sup>5</sup> See paragraphs 2.62-2.106 below.

<sup>6</sup> [1934] IR 518. See discussion at paragraph 2.03 below.

<sup>7</sup> See also paragraph 4.04 below.

<sup>8</sup> See *R v Shayler* [2001] 1 WLR 2206, discussed at paragraph 4.08 below.

comparable evils. In some civilian systems, the former are treated as instances of justified (as opposed to excused) conduct, and, accordingly, give rise to a complete defence on the grounds that the defendant has done the right thing in the circumstances. In practice this distinction is unimportant since in most legal systems a defendant who makes the wrong choice in difficult circumstances will still be *excused* on the grounds of duress or necessity.

1.09 However, the distinction is relevant to the discussion of whether the pleas of duress and duress of circumstances should be extended to murder. If it is agreed that a killer who effects a net saving of human life in a situation of severe moral compulsion has done the right thing in the circumstances, then it follows that duress and necessity should be a complete answer to murder; and, on the principle of fair labelling, that the accused is entitled to be acquitted on the grounds of lesser evils rather than duress or necessity simpliciter.

1.10 On the other hand, if the focus is on the element of constrained choice rather than choice of evils, the Commission acknowledges that the case for allowing duress and necessity to operate as partial defences to murder can be coherently made.

1.11 The ensuing discussion will be guided by the basic principles set out in this Chapter.



## CHAPTER 2     **DURESS: GENERAL SCOPE AND LIMITATIONS**

### **A           Introduction**

2.01       The defence of duress applies when a person is compelled by threats to do an act, which would otherwise be a crime, where the person believes that the threats will be carried out. In this Chapter, the Commission discusses the general scope and limitations to the defence of duress.

2.02       The Chapter begins with a discussion of the only Irish case in the modern era to discuss duress, *Attorney General v Whelan*<sup>1</sup>. The remainder of the Chapter discusses the scope and limitations of the defence under the following headings; whether it should be regarded as excusatory or justificatory in nature; nature of the threats; target of the threats; the effect of the threats; the imminence rule and exposure to the risk of duress. This chapter also discusses the defence of marital coercion which existed at common law, and the burden of proof in relation to duress. In Chapter 3, the Commission considers the application of the defence to homicide.

### **B           Duress: An Overview**

#### **(1)       Ireland**

2.03       The only Irish case which has examined the nature and scope of the defence of duress is the 1933 decision of the Court of Criminal Appeal in *Attorney General v Whelan*.<sup>2</sup>

2.04       The defendant was charged with having received a sum of stolen money, knowing it to be stolen. He had also been indicted, with others, on a charge of conspiracy to steal a quantity of money from a train but was found not guilty on the conspiracy charge. Another man, Farnan, had also been indicted on the conspiracy charge and had pleaded guilty. Farnan had brought a box of coins which had been stolen in the train robbery to the defendant's house late one night. The defendant admitted he had accepted

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<sup>1</sup> [1934] IR 518. It was not until the early 1940s that the Irish law reports adopted the current convention of entitling prosecutions on indictment as being in the name of The People.

<sup>2</sup> *Ibid.*

the money but said that he had done so under duress from Farnan, who was armed with a revolver.

2.05 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. He posed a special question to the jury, which was “[I]n receiving the money did Peter Whelan act under threats of immediate death or serious personal violence?”<sup>3</sup> The jury answered in the affirmative.

2.06 The trial judge then ruled that although the defendant had acted under duress, this was not a defence but rather would act as mitigation in sentencing. On appeal to the Court of Criminal Appeal, the defendant contended that the finding of the jury that he had acted under duress amounted to an acquittal.

2.07 It was noted by the Court of Criminal Appeal that authorities on whether acting under duress should entitle a defendant to an acquittal were rare, and indeed showed a degree of discrepancy.<sup>4</sup> The Court noted that, as a result of this, the case had to be decided on the basis of general principle.

2.08 The Court went on to outline the scope of the defence. In relation to threats, it was held that “[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>5</sup>

2.09 The Court noted, however, that the application of the general rule must be subject to certain limitations. The Court stated that “where the excuse of duress is applicable it must further be clearly shown that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats”.<sup>6</sup>

2.10 Thus, the general scope of the defence of duress, as outlined in *Whelan*, is that; the will of the defendant must have been overborne by the threats, the duress must be operating when the offence is committed and if

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<sup>3</sup> [1934] IR 518, 521. See paragraph 2.27 below.

<sup>4</sup> *Ibid*, 524.

<sup>5</sup> *Ibid*, 526.

<sup>6</sup> *Ibid*. In *DPP for Northern Ireland v Lynch* [1975] AC 653, Lord Morris noted in relation to the *Whelan* case that the word ‘excuse’ would have been more appropriate than ‘justification’. See paragraph 4.94 below.

there is an opportunity for the individual will to reassert itself and it is not taken, a plea of duress will fail.

2.11 In the particular circumstances, the Court of Criminal Appeal held that the appellant's conviction should not stand and directed a verdict of acquittal to be entered.

2.12 The Court also stated, *obiter*, that the plea of duress does not extend to the offence of murder and this will be discussed further below in relation to the scope of the defence.<sup>7</sup>

2.13 As far as the Commission can ascertain, although *Attorney-General v Whelan* has been cited in various cases in other jurisdictions<sup>8</sup> there has been little judicial consideration in Ireland of the nature and scope of the defence of duress since 1933.<sup>9</sup> In *People (DPP) v Dickey*,<sup>10</sup> the Court of Criminal Appeal applied, without an extensive analysis, the approach taken in *Whelan*.<sup>11</sup>

2.14 In other jurisdictions there has been considerable discussion of the nature and scope of the defence. The Commission therefore considers that it is appropriate to discuss those more recent developments in the context of this Consultation Paper.

## (2) *England*

2.15 The most recent statement of the general scope of and limitations to the defence of duress in English law was given by the House of Lords in *R v Hasan*.<sup>12</sup> In this case, the primary issue was the denial of the defence on the basis that the defendant has voluntarily exposed himself or herself to the risk of threats.<sup>13</sup> The House of Lords, however, also reviewed the general scope of the defence. It was noted that certain distinguishing features of the defence include that it is a complete, rather than a reductive, defence; that it is excusatory; that the victim is usually morally innocent and that the burden

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<sup>7</sup> See paragraph 3.02 below.

<sup>8</sup> For example, *R v Hasan* [2005] 4 All ER 685, *R v Howe* [1987] AC 417, *R v Harding* [1976] VR 129, *DPP for Northern Ireland v Lynch* [1975] AC 653, *R v Smyth* [1963] VR 737.

<sup>9</sup> The defence was dealt with in *The People (DPP) v Kavanagh* Court of Criminal Appeal 18 May 1999 but only in order to establish the onus of proof in relation to the defence. See paragraph 2.182 below.

<sup>10</sup> Court of Criminal Appeal 7 March 2003.

<sup>11</sup> The Court ordered a retrial on the basis that the trial judge had not directed the jury correctly in relation to the burden of proof. See paragraph 2.184 below.

<sup>12</sup> [2005] 4 All ER 685, 694-695.

<sup>13</sup> See paragraphs 2.137-2.159 above.

of proof lies with the prosecution to prove that the defendant did not act under duress. Lord Bingham noted that, given these features, it is unsurprising that the defence of duress should so far have developed within narrowly defined limits, and he went on to state that these features would encourage him “where policy choices are to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on.”<sup>14</sup>

2.16 The limitations laid out by the House of Lords in *R v Hasan* are as follows:

- The threat or danger must be of death or serious injury;
- 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.

2.17 In *R v Hasan*, the defendant had been convicted of aggravated burglary. At trial, his defence was that he had been coerced into committing the burglary after threats were made to harm him and his family. The person who had threatened him was, according to the defendant, a drug dealer with a reputation for violence but the defendant had an association with him. The defendant’s appeal against conviction was allowed by the Court of Appeal and his conviction was quashed. However the prosecution appealed successfully to the House of Lords, who restored the defendant’s conviction and outlined the above limitations.

2.18 The Commission notes here that, in recent English law a defence of duress of circumstances has been developed by analogy with duress, and that these limitations apply to both defences. The defence of duress of circumstances will be discussed further below.<sup>15</sup>

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<sup>14</sup> *R v Hasan* [2005] 4 All ER 685, 695.

<sup>15</sup> See paragraph 4.29-4.47.

### (3) *Australia*

2.19 The defence of duress was considered in the Australian case *R v Hurley and Murray*<sup>16</sup> in which Smith J outlined a working definition of the defence. It has been noted that this has been widely accepted as a correct statement of the position of the defence at common law.<sup>17</sup> The accused is required to have committed the crime he or she has been charged with in all of the following circumstances:

- When the accused was under a threat that death or grievous bodily harm would be inflicted upon a human being if he or she failed to do the act;
- Where the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did;
- Where the threat was present and continuing, imminent and impending;
- Where the accused reasonably apprehended that the threat would be carried out;
- Where the threat induced the defendant to commit the crime;
- Where the crime was not murder, nor any other crime so heinous as to be excluded from the doctrine;
- Where the accused did not expose himself or herself to the threat by their own volition;
- Where the accused had no means to safely prevent the execution of the threat.

### C **Justification and Excuse**

2.20 The defence of duress operates to exonerate a person for what would otherwise be a crime as “an expression of compassion for one of our kind caught in a maelstrom of circumstances.”<sup>18</sup>

2.21 There has been some debate as to whether the defence of duress operates as an excusatory defence or justificatory defence. If the defence is excusatory, it is clear that the action of the person was a crime, but the

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<sup>16</sup> [1967] VR 526.

<sup>17</sup> Fisse *Howard's Criminal Law* (5<sup>th</sup> ed The Lawbook Company 1990) at 541.

<sup>18</sup> Fletcher “The Individualisation of Excusing Conditions” (1974) 47 S Cal LR 1269 at 1308.

criminal justice system recognises that the person had very limited choice in the matter and thus it would be unfair to place criminal responsibility on them. If a defence is 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.

2.22 Generally the defence of duress is seen as an excusatory defence because the person argues that his or her will was overborne by threats, and that although the act was a crime, no criminal sanction should follow due to the constrained choice that the person was faced with.<sup>19</sup>

2.23 It has been pointed out that the case law on duress firmly supports its status as an excusatory defence.<sup>20</sup> While Murnaghan J in *Attorney General v Whelan*<sup>21</sup> used the words ‘justification’ and ‘excuse’ almost interchangeably, the Commission agrees with the view of Lord Morris in *DPP for Northern Ireland v Lynch*<sup>22</sup> that the word ‘excuse’ is the more appropriate term in this context. Subject to the views of the Commission on the application of duress to murder,<sup>23</sup> the Commission is of the opinion that this is appropriate and thus, the Commission provisionally recommends that the status of duress as an excusatory defence in general terms be retained.

2.24 *The Commission provisionally recommends that the status of the defence of duress as an excusatory defence in general terms should be retained.*

## **D Nature of the Threats: Death or Serious Injury**

### **(1) Ireland**

2.25 In *Attorney General v Whelan*,<sup>24</sup> the defendant was under threats which were accepted to amount to threats of “death or serious violence”. In that case, no actual threats were made to the defendant, but it was noted that the presence of the threatener, who was armed and was the kind of person who would not hesitate to use the revolver, was sufficient to amount to a threat of “death or serious violence”.

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<sup>19</sup> The issue of justification and excuse in relation to the defence of necessity is discussed at paragraphs 4.93- 4.99 below.

<sup>20</sup> Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 1086.

<sup>21</sup> [1934] IR 518.

<sup>22</sup> [1975] AC 653.

<sup>23</sup> See paragraph

<sup>24</sup> [1934] IR 518. See paragraph 2.03 above.

2.26 The Court of Criminal Appeal held that “[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.”

(2) *England*

2.27 The definition of duress propounded by Professor Glanville Williams<sup>25</sup> refers simply to threats of physical harm, but the weight of authority suggests that the threats must be of death or *serious* injury.<sup>26</sup> It was suggested in *R v Steane*<sup>27</sup> that a threat of false imprisonment would suffice for duress and this was echoed by Lord Simon (in the minority) in *DPP for Northern Ireland v Lynch*<sup>28</sup> when he observed that the law on this point is not definite and that a threatened loss of liberty may suffice. However, he dismissed the idea that a threat to property would be sufficient.

2.28 The Law Commission recommended in its 1977 *Report on Defences of General Application* that the threats should be of death or serious personal injury which should be defined to include mental as well as physical injury.<sup>29</sup> The Commission’s 1985 Report, *Codification of the Criminal Law*, stated that a threat must have been made to kill or cause serious injury.<sup>30</sup> The threat of mental injury was removed because, as the Commission noted, “injury” would be a wide enough term to include “injury to the state of a man’s mind”.<sup>31</sup>

2.29 In 1989, the Law Commission in its *Report on a Criminal Code for England and Wales*, the Commission recommended that one of the conditions of the defence was that the threat must be “one of death or serious personal harm to himself or another.”<sup>32</sup> The Commission noted that this followed the prevailing judicial view and that of most modern codes. In

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<sup>25</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 751.

<sup>26</sup> See *R v Hudson and Taylor* [1971] 2 QB 202 and *R v Graham* [1982] 1 All ER 801.

<sup>27</sup> [1947] KB 997.

<sup>28</sup> [1975] AC 653.

<sup>29</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977).

<sup>30</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law* (No 143 1986) at paragraph 13.15 to 13.24. *Draft Criminal Code Bill 1985* clause 45.

<sup>31</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law* (No 143 1986) at paragraph 15.43.

<sup>32</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 2: Commentary on Draft Criminal Code Bill* (No 177 1989) at paragraph 12.14.

1993, in its *Report on Offences against the Person and General Principles* the Commission again recommended that the threat must be of death or serious injury.<sup>33</sup>

### (3) *Canada*

2.30 Section 17 of the Canadian Criminal Code<sup>34</sup> requires the threat to be “of immediate death or bodily harm”. Until the adoption of this Criminal Code in 1982 the threats had to be of death or *grievous* bodily harm.

2.31 The Canadian Law Reform Commission (“CLRC”) recommended in its 1982 Working Paper on *Criminal Law: the General Part* that the level of threats be “threats of serious and immediate bodily harm.”<sup>35</sup>

2.32 In its later Report, *Recodifying Criminal Law*<sup>36</sup>, the CLRC made the following recommendation in relation to duress in which there is no requirement that the threats are physical in nature: “No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.”<sup>37</sup>

### (4) *Australia*

2.33 In *R v Hurley and Murray*,<sup>38</sup> it was noted that a threat of “death or grievous bodily harm” was necessary in order for the accused to plead duress. The defence of duress is clearly open to an accused faced with threats of death or serious bodily injury. The threat of imprisonment has received some support,<sup>39</sup> although it has been suggested that this could be regarded as an implied threat to kill or cause serious bodily injury if the demands of the kidnappers are not met.<sup>40</sup> It has been noted that it appears

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<sup>33</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 29.1.

<sup>34</sup> RS 1985 c. C-46; s.17 RS 1985, c 27 (1st Supp) s.40.

<sup>35</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper 29 1982) at 87.

<sup>36</sup> Law Reform Commission of Canada *Report: Recodifying Criminal Law* (No 30 Volume 1 1986) at 32-33.

<sup>37</sup> *Ibid* at 32.

<sup>38</sup> [1967] VR 526.

<sup>39</sup> *R v Harding* [1976] VR 129, *R v Lawrence* [1980] 1 NSWLR 122, although this threat was not recognised in *R v Foster* (1990) 14 Crim LJ 289.

<sup>40</sup> Dennis “Duress, Murder and Criminal Responsibility” (1980) 96 LQR 208 at 231.

unlikely that threats to property will be recognised as sufficient to afford the defendant a plea of duress.<sup>41</sup>

2.34 The Western Australian Code and the Queensland Code both refer to threats of “immediate death or grievous bodily harm.”<sup>42</sup> The provisions of the Australian Capital Territory and Commonwealth Codes refer merely to threats, and do not elaborate on the nature of the threats.

2.35 The 1980 Report of the Law Reform Commission of Victoria on *Duress, Necessity and Coercion* recommended that in cases of murder, where the accused intended or expected death to occur as a result of his or her actions, the harm threatened should be one of “death or serious personal injury (mental or physical).”<sup>43</sup> In other cases of murder and indictable injuries to the person, the harm threatened should be the same, or be “torture, rape, buggery or imprisonment.” In all other cases, threats could apply to property, livelihood and reputation, if the person threatened cannot fairly be expected to suffer the risk.

2.36 The Law Reform Commission of Victoria again considered the nature of the threats in 2004 and agreed with the Model Criminal Code Officers Report that a limitation of the defence to situations where threats were of death or serious bodily harm was not required.<sup>44</sup> The Commission was of the opinion that, consistent with the law on self-defence, it is unlikely that a jury would acquit a person of murder, on the basis of a defence of duress, except where that person was threatened with very serious harm.<sup>45</sup>

## (5) *New Zealand*

2.37 In New Zealand, under the *Crimes Act 1961*, the harm threatened must be of death or grievous bodily harm. Like Canada, however, there is no additional requirement that the threatened harm be sufficiently serious to induce a person of ordinary firmness to act as the accused did. Threats of mere harm, however, will not suffice. In *R v Maurirere*<sup>46</sup> it was held that grievous bodily harm meant “harm which will seriously interfere for a time

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<sup>41</sup> Yeo *Compulsion in the Criminal Law* (The Law Book Company Ltd 1990) at 71.

<sup>42</sup> Section 31 Criminal Code (WA); section 31 Criminal Code (Qd); section 20(1) *Criminal Code Act 1924*.

<sup>43</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>44</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992) at 65.

<sup>45</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at paragraph 3.156; Recommendation 13.

<sup>46</sup> [2001] NZLR 431.

with health and comfort” and was “really serious”. In that case the defendant had been the victim of a serious assault from her boyfriend in the past and there was corroborative evidence that she had been seen with black eyes. This was found to be insufficient for the purposes of the *Crimes Act*.

**(6) South Africa**

2.38 As will be discussed further below, South African law has a defence of necessity which covers situations where an accused’s choice is constrained either by human agents (duress or compulsion) or by virtue of the surrounding circumstances (necessity).<sup>47</sup>

2.39 One of the requirements for an act to be justified on the ground of necessity is that a legal interest of the accused must be endangered. The case law establishes that, while threats of death or serious bodily injury will certainly trigger the defence, threats of lesser injury to the person and of damage to property will also suffice.<sup>48</sup> However, this does not extend to threats of mere pecuniary loss<sup>49</sup> and the existence and nature of the threats are judged objectively.<sup>50</sup> It has been argued that the defence should apply regardless of the nature of the legal interest threatened, provided the other requirements are met,<sup>51</sup> and it is easy to see the merit in this argument given the existence of the final requirement which requires the competing interests to be weighed against each other. In order for the defence to be successful the evil avoided must be greater than the evil caused by the infringement of the law.

**(7) United States**

2.40 While a threat of death or serious injury is usually required to trigger the operation of the defence, in many State jurisdictions in the United States there has been a tendency to look to the gravity of the offence charged. If the offence is not of a very serious nature, the court may hold that a threat of less than death or serious bodily injury will suffice. Thus, in the trial of a regulatory offence, it was held by the Supreme Court of Kentucky, that the jury should be instructed that the defendant had a defence if compelled to commit the act under “such violence or threats as... inspire a just fear of great injury to person, reputation or property.”<sup>52</sup> The defence

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<sup>47</sup> *S v Goliath* (1972) 3 SA 1. See paragraphs 3.60 and 4.85 below.

<sup>48</sup> *R v Metwa* (1921) TPD 227; *R v Chansie* (1926) OPD 74.

<sup>49</sup> *R v Canestra* (1951) 2 SA 317.

<sup>50</sup> *R v Vermaak* (1900) 21 NLR 204 at 211.

<sup>51</sup> Burchell and Hunt *South African Criminal Law and Procedure Volume 1: General Principles of Criminal Law* (3<sup>rd</sup> ed Juta 1997) at 89.

<sup>52</sup> *Commonwealth v Refitt* 149 Ky 300 (1912) at 303-4.

cannot generally be invoked in respect of threats of future harm; however, in Georgia, it was held that, in certain circumstances, a threat of future harm may suffice to excuse a prohibited act.<sup>53</sup>

(8) *Discussion*

2.41 The requirement of “death or serious injury” forms the first objective criterion in the current test for duress. It is arguable that a threshold criterion is unnecessary given the general objective requirement that the accused display reasonable fortitude. If duress acts as a concession to human weakness, it can be argued that the law should recognise that every type of threatened harm is capable of triggering the defence, provided that it would overwhelm a person of normal reasonable steadfastness in the accused’s situation. Another option for reform is that the degree of threat should not be fixed in this way and that a proportionality test should be introduced, allowing comparison between the threat and the crime charged.

2.42 To change the test to a “balancing of harms” test, based on proportionality, moves the focus of the defence away from its traditional excusatory base (focus on the actor) to a justificatory one (focus on the act). It is certainly arguable that a proportionality test between the threat and the crime charged could be fairer. Some examples given by Lord Simon in *DPP for Northern Ireland v Lynch* serve to illustrate the point: the threat to burn down a defendant’s house of England and Wales unless he or she keeps watch while a crime is committed or a fugitive from justice who may say “I have it in my power to make your son bankrupt. You may avoid that by driving me to the airport.”<sup>54</sup>

2.43 A proportionality test would allow threats to be regarded by the court or jury cumulatively, for example, threats to reveal a defendant’s disreputable past as well as to cause him or her serious injury.

2.44 However the Commission recognises the argument that it may prove extremely difficult to balance the harms in question, for example, balancing a threat of severe injury to the person against a compelled disclosure of information which might endanger national security.<sup>55</sup> Additionally, although the proportionality test may appear fairer in theory, there is a possibility that in practice a proportionality test could be too vague and may be difficult to elaborate with precision.

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<sup>53</sup> *Perryman v State* 63 Ga App 819, 12 SE 2d 388 (1940).

<sup>54</sup> [1975] AC 653 at 687-688. Lord Simon discussed the issue of who the threat must be directed to and went on to discuss threats to property, noting that a threat of injury to property is not enough to found the defence as the line has to be drawn somewhere, however anomalous.

<sup>55</sup> Law Commission of England and Wales *Codification of the Criminal Law; General Principles: Defences of General Application* (No 55 1974) at paragraph 16.

2.45 If the accused is acting under the influence of threats which would cause a person of ordinary firmness to act in the manner in which he or she did, it is possible that he or she will commit the crime, regardless of its severity. As Howard notes, “this may be a small crime or a great one but it has no necessary connection with the threats.”<sup>56</sup>

2.46 However the other aspects of the defence, for example, the reasonable fortitude test, arguably render superfluous an additional test of proportionality.

2.47 In the Commission’s view, given that the accused acting under duress has injured an innocent victim, society is entitled to expect that an individual should resist threats which fall below a minimum level of severity. The law must draw a line somewhere and it chooses to do so between threats to bodily integrity and threats to property. However it is possible that a threat of death or serious bodily harm is not necessarily the worst of dangers. Thus, for example, torture may cause extreme pain without any residual bodily injury.

2.48 The older authorities are not clear on this aspect of the defence.<sup>57</sup> Almost all common law jurisdictions have confined the defence of duress by the use of a limitation on the basis of the threat. The rule also finds support in modern authority and as already noted, various law reform bodies which have examined the defence have likewise recommended that only threats of death or serious harm should supply the defence. The Commission has concluded that this is the correct approach to this issue.

2.49 *The Commission provisionally recommends that the threat which underpins the defence of duress should be one of death or serious harm.*

## **E Target of the Threats**

### **(1) Ireland**

2.50 The issue here is to whom the threats should be directed. In most duress cases, the threats will have been directed at the accused, but it is possible that they may be directed at a third party. *Attorney General v Whelan*<sup>58</sup> did not refer to this issue.

2.51 In *People (AG) v Keatley*<sup>59</sup> however, there is a reference to the issue, and although that is not a duress case, it is of relevance. In that case, it

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<sup>56</sup> Fisse *Howard’s Criminal Law* (5<sup>th</sup> ed The Law Book Company 1990) at 551.

<sup>57</sup> Interestingly, the balancing of harms approach does receive some support from Hale, *Pleas of the Crown* i 56.

<sup>58</sup> [1934] IR 518. See paragraph 2.03 above.

<sup>59</sup> [1954] IR 12.

was held, in relation to self-defence, that the right of the use of force in self-defence also applies to the defence of others, and that no special relationship is necessary between the parties. Potentially, a similar approach may be relevant to the law of duress in Ireland.

## (2) *England*

2.52 It appears that, in English law, it is possible to avail of the defence of duress if the threats are to third parties.<sup>60</sup> There is a requirement, however, that the threat must be directed against the defendant, his immediate family or someone close to the defendant. This was affirmed in the recent House of Lords decision *R v Hasan*<sup>61</sup> in which Lord Bingham referred to the Judicial Studies Board's specimen direction which stated that the threat must be directed, if not to the defendant or a member of his immediate family, to a person for whose safety the defendant would reasonably regard himself as responsible. Although this point was not at issue in *R v Hasan*, Lord Bingham noted that this direction appeared to be in line with the rationale of the defence of duress.

2.53 The Law Commission of England and Wales noted in 1993 that there was little authority on this point and recommended that the defence should be founded when the threat is made to anyone, on the grounds that this aspect is more properly taken into account when assessing the overall reasonableness of the accused's response to the threat.<sup>62</sup>

## (3) *Canada*

2.54 The Draft Legislation proposed by the Canadian Law Reform Commission in 1982 referred to the target of the threats, an issue on which section 17 of the Canadian Criminal Code was silent.<sup>63</sup> The proposed section limited the defence of duress to threats made against those under the accused's protection, for example, family members.

2.55 In its later Report of 1986, *Recodifying Criminal Law*, the Canadian Law Reform Commission recommended that the defence be

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<sup>60</sup> *R v Conway* [1989] QB 290; *R v Martin* [1989] 1 All ER 652.

<sup>61</sup> [2005] 4 All ER 685.

<sup>62</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 29.2.

<sup>63</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (No 29 1982) at 87 reads: "Every one is excused from criminal liability for an offence committed by way of reasonable response to threats of serious and immediate bodily harm to himself or those under his protection unless his conduct manifestly endangers life or seriously violates bodily integrity."

broadened by allowing threats to include any person, not just someone under the protection of the accused.<sup>64</sup>

#### (4) *Australia*

2.56 At common law in Australia, it appears that the defence is not confined to cases where the threat is made to the accused or persons to whom he or she may be closely connected: the requirement is simply that the threats pertain to a “human being”.<sup>65</sup> None of the Codes make any reference to the potential target of the threat.

2.57 The Law Reform Commission of Victoria recommended in 1977 that the harm threatened must be directed at the accused or someone closely connected with him.<sup>66</sup> More recently, however, the Commission recommended, in relation to the application of duress to homicide, that the nature of the threat need not reach a certain level, as discussed above, and in the accompanying draft provisions, made no recommendation that the threat should be directed at certain persons.<sup>67</sup>

#### (5) *Discussion*

2.58 There appears to be no requirement under the current Irish case-law that the threats must be issued against the defendant personally or even against someone with whom the accused has a special relationship.<sup>68</sup> However it is necessary to remember that the threat must also be one which the actor could not reasonably be expected to bear. If the threats are directed against a stranger, it will prove more difficult to satisfy this requirement. As one group of commentators argue, “a defence of duress is unlikely to be accepted as compelling defendants into the commission of a crime unless the threat is made either to their immediate family or to some other person to whom they are exceptionally close.”<sup>69</sup> Further, the party to whom the threat is directed can be of relevance in establishing whether the accused has in fact been compelled to commit the crime.

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<sup>64</sup> Law Reform Commission of Canada *Report: Recodifying Criminal Law Volume 1* (No 30 1986) at 32 reads: “No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.”

<sup>65</sup> *R v Hurley and Murray* [1967] VR (FC) 526.

<sup>66</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>67</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at paragraph 3.155.

<sup>68</sup> See paragraph 2.51 in relation to *The People (AG) v Keatley* [1954] IR 12.

<sup>69</sup> Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 1090.

2.59 In the Commission's view there are strong arguments in favour of allowing the subject of the threats to be anyone at all. By analogy with the law on self defence, the defence should be available where a threat of death or serious harm is directed towards any person. It is possible that a threat of death or serious injury to a close friend of the defendant may be equally as compelling as a threat to a relative. Furthermore, it is unnecessary to require that the threats be directed at a specific person as this element will be adequately catered for by the question whether the defendant has responded reasonably to the threat.

2.60 However, if the defence is to be available, even to a limited extent, in homicide cases, it may be necessary to reconsider this approach.

2.61 *The Commission provisionally 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.*

## **F The Effect of the Threat and Perception by the Defendant**

### **(1) Ireland**

2.62 In *Attorney General v Whelan*,<sup>70</sup> the Court of Criminal Appeal held that the will of the defendant must be overborne by the threats. The Court noted that the threats of immediate death or serious personal violence must be "so great as to overbear the ordinary power of human resistance".<sup>71</sup>

2.63 The Court of Criminal Appeal in *People (DPP) v Dickey*<sup>72</sup> noted that the trial judge in that case had correctly applied the decision in *Attorney General v Whelan*. The trial judge had told the jury that in considering whether the defendant had 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."

### **(2) England**

#### **(a) Steadfastness of the Defendant**

2.64 The approach of the Court in *Attorney General v Whelan* was subsequently cited by Lord Edmund Davies in *DPP for Northern Ireland v Lynch*.<sup>73</sup>

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<sup>70</sup> [1934] IR 518. See paragraph 2.03 above.

<sup>71</sup> *Ibid.*, 526.

<sup>72</sup> Court of Criminal Appeal 7 March 2003.

<sup>73</sup> [1975] 1 All ER 913, 952.

2.65 As to the effect of the threat on the defendant, the standard is objective. In *R v Graham*<sup>74</sup> the Court of Appeal held that the defendant is required to have the “steadfastness reasonably to be expected of the ordinary citizen in his situation” although it was noted that until then there had been little by way of authority on the nature of the test. The decision in *Graham* was approved by the House of Lords in *R v Howe*.<sup>75</sup>

2.66 In *R v Graham*, Lord Lane CJ, drawing an analogy with the defence of provocation, held that a defendant’s fortitude should be measured against that of a “sober person of reasonable firmness”. Thus, while in provocation the characteristic which must be viewed objectively is self control, in duress it is firmness of purpose. However, like the reasonable man invoked in *DPP v Camplin*<sup>76</sup> in laying down a test for provocation, the “sober person of reasonable firmness” is to be endowed with such permanent<sup>77</sup> characteristics of the defendant as sex, age and physical health. Moreover, drawing on the analogy with provocation where a similar test is used, it is likely that the jury may also take into account characteristics of the defendant *bearing on the gravity of the threat to him or her*.<sup>78</sup>

2.67 Subsequent case law of the Court of Appeal has resulted in only one addition to the list of relevant characteristics. In *R v Bowen*<sup>79</sup> the Court noted *obiter* that a “recognised mental illness or psychiatric condition, such as post traumatic stress disorder” could be taken into account. For the most part, however, the Court has been reluctant to admit evidence outside the categories of age, sex, physical and mental disability, fearing that this would dilute the objectivity of the reasonable firmness test. In *Bowen* itself it was held that evidence of low intelligence, falling short of a mental disability, was not admissible and in *R v Hegarty*<sup>80</sup> the Court found that medical evidence of the defendant’s personality disorder which rendered him emotionally unstable had been properly excluded. Similarly, in *R v Horne*<sup>81</sup> the Court ruled that evidence of personal vulnerability or pliancy had been correctly ruled out.

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<sup>74</sup> [1982] 1 All ER 801.

<sup>75</sup> [1987] All ER 771.

<sup>76</sup> [1978] AC 705.

<sup>77</sup> Lord Lane CJ expressly excluded transitory, self induced factors such as drink or drugs.

<sup>78</sup> In *DPP v Camplin* [1978] AC 705 the House of Lords held that the jury may take into account those characteristics of the accused which bear on the gravity of the provocation to him.

<sup>79</sup> (1996) 2 Cr App Rep 157.

<sup>80</sup> [1994] Crim LR 353.

<sup>81</sup> [1994] Crim LR 584.

2.68 In *R v Hasan*,<sup>82</sup> the House of Lords noted that “the relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant’s perceptions and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions.”

2.69 In relation to proposed reform on the issue, the Law Commission recommended in 1977 that the threat must be such that the defendant could not reasonably be expected to resist it in all the circumstances of the case, including the nature of the offence, the defendant’s belief as to the threat, and any other relevant personal circumstances. The Law Commission took the view that “threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person.”<sup>83</sup>

2.70 The substance of this recommendation was incorporated into the Law Commission’s draft *Criminal Code Bill* in 1985<sup>84</sup> with the modification that the phrase “personal characteristics that affect [the] gravity [of the threat]” was considered to be more precise than “any of his personal characteristics which are relevant.”<sup>85</sup>

2.71 In the Law Commission’s *Report on a Criminal Code* in 1989, most of the recommendations followed the Law Commission’s earlier recommendations.<sup>86</sup> The main test remained the question of whether the “threat is one which in all the circumstances (including any of his personal circumstances that affect its gravity) he cannot reasonably be expected to resist”.<sup>87</sup> This would allow evidence of an individual’s personal vulnerability to be considered by the jury. The Law Commission restated its view that a reasonableness requirement should not be imposed in relation to the accused’s perception of the surrounding circumstances. It was argued that it was important to bring the law on duress in line with the law on self defence and with the general policy of the Criminal Code that reasonableness should be a matter of evidence only. It is notable, therefore,

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<sup>82</sup> [2005] 4 All ER 685, 695. See paragraph 2.15 above.

<sup>83</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977) at paragraph 2.28.

<sup>84</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law A Report to the Law Commission* (No 143 1986) at paragraph 13.15 to 13.24. Clause 45 *Draft Criminal Code Bill 1985*.

<sup>85</sup> See clause 1(3) of the Draft Bill.

<sup>86</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill* and *Volume 2: Commentary on Draft Criminal Code Bill* (No 177 1989).

<sup>87</sup> Clause 42(3)(b) *Draft Criminal Code Bill*.

that in reducing the significance of the objective element in the above two respects, the Commission's views run counter to the *dicta* of the Court of Appeal in *Graham*.

2.72 In 1993 the Commission again examined the area of duress, in the Report on the *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles*.<sup>88</sup> It identified certain areas of particular concern, two of which were relevant to the threat. The first, as noted below, was whether the actor's belief in the existence, nature or seriousness of the threat must be reasonably held.

2.73 The second question addressed was whether the "reasonable steadfastness" requirement should be retained. The recommendation of the Commission in this regard remained unchanged from 1985, namely, that the threat/danger was one "which in all the circumstances (including any of the defendant's personal characteristics that affect its gravity) he cannot reasonably be expected to resist." The Commission argued that to deny the defence to the "objectively weak" would be futile and would also be inconsistent with the purpose of the defence not to enforce unrealistically high standards of behaviour.

2.74 In a recent Law Commission Consultation Paper<sup>89</sup> the Law Commission noted, in the light of its provisional recommendation that duress be made available as a partial defence to "first degree murder,"<sup>90</sup> that the relevance of characteristics should be pared down in order to achieve consistency with the recommendations that it makes on the partial defence of provocation. Thus, the Law Commission recommends that the defendant's age and "all the circumstances of the defendant other than those which bear on his capacity to withstand duress" would be relevant for the purpose of the objective test in *R v Graham*.<sup>91</sup> Thus, the 'firm proposal' of the Law Commission as regards the effect of the threats on the defendant is as follows; "In deciding whether a person of reasonable firmness would have acted as the defendant did, the jury can take into account all the circumstances of the defendant including his age other than those which bear upon his capacity to withstand duress."<sup>92</sup>

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<sup>88</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993).

<sup>89</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005).

<sup>90</sup> See paragraph 3.27-3.30 below.

<sup>91</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005) at paragraph 7.39.

<sup>92</sup> *Ibid* at paragraph 7.2.

**(b) Perception of the Threat**

2.75 In *R v Graham*<sup>93</sup> the Court of Appeal imposed another significant objective requirement in relation to duress, namely, that a defendant cannot rely on an unreasonable belief of fact in order to establish the defence. The jury should be directed to enquire as to whether “the [defendant] was impelled to act as he did because, as a result of what he *reasonably* believed [the duressor] had said or done, he had *good cause* to fear that if he did not so act [the duressor] would kill him or ... cause him serious injury”.<sup>94</sup> This requires defendants first, to place a reasonable interpretation on the words or actions of the duressor and, secondly, even if they satisfy this requirement, the impression so formed must constitute adequate grounds for their fear of death or serious injury.

2.76 This principle has been repeatedly followed by the Court of Appeal in England, with some exceptions.<sup>95</sup> Thus, in *R v Cairns*<sup>96</sup> the Court held that the relevant question for the jury was the reasonableness of the defendant’s perception of the threat not the existence in actual fact of the threat.

2.77 In *R v Hasan*<sup>97</sup>, the trial judge put the following question to the jury: “Was the defendant driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not burgle [the] house, his family would be seriously harmed or killed?”<sup>98</sup> In the House of Lords, this question was not challenged by the appellant, but Lord Bingham makes reference to the formulation of *R v Graham* and *R v Howe* in relation to belief and notes that this formulation is followed in the present case save in one respect. He went on to note that the trial judge had, “very properly,” based his judgment on the Judicial Studies Board’s specimen direction of August 2000, thus including the words “genuinely believed” as opposed to “reasonably believed”. Lord Bingham noted that while it is essential that the threats are genuinely, that is actually, believed, “there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine.”<sup>99</sup>

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<sup>93</sup> [1982] 1 All ER 801.

<sup>94</sup> *Ibid.*, 806. Emphasis added.

<sup>95</sup> See for example *DPP v Rogers* [1998] Crim LR 202.

<sup>96</sup> [1999] Crim LR 826.

<sup>97</sup> [2005] 4 All ER 685.

<sup>98</sup> *Ibid.*, 691.

<sup>99</sup> *Ibid.*, 696.

2.78 In 1993 the Law Commission of England and Wales examined the defence of duress, as part of a report on offences against the person.<sup>100</sup> It identified certain areas of particular concern, two of which were relevant to the threat. First, must the actor's belief in the existence, nature or seriousness of the threat be reasonably held? The Law Commission reiterated its previous view that a defendant should be entitled to rely on an honest, but unreasonable belief and that reasonableness should be an evidential consideration only. In so doing, it observed that this would bring the law on duress in line with recent judicial developments and with the general policy of the proposed legislation as a whole.<sup>101</sup> The second question which was addressed in this Report was whether the "reasonable steadfastness" requirement should be retained and this is discussed above.

2.79 In the more recent Law Commission Consultation Paper, *A New Homicide Act for England and Wales?*,<sup>102</sup> the Law Commission addresses the need for the defendant's view of the nature of the threat to be objectively reasonable. It is noted that the previous opinion of the Law Commission was that the belief had to be honest, but not necessarily reasonable. In this Consultation Paper, the Law Commission reconsiders this and notes that "there must be a reasonable basis for a belief in death or life-threatening harm."<sup>103</sup>

### (3) *Canada*

#### (a) *Steadfastness and Perception of the Defendant*

2.80 Section 17 of the Canadian Criminal Code requires a belief that the threats will be carried out, thus mandating a subjective assessment of the particular accused's belief and consideration of his or her individual strengths and weaknesses. This differs from the English definition because the effectiveness of the threats is tested against the particular defendant rather than the reasonable man.<sup>104</sup> However, Stuart notes that the courts have not always applied the test in a manner faithful to the subjective nature of section 17.<sup>105</sup>

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<sup>100</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993).

<sup>101</sup> *Ibid* at paragraph 29.9.

<sup>102</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005).

<sup>103</sup> *Ibid* at paragraph 7.46.

<sup>104</sup> *R v Howe* [1987] 1 All ER 771.

<sup>105</sup> Stuart *Canadian Criminal Law* (3<sup>rd</sup> ed Carswell 1995) at 432-3 citing *R v Wilcox* (1976) 38 CRNS 40, *R v Smith* (1977) 40 CRNS 390, *R v Bergstrom* (1980) 52 CCC (2d) 407 and *R v Mena* (1987) 34 CCC (3d) 304.

2.81 The Canadian Law Reform Commission (CLRC) in its 1982 Working Paper included a “reasonable response” requirement.<sup>106</sup>

2.82 This requirement would mean that there would be no defence available to accused persons unless their belief in the threats was a reasonable one, thus bringing Canadian law in line with English law. The reasonable response requirement was retained in the later report of the CLRC in 1987.<sup>107</sup>

#### (4) *Australia*

##### (a) *Steadfastness and Perception of the Defendant*

2.83 As already noted, in *R v Hurley and Murray*,<sup>108</sup> various requirements that the accused must meet before he may avail of the defence of duress were set out for the law in Victoria. The requirements relevant to the threat were that:

- the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did;
- the accused reasonably apprehended that the threat would be carried out;
- the threat induced the defendant to commit the crime.

2.84 However, it should be noted that the normative test laid down in *Hurley and Murray* (that the threat was such that it *might* have caused a reasonable person placed in the same situation to take similar action) is a less stringent test than that laid down by the English Court of Appeal in *R v Graham*<sup>109</sup> (which requires the prosecution to prove that a person of reasonable firmness *would* not have responded to the threat in the manner in which the accused did).<sup>110</sup>

2.85 There are considerable differences between the Australian States as to the nature of the test for duress. Under common law and the 1983

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<sup>106</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper 29 1982). See paragraph 3.33 for full text of draft provision.

<sup>107</sup> Law Reform Commission of Canada *Report: Recodifying Criminal Law* (No 30 Volume 1 1986) at 32-33.

<sup>108</sup> [1967] VR 526. See paragraph 2.33 above.

<sup>109</sup> [1982] 1 All ER 801.

<sup>110</sup> The law in New South Wales, on the other hand, reflects the English position in this respect. *R v Abusafiah* (1991) 24 NSWLR 531.

Northern Territory Code,<sup>111</sup> the test for duress is objective so that a precondition to the defence is that a reasonable person placed in the same situation could or would have acted as the accused did. Under the older Codes, however, the test would appear to be subjective. The Tasmanian provision, for example, is couched in completely subjective terms.<sup>112</sup>

2.86 In 2004, in a report on *Defences to Homicide*, the Law Reform Commission of Victoria discussed the objective and subjective tests, and noted that the Law Commission of England and Wales included subjective elements with an objective reasonableness requirement in relation to the accused's response.<sup>113</sup> The 1980 Law Reform Commission of Victoria Report had recommended this approach, as well as the proposal that the jury asked whether the accused was morally culpable, and if not, that he be acquitted.<sup>114</sup>

2.87 In the 2004 Report, the Law Reform Commission of Victoria proposed that an objective test of reasonableness be applied. Therefore a person would only be able to rely on duress if he or she subjectively believed that the conduct was necessary to protect himself or herself or another person or as a reaction to an emergency, and that the conduct itself was an objectively reasonable response to the circumstances as perceived by the accused.<sup>115</sup> This test was proposed in recognition of the importance of imposing stringent controls on the applicability of these defences, if they are extended to murder.<sup>116</sup>

##### (5) *New Zealand*

2.88 In New Zealand there is no requirement that the accused's belief in the threat be reasonable, provided it is genuinely held.<sup>117</sup>

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<sup>111</sup> In the Northern Territory, there are four constituent elements to the defence of duress, namely, a belief that the person making the threat was in a position to execute the threat; a belief that there was no alternative; an ordinary person would have taken the same or similar action; and a requirement that the defendant report the threat to a police officer as soon as was reasonably practicable. Section 40 Criminal Code of the Northern Territory of Australia.

<sup>112</sup> See paragraph 3.45 below.

<sup>113</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at paragraph 3.161.

<sup>114</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>115</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at paragraph 3.158.

<sup>116</sup> *Ibid* at paragraph 3.163.

<sup>117</sup> *R v Raroa* [1987] 2 NZLR 486; Section 24 *Crimes Act 1961*.

**(6) United States**

2.89 The American Law Institute's Model Penal Code draft provisions on duress favour an objective view. The defence is allowed to those who have been subjected to threats which a person of reasonable firmness in that situation would have been unable to resist. The words "in his situation" seem to indicate that certain personal characteristics of the accused should be taken into account. The commentary on the Model Code indicates that "stark tangible factors which differentiate the actor from another like his size or strength or age or health would be considered" although matters of temperament would not.<sup>118</sup> In this regard, the Model Penal Code adopts a position very similar to that currently pertaining in England as outlined in *R v Graham*.<sup>119</sup>

**(7) Discussion**

**(a) Reasonable Response**

2.90 It is the settled policy of the criminal law to limit the availability of the criminal law defences by using an objective test. This prevents those who lack powers of self control, or who (in the case of duress) may be particularly cowardly, from obtaining the benefit of them. Clearly the law should maintain high standards in order to prevent people from giving way to their fears at the expense of innocent victims.

2.91 However, it has been argued that the law should not enforce unrealistically high standards of behaviour.<sup>120</sup> The impact of threats which are visited upon a "weak, immature or disabled" person is much greater. It has been further suggested that to deny the defence to the "objectively weak" would be ineffectual as a means of law enforcement.<sup>121</sup>

2.92 Duress differs from other defences such as provocation in that the defence fails from the beginning if threats of death or serious harm cannot be established. It has been suggested that if the minimum threshold requirement of death or serious harm and the reasonable belief element in same are satisfied, the requirement of reasonable fortitude is superfluous.<sup>122</sup>

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<sup>118</sup> American Law Institute *Commentary on Tentative Draft No. 10 of the Model Penal Code* (1960) 7.

<sup>119</sup> [1982] 1 All ER 801.

<sup>120</sup> The Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles* (No 218 1993) at paragraph 29.14.

<sup>121</sup> *Ibid.*

<sup>122</sup> Smith "Duress and Steadfastness: In Pursuit of the Unintelligible" [1999] Crim LR 363.

2.93 If duress is perceived as excusatory in nature- a concession to human frailty- then it is arguable that account should be taken of the defendant's characteristics. However, it is not appropriate that *all* of a defendant's characteristics should be taken into account as some of these may be morally repugnant, for example, a practising paedophile who has been threatened with serious injury unless he has intercourse with a child.<sup>123</sup> It has been suggested that the *Graham* test can be perceived as unworkable in practice as it is difficult to determine in advance what characteristics of the defendant can be taken into consideration.<sup>124</sup>

2.94 However, if duress is to apply to homicide at any stage, it is imperative that the jury are able to assess the defendant's actions by reference to the standards of the ordinary person, and that is certainly a powerful argument in favour of the requirement.<sup>125</sup> Furthermore it is important that stringent controls are placed on the applicability of the defence, if it is to apply to murder, in order to avoid the defence being raised to readily in this context.

2.95 If a normative standard is preferred, the question remains as to what personal characteristics of the accused should be attributed to the ordinary person. The English case law on duress indicates that age, sex, "serious physical disability" and "medically recognised mental conditions are relevant considerations."<sup>126</sup> The English Law Commission has recommended the amendment of the test to provide that the threat or danger was one "which in all the circumstances (including any of the defendant's personal characteristics that affect its gravity) he cannot reasonably be expected to resist."<sup>127</sup> This is essentially a subjective test which would allow particularly weak or timid defendants who lack ordinary powers of resistance to adduce evidence of their timidity. The Law Commission has more recently proposed a recommendation that 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 out in *R v Graham*.<sup>128</sup>

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<sup>123</sup> Horder "Occupying the moral high ground? The Law Commission on duress" [1994] Crim LR 334 at 342.

<sup>124</sup> Smith "Must Heroes Behave Heroically?" [1989] Crim LR 622 at 626.

<sup>125</sup> See the discussion of the application of duress to homicide in Chapter 3 below.

<sup>126</sup> *R v Bowen* [1986] 2 Cr App Rep 157.

<sup>127</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993) paragraphs 29.11-29.14.

<sup>128</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005) at paragraph 7.2.

2.96 The Commission has provisionally concluded in this respect that the line should be drawn at conditions which affect a defendant's *capacity* to resist threats which would allow the reasonable firmness test to be modified to take account of various mental conditions while excluding particularly timid or pliable individuals.

2.97 *The Commission provisionally recommends that, in establishing whether the response of the accused was a reasonable one, an objective test should be applied.*

**(b) *Belief in the Existence, Nature or Seriousness of the Threat***

2.98 The issue to be addressed here is whether the defendant's belief in the existence/nature or seriousness of the threat is reasonably held. Yeo notes:

“As in the case of self-defence, the threat occasion for the defence of duress may take three possible forms. These are: (i) a threat occasion which can be objectively demonstrated to have existed; (ii) a person's honest albeit reasonable belief as to the existence of a threat occasion and (iii) a person's honest and reasonable belief that a threat occasion existed ... It can be stated with confidence that judges and commentators examining this issue see the choice as being really between the second and third forms of threat occasions.”<sup>129</sup>

2.99 It is arguable that as a matter of public policy, duress should be limited in terms of reasonableness and that this extends to the element of belief in the threats.<sup>130</sup> However, the law on duress in this regard is not consistent with the law on provocation and self defence in Ireland.<sup>131</sup>

2.100 The analogy with self defence breaks down on three levels. First, duress is an excuse and not a justification (like self defence). Thus, society will not excuse a person who has caused harm to an innocent person by acting on an unreasonable or negligent belief. Second, in cases of self defence the decision to retaliate is made in the heat of the moment when the attack is already underway, which is not necessarily so in situations of duress where the threat may be imminent but not immediate. Third, it has been suggested that the reasonableness requirement is out of line with the law on the defence of mistake since *R v Morgan*<sup>132</sup> and more recent decisions of the

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<sup>129</sup> Yeo *Compulsion in the Criminal Law* (The Law Book Company Ltd 1990) at 227.

<sup>130</sup> Elliot “Necessity, Duress and Self Defence” [1989] *Crim. Law Rev* 611 at 614.

<sup>131</sup> See Law Reform Commission *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003), discussing the subjective nature of the test in current Irish law.

<sup>132</sup> [1975] 1 All ER 8.

House of Lords, albeit in the context of proving *mens rea* for certain sex offences.<sup>133</sup>

2.101 It might be suggested that questions of reasonableness should be a matter of evidence only which can be accorded due weight by a jury. In some situations, the more unreasonable the belief, the more likely it is that it was genuinely held. However it is also true that unreasonable beliefs can often be blameworthy and “are usually rejected as implausible, fanciful, disingenuous or the like”.<sup>134</sup> Further, they may indulge prejudice, for example, a person with racist beliefs who considers his or her duressor to be violent purely on the grounds of their race.<sup>135</sup>

2.102 The requirement of reasonably held belief in the existence, nature or seriousness of the threat can be said to be unnecessary in light of the requirement that the accused’s response to the threat was reasonable. The reasonable response requirement does not necessarily mean that a defendant’s appreciation of the circumstances must also be reasonable, as noted by one commentator, who goes on to say that “a person who yields to a strong but imaginary fear may be stupid in imagining it, but he is no more blameworthy than one whose fear is based on reasonable grounds.”<sup>136</sup> He further suggests that the opinions of Archbold, Smith and Hogan and of the Law Commission used by Lord Lane in *R v Graham*<sup>137</sup> are in relation to reasonable fortitude, yet lead his Lordship to the policy statement that appreciation of the factual situation must be reasonable.

2.103 The determination of the conditions which may excuse a defendant who has acted unlawfully is a distinct, (albeit collateral), issue from *mens rea* in which negligence may properly play a role. However, the criminal law usually does not impose liability on the basis of mere negligence. The sole requirement that defenders act honestly ensures that liability is not established by negligence alone.

2.104 In the Commission’s view, a possible solution in this regard is the position adopted by the Australian courts where the test is what the accused reasonably believed as opposed to what a reasonable person in the situation would have believed. The question is therefore not whether an ordinary person would have held the mistaken belief which the defendant held, but

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<sup>133</sup> *B (a minor) v DPP* [2000] 2 AC 428; *R v K* [2002] 1 Cr App Rep 13. See McAuley “Beckford and the Criminal Law Defences” (1990) 41 *Northern Ireland Legal Quarterly* 158.

<sup>134</sup> McAuley “Beckford and the Criminal Law Defences” (1990) 41 *NILQ* 158.

<sup>135</sup> Horder “Occupying the moral high ground? The Law Commission on Duress” [1994] *Crim LR* 334 at 341.

<sup>136</sup> Elliot “Necessity, Duress and Self Defence” [1989] *Crim LR* 611 at 615.

<sup>137</sup> [1982] 1 All ER 801.

rather whether an ordinary person with the accused's characteristics (including intellectual disability) would have formed such an opinion. This solution is consistent with the concept of duress as an excuse.<sup>138</sup> The English courts have attempted to make the objective test a high priority, in order to avoid slipping into the subjective.

2.105 A further consideration arises if a subjective formulation were to be adopted. It is possible to distinguish between offences which require subjective *mens rea*, such as intention and recklessness, and those which require a different standard, such as negligence. This argument is advanced by Howard who suggests that for "offences defined exclusively or primarily in terms of intention, recklessness or some other subjectively blameworthy states of mind", a defence of duress should be judged on the facts as the defendant took them to be. He then goes on to suggest that for offences not defined exclusively by these standards a defence of duress should be judged on the facts as the defendant reasonably took them to be. He added that this would be subject to the proviso that, in the case of an offence of criminal negligence, the defendant's view of the facts should be assessed according to the same standard of negligence.<sup>139</sup> The Commission concludes that this is consistent with the current view of the defence of duress.

2.106 *The Commission provisionally recommends 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.*

## **G The Imminence Rule and Official Protection**

2.107 Although the requirements of imminence and of official protection are not synonymous, they are comparable in that if the threat must be imminent, it will occur before the accused can obtain official protection. The Commission therefore discusses them together for convenience.

### **(I) Ireland**

2.108 In *Attorney General v Whelan*<sup>140</sup> it was noted that the threat must be of immediate death or serious violence. It was further noted that the defence of duress will only be available if there was no "reasonable opportunity for the will [of the defendant] to reassert itself".

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<sup>138</sup> Yeo *Compulsion in the Criminal Law* (The Law Book Company 1990) at 230.

<sup>139</sup> Fisse *Howard's Criminal Law* (5<sup>th</sup> ed The Law Book Company 1990) at 552-3.

<sup>140</sup> [1934] IR 518, 526. See paragraph 2.03 above.

## (2) *England*

2.109 The requirement of immediacy in duress has been interpreted expansively in English law so that this element of the defence now equates more precisely with “imminence”. Similarly, defendants must believe that the threat will be executed before they can obtain official protection. This requirement was first laid down in *R v McGrowther*<sup>141</sup> where Lee CJ noted, in relation to a charge of treason, that “the only force that doth excuse, is... present fear of death; and his fear must continue all the time the party remains with the rebels.”<sup>142</sup> Modern case law, however, has placed an expansive interpretation on this requirement.

2.110 In *R v Hudson and Taylor*,<sup>143</sup> two teenage girls, aged 17 and 19, 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 some associates of the accused before the trial. One of the men who had threatened them was in fact present in the public gallery at the trial. The trial judge withdrew the defence of duress 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. The Court reiterated that the threat must be effective at the moment when the crime was committed but with the important qualification that when there was no opportunity for delaying tactics at the moment of decision, 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.

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<sup>141</sup> (1746) 18 St Tr 391.

<sup>142</sup> *Ibid.*

<sup>143</sup> [1971] 2 QB 202. The circumstances in *Hudson and Taylor* are comparable to those in *The People (DPP) v Amanda McNamara*, Circuit Criminal Court, 7 February 2006, Irish Times, 8 February 2006. The defendant had given a statement to the Garda Síochána implicating a person, Liam Keane, in a death. At the subsequent murder trial of Liam Keane, the defendant was called as a prosecution witness but contradicted her earlier statement saying that she no longer could stand over its contents as she no longer remembered the events surrounding the murder, as she had been so high on drink and drugs at the time: arising from this and similar actions by other witnesses, the murder trial collapsed. The defendant was then charged with perjury. She pleaded guilty to the charge, but at sentencing her counsel was reported to have argued that she had been subject to a “campaign of fear and intimidation.” Duress was not raised in this case by way of defence, but it is notable that it was argued in mitigation at the sentencing stage. At the time of writing, sentencing of the defendant is still awaited, pending hearings involving 2 other perjury cases arising from the collapsed trial.

2.111 In relation to the obligation to seek police protection, the Court held that the defence of duress will not automatically be defeated by a failure to avail of a reasonable opportunity to render the threat ineffective. Instead, the reasonableness of a defendant's conduct should be considered by the jury in the light of their age, circumstances and the risk involved in so acting.

2.112 In *R v Abdul-Hussain*<sup>144</sup> the distinction between immediate and imminent also arose. In that case, the defendants formed the idea on 8 August 1996 to hijack a plane to avoid being deported to Iraq where they feared persecution. On 27 August they hijacked a plane at Khartoum airport which subsequently landed in England where they were charged with offences under the UK *Aviation Security Act* 1982. The trial judge refused to let the defence of duress go to the jury on the basis that the threat was insufficiently close and immediate to give rise to a spontaneous reaction to the risk arising. The Court of Appeal quashed the convictions and held that the trial judge had interpreted the law in this regard too strictly. The Court confirmed *R v Hudson and Taylor* and relied on the distinction between an immediate and an imminent peril 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 the threat need not be immediately in prospect."<sup>145</sup>

2.113 The judgment in *R v Hudson and Taylor* was referred to in *R v Hasan*.<sup>146</sup> Lord Bingham noted that while he understood that the Court of Appeal in that case had sympathy with the predicament of the two young girls, he could not accept that a witness testifying at Manchester Crown Court had no opportunity to avoid complying with a threat made, the execution of which was not possible. He noted that the case has had "the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress."<sup>147</sup> It has been suggested that although *R v Hudson and Taylor* was not expressly overruled in *R v Hasan*, it was "the subject of such disapproving comment as to effectively render the decision no more than a historical anomaly."<sup>148</sup>

2.114 The Law Commission of England and Wales made the following recommendations in its 1977 Report. First, that the defendant must believe that the threat will be carried out immediately, or if not immediately, that

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<sup>144</sup> [1999] Crim LR 570.

<sup>145</sup> *Ibid*, 570.

<sup>146</sup> [2005] 4 All ER 685. See paragraph 2.15 above.

<sup>147</sup> *Ibid*, 698.

<sup>148</sup> Ryan & Ryan "Resolving the Duress Dilemma: Guidance from the House of Lords" (2005) 56 NILQ 421 at 427.

there was no real opportunity open to him or her to seek official protection and that there is no other way of avoiding the harm, and second, that the effectiveness of the official protection available, in fact or in the defendant's belief, is immaterial.<sup>149</sup>

2.115 This recommendation was incorporated into the Law Commission's Criminal Code Bill in 1985, with some modifications.<sup>150</sup> For example, the phrase "before he can obtain official protection" was substituted for "real opportunity of seeking official protection", in order to emphasise that the issue was whether defendants had been able to make actual contact with the authorities rather than whether they had a chance to look for official assistance.<sup>151</sup> It is also noteworthy that the 1985 Code questioned the view taken by the Law Commission as to the efficacy of police protection, although it did not go so far as to alter the 1977 provisions in this regard.<sup>152</sup>

2.116 In 1989, the Law Commission again referred to this point in its Report on a Criminal Code.<sup>153</sup> In line with the 1977 proposals, Clause 42(4) provides that it is immaterial that the defendant believes that official protection will or may be ineffective.

2.117 The effectiveness of official protection was one of the specific issues considered by the Law Commission in its 1993 report, *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles*.<sup>154</sup> The Law Commission reconsidered its previous position on this aspect of the defence and recommended the removal of their earlier clause to the effect that the belief of the accused that the authorities cannot provide adequate protection should be immaterial. Their reasoning in this regard appears to be based primarily on a conviction that this would be inconsistent with the general approach of the rest of the defence. Further, it

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<sup>149</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977) at paragraph 2.46.

<sup>150</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law* (No 143 1986) at paragraph 13.15 to 13.24. *Draft Criminal Code Bill 1985* clause 45.

<sup>151</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law* (No 143 1986) at paragraph 13.15 to 13.24. *Draft Criminal Code Bill 1985* clause 45. See clause 1(3) of the draft Bill.

<sup>152</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law* (No 143 1986) at paragraph 13.18.

<sup>153</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill* and *Volume 2: Commentary on Draft Criminal Code Bill* (No 177 1989).

<sup>154</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993).

was noted that this was the view favoured by the Criminal Code Team, by the Court of Appeal in *R v Hudson and Taylor* and by the weight of opinion on consultation.

(3) *Canada*

2.118 The most significant restriction on the operation of the defence in Canadian law had been the requirement that existed until 2001 that the threat must be “immediate” and the person making the threats must be “present”. The Canadian courts interpreted this requirement strictly requiring that the accused be within the physical control of the duressor at the time the threat is issued. In *R v Carker (No. 2)*<sup>155</sup> the Supreme Court of Canada rejected duress as a defence to wilful damage by a prison inmate where threats of bodily harm were made by prisoners locked in separate cells. This was done on the basis that the threats were neither immediate nor made by persons actually present. The decision was criticised by Canadian academics<sup>156</sup> and was in stark contrast to English law as set out in *R v Hudson and Taylor*.<sup>157</sup>

2.119 The requirement was overturned in 2001 in *R v Ruzic*.<sup>158</sup> The Supreme Court of Canada 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 the defence of duress to be relied upon, was contrary to section 7 of the Canadian Charter of Rights and Freedoms, by virtue of its restriction in scope. The Court pointed out that “a threat will seldom meet the immediacy criterion if the threatener is not physically present at or near the scene of the offence”<sup>159</sup> but held that by the strictness of its conditions, section 17 breaches section 7 of the *Charter* because it allows individuals who acted involuntarily to be declared criminally liable.

2.120 In 1982, the Canadian Law Reform Commission had, in a Working Paper on *Criminal Law: The General Part- Liability and Defences*, noted that one of the main difficulties with the law on duress as it stood in Canada was that the requirement of immediacy arguably rendered superfluous the further requirements that the accused is not a party to a criminal conspiracy and that the duressor be present. Therefore in its draft provisions it removed from section 17 the phrase “person who is present when the offence is committed” as in the Commissions view, in order for the threat of harm to be immediate the harm must be threatened by a person

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<sup>155</sup> [1967] SCR 114.

<sup>156</sup> See Stuart *Canadian Criminal Law* (3<sup>rd</sup> ed Carswell 1995) at 397.

<sup>157</sup> [1971] 2 QB 202.

<sup>158</sup> [2001] 1 SCR 687.

<sup>159</sup> *Ibid* at paragraph 53.

actually or constructively present.<sup>160</sup> In its later Report on *Recodifying Criminal Law* the Canadian Law Reform Commission also recommended the removal of the need for the threatener's presence at the crime. This was justified on the basis that "both are factors going ultimately to the reasonableness or otherwise of the accused's response."<sup>161</sup>

#### (4) *Australia*

2.121 The actual presence of the duressor would appear to be a necessary precondition under the Western Australian and Tasmanian Codes, although not at common law, or in the other Australian codes.

2.122 Under Australian common law there is no requirement that the threatener be present at the time the offence is committed.<sup>162</sup> Further, the threats need not be of immediate harm if all the other requirements, as laid out in *R v Hurley and Murray*,<sup>163</sup> are met.

2.123 The Law Reform Commission of Victoria, in its 1977 *Report on Duress, Necessity and Coercion* recommended that the harm need not be immediate, but imminent and impending, or before the accused could seek official protection, and the defence remains open to those who believe that such protection would offer no real protection from the harm.<sup>164</sup> In the 2004 *Report on Defences to Homicide*, no reference was made to an immediacy requirement, and the official protection requirement is covered by the recommendation that the accused must believe that there is no other way that the threat can be rendered ineffective other than that action which the accused takes.<sup>165</sup>

#### (5) *New Zealand*

2.124 Because the law of duress in New Zealand is so similar to the law in Canada, the same limitations exist in relation to immediacy as existed in Canada before *R v Ruzic*.<sup>166</sup> Two of the most significant limitations in the provisions dealing with duress are found in the requirements in section 21(1)

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<sup>160</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper 29 1982) at 84-91.

<sup>161</sup> Law Reform Commission of Canada *Report: Recodifying Criminal Law* (No 30 Volume 1 1986) at 33.

<sup>162</sup> *R v Williamson* [1972] 2 NSWLR 281.

<sup>163</sup> [1967] VR 526, discussed at paragraphs 2.33 and 2.83 above.

<sup>164</sup> Victorian Law Reform Commission *Duress Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>165</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at Recommendation 14.

<sup>166</sup> [2001] 1 SCR 687. See paragraph 2.118 above.

of the *Crimes Act 1961* that the threats be of “immediate” harm “from a person who is present when the offence is committed”. Their importance is highlighted by the fact that many of the reported cases of compulsion which have come before the Court of Appeal have failed on one of these grounds.

2.125 In *Salaca v The Queen*<sup>167</sup> the defendant claimed that he had committed bigamy in response to a threat from his prospective wife that if he did not marry her she would get a witch doctor to do something to him. The Court of Appeal held that there was no compulsion, despite evidence of the defendant’s belief in the witch doctor’s supernatural powers, principally on the basis that there was no evidence that any “immediate” harm was threatened.

2.126 In *R v Joyce*<sup>168</sup> the presence requirement proved fatal to the defence. The defendant had agreed with another person to rob a petrol station but tried to withdraw when the other person involved revealed that he was going to use a rifle to accomplish his object. At this point his partner threatened to shoot him if he did not go through with the plan and the accused complied by acting as lookout during the robbery. The difficulty arose from the fact that at the time when the accused was committing the offence, his duressor was inside the building and it could not be said that he was being threatened by a person “present”. This is a very strict interpretation of the requirement and one which operates as a significant limitation on the defence in New Zealand. As Orchard remarks, the Court’s interpretation of the section effectively involves reintroducing the word “actually” which had been deleted from the Criminal Code in 1961.<sup>169</sup>

2.127 Finally, in *R v Teichelman*<sup>170</sup> the Court of Appeal confirmed that section 24(1) of the *Crimes Act 1961* anticipated situations where the duressor physically “stood over” the accused while committing the crime:

“The subsection is directed essentially at what are colloquially called standover situations where the accused fears that instant death or grievous bodily harm will ensue if he does not do what he is told. It follows from what we have said that before the matter can go to a jury there must be evidence of a continuing threat of immediate death or grievous bodily harm made by a person who is present while the offence is being committed and so

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<sup>167</sup> [1967] NZLR 421.

<sup>168</sup> [1968] NZLR 1070.

<sup>169</sup> Orchard “The Defence of Compulsion” (1980) 9 New Zealand Universities Law Review 105 at 115.

<sup>170</sup> [1981] 2 NZLR 64.

is in a position to carry out the threat or have it carried out then and there.”

2.128 However, a degree of doubt has been cast upon the validity of the requirement that the duressor be present at the time of the offence in New Zealand, as a result of the Canadian case of *R v Ruzic*.<sup>171</sup> Because the New Zealand Code is so similar to the Canadian Code, there is a possibility that this requirement, like its Canadian equivalent, could be rendered invalid.

**(6) United States**

2.129 There is no requirement of immediacy or imminence in the American Law Institute’s Model Penal Code.<sup>172</sup>

**(7) Discussion**

2.130 It appears that in general a threat of harm which may not follow instantly but after an interval will suffice for the defence of duress. The strict interpretation of this requirement in Canada and New Zealand has acted as a significant limitation on the operation of the defence in practice and has attracted considerable academic criticism.<sup>173</sup> The distinction between an immediate and an imminent threat as drawn by the English Court of Appeal in *R v Hudson and Taylor* has been reaffirmed in *R v Abdul-Hussain*<sup>174</sup> in which it was held that the threat need only be imminent. It is particularly significant that in *R v Ruzic*<sup>175</sup> the Supreme Court of Canada has declared that the stringent requirements of presence and immediacy in the Canadian provisions on duress should be struck down as contrary to the Canadian Charter of Fundamental Rights. Further, it is apparent that the pressure that is brought to bear on an accused could be just as great in cases whether the injury may take place later in time as in situations where the threat is of immediate injury. The Commission concurs with the view in *R v Abdul-Hussain*, that:

“If Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of 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>176</sup>

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<sup>171</sup> [2001] 1 SCR 687.

<sup>172</sup> American Law Institute Model Penal Code 1962 section 2.09.

<sup>173</sup> Orchard “The Defence of Compulsion” (1980) 9 New Zealand Universities Law Review 105 at 115; Stuart *Canadian Criminal Law* (3<sup>rd</sup> ed Carswell 1995) at 397.

<sup>174</sup> [1999] Crim LR 570

<sup>175</sup> [2001] 1 SCR 687.

<sup>176</sup> [1999] Crim LR 570.

2.131 The requirement that the defendant must avail of any official protection open to him or her poses the further question of whether a defendant's subjective belief in the ineffectiveness of the authorities should give rise to liability. The Law Reform Commission of Victoria has linked the question of immediacy to the issue of resort to official protection by recommending a formulation that "the person believed that the harm threatened was likely to occur immediately if the person threatened did not take the action in question or if not immediately before he could have any real opportunity of seeking official protection".<sup>177</sup> Thus, the existence of a reasonable avenue of escape would mean that the threat could not be considered imminent.

2.132 In the Commission's view a person's belief that he or she cannot be protected goes to the heart of the issue surrounding his or her freedom of action. This approach is consistent with the underlying rationale of the approach to act as a concession to human frailty.

2.133 It is true that in some circumstances, for example, domestic violence, official protection may well prove ineffective. In the Commission's view, however, it should not be left solely to the jury to consider whether the defendant believed the protection would be effective. This would involve difficult collateral issues, which may be very broad in scope and there is also a significant danger of misuse of the defence.

2.134 The Commission has concluded in this respect that it is essential that the defence of duress should not be used as a means of undermining the laws on perjury and contempt of court. A normative approach would nearly always preclude the defence in situations where a person is compelled to commit perjury.

2.135 *The Commission provisionally recommends that while the threat should be imminent, no requirement of immediacy should exist in relation to the harm threatened.*

2.136 *The Commission provisionally recommends that the person threatened should be required to seek official protection if possible but that a failure to do so will not automatically preclude the availability of the defence.*

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<sup>177</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980) at paragraph 4.19.

## **H Exposure to Risk of Duress**

### **(1) Ireland**

2.137 The defence of duress is generally regarded as not being available to defendants who have knowingly exposed themselves to the threat, for example, by voluntarily joining a criminal organisation which subsequently puts pressure on them to commit offences. This is an important limitation on the defence in practice.

2.138 There does not appear to be any Irish authority on this issue and *Attorney General v Whelan*<sup>178</sup> makes no reference to it.

### **(2) England**

2.139 In *R v Hasan*,<sup>179</sup> the question put forward for consideration by the House of Lords on appeal was as follows:

“Whether the defence of duress is excluded when, as a result of the accused’s voluntary association with others:

(i) he foresaw (or possibly should have foreseen) the risk of being subjected to *any compulsion* by threats of violence;

(ii) only when he foresaw (or should have foreseen) the risk of being subjected to compulsion to *commit criminal offences*; and, if the latter;

(iii) only if the offences foreseen (or which should have been foreseen) were of the *same type* (or possibly of the same type and gravity) as that ultimately committed.”<sup>180</sup>

2.140 Lord Bingham rejected the defendant’s argument that options (ii) and (iii) were correct holding that “nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant’s subservience.”<sup>181</sup> It was held that the defence of duress is excluded when, as a result of the accused’s voluntary association with others engaged in criminal activity, he foresaw, or ought reasonably to have foreseen, the risk of being subjected to *any compulsion* by threats of violence.<sup>182</sup>

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<sup>178</sup> [1934] IR 518. See paragraph 2.03 above.

<sup>179</sup> [2005] 4 All ER 685. See paragraphs 2.15-2.17 above.

<sup>180</sup> *Ibid*, 699.

<sup>181</sup> *Ibid*, 702.

<sup>182</sup> *Ibid*, 703. It is also worth noting that in Baroness Hale’s judgment, she expressed concern about how this limitation might impact on victims of domestic crime and noted that this limitation on the defence is not aimed at battered wives, or those in close personal or family relationships with their duressors. However, she said that the

2.141 The House of Lords in *R v Hasan* relied on a number of authorities on this point, the first of which is the decision of the Northern Ireland Court of Appeal in *R v Fitzpatrick*.<sup>183</sup> In *R v Fitzpatrick*, the accused pleaded duress to a robbery charge on the basis that the IRA had forced him to commit the crime. He had voluntarily joined the IRA some years previously. The Court rejected his defence on the basis that a defendant who has recklessly exposed himself to the risk of being subjected to coercive pressure forfeits the right to invoke duress in order to “put on when it suits him the breastplate of righteousness.” Indeed, if the Court had accepted the defence, then the better organised the conspiracy and the more brutal its internal discipline, the more confident members of the group may be of relying on the defence of duress and it could hardly be supposed that the criminal law tolerates such an absurdity. This principle was extended in *R v Calderwood and Moore*<sup>184</sup> to a situation where the accused claimed he did not join the organisation voluntarily but had voluntarily associated with a group of people who were engaged in criminal and violent activities. The Court reasoned that he had thereby exposed himself to the risk of compulsion to join the group and the concomitant risk of compulsion to commit criminal acts.

2.142 In *R v Sharp*<sup>185</sup> the defendant was part of a group who carried out a series of armed robberies on sub post offices. He claimed that he panicked when he saw that guns were to be used in the course of one robbery and expressed a desire to withdraw, but another one of the robbers threatened to “blow his head off” if he did not carry on with the plan. In the course of the robbery a postmaster was killed by one of the robbers. Sharp was convicted of manslaughter and appealed. The Court of Appeal relied on the opinions of the Law Lords in *DPP for Northern Ireland v Lynch*<sup>186</sup> in reaching the conclusion that persons who voluntarily place themselves in a situation where they are likely to be subject to compulsion cannot subsequently avail of the defence of duress. Although the point did not arise directly in *Lynch*, their Lordships did express the view *obiter* that the prior fault of a defendant in placing themselves in a situation where they could be exposed to duress would defeat duress. The appeal in *Sharp* was accordingly rejected.

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other restrictions on the defence are more than adequate to keep it within bounds in such cases. *Ibid*, 715.

<sup>183</sup> [1977] NI 20.

<sup>184</sup> [1983] NI 361.

<sup>185</sup> [1987] 3 All ER 103.

<sup>186</sup> [1975] AC 653.

2.143 The harshness of this rule was alleviated somewhat by the subsequent decision in *R v Shepherd*.<sup>187</sup> In that case the appellant was a member of a shoplifting gang. After a number of such outings, he wanted to give it up but was threatened with violence to himself and his family by another member of the gang. The Court of Appeal held that his conviction should be overturned as duress had not been left to the jury. Mustill LJ stated:

“Common sense must recognise that there are certain kinds of criminal enterprises the joining of which, in the absence of any knowledge of propensity to violence on the part of one member, would not lead another to suspect that a decision to think better of the whole affair might lead him into serious trouble.”<sup>188</sup>

2.144 Thus, it appears that the defence is not automatically denied to defendants who have voluntarily allied themselves with the persons exercising the duress. The Court will assess the defendant’s knowledge of the methods of the gang and of its members in deciding whether to allow the defence to go to the jury.

2.145 The Law Commission recommended in its 1977 draft provisions on duress that the defence should not be available where the defendant is voluntarily and without reasonable cause in a situation in which he or she knows he or she will or may be subjected to duress.<sup>189</sup> This recommendation was not repeated in the Commission’s later 1993 Report in which it was noted that such a limitation was consistent with case law and its earlier recommendations.<sup>190</sup>

2.146 In the more recent Law Commission Consultation Paper *A New Homicide Act for England and Wales?*,<sup>191</sup> the Law Commission noted that in the light of the recent case of *R v Hasan*,<sup>192</sup> the issue of voluntary exposure to duress has been resolved, and it is quite clear now that a person who has

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<sup>187</sup> (1988) 86 Cr App Rep 47.

<sup>188</sup> *Ibid.*

<sup>189</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977).

<sup>190</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993) at paragraph 29.15.

<sup>191</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005).

<sup>192</sup> [2005] 4 All ER 685. See paragraph 2.15 above.

voluntarily exposed himself or herself to duress will be precluded from relying on the defence.<sup>193</sup>

**(3) Canada**

2.147 Under the Canadian Criminal Code, the defence of duress is not available to those who have voluntarily exposed themselves to the risk of duress. The defence is limited to those who are not “a party to a conspiracy or association whereby the person is subject to compulsion.”<sup>194</sup> However, the phrase “party to a conspiracy or association whereby he is subject to compulsion” can be interpreted to refer to group activity wider than membership of a criminal gang, and would probably extend to the lesser level of association at issue in the Northern Irish decision of *R v Calderwood and Moore*.<sup>195</sup>

2.148 As already noted in relation to immediacy, the Canadian Law Reform Commission has suggested that this requirement renders superfluous the requirement that the accused is not a party to a criminal conspiracy. Therefore, in the draft provision the words “if he is not a party to a conspiracy” were omitted, with the result that where the harm threatened is immediate, duress will be a defence even if the accused has subjected himself to the risk of duress.<sup>196</sup> It is also noteworthy that the later report in 1987 dispensed with the need for the accused’s absence from conspiracy, based on the view that it was a factor going to the reasonableness of the accused’s response.<sup>197</sup>

**(4) Australia**

2.149 One of the requirements laid out in *R v Hurley and Murray*<sup>198</sup> was that the accused can only avail of the defence if he or she did not expose him or herself to the threat by his or her own volition.

2.150 There is disparity between the common law and the Codes in relation to the issue of self induced duress. While the general principle that the protection of the defence does not extend to those who expose

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<sup>193</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005) at paragraph 7.55.

<sup>194</sup> Section 17 Canadian Criminal Code RS 1985 c. C-46; s. 17 RS 1985, c 27 (1st Supp) s. 40.

<sup>195</sup> [1983] NI 361. See paragraph 2.139 above.

<sup>196</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper 29 1982) at 84-91.

<sup>197</sup> Law Reform Commission of Canada *Report: Recodifying Criminal Law Volume 1* (No 30 1986) at 32-33.

<sup>198</sup> [1967] VR 526, discussed at paragraphs 2.33 and 2.83 above.

themselves to the risk of duress is common to all the States, the Code provisions are more stringent than common law. It would appear that none of the Codes, except for the ACT and Commonwealth Codes, require subjective appreciation of the risk, although it has been noted that “it is possible to construe the words ‘enter into’ and ‘by being a party’ as referring only to willing or voluntary participants.”<sup>199</sup>

2.151 The 1977 Report of the Law Reform Commission of Victoria, in its draft provisions, recommended that the defence would not apply if the actor voluntarily, and without reasonable cause, placed himself in the situation when he believed he might be called on to commit the offence, or a similar offence.<sup>200</sup> In the Commission’s later *Report on Defences to Homicide* it recommended that duress should not be available to those who are threatened by or on behalf of a person with whom the accused is voluntarily associating for the purpose of carrying out conduct of the kind carried out. This avoids the possibility of the defence being used by those who kill in the course of criminal activity, and is in line with the ACT and Commonwealth Criminal Codes.<sup>201</sup>

#### (5) *New Zealand*

2.152 In *R v Joyce*<sup>202</sup> the Court of Appeal noted that a literal interpretation of section 24(1) of the *Crimes Act 1961* that the accused “is not a party to any association or conspiracy whereby he is subject to compulsion” would remove the defence from any accused who was a party to any association or conspiracy. But, in that case the Court of Appeal held that this limitation was contingent on whether violence was reasonably foreseeable. The test is therefore whether “the very nature of the association was such that the offender as a reasonable man should have been able to foresee that the association was of a kind that at least rendered it possible that at a later stage he might be made subject to compulsion”.

#### (6) *Discussion*

2.153 Should the fact that a defendant ought reasonably to have foreseen the likelihood of being subjected to threats disbar him or her from the defence or should actual foresight of the risk of compulsion be required?

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<sup>199</sup> O’Connor and Fairall *Criminal Defences* (3<sup>rd</sup> ed Butterworths 1996) at 160.

<sup>200</sup> Victorian Law Reform Commission *Duress Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>201</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at paragraph 3.157 Recommendation 15; section 10.2(3) *Criminal Code Act 1995* (Cth); section 40(3) *Criminal Code 2002* (ACT).

<sup>202</sup> [1968] NZLR 1070.

2.154 It should be reiterated that a defendant who should have availed of a reasonable opportunity to escape the threats cannot seek to rely on the defence. Similarly, the defence is not available where the defendant has voluntarily allied himself with his threateners. The objective/subjective dichotomy also arises in relation to this aspect of the defence - namely, whether the defendant should be held liable on the basis of his personal knowledge of the risk or whether the defence can be denied where the defendant negligently omitted to perceive the propensity of a criminal gang to violence. In many ways the answer to this question follows on from the analogous issue of resort to official protection, as both have in common that the accused had been culpable in allowing the development of the duress. It also bears similarities to the question of reasonable belief, discussed above in relation to the effect of the threat and the defendant's perception thereof.<sup>203</sup>

2.155 The essential question is whether there should be a test based on foresight, which centres on whether the defendant had placed himself in a situation where he or she knows that he or she will be subjected to duress in the future. In the Commission's view this is properly a matter of fact for the jury. As Elliott has pointed out, stupid or particularly naive defendants should not be punished on account of their stupidity. The defendant is no more blameworthy than one whose opinion on the risk of duress has been formed on reasonable grounds.<sup>204</sup>

2.156 Another argument against a test based on foresight is that those who have failed to perceive signals which would alert the ordinary individual to the risk of violence are culpable and should not be allowed to escape liability. As a matter of public policy, the Commission concurs with the view that duress should be limited in terms of reasonableness.

2.157 On the other hand, the Commission acknowledges that society requires a person who joins a criminal organisation to take reasonable care as to the use of violence. A failure to do this should disqualify a defendant from the defence.<sup>205</sup>

2.158 Denying the defence on the grounds that society expects those in a criminal organisation to take reasonable care may act as an added incentive to defendants to escape from the criminal organisation (in addition to the requirement that the defendant must avail of any official protection open to him or her.)<sup>206</sup>

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<sup>203</sup> See paragraphs 2.62-2.106 above.

<sup>204</sup> Elliot "Necessity, Duress and Self Defence" [1989] Crim LR 611 at 615.

<sup>205</sup> Yeo *Compulsion in the Criminal Law* (The Law Book Company 1990) at 174.

<sup>206</sup> *Ibid.*

2.159 *The Commission provisionally 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.*

## **I Marital Coercion**

### **(1) Introduction**

2.160 In this section, the Commission deals with marital coercion, a special defence that was afforded to a married woman who had committed certain crimes in the presence of her husband. This is discussed in the context of duress as it is connected with the defence of duress and its development is certainly linked with the defence of duress. Under the defence of marital coercion, it was presumed that if a woman's husband was present then she had acted under his immediate coercion unless the prosecution could prove that she took the initiative in committing the offence. This defence should be distinguished from the defences of duress and necessity which are of general application. It did not extend to the offences of treason or murder, nor to brothel-keeping as this latter offence was believed to pertain to the governance of the home.

2.161 It would appear that the presumption was first developed in the Middle Ages to mitigate the effects of the rule denying the benefit of clergy to women.<sup>207</sup> However, the benefit of clergy was in fact extended to women in 1692 and it has been suggested that the rule has survived for at least twelve centuries.<sup>208</sup>

### **(2) The Defence**

#### **(a) Ireland**

2.162 The law in this country in relation to the presumption of marital coercion was put beyond doubt in the case of *State (DPP) v Walsh and Conneely*<sup>209</sup>, a contempt case which arose out of the well known capital murder case of *People (DPP) v Murray*<sup>210</sup>. The Murrays had been sentenced to death by the Special Criminal Court. The two defendants, Walsh and Conneely, were members of an organisation called the Association for Legal

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<sup>207</sup> The benefit of clergy was originally a provision by which clergymen could claim that they were outside the jurisdiction of the secular courts and be tried instead under canon law.

<sup>208</sup> Coughlin "Excusing Women" (1994) Cal L Rev 1.

<sup>209</sup> [1981] IR 412.

<sup>210</sup> [1977] IR 360.

Justice and had issued a press statement commenting on the Special Criminal Court's trial and conviction of the Murrays. The statement commented that the Special Criminal Court lacked judicial independence and that, in trying the Murrays, it had "so abused the rules of evidence as to make the court akin to a sentencing tribunal". The defendants were tried for contempt and convicted and they then appealed to the Supreme Court. The issue of marital coercion was raised as the second named accused claimed that the statement referring to the Court as a sentencing tribunal was inserted in the article at her husband's suggestion.

2.163 Henchy J held that the facts were clearly capable of rebutting the presumption of coercion but noted that in any event the doctrine was no longer extant in the State. He noted that the *raison d'être* for the rule "had been swept away by legislation and judicial decisions" and that the presumption "presupposes a disparity in status and capacity between husband and wife which runs counter to the normal relations between a married couple in modern times." Most significantly, however, he held that the rule had not survived the enactment of the Constitution as it offended the concept of equality before the law in Article 40.1:

"A legal rule that presumes, even on a *prima facie* and rebuttable basis, that a wife has been coerced by the physical presence of her husband into committing an act prohibited by the criminal law, particularly when a similar presumption does not operate in favour of a husband for acts committed in the presence of his wife, is repugnant to the concept of equality before the law guaranteed by the first sentence of Article 40, s 1, and could not, under the second sentence of that Article, be justified as a discrimination based on any difference of capacity or of social function as between husband and wife. Therefore, the presumption contended for must be rejected as being a form of unconstitutional discrimination."

2.164 It is clear that the decision in *State (DPP) v Walsh and Conneely* is that the defence of marital coercion did not survive the enactment of the Constitution. This would preclude the enactment of a statutory defence of marital coercion similar to that which exists in England.

**(b) *England***

2.165 Abolition of the presumption of marital coercion was advocated as early as 1845.<sup>211</sup> The complete abolition of the defence - with the result that wives would be placed in the same position as other defendants - was

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<sup>211</sup> *Report of the Criminal Law Commissioner (1845) Parl Pa xxiv 114.*

recommended by the Avory Committee,<sup>212</sup> and this was implemented by section 47 of the *Criminal Justice Act 1925* which provides:

“Any presumption of the law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.”

2.166 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, on the balance of probabilities, that she was subject to coercion. However the provision has caused some interpretation problems, the question being whether this statutory defence is in fact a synonym for the defence of duress or whether it constitutes something wider than duress. It has been noted that during the parliamentary debate surrounding the enactment of the legislation, opinion was expressed that coercion included moral and spiritual, not just, physical coercion, thereby allowing the new statutory defence to constitute something wider than duress. However, if coercion were to mean something more than duress, it appears odd that it would not be defined as such in the legislation.<sup>213</sup>

2.167 In *R v Shortland*<sup>214</sup> it was held that the wife must prove that her will was overborne by the wishes of her husband, and that there was no need for proof of physical force or the threat of physical force, for the proof of moral force would suffice. In this case, the court referred to *R v Richmond and Richmond*<sup>215</sup> in which it was also found that moral coercion would suffice. Coercion is thus a wider defence than duress and in fact is available to wives in addition to that general defence.

2.168 While the rationale for granting a wider defence to wives appears to be that a wife needs this extra protection, the Avory Committee of 1922 was not of this opinion, and Stephen points out that it is quite absurd to allow more protection to a wife than to a daughter of 15.<sup>216</sup>

2.169 Williams points out that two parts of the old law retain their significance in the new statutory defence. First, the defence is available only

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<sup>212</sup> Avory Committee *Report on the Responsibility of the Wife for Crimes Committed under the Coercion of the Husband* (1922) Cmd 1677.

<sup>213</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 764-768.

<sup>214</sup> (1996) 1 Cr App R 116.

<sup>215</sup> [1982] Crim LR 507.

<sup>216</sup> Stephen *A History of the Criminal Law of England* (Macmillan 1883) Vol II at 106.

to a “wife”, but he notes that it is not necessary for a marriage to be strictly proved.<sup>217</sup> However, in *R v Ditta, Hussain and Kara*,<sup>218</sup> the court found that the man and woman must be husband and wife in the strict sense of the terms. Second, the crime must have been committed in the presence of the husband, though the interpretation of this has been loose enough to allow a wife to plead the defence even when the husband was not in the same room.<sup>219</sup>

2.170 The abolition of the defence was recommended by the Law Commission in its 1977 *Report on Defences of General Application*.<sup>220</sup> There were several reasons for this, including the following:

- There are uncertainties surrounding the operation of the defence, for example, in relation to the strictness of the requirement in law that the husband be physically present when the wife commits the offence;
- There are very few instances of the defence being invoked;
- The defence is ill-suited to modern conditions. Many married women are now financially independent from their husbands;
- It is absurd to provide a special defence to wives which is not available to other women who may be placed in an equally vulnerable position, such as a woman living with a man as his common law wife, or a dependant daughter of 17 years.

2.171 As yet however, no move has been made to abolish this defence in England, which has been described by some as a “relic of the past which ought to have been abolished long ago.”<sup>221</sup>

### **(c) Other Jurisdictions**

2.172 The common law presumption of coercion has been abolished in the majority of common law jurisdictions, many of which now seem to place the wife in the same position as other accused persons.

#### **(i) Canada**

2.173 The presumption was abolished in Canada as far back as 1892 with the enactment of the first Criminal Code.<sup>222</sup> In the Canadian Law

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<sup>217</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 765.

<sup>218</sup> [1988] Crim LR 42.

<sup>219</sup> *R v Connelly* (1829) 2 Lew 229, 168 ER 1137.

<sup>220</sup> The Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977).

<sup>221</sup> Smith and Hogan *Criminal Law* (11<sup>th</sup> ed Butterworths 2005) at 242.

Reform Commissions 1982 Working Paper,<sup>223</sup> it was noted that draft legislation to recodify the criminal law should omit the reference to the fact that no presumption of marital coercion exists, on the basis that the old common law rule had been abolished in the Criminal Code, and it would not be relevant to mention it in a revised code. In the later Report on Recodifying Criminal Law there was no mention of the presumption, or its abolition.<sup>224</sup>

**(ii) New Zealand**

2.174 The common law presumption of marital coercion was abolished in New Zealand by section 44 of the *Crimes Act 1908*, as amended by s24 *Crimes Act 1961*.

**(iii) Australia**

2.175 There is some disparity in the Australian states in relation to their treatment of the presumption of marital coercion. New South Wales was the first state to abolish the rule in 1900<sup>225</sup> and created in its place a rule similar to the English defence. Victoria abolished the presumption in 1958, and also created a similar defence to the English one.<sup>226</sup> This statutory defence is not subject to the interpretation difficulties of the English one however.<sup>227</sup> Queensland and Western Australia have followed suit, abolishing the rule by legislation, and replacing it with a similar rule. South Australia, in 1935, abolished the rule and created a defence of coercion identical to the English provisions.<sup>228</sup> Therefore the defence remains but the presumption is removed. In the Australian Capital Territory, the presumption has also been abolished.<sup>229</sup> In the Northern Territory the defence has remained at common law.

**(iv) The United States**

2.176 In the United States, a dwindling number of states continue to adhere to the marital rule. Boyce and Perkins note that:

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<sup>222</sup> Section 18 Canadian Criminal Code R.S., c C-34, s 18; 1980-81-82-83, c 125, s 4.

<sup>223</sup> Law Reform Commission of Canada *Criminal Law: The General Part – Liability and Defences* (Working Paper 29 1982).

<sup>224</sup> Law Reform Commission of Canada *Recodifying Criminal Law* (No 30 1986).

<sup>225</sup> Section 407A *Crimes Act 1900*.

<sup>226</sup> Section 336 *Crimes Act 1958*.

<sup>227</sup> Pace “Marital Coercion –Anachronism or Modernism” 1970 Crim LR 82.

<sup>228</sup> Section 328A *Criminal Law Consolidation Act 1935*.

<sup>229</sup> *Crimes Amendment Act (No 2) 1999*.

“it is definitely not recognised in the overwhelming majority of jurisdictions ... The presumption of coercion arising from the mere presence of the husband is usually not as strong as formerly, even where still recognised. It is a mistake, however, to assume that the ‘doctrine of coercion’ has disappeared entirely.”<sup>230</sup>

2.177 Section 2.09 of the Model Penal Code, which treats the defence of duress, provides that: “It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman, acting in the presence of her husband, is coerced is abolished].”

### (3) *Marital Coercion and Battered Woman Syndrome*

2.178 While the appropriateness of the retention of a defence of marital coercion is debatable, there have been suggestions that the defence is in actual fact still in existence in the form of Battered Woman Syndrome (BWS). It has been noted that just as marital coercion vanished in the mid 1970’s, it re-emerged in the guise of BWS.<sup>231</sup> While BWS is not in itself a defence, it has in some cases been considered a species of duress, and has been found to be relevant to defences such as duress, provocation and self-defence.<sup>232</sup> One commentator suggests however that BWS is more similar to the marital coercion standard rather than the duress standard. It has been noted that a woman’s conduct may have been unreasonable but she is excused from liability if she can prove that her choices were determined not by her own will, but by the “superior will of her husband.”<sup>233</sup> It is more likely that BWS could be used to support the defence of duress and show that there existed a genuine threat and fear, rather than the syndrome itself being used as a defence.

### (4) *Discussion*

2.179 In most jurisdictions the presumption of marital coercion has been abolished on the basis that it is archaic, and no longer necessary. Boyce and Perkins note that “[T]here may have been some reason for this doctrine in the ancient law but there is none today.”<sup>234</sup> As noted above the comments of Henchy J in *State (DPP) v Walsh and Conneely* preclude the enactment in

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<sup>230</sup> Boyce and Perkins *Cases and Materials on Criminal Law and Procedure* (7<sup>th</sup> ed Foundation Press 1989) at 670.

<sup>231</sup> Coughlin “Excusing Women” (1994) Cal L Rev 1 at 29.

<sup>232</sup> *R v Oakes* [1995] 2 NZLR 673; *R v O'Brien* [2003] NSWCCA 121; *R. v TLC* [2004] ABPC 79.

<sup>233</sup> Coughlin “Excusing Women” (1994) Cal L Rev 1 at 50.

<sup>234</sup> Boyce and Perkins *Cases and Materials on Criminal Law and Procedure* (7<sup>th</sup> ed Foundation Press 1989) at 670.

Ireland of a provision similar to that pertaining in England. In any case, there appears to be few policy grounds on which such a change in the law could be supported, or indeed which support the retention of the provision in other jurisdictions. Pace does argue that there is a legitimate need for a “defence which recognises the peculiar and particular vulnerability of married women to pressure from their husbands”<sup>235</sup> while Williams observed in 1961 that “there are some who hold that the wife still needs wider protection than other people, on the ground that something of her former subordination to her husband still survives in social mores.” The latter author was, however, quick to point out that the Commissions of 1845 and 1922 did not adhere to this view.<sup>236</sup> The argument retains even less force today. Howard describes the rule as “an anachronism of no apparent value.”<sup>237</sup>

2.180 Furthermore, the legislative trend in most common law jurisdictions is to place wives who come before the criminal courts 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 to reflect the analysis in *State (DPP) v Walsh and Conneely*. Of course, the defence of duress will remain open to a wife who is threatened by her husband, and even where such threats fall short of the requirements of the defence, they will form an important part of any plea for mitigation on her behalf.

2.181 *The Commission provisionally recommends 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.*

## **J Burden of Proof**

2.182 In *The People (DPP) v Kavanagh*<sup>238</sup> the Court of Criminal Appeal confirmed that, as with other defences, the onus at all times lies with the prosecution to disprove the defence of duress beyond a reasonable doubt. The defendant had only to discharge the evidential burden in relation to the defence by placing such evidence before the Court as made the issue fit and proper to be left to the jury.

2.183 It was held by the Court of Criminal Appeal that:

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<sup>235</sup> Pace “Marital Coercion -Anachronism or Modernism” 1970 Crim LR 82 at 85.

<sup>236</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 765.

<sup>237</sup> Howard *Australian Criminal Law* (The Law Book Company 1965) at 366.

<sup>238</sup> Court of Criminal Appeal 18 May 1999.

“[i]t is of course clear that it is no part of the duty of a defendant in any criminal case to prove a defence. The onus is at all times on the Director of Public Prosecutions to prove every ingredient of the crime alleged against the accused beyond reasonable doubt.”

The Court went on to refer to Archbold<sup>239</sup> which notes that the evidential burden is on the defendant and having done this, the persuasive burden is on the prosecution to “destroy the defence in such a manner as to leave in the minds of the jury no reasonable doubt on the question whether the defendant can be absolved on the ground of the alleged compulsion.”

2.184 The issue was considered again in *The People (DPP) v Dickey*.<sup>240</sup> The trial judge had directed the jury that where the issue of duress has having been raised by the defence, it is incumbent on the prosecution to rebut the issue. The Court of Criminal Appeal held that the jury may not have been fully aware that there was a burden of proof on the prosecution to prove that the applicant was not acting under duress, rather than to rebut the defence that he was so acting. It was also noted by the Court that the jury may not have been aware that the standard of proof in such a rebuttal is beyond reasonable doubt. The appeal was therefore allowed and the Court ordered a retrial.

2.185 In 1993, the Law Commission of England and Wales<sup>241</sup> recommended that the burden of proof be reversed, placing the burden on the defendant, on the balance of probabilities, to establish the defence of duress and also to show, if necessary, that they did not knowingly and without reasonable excuse expose themselves to the risk of the threat being made. The reasons offered for this change were, first, that applying the defence to murder would be more palatable if the burden were reversed; second, it would be difficult for the prosecution to disprove the defence in certain cases, for example where the defendants may have been members of a gang; and third, that the defence is unique and the circumstances leading to the threat may have occurred quite separately from the commission of the crime and thus it would be particularly difficult for the prosecution to disprove.

2.186 It has been suggested that none of these reasons are convincing enough to lead to a reversal of the burden of proof in relation to duress. First, it is not clear whether the application of the defence of duress to

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<sup>239</sup> Archbold *Criminal Pleading, Evidence and Practice* (36<sup>th</sup> ed Sweet and Maxwell 1966) at 21.

<sup>240</sup> Court of Criminal Appeal 7 May 2003.

<sup>241</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 33.1.

murder is appropriate,<sup>242</sup> so reversing the burden for that purpose is not necessary. Second, the burden was reversed in order to “concentrate ... on the plausibility of the defendant’s story”<sup>243</sup> and it has been suggested that reversing the burden would thus entail a shift from the adversarial system of trial to an inquisitorial approach, which would affect the presumption of innocence. Third, it has been noted that the “uniqueness” of the defence does not affect problems of proof which may arise in establishing or refuting the facts.

2.187 In a recent case referring to the burden of proof (involving the defence of diminished responsibility), *R v McQuade*,<sup>244</sup> the issue of reverse burdens of proof was discussed. In that case Kerr LCJ made reference to the conjoined appeals of *Sheldrake v DPP, Attorney-General’s Reference (No 4 of 2004)*<sup>245</sup> in which Lord Bingham gave considerable attention to the issue. It was noted by Lord Bingham that UK law prior to the incorporation of the European Convention on Human Rights under the *Human Rights Act 1998* regarded the principle that the onus lies on the prosecution in a criminal trial to prove all the elements of an offence as supremely important, but not absolute. He went on to note that Parliament has been prepared in some instances to impose legal burdens on, or provide for presumptions rebuttable by, the defendant. He also noted that although the presumption of innocence has not been treated as absolute by Parliament, the underlying rationale has been that “it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so.”

2.188 In *R v McQuade*, the defendant contended that section 5(3) of the *Criminal Justice Act (Northern Ireland) 1966*, which provided that it was for the defence to prove (on the balance of probabilities, pursuant to section 5(4)) that the defendant suffered from a mental abnormality, was incompatible with the presumption of innocence guaranteed by Article 6(2) of the European Convention on Human Rights. It was held that while the defendant in this case must establish the proposition on the balance of probabilities, it does not, in the circumstances, seem reasonable that the prosecution (facing a higher standard of proof) should be burdened with such difficulties in evidence that may arise from this lack of certainty. The Court went on to note that this conclusion was reached due to the practical

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<sup>242</sup> See discussion on application of the defence of duress to homicide in Chapter 3.

<sup>243</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 33.10.

<sup>244</sup> [2005] NICA 2.

<sup>245</sup> [2005] 1 All ER 237.

difficulties involved in proving that a person who raises the issue of mental abnormality does not suffer from that condition.

2.189 In *R v Hasan*,<sup>246</sup> Lord Bingham affirmed that the burden is on prosecution to establish that the defendant did not commit the crime with which he is charged under duress. He went on to refer to the Law Commission's recommendation that the burden be reversed, noting that even if the House were convinced of the merits of such a reversal, there would be doubt as to whether the House, in its judicial capacity, could make such a change. He went on to note that the Commission was correct in its statement that the defence of duress is peculiarly difficult for the prosecution to investigate and disprove beyond reasonable doubt.<sup>247</sup> Notwithstanding this, it remains unclear whether Parliament would be prepared to reverse the burden, thus placing the burden of proof on the defendant, and putting limitations on the presumption of innocence.

2.190 In a recent Law Commission Consultation Paper, *A New Homicide Act for England and Wales?*,<sup>248</sup> the Law Commission reconsidered and indicated that reversing the burden could still be an option. However, the Law Commission is keen to point out that it is no longer the case that one can claim that duress is an easy defence to raise and a difficult one to disprove. It is noted that recent changes in the law mean that it is no longer necessary to recommend that the defendant bear the burden of proof and ultimately the Commission appear to accept the view expressed in *R v Hasan* that there is no need to place a reverse burden on the defendant.

2.191 The Commission considers that the recent views expressed by the Court of Criminal Appeal in the *Kavanagh* and *Dickey* cases are consistent with the appropriate roles of the prosecution and defence, both in terms of traditional common law principles and human rights principles. The Commission therefore provisionally recommends that the burden of proof as it stands, with the onus on the prosecution to disprove the defence beyond a reasonable doubt, is appropriate.

2.192 *The Commission provisionally recommends that the onus should remain on the prosecution to disprove the defence of duress beyond a reasonable doubt.*

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<sup>246</sup> [2005] 4 All ER 685. See paragraph 2.15 above.

<sup>247</sup> *Ibid*, 693.

<sup>248</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005).



## CHAPTER 3 DURESS AND MURDER

### A Introduction

3.01 In Chapter 2, the Commission discussed the general scope of and limitations to the defence of duress. In this Chapter, the Commission discusses whether the defence should apply, either as a full or partial defence, to murder.

### B Ireland

3.02 As already noted, the only modern Irish case which has examined the scope of the defence of duress is *Attorney General v. Whelan*.<sup>1</sup>

3.03 The decision in *Whelan* concerned a charge of receiving stolen property. However the Court added, *obiter*, that “[t]he 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>2</sup> This view reflected the contemporary view of the scope of the defence, namely that while it applied to many offences, it was generally not applicable to murder. This aspect of the judgment has been approved in a number of cases in other jurisdictions.<sup>3</sup>

3.04 The dicta in *Whelan* represent the only judicially expressed view in Ireland on the application (or non-application, more correctly) of duress to murder. Indeed, given that the dicta refer to murder, it can be argued that the Court did not consider whether there may be other forms of homicide to which the defence *does* apply. There has been considerable discussion of the application of the defence to murder in various other jurisdictions. The Commission therefore considers it is appropriate to discuss those more recent developments in the context of this Consultation Paper.

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<sup>1</sup> [1934] IR 518. See paragraph 2.03 above.

<sup>2</sup> *Ibid*, 524. As the discussion at paragraph 2.23 above indicated, the Court in *Whelan* used the word ‘justification’ interchangeably with ‘excuse’ and the Commission considers that the word excuse is preferable in this context.

<sup>3</sup> See, for example, *R v Smyth* [1963] VR 737, *DPP for Northern Ireland v Lynch* [1975] AC 653, *R v Harding* [1976] VR 129, *R v Howe* [1987] 1 All ER 771.

## C England

### (1) *Status of the Defence*

3.05 It is now generally accepted in English law that duress is available as a defence to all crimes except for murder, attempted murder, and some forms of treason.<sup>4</sup>

#### (a) *Murder*

3.06 In the landmark decision of *R v Howe*<sup>5</sup> the House of Lords stated categorically that duress was not available on a charge of murder or aiding or abetting murder.

3.07 The argument for excluding murder from the ambit of the defence can be traced back to Hale<sup>6</sup> who wrote:

“Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent.”

3.08 Blackstone<sup>7</sup> echoed Hale’s remarks in stating that ‘a man ought rather to die himself than escape by the murder of an innocent’. However, as observed by some commentators, the authority supporting Hale and other writers on this point appears weak.<sup>8</sup> In this regard it has been noted that “[a]lthough Hale’s famous statement is now regarded as authoritative, neither its connection with early modern case law nor its impact on nineteenth century jurisprudence was impressively firm”.<sup>9</sup>

3.09 The uncertain state of the law in this area was perhaps borne out by the emergence of authority to the effect that accomplices to murder could avail of the defence. In *R v Kray (Ronald)*<sup>10</sup> the Court of Appeal accepted

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<sup>4</sup> See judgment of Rose LJ in *R v Abdul-Hussain & Others* [1999] Crim LR 570 which referred with approval to the *dicta* of Kennedy LJ in *R v Pommell* (1995) 2 Cr App Rep 607.

<sup>5</sup> [1987] AC 417.

<sup>6</sup> 1 Hale PC 51.

<sup>7</sup> Blackstone *Commentaries* IV 30.

<sup>8</sup> Smith and Hogan *Criminal Law* (10<sup>th</sup> ed Butterworths 2002) at 255; McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 831-834.

<sup>9</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 831.

<sup>10</sup> (1969) 53 Cr App Rep 569.

that an accessory before the fact to murder had a viable defence in claiming that by reason of threats he was so terrified that he ceased to be an independent actor. The case concerned a man who had carried a gun from one place to another, knowing that the defendant intended to use it for murder.

3.10 The decision in *Kray* was cited with approval in *DPP for Northern Ireland v Lynch*<sup>11</sup> where the majority of the House of Lords allowed the defence of duress to an alleged principal in the second degree to murder. The defendant had been threatened by members of the IRA and forced to drive them to a place where a policeman was shot. He then drove the killers away from the scene. When interviewed, he said that he was certain that if he disobeyed the IRA members he would be killed and so he had no choice but to drive the car. The trial judge decided not to leave the defence of duress to the jury on the ground that it was not available on a charge of murder as a matter of law. The Northern Ireland Court of Appeal upheld this view by a two to one majority.

3.11 In the House of Lords, it was held, by a majority of 3-2, that on a charge of murder, the defence of duress was available to a person charged in the second degree. Lord Wilberforce examined the rationale referred to in *Attorney General v Whelan* for excluding murder from the defence, namely, that murder was a most heinous crime. He nonetheless held that that does not preclude the defence operating in respect of *all* cases of murder and he concluded that: “[A]n accessory before the fact, or an aider and abettor, may (not necessarily must) bear a less degree [of heinousness] than the actual killer: and even if the rule of exclusion is absolute, or nearly so in relation to the latter, it need not be so in lesser cases.”<sup>12</sup>

3.12 *Lynch* has been criticised, however, on this very point, namely, that a principal in the second degree on a murder charge, may be just as, if not more, morally culpable than the actual perpetrator. For example, when the matter was revisited in *R v Abbott*,<sup>13</sup> the majority of the Privy Council distinguished *Lynch* and decided that the defence was not available to a principal to murder where the defendant was alleged to have actively taken part in the killing of the deceased, holding her while she was stabbed, and assisting in burying her while she was still alive. The minority, however, approved *Lynch* in holding that the defence should be allowed, arguing that it was inconsistent to allow duress to aiders and abettors but not to principals

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<sup>11</sup> [1975] AC 653.

<sup>12</sup> *Ibid.*, 681.

<sup>13</sup> [1976] 3 All ER 140.

in the first degree. This inconsistency was resolved in *R v Howe*<sup>14</sup> where the House of Lords took the opportunity to re-examine the law.

3.13 In *R v Howe*, the House of Lords opted to restore the law to its pre-*Lynch* position. Lord Hailsham was strongly influenced by the well-known decision in *R v Dudley and Stephens*<sup>15</sup> which held that the defence of necessity (arising from imminent danger not caused by human threats) did not apply to murder.<sup>16</sup> While Lord Hailsham conceded that there was a distinction to be drawn between duress and necessity in relation to the origin of the danger, he considered that this distinction was irrelevant, since duress, was only the specific type of necessity caused by wrongful threats. He considered the argument that this approach was to expect heroism of ordinary individuals, but he concluded that:

“in general I do not accept in relation to the defence of duress it is either good morals, good policy or good law as did the majority in *Lynch* and the minority in *Abbott* 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.”

3.14 Lord Griffiths took a similar approach. He felt that the reason the defence of necessity was denied in *Dudley* was the same reason that duress must be denied as a defence to murder, namely, the special sanctity which the law attaches to human life and which denies the right to a person to take an innocent life even at the price of one’s own or another’s life. Lord Griffiths also said that he could find no clear basis on which to differentiate between various participants in murder, and on that basis he disagreed with the majority in *Lynch*.

3.15 The English Law Commission<sup>17</sup> has identified the following 4 arguments advanced by the House of Lords in *Howe* in support of their conclusions:

- Since Hale’s time it has been understood that the law provides no defence of duress to murder. This is in line with the defence of necessity;
- The sanctity which the law attaches to human life requires that it lay down such standards of conduct;

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<sup>14</sup> [1987] AC 417.

<sup>15</sup> (1884) 14 QBD 273.

<sup>16</sup> See paragraph 4.11 below.

<sup>17</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 122 1992) at paragraph 18.15.

- It was noted that the social climate at the time, with its “rising tide of violence and terrorism”<sup>18</sup> was not an appropriate time for change;
- In the more difficult cases, the proper exercise of prosecutorial discretion can mitigate the effects of the rule. Further, the Home Secretary and the Parole Board may take the circumstances of the murder into account when considering parole, and this can mitigate the rigours of a blanket denial of the defence.

3.16 The law in relation to attempted murder was put beyond all doubt by a majority of the House of Lords in *R v Gotts*<sup>19</sup> where it was held that the defence of duress was not applicable to attempted murder. This seems to be a logical extension of *Howe* given that attempted murder requires an intention to kill, not simply to injure seriously.

**(b) Treason**

3.17 As noted above, the defence of duress has always been deemed to be excluded from some forms of treason. In this regard, Hale<sup>20</sup> suggests that the defence could be pleaded on a charge of treason during wartime but not in peacetime on the basis that in peacetime “the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitatae pacis*.”<sup>21</sup> Williams<sup>22</sup> also argues for a limitation on the availability of the defence where the treason “takes the form of endangering hundreds or thousands of lives” on the basis that such actions could not be justified on the basis of personal fears.

3.18 A survey of the relevant old case law, however, reveals that in a majority of the cases involving treason the defence would appear to have been allowed.<sup>23</sup> More recently, in *R v Purdy*<sup>24</sup> the court allowed a claim of

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<sup>18</sup> *R v Howe* [1987] AC 417, 443-444.

<sup>19</sup> [1992] 2 AC 412.

<sup>20</sup> Hale *Pleas of the Crown* at 49-50 and 56-8.

<sup>21</sup> *Ibid* at 49.

<sup>22</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 762.

<sup>23</sup> In *Oldcastle's Case* the defence was successfully pleaded in relation to a charge of treason for supplying food to Sir John Oldcastle and his rebels. (It is notable, however, that Hale, in his commentary on this case, questions whether the defence would have been successful if the accused had actually taken part in the rebellion (1419) 1 Hale PC 50, 1 East PC 70). Duress was also left to the jury in *R v Mc Growther* ((1746) 168 ER 8) where the charge was one of treason for participating in the rebellion of 1745, although the defendant was ultimately convicted. Similar rulings followed in *R v Stratton* (1779) 21 How St Tr 1045 and *R v Crutchley* (1831) 5 C&P 133, both cases involving treason.

<sup>24</sup> (1946) 10 JCL 182.

fear of death as a defence to a British prisoner of war charged with treason by assisting the Germans with propaganda during the Second World War.

3.19 As against this, in *R v Axtell*<sup>25</sup> (“the Regicides case”) the court rejected a claim by the accused that as soldiers they would themselves have been executed for disobedience if they had failed to execute Charles I. However, it is arguable that while the charge in form was one of treason, it was in substance one of murder, and, as such, duress could not be allowed.<sup>26</sup>

## (2) *Proposals for Reform*

3.20 The Law Commission of England and Wales has examined the issue of duress on several occasions. The Law Commission first published a Working Paper on duress and other defences in 1974<sup>27</sup> and after a consultation process, presented its Report in July 1977.<sup>28</sup>

3.21 The Law Commission had little difficulty in deciding to recommend that duress should be retained as a defence. It was noted that the murder exception rule was inconsistent both with the human instinct of self preservation and the underlying rationale for the defence which acts as a concession to human frailty. In addition, the Law Commission was confident in the ability of jurors to assess adequately a defence of duress in cases of murder, particularly in the light of the strict definition of the defence recommended by them.

3.22 When the Law Commission revisited the issue in its final *Report on a Criminal Code*<sup>29</sup> in 1989, it did so against the markedly different legal landscape created by the House of Lords decision in *R v Howe*.<sup>30</sup> Clearly

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<sup>25</sup> (1660) 5 How St Tr 1146.

<sup>26</sup> In *R v Steane*, a case involving a statutory form of treason, the Court appeared willing to entertain duress as a defence but decided the case on other grounds. While Lord Goddard stated *obiter* that the defence of duress is not applicable to treason, this is now widely regarded as bad law. It may be surmised, therefore, that the defence remains open to many forms of treason, save those variants of the offence of a particularly grave or immoral character. (*R v Steane* [1947] 1 KB 997).

<sup>27</sup> Law Commission of England and Wales *Codification of the Criminal Law: General Principles Defences of General Application* (No 55 1974).

<sup>28</sup> Law Commission of England and Wales *Criminal Law Report on Defences of General Application* (No 83 1977).

<sup>29</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill and Volume 2: Commentary on Draft Criminal Code Bill* (No 177 1989).

<sup>30</sup> [1987] AC 417. See paragraph 3.13 above.

influenced by that decision, it recommended that the defence should not apply to murder or attempt to murder.<sup>31</sup>

3.23 In its 1993 *Report on Offences against the Person*, the Law Commission identified, as already noted,<sup>32</sup> four main arguments of the House of Lords in *Howe* in favour of maintaining the murder exception rule.<sup>33</sup> In response to these, the Commission stated:

- The existence of a long line of authority supporting the rule is not determinative of the issue. Parliament has not yet had an opportunity of considering both sides of the debate;
- Innocent life is not effectively protected by a rule of which the actor is unlikely to be aware and is unlikely to obey. It should be for the jury to determine whether the threat was one “which he [could not] reasonably be expected to resist”;
- The defence is not available to a member of a criminal or terrorist group. Innocent tools of terrorists, however, should not be denied the defence merely because others may claim it falsely;
- Executive discretion is not a satisfactory solution to hard cases where a plea of duress is raised. The defendant’s claim should be properly assessed at trial.<sup>34</sup>

3.24 The Law Commission noted that the concerns of those who oppose the extension of the defence to murder could be broadly divided into two categories, those based on principle and those based on practical concern. Dealing first with the issue of principle, and the argument that the special sanctity the law attached to human life cannot excuse murder, it was acknowledged that this argument could not be lightly dismissed. However, in the view of the Law Commission:

“it is not only futile, but also wrong, for the *criminal* law to demand heroic behaviour. The attainment of a heroic standard of behaviour will always count for great merit; but failure to achieve that standard should not be met with punishment by the State.”<sup>35</sup>

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<sup>31</sup> Clause 42(2) *Draft Criminal Code Bill*. However, the Commission placed this aspect of the clause in square brackets as a sign that a question mark remained over this issue.

<sup>32</sup> See paragraph 3.15 above.

<sup>33</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 30.11.

<sup>34</sup> *Ibid* at paragraph 18.16.

<sup>35</sup> *Ibid* at paragraph 30.11.

3.25 The Law Commission placed emphasis on the fact that the defence acts as an excuse and not a justification; that the actor may kill to save the lives of third parties as well as his own; and that the defendant must also meet the other requirements of the defence, most notably, the ‘reasonable fortitude’ requirement that the threat was one which the defendant could not reasonably have been expected to resist.<sup>36</sup> In relation to the practical objections to the extension of the defence, the Law Commission noted that these stemmed mainly from the fact that duress is most likely to be raised in the context of terrorist or organised crime offences and that, in such situations, it would be easy to concoct a defence of duress which may prove extremely difficult for the prosecution subsequently to disprove at trial. The Law Commission felt, however, that these concerns could largely be met by its proposals to place the burden of proof on the defendant. The reversal of the persuasive burden would allow the Court or jury to focus on the credibility of the defendant’s version of events, particularly the issue of voluntary exposure to duress.<sup>37</sup>

3.26 The Law Commission also considered the possibility that duress could operate as a partial defence, reducing murder to manslaughter. This was rejected, however, on the basis that an individual who satisfied all the requirements of the defence should not suffer the stigma of manslaughter conviction, which is also a serious crime.

3.27 More recently the Law Commission has reconsidered the issue of applying the defence of duress to murder. In the Consultation Paper *A New Homicide Act for England and Wales?*,<sup>38</sup> the Law Commission proposed a new framework for homicide offences, 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 has a partial defence; and third, manslaughter, where the defendant killed through gross negligence, through an intentional or reckless assault or through intentional or reckless causing of, or through the attempt to cause, some harm, or intended to kill but has a partial defence.<sup>39</sup>

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<sup>36</sup> See paragraphs 2.62-2.106 above.

<sup>37</sup> In relation to burden of proof, see paragraph 2.182-2.192 above.

<sup>38</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005).

<sup>39</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005) at paragraph 7.26 *et seq.* The Law Commission notes that a partial defence may either reduce “first degree murder” to “second degree murder” or else reduce “first degree murder” and “second degree murder” to manslaughter.

3.28 In relation to these proposed defences, the Law Commission provisionally proposes that duress should be a partial defence to a charge of “first degree murder.” The Commission notes that there are two reasons for this. First, that this would achieve consistency with the partial defences of provocation and diminished responsibility and second, that it reflects 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.

3.29 Regarding “second degree murder,” the Law Commission notes that there are two options. First, duress should not be a defence to “second degree murder” as any mitigation can be taken into account at sentencing since the mandatory life sentence will not apply to this offence. Alternatively, duress could lead to a complete acquittal.

3.30 In a further argument for the application of the defence of duress to murder, at least in some cases, the Law Commission noted that there is a very strong case that this can cause injustice among juveniles and young persons, who are much less mature than adults and, it is argued, less able to withstand a threat of death or serious injury. The Law Commission thus asks if duress could be a complete defence to “first degree murder” in the case of juveniles, or act as a partial reductive defence. This would be in recognition of the fact that childhood immaturity reduces culpability.<sup>40</sup>

3.31 To summarise, the most recent recommendations of the Law Commission involve the application of the defence of duress to murder, albeit as a partial defence.

## **D Canada**

### **(1) Status of Defence**

3.32 Section 17 of the Canadian Criminal Code<sup>41</sup> deals with the defence of compulsion by threats, the Canadian equivalent of the defence of duress. The defence has remained substantially unaltered since the first Canadian Criminal Code in 1892 and was undoubtedly influenced by the draft English Code of 1879 in excluding many serious offences from the ambit of the defence. The list of excluded offences is the most extensive of all the common law jurisdictions. Indeed, the stringency of section 17 has prompted Stuart to remark that the Canadian law on duress is “one of the most restrictive to be found and certainly narrower than the English common law of 1892 or today.”<sup>42</sup>

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<sup>40</sup> *Ibid* at paragraph 7.72.

<sup>41</sup> RS 1985 c C-46; s17 RS 1985, c 27 (1st Supp) s40.

<sup>42</sup> Stuart *Canadian Criminal Law* (3<sup>rd</sup> ed Carswell 1995) at 427-8.

3.33 Section 17 provides:

“A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).”<sup>43</sup>

3.34 The Code provisions apply only to actual perpetrators and not to secondary parties to the offence. Despite *dicta* to the contrary in *R v Carker*<sup>44</sup>, the Supreme Court of Canada held in *R v Paquette*<sup>45</sup> that the common law defence of duress is available to secondary parties.<sup>46</sup> It has been suggested that the decision was “borne out of the frustration as to the narrowness of section 17... [particularly] the lengthy list of excluded offences.”<sup>47</sup>

## (2) *Proposals for Reform*

3.35 In its 1982 Working Paper on *Criminal Law: the General Part*<sup>48</sup> the Canadian Law Reform Commission identified the main difficulties with the law on duress as it stood in Canada. First, the rule concerning secondary parties differs from the law concerning principal offenders. Second, section 17 excludes the defence from very serious crimes without articulating any underlying principle or rationale. Third and fourth, the requirement of immediacy arguably renders superfluous the further requirements that the

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<sup>43</sup> Section 17 Canadian Criminal Code RS 1985 c C-46; s17 RS 1985, c 27 (1st Supp) s40.

<sup>44</sup> [1967] SCR 114.

<sup>45</sup> (1976) 30 CCC (2d) 417.

<sup>46</sup> Common law defences are preserved by subsection 7(3) of the Criminal Code.

<sup>47</sup> Stuart *Canadian Criminal Law* (3<sup>rd</sup> ed Carswell 1995) at 435.

<sup>48</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper 29 1982) at 84-91.

accused is not a party to a criminal conspiracy and that the duressor be present. The third and fourth requirements have been discussed already.<sup>49</sup>

3.36 In order to avoid these difficulties, the Commission recommended the following draft legislation:

“Every one is excused from criminal liability for an offence committed by way of reasonable response to threats of serious and immediate bodily harm to himself or those under his protection unless his conduct manifestly endangers life or seriously violates bodily integrity.”<sup>50</sup>

3.37 The Canadian Law Reform Commission argued that this simplified formulation of the defence was more comprehensive in that it applied the same rules to secondary parties and principals. In addition, it replaced the *ad hoc* list of excluded offences with a general test of danger to life or serious violation of bodily integrity which allows the trier of fact to determine the question of duress on the facts. For example, a robbery may not involve danger to life or to bodily integrity in circumstances where, say, an imitation firearm is used.

3.38 In its later Report, *Recodifying Criminal Law*<sup>51</sup>, the Commission made the following recommendation in relation to duress: “No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.”<sup>52</sup>

3.39 This clause retains the substance of the reforms proposed in the earlier Working Paper with some slight modifications. Most significantly, the discretion afforded to the trier of fact to decide whether a particular offence endangers life or bodily integrity was replaced with the more familiar requirement that the defence cannot apply to murder or offences which result in grievous bodily harm. This proposal would result in the defence being available to more offences than is currently the case in Canada.

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<sup>49</sup> See paragraphs 2.107-2.136 above.

<sup>50</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper 29 1982) at 87.

<sup>51</sup> Law Reform Commission of Canada *Report: Recodifying Criminal Law Volume 1* (No 30 1986) at 32-33.

<sup>52</sup> *Ibid* at 32.

## **E           Australia**

### **(1)           *Status of Defence***

3.40       In three of the six Australian states, and in the two self governing territories, duress is regulated by statute.<sup>53</sup> Common law continues to apply in the remaining three states, namely South Australia, New South Wales and Victoria.

#### **(a)           *Common Law***

3.41       The defence of duress in Australia came under close scrutiny by the Victorian Full Court in the seminal case of *R v Hurley and Murray*.<sup>54</sup> It was noted in that case that the defence of duress is not available to murder.

3.42       While the defence does not apply to murder, two of the common law states, New South Wales<sup>55</sup> and Victoria<sup>56</sup> allow duress to accessories to murder. In South Australia duress is not a defence to murder in any degree.<sup>57</sup>

#### **(b)           *The Codes***

3.43       In 1899, the Griffith Code was adopted as the Criminal Code of Queensland and was later adopted by Western Australia.<sup>58</sup> Section 31(4) of the Griffith Code, which applies in Queensland and Western Australia, deals as follows with duress. It provides:

“A person is not criminally responsible for an act or omission when he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution.”<sup>59</sup>

3.44       Under the Griffith Code, a number of serious offences are excluded from the scope of duress. These are treason, murder, piracy, and

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<sup>53</sup> Queensland, Western Australia, Tasmania, Northern Territory and Australian Capital Territory.

<sup>54</sup> [1967] VR 526. See paragraph 2.19 above.

<sup>55</sup> *R v McConnell* [1977] 1 NSWLR 714; *R v McCafferty* [1974] 1 NSWLR 89.

<sup>56</sup> *R v Derrington and McGauley* [1980] VR 353.

<sup>57</sup> *R v Brown and Morely* (1968) SASR 467.

<sup>58</sup> Criminal Code 1899 (Qd); Criminal Code 1913 (WA).

<sup>59</sup> This section is mirrored exactly in section 31 Criminal Code (WA) and section 31 Criminal Code (Qd).

offences of which grievous bodily harm or an intention to cause grievous bodily harm is an element.

3.45 The Griffith Code has also influenced the other criminal codes in Australia. The sections of the Tasmanian Code, for example, are not dissimilar although it will be noted that the excluded offences under the Tasmanian Code are more extensive than the Griffith Code:

“...compulsion by threats of immediate death or grievous bodily harm, from a person actually present at the commission of the offence, shall be an excuse for the commission, by a person subject to such threats, and who believes that such threats will be executed, and who is not a party to such association or conspiracy the being a party to which rendered him subject to compulsion, of any offence other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, rape, forcible abduction, aggravated armed robbery, armed robbery, robbery, causing grievous bodily harm, and arson.”<sup>60</sup>

3.46 In the Northern Territory the defence is not available to those charged with murder, manslaughter, or a crime of which grievous bodily harm or an intention to cause such harm is an element, or to those who have exposed themselves to the risk of duress.<sup>61</sup> The harshness of this provision is mitigated somewhat by section 41 of the Code which allows for a partial defence of coercion in relation to murder. If the requirements of the defence are satisfied, then the charge will be reduced from murder to manslaughter.<sup>62</sup>

3.47 The provisions of the Australian Capital Territory and Commonwealth Codes which deal with duress are drafted in virtually identical terms, and do not contain any reference to a limitation in the scope of the defence:

“... (2) A person carries out conduct under duress if and only if he or she reasonably believes that:

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<sup>60</sup> Section 20(1) *Criminal Code Act 1924*.

<sup>61</sup> “The excuse referred to in subsection (1) does not extend to ... a person who has rendered himself liable to have such a threat made to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act” Section 40(2) *Criminal Code of the Northern Territory of Australia*.

<sup>62</sup> “When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act or made the omission that caused death because of coercion of such a nature that it would have caused a reasonable person similarly circumstanced to have acted in the same or a similar way, he is excused from criminal responsibility for murder and is guilty of manslaughter only.” Section 41 *Criminal Code of the Northern Territory of Australia*.

(a) a threat has been made that will be carried out unless an offence is committed; and

(b) there is no reasonable way that the threat can be rendered ineffective; and

(c) the conduct is a reasonable response to the threat.

(3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.”<sup>63</sup>

## (2) *Proposals for Reform*

3.48 The South Australia Criminal Law and Penal Methods Committee in a 1977 *Report on the Substantive Criminal Law* recommended that duress should be a full defence to murder if the accused is deprived of any power to resist what is demanded of him.<sup>64</sup> If the accused’s choice of action was *impaired substantially*, then he should be guilty of manslaughter. The recommendations were as follows:

“[W]here the defendant is by reason of duress deprived of any power to resist compliance with what is demanded of him, and kills another in consequence, he should be guilty of no criminal offence... [W]here by reason of duress the defendant’s power of choice of action is substantially impaired, and he kills another in consequence, he should be guilty of manslaughter.”<sup>65</sup>

3.49 The Law Reform Commission of Victoria, in a Working Paper on *Duress, Necessity and Coercion*,<sup>66</sup> suggested that the recommendations of the English Law Commission Report of 1977 should form the basis of any proposed legislative changes.<sup>67</sup>

3.50 The definition of duress in its subsequent Report incorporated two defences, the traditional defence of duress as well as a defence termed

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<sup>63</sup> Section 10.2 *Criminal Code Act* 1995 (Commonwealth of Australia). See also Section 40 *Criminal Code* 2002 (ACT).

<sup>64</sup> South Australia Criminal Law and Penal Methods Committee *The Substantive Criminal Law* (No 4 1977) at paragraph 12.5.

<sup>65</sup> *Ibid.*

<sup>66</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 5 1978) at paragraph 2.67.

<sup>67</sup> Law Commission of England and Wales *Criminal Law Report on Defences of General Application* (No 83 1977). See paragraph 3.20-3.31 above.

“excusatory necessity” (that is, duress of circumstances).<sup>68</sup> The Commission recommended that the defence be available to a person who commits an offence under compulsion (whether human or of circumstances), with the following conditions:

- In the case of murder which was intentional or where death was expected, belief need not be reasonable but the harm threatened must have been death or serious personal injury to the actor, or someone closely connected with him;
- In all other murder cases, or cases of indictable injuries to the person, the harm threatened is extended to include torture, rape, buggery or unlawful imprisonment to the same persons as above.

3.51 It was noted in the report that it is left to the jury to decide on moral culpability, if there is none then they must acquit, if there is some degree, but not enough to satisfy a murder charge, then the verdict should be manslaughter.<sup>69</sup>

3.52 The Report discussed in detail the possibility of allowing duress as a defence to murder, and recommended that it should be available, regardless of the extent of participation by the defendant. Having considered the law of *DPP for Northern Ireland v Lynch*<sup>70</sup> and *R v Abbott*<sup>71</sup> the Commission concluded that the illogical and unjust distinction between those accused of murder in the second degree and principals in the first degree should be removed, but that the defence should only be available if the harm threatened is death or serious personal injury.<sup>72</sup> In other cases the ambit of harm threatened was widened to allow for torture, rape, buggery or unlawful imprisonment.<sup>73</sup> The Report called for a greater degree of flexibility in this area of the law.<sup>74</sup>

3.53 The Law Reform Commission of Victoria considered the issue of duress again in its 1991 *Report on Homicide* in which it advocated the application of the defence of duress to murder.<sup>75</sup>

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<sup>68</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>69</sup> *Ibid.*

<sup>70</sup> [1975] AC 653.

<sup>71</sup> [1976] 3 All ER 140.

<sup>72</sup> *Ibid* at paragraphs 2.12-2.15.

<sup>73</sup> *Ibid* at paragraph 2.17.

<sup>74</sup> *Ibid* at paragraph 2.19.

<sup>75</sup> Victorian Law Reform Commission *Homicide* (No 40 1991) at paragraph 244 Recommendation 31.

3.54 More recently, the Law Reform Commission of Victoria considered the area in the 2004 *Final Report on Defences to Homicide*.<sup>76</sup> Having considered the arguments for allowing duress as a defence to murder, including the arguments as laid out in the 1980 and 1991 Reports, the Commission recommended the application of the defences of duress and extraordinary emergency to murder and attempted murder.<sup>77</sup>

## **F New Zealand**

### **(1) Status of the Defence**

3.55 Like the Canadian law on duress, the law in New Zealand has also been informed by the draft English Code of 1879 and it therefore bears a striking similarity to the Canadian Code. The law in this area is governed by section 24 of the *Crimes Act 1961*. The section re-enacts provisions found in the 1893 and 1908 Codes which were derived from the Draft Code of 1879. The section reads:

“(1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.

(2) Nothing in subsection (1) of this section shall apply where the offence committed is [any of the following offences: treason, communicating secrets, sabotage, piracy, piratical acts, murder, attempt to murder, wounding with intent, injuring with intent to cause grievous bodily harm, abduction, kidnapping, robbery, aggravated robbery, arson].<sup>78</sup>

3.56 Like Canada, New Zealand has an extensive list of offences which are excluded from the defence. The section is silent as to whether the list of excluded offences applies to secondary parties, which thereby left open the possibility that the view of the Canadian Supreme Court in *Paquette*<sup>79</sup> could also be followed in New Zealand. The matter was put beyond doubt in *R v Witika*<sup>80</sup> where the Court of Appeal, relying on *R v Howe*,<sup>81</sup> held that there

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<sup>76</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004).

<sup>77</sup> See paragraph 4.65 below.

<sup>78</sup> Section 24 *Crimes Act 1961*.

<sup>79</sup> (1976) 30 CCC (2d) 417.

<sup>80</sup> [1993] 2 NZLR 424.

was no justification for the defences of duress or compulsion to be different for secondary parties for the defence. The Court held that the correct construction of section 24 of the Code was that it includes both types of offender because where a distinction is drawn in other sections of the Code the expression “actually commits” is used.

## **G United States**

3.57 The common law in the USA permits duress as a defence to a charge of any crime except murder. The general rule, however, is that the doing of a prohibited act is not a crime if reasonably believed to be necessary to save the actor from imminent death or great bodily injury. The defence has been applied in prosecutions for reckless driving, malicious mischief, larceny, embezzlement, receiving stolen goods and even in respect of more serious offences such as burglary, robbery, kidnapping and arson.<sup>82</sup>

3.58 Many of the restrictions placed on the operation of the defence at common law, however, are not to be found in the provisions of the American Law Institute’s Model Penal Code which has been adopted by a majority of the American states. The provisions on duress are to be found in section 2.09 of Article 2 which deals with General Principles of Criminal Liability:

“(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute the offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.”<sup>83</sup>

3.59 The Model Penal Code adopts a very general formula thus conferring a fairly broad discretion on the court or jury to decide each case according to the moral culpability of the accused. It specifically provides that the threats can be made against anyone and it is notable that the mere infliction of force or a threat to apply force will supply a defence. Significantly, no limitation as to murder is included in the section. However,

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<sup>81</sup> [1987] AC 417.

<sup>82</sup> Perkins and Boyce *Criminal Law* (3<sup>rd</sup> ed Foundation 1982) at 1054-1065.

<sup>83</sup> American Law Institute Model Penal Code 1962 section 2.09.

a majority of US states that have decided on the issue have declined to allow duress as a defence to murder.<sup>84</sup>

## **H South Africa**

3.60 South African law does not make the traditional distinction between situations where an accused's choice is constrained by human agents (duress or compulsion) or by virtue of the surrounding circumstances (necessity). Instead, the law favours a broad defence of necessity with one set of principles applicable in both instances.<sup>85</sup> This latter form of necessity as it exists in South African law will be discussed in more detail later in this Paper.<sup>86</sup>

3.61 In relation to the applicability of the defence to murder, early South African cases, such as *R v Werner*,<sup>87</sup> followed the approach of the English courts in holding that it is never justified to take the life of another to save one's own. The leading case on the subject, however, is now *S v Goliath*<sup>88</sup> which allows the defence on a charge of murder.

3.62 The facts of *S v Goliath* were that the two accused came across their victim while out walking one night. They asked him for money and upon being told he had none, the principal offender stabbed the deceased in the chest while his accessory bound the deceased's arms behind his back. The accessory claimed that he did so under threats from the principal that he would stab him to death. At their subsequent trial for murder, the principal was found guilty of murder and was sentenced to death, while the accessory was acquitted on the ground that he acted under the principal's compulsion. On an appeal by the prosecution on a point of law, Rumpff JA, delivering the leading judgment, held that compulsion or duress can constitute a complete defence to a charge of murder if the pressure brought to bear on an accused was so strong that no reasonable person in the circumstances of the accused could be expected to have resisted it.<sup>89</sup> The Court dismissed *dicta* to the contrary in *R v Werner* as being *obiter* and observed that the murder exception rule was an historical hangover from old English decisions and writers who were influenced by the ethical considerations of their time. He also noted that the correctness of this position had subsequently been

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<sup>84</sup> Reed, "The Need for a New Anglo-American Approach to Duress" (1997) 61 *Journal of Criminal Law* 209 at 216.

<sup>85</sup> *S v Goliath* (1972) 3 SA 1.

<sup>86</sup> See paragraph 4.85 below.

<sup>87</sup> (1947) 2 SA 828, 837. See also *S v Bradbury* (1967) 1 SA 387.

<sup>88</sup> (1972) 3 SA 1.

<sup>89</sup> Ogilvie Thompson CJ, Jansen JA and Trollip JA concurring; Wessels JA dissenting.

doubted by modern writers on English and American law and that this was no longer the law in many continental countries. Rumpff JA was therefore fortified in arriving at the conclusion that heroism should not be expected of ordinary individuals:

“It is generally accepted...that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. I do not think that such an exception to the general rule which applies in criminal law is justified.”<sup>90</sup>

3.63 It would be a misinterpretation of *Goliath* to state that South African courts lightly accept compulsion as a defence to murder. As observed by Rumpff JA, the facts of the case will be carefully scrutinised and of course the accused will have to satisfy the reasonable person test.

3.64 Before leaving South African law, it should be noted that both the majority and minority in *Goliath* also expressed support for a partial defence of compulsion where the reasonable person would not have committed the crime. This would allow a court or jury to return a verdict of culpable homicide and not murder. However, in *S v Bailey*<sup>91</sup> this rule was rejected as contrary to principle and logic, because if the accused intended to kill he or she must be guilty of murder if the other elements of the crime are present.

## **I Consideration of Duress as a Full Defence to Murder**

3.65 To summarise, the denial of the defence of duress in cases of murder is reflected in the common law and statutory codes of many jurisdictions. The English Law Commission has consistently recommended that it be allowed as a full defence, and the *logic* of the Commission’s argument was recently described in the House of Lords as “irresistible.”<sup>92</sup>

3.66 While many of the older academic works on the subject tend not to be in favour of extending duress to murder, it has been suggested that these writers should not be compelling in a modern context.<sup>93</sup> Thus, the minority judges in *R v Abbott* stated that “they have to be read with

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<sup>90</sup> (1972) 3 SA 1.

<sup>91</sup> (1982) 3 SA 772.

<sup>92</sup> *R v Hasan* [2005] 4 All ER 685, 694, *per* Lord Bingham. See paragraph 2.15 above.

<sup>93</sup> Milgate, “Duress and the Criminal Law: Another About Turn by the House of Lords” (1988) 47 CLJ 61 at 63.

circumspection in these days, for the criminal courts have long accepted duress as an available defence to a large number of crimes from which those same writers withheld it.”<sup>94</sup>

3.67 More modern academic works have tended to argue for, at the very least, a reconsideration of the denial of the defence to murder. These have noted that the denial of the defence is based on past ethical standards and that there is a discernible trend towards moving from the strict common law position that the defence is unavailable in murder cases.<sup>95</sup> Stuart notes also that most English commentators suggest that no offence, including murder, should be automatically excluded from the scope of the defence.<sup>96</sup>

3.68 The Commission now turns to discuss the various issues that arise in this respect.

**(a) Arguments for the Application of the Defence to Murder**

**(i) Modern Ethical Standards**

3.69 It has been suggested that close examination of the weight of authority against the availability of the defence reveals mainly reiteration of Hale’s assertion in this regard.<sup>97</sup> It is of course the case that Hale’s writings were based on the ethical standards of the time. In that respect, it may be open to question whether today’s society is likely to be guided by such standards, or would be more willing to consider arguments based on threats to personal autonomy.

**(ii) Heroism**

3.70 There is a long line of authority to the effect that where a person is forced to choose between sacrificing his or her own life and taking that of another, the correct moral choice is to sacrifice their own life.<sup>98</sup> This is based on the sanctity of life. However it has been noted that perhaps the criminal law should no longer expect heroism.<sup>99</sup> It has been suggested that

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<sup>94</sup> [1977] AC 755, 771.

<sup>95</sup> Sornarajah “Duress and Murder in Commonwealth Criminal Law” (1981) 30 *International and Comparative Law Quarterly* 660.

<sup>96</sup> Stuart *Canadian Criminal Law* (3<sup>rd</sup> Ed Carswell 1995) at 436.

<sup>97</sup> Milgate, H.P., “Duress and the Criminal Law: Another About Turn by the House of Lords” (1988) 47 CLJ 61 at 63.

<sup>98</sup> 1 Hale PC 51; Blackstone *Commentaries* IV 30.

<sup>99</sup> Law Commission *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 30.11.

apart from a few exceptional cases, there is no duty in the criminal law to be a hero.<sup>100</sup>

**(iii) Excuse**

3.71 If an act can be excused this means that the act was undoubtedly a crime, but the law recognises that the actor was placed in very difficult circumstances and may have been coerced into committing the crime. Allowing the defence to be used in murder cases allows the criminal law to deplore the act but excuse the actor. It is by no means justifying the act.

**(iv) Recognition of Human Weakness**

3.72 If the law recognises, 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.

3.73 Duress, like self defence, is preventative, that is, the defendant acts to avert harm, while the former merely operates retrospectively.<sup>101</sup>

**(v) Deterrent Effect**

3.74 It has been suggested that denial of the plea of duress in murder cases may have a deterrent effect on a person under duress.<sup>102</sup> Nonetheless, it can also be argued that the imposition of such a standard will not necessarily act as an effective deterrent. It may be more likely that a person faced with such difficult circumstances that they find themselves under duress to commit a murder is unlikely to consider the possibility that they are breaking the criminal law and the consequences thereof. In fact, it has been suggested that the instinct of self preservation in the face of an immediate threat will nearly always take precedence over the threat of legal punishment at some future date.<sup>103</sup>

**(b) Arguments against the Application of the Defence to Murder**

**(i) The Law may be Countenancing Murder**

3.75 One of the main arguments against the extension of the defence to murder is that the law may be seen to be countenancing, even incentivising, murder. It then appears that the sanctity of life is being ignored by the courts

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<sup>100</sup> Milgate "Duress and the Criminal Law: Another About Turn by the House of Lords" (1988) 47 CLJ 61 at 67; Gearty "Howe to be a Hero" [1987] CLJ 203.

<sup>101</sup> Horder "Autonomy, Provocation and Duress" [1992] Crim LR 706 at 709.

<sup>102</sup> Hall *General Principles of the Criminal Law* (2<sup>nd</sup> ed Bobbs-Merrill 1960) at 444-448; Stephen *A History of the Criminal Law of England* (Macmillan 1883) Vol I at 107.

<sup>103</sup> Walters "Murder under duress and judicial decision making in the House of Lords" (1988) 8 *Legal Studies* 61 at 69.

in favour of compassion to someone who, although coerced into doing it, has murdered someone.

**(ii) Standards of Behaviour**

3.76 Another important argument in this respect is 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. It was noted in *R v Howe*<sup>104</sup> 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. This is true yet, as noted above, to allow duress as a defence to murder is not to justify the act, that is, to say that the act was the right thing to do in the circumstances, but to excuse the actor, by recognising that he or she acted under constrained choice, while still deploring the act.

**(iii) Fabrication**

3.77 It can be argued that the defence of duress is particularly susceptible to fabrication. As a result, it has been suggested that it would be unwise to offer what may be perceived to be an easy defence to a serious crime. As noted in the House of Lords in *R v Howe*, “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>105</sup>

**(iv) Charter for Terrorism**

3.78 It was suggested by Lord Simon in *DPP for Northern Ireland v Lynch*,<sup>106</sup> as well as being noted in *R v Howe*,<sup>107</sup> that the leader of a gang, through coercion, could confer immunity on his or her followers, thereby leading to many deaths of innocent victims.

3.79 However this “charter for terrorism” argument supposes that, once raised, the defence will invariably succeed. The current objective elements in the duress defence result in its denial where the defendant’s behaviour has been unreasonable. Further, the prior fault rule would deny the defence to terrorists or members of criminal gangs.<sup>108</sup>

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<sup>104</sup> [1987] 1 All ER 771.

<sup>105</sup> *Per* Lord Lane.

<sup>106</sup> [1975] AC 675, 687-688.

<sup>107</sup> [1987] 1 All ER 771.

<sup>108</sup> Milgate H.P. "Duress and the Criminal Law: Another About Turn by the House of Lords" (1988) 47 CLJ 61 at 72.

(v) ***Prosecutorial Discretion***

3.80 There have been suggestions that an appropriate way of dealing with these difficult cases is to leave them to prosecutorial discretion.<sup>109</sup> However this is countered by the argument that it may be seen as an evasion of the issue to delegate difficult cases to the public prosecutor. Some commentators feel that the issue should be faced and that the validity of the defence in individual cases is better judged at trial than by government officials.<sup>110</sup> The Canadian Law Reform Commission noted in the 1982 *Working Paper on Criminal Law: The General Part - Liability and Defences*<sup>111</sup> that this approach would lead to a divergence of law in code and law in practice and would also lead to a lack of jurisprudence in the area.

3.81 The Commission considers that it is equally arguable that prosecutorial discretion combined with other factors such as the use of the defence to reduce murder to manslaughter and discretion in sentencing may be a more appropriate way to deal with individual cases as it would allow a degree of flexibility for the more difficult cases.

(vi) ***Legislative Changes***

3.82 It is also noteworthy that although the Law Commission of England and Wales have consistently called for changes in this area of the law, the UK Parliament has not acted on these recommendations. In the Commission's view this shows a consistent lack of legislative will to extend the defence.

## **J Consideration of Duress as a Partial Defence to Murder**

3.83 If it is to be recommended that duress should not provide a complete defence to murder, it is nevertheless important to consider whether it should act as a partial defence, reducing the plea to manslaughter.

3.84 The Court of Appeal in *R v Howe* noted that if duress is to act as a defence to murder at all, it should only reduce the offence from murder to manslaughter.<sup>112</sup> It was suggested in that case that the defence of duress could have developed more logically as mitigation, as suggested by Stephen.<sup>113</sup>

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<sup>109</sup> *R v Howe* [1987] 1 All ER 771.

<sup>110</sup> Milgate H.P. "Duress and the Criminal Law: Another About Turn by the House of Lords" (1988) 47 CLJ 61 at 71.

<sup>111</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper No 29 1982) at 91-96.

<sup>112</sup> [1987] All ER 771, 785.

<sup>113</sup> Stephen *A History of the Criminal law of England* (Macmillan 1883) Vol II at 108.

3.85 It has been noted that in the recent decision in *R v Hasan*, Lord Bingham suggested that the strictness of the parameters of the defence can be supported when one bears in mind that judges can have regard to duress at the sentencing stage, even if the strict requirements of duress have not been satisfied.<sup>114</sup> Thus, it has been suggested that the focus towards the conceptual underpinnings of the defence is shifting back to the approach advocated by Lord Simon in his dissenting judgment in *DPP for Northern Ireland v Lynch*, where he expressed the view that duress should go to mitigation, but not liability.<sup>115</sup>

3.86 Many of the arguments put forward in relation to duress being used as a full defence also apply to the suggestion that it should be used as a partial defence. However the arguments for a partial defence allow for a balance between recognising the sanctity of life and recognising the difficult situation that those who fall under duress are placed in.

3.87 The English Law Commission recently considered the issue of allowing duress as a partial defence to “first degree murder” in its proposed new homicide framework.<sup>116</sup> The Law Commission recommended that the defence of duress should act as a partial defence giving the following reasoning. First, that by allowing duress to act as a partial defence, consistency would be achieved with the partial defences of provocation and diminished responsibility and second, 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.

**(a) Arguments for the Partial Application of Duress to Murder**

**(i) Policy**

3.88 On a policy basis, it seems appropriate that if the defence is not to apply as a full defence to murder, some provision should be made for those who kill while under serious threats, to reflect the fact that they acted under duress due to their being “caught in a maelstrom of circumstances.”<sup>117</sup>

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<sup>114</sup> [2005] 4 All ER 685, 696. See paragraph 2.15 above.

<sup>115</sup> [1975] AC 653, 686. See Ryan & Ryan “Resolving the Duress Dilemma: Guidance from the House of Lords” (2005) 56 NILQ 421 at 430.

<sup>116</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005). See paragraph 3.27 above for recommendations.

<sup>117</sup> Fletcher “The Individualisation of Excusing Conditions” (1974) 47 S Cal LR 1269 at 1308.

**(ii) Discretion in Sentencing**

3.89 Allowing the defence of duress to act as a partial defence to murder would have the advantage of flexibility (the mandatory penalty of life imprisonment is avoided) so that duress could be taken into account in sentencing. The moral culpability of the accused, as determined by the particular circumstances of the case, could then be reflected in the sentence. The defendant would still remain guilty but the court could take into account that he or she was coerced into committing the crime.

3.90 It is arguable that such flexibility is particularly important in cases where people have killed under duress. The defendant can be seen as somewhat less blameworthy, due to the fact that they have acted as a result of threats.

3.91 The English Law Commission recently provisionally proposed the application of duress as a partial defence to “first degree murder”.<sup>118</sup> It is noted in the Consultation Paper that the main justification for allowing the defence to murder is to “obviate the effect of a mandatory life sentence.”<sup>119</sup>

**(iii) Compassion**

3.92 If the defence is allowed to act as a partial defence to murder, the courts will have the opportunity to take into account the sanctity of life while still showing compassion to the accused. Ashworth points out that a qualified defence allows the law to recognise the sanctity of human life while showing compassion.<sup>120</sup>

**(iv) The Defendant is Not Fully Blameworthy**

3.93 A person who acts under duress has intentionally taken an innocent life, but it could be argued that they cannot be regarded as fully blameworthy as their will was impaired. Allowing them to rely on the defence of duress ensures that this lower level of blameworthiness is recognised by the courts.

**(b) Arguments against the Partial Application of Duress to Murder**

**(i) Logic of Allowing Duress as a Partial Defence**

3.94 Although the Court of Appeal in *R v Howe*<sup>121</sup> suggested that if duress is to act as a defence in murder it should only be as mitigation, Lord

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<sup>118</sup> Law Commission of England and Wales *A New Homicide Act for England and Wales?* (No 177 2005).

<sup>119</sup> *Ibid* at paragraph 7.62.

<sup>120</sup> Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed Oxford University Press 2003) at 230 and 280.

<sup>121</sup> [1987] All ER 771.

Griffiths, citing Lord Morris' in *DPP for Northern Ireland v Lynch*,<sup>122</sup> stated that it is too late now to adopt that view. Lord Griffiths added that this compromise solution should not be accepted saying that “[w]here the defence of duress is available it is a complete excuse.”<sup>123</sup> He went on to note that English law has rejected the use of duress as mitigation and thus it would be yet another anomaly in the law of duress to allow it as mitigation for murder alone. Although there were various views in relation to the logic of allowing duress as a defence to murder, there was a general agreement that such change, if it were to be introduced, should be effected by Parliament.

3.95 This argument can be countered by the acknowledgement that murder, as it involves the taking of another human life, may be treated differently to other offences. Thus, it follows that defences to murder may be different to defences to other offences. The argument that murder may be treated differently is borne out by the fact that provocation only applies in the context of reducing murder to manslaughter.<sup>124</sup>

**(ii) Provocation Analogy**

3.96 As noted above, it is difficult to find a logical reason to apply duress as a partial defence to murder. One rationale apparent is to treat duress in murder as analogous to provocation. Duress is analogous to provocation, which is a partial defence to murder, in so far as it is excusatory in nature and arguably should operate to like effect. The law excuses the offender on the basis of the common human emotions of anger in provocation and fear in duress.<sup>125</sup> However the analogy is weakened by the fact that provocation is only a partial defence to murder whereas duress is a complete defence to all crimes *except* murder.<sup>126</sup> As already noted, this can be rationalised by the fact that murder may be treated differently to other offences.

**(iii) Stigma of Manslaughter Conviction**

3.97 The Law Commission of England and Wales considered the possibility of allowing duress to reduce murder to manslaughter, and rejected

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<sup>122</sup> [1975] AC 653, 670.

<sup>123</sup> [1987] All ER 771, 790.

<sup>124</sup> See Law Reform Commission *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003).

<sup>125</sup> Horder “Autonomy, Provocation and Duress” [1992] Crim LR 706 at 709.

<sup>126</sup> Further, in *R v Howe*, Lord Hailsham, in rejecting the use of duress as a partial defence, argued that provocation can be distinguished from duress in that provocation involves an emotional loss of self control while duress involves a conscious decision which can be coolly undertaken (*R v Howe* [1987] All ER 771, 782).

the suggestion on the basis that an individual who satisfies all the requirements of the duress defence should not be subject to the stigma of a conviction for manslaughter, which is still a serious crime.<sup>127</sup>

3.98 Nonetheless, it is essential that the criminal law views the killing as a crime, because not to do so would be to ignore the sanctity of life, and allow someone who has taken a human life to go unpunished. Extending duress to murder, as a partial defence, can ensure that the acts of the defendant are seen as a crime, but allow the courts to excuse the person who submitted to the threats and carried out the crime.

## **K Discussion**

3.99 The denial of the defence of duress in cases of murder is reflected in the law and Codes of many common law jurisdictions. As discussed above, the English Law Commission has consistently recommended that it be allowed as a full defence,<sup>128</sup> and the logic of the Commission's argument was recently described in the House of Lords as "irresistible".<sup>129</sup> The Victorian Law Reform Commission also recently recommended that duress should be available as a defence to murder and manslaughter in Victoria,<sup>130</sup> while it is a defence to murder under the Commonwealth and ACT Criminal Codes.<sup>131</sup>

3.100 The Commission acknowledges the fact that the issue of the scope of the defence of duress is a difficult and complex issue. It is also noted that that it is very seldom that cases arise that fit the mould of 'the perfect duress case'. There seems to be an automatic instinctive reaction in society which shows a reluctance to extend the defence to murder, as reflected by the reluctance of the legislature to extend the defence, but there is some possibility of the creation of circumstances under which duress can be used as a partial defence in cases of murder. For the reasons outlined above, including flexibility and discretion in sentencing, it seems that allowing the defence of duress to be available to those who commit murder, in order to reduce murder to manslaughter, is a viable option. This by no means will ensure that all of those who plead duress to murder will have their plea accepted and their charge reduced to manslaughter; it merely means that the

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<sup>127</sup> Law Commission *Criminal Law: Legislating the Criminal Code Offences Against the Person and General Principles* (No 218 1993) at paragraph 30.11.

<sup>128</sup> See paragraphs 3.20-3.31 above.

<sup>129</sup> *R v Hasan* [2005] 4 All ER 685, 695, per Lord Bingham. See paragraph 2.15 above.

<sup>130</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* Recommendation 13.

<sup>131</sup> Sections 10.2 and 10.3 *Criminal Code Act 1995* (Cth); sections 40 and 41 *Criminal Code 2002* (ACT).

option is there in those cases where such a reduction and sentencing discretion is appropriate. On balance, the Commission has provisionally concluded that the defence of duress should apply to all crimes excluding murder and attempted murder, but that it should apply as a partial defence to those crimes, reducing the charge of murder to that of manslaughter.

3.101 The Commission acknowledges that, as already discussed,<sup>132</sup> this conclusion is predicated on an analysis whose focus is on the element of constrained choice operating in duress cases. On this analysis the defendant is entitled to be excused, or partially excused, because it would be unfair to hold him accountable for his actions by reason of the element of moral compulsion. If, on the other hand, the focus is shifted to the choice of evils confronting the defendant, an arguable case can be made that an accused who chooses the lesser of two evils is entitled to a complete acquittal. On this view, the argument is that the accused's actions, though regrettable, are nevertheless justifiable; by effecting a net saving of human life he has done the right thing in the circumstances. Accordingly, the argument from justification points to a full, rather than partial, defence to murder in cases of this kind, and, on the principle of fair and proper labelling, to an acquittal on the grounds of lesser evils rather than duress. While expressing an initial preference for the excusatory analysis, the Commission acknowledges that a coherent case can be made for the justificatory approach and would welcome views on this matter.

3.102 *The Commission provisionally recommends that the defence of duress should apply to all offences excluding murder and attempted murder. Moreover, while acknowledging that the plea might be made available as a partial defence to those offences, the Commission accepts 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, and invites submissions on this matter.*

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<sup>132</sup> See paragraphs 1.08-1.11 above

## CHAPTER 4    NECESSITY

### A        Introduction

4.01        In this Chapter, the Commission considers the defence of necessity and its connection with duress. The Commission also discusses the more recent development in English law of the defence of duress of circumstances.<sup>1</sup>

4.02        There is a significant overlap between the defences of necessity and duress in that they both involve an element of constrained choice. Indeed necessity is sometimes referred to as duress *per necessitatum* (duress by necessity or coercion). They can be distinguished because duress involves the will being overborne by threats while necessity involves the will being overborne by external circumstances.

### B        Ireland

4.03        It is generally accepted that necessity is a recognised defence in Irish law, although its application is narrowly circumscribed, and for that reason its status as a general defence can be questioned. But there are clear examples where a person is, in effect, by virtue of the extraordinarily constrained circumstances in which they find themselves, permitted to break the letter of the criminal law in order to prevent another evil to them or another person, or, sometimes, to other property.<sup>2</sup>

4.04        A common law example of necessity is where a doctor operates on an unconscious person who cannot give consent to the operation, in order to save the person's life.<sup>3</sup> Without the consent of the patient, the operation

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<sup>1</sup>        Since the defence of duress of circumstances, as developed by the English courts, concerns constraints imposed by surrounding circumstances, it can be seen as a form of necessity.

<sup>2</sup>        See generally Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 1075-1085; McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 779-822 and Smith and Hogan *Criminal Law* (10<sup>th</sup> ed Butterworths 2002) at 266-275.

<sup>3</sup>        See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 1084-1085; McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 817-822. It has been argued that the circumstances in *Attorney General v X*, [1992] ILRM 401, involved a case of necessity. In that case, the Supreme Court held

amounts to an assault, but the necessity of the situation provides a defence for the doctor. A statutory example is section 6 of the *Criminal Damage Act 1991*<sup>4</sup> which states that it is a defence to a charge of criminal damage to property that the intentional damage was done to avoid injury to a person or to save other property and where this damage was reasonable in the circumstances. Emergency rescue teams who cut through a car to save a person trapped in the car or fire officers who deliberately knock a building to prevent a fire spreading to other buildings come within section 6 of the 1991 Act.

## **C England**

### **(1) Introduction**

4.05 The common law origins of necessity as a defence date back to the 16th Century decision in *Reniger v Fogossa*.<sup>5</sup> In a celebrated argument, it was noted that:

“in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law...where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion...”<sup>6</sup>

Williams points to various sources justifying necessity as a defence and “somewhat confidently” asserts the existence of the defence in English law.<sup>7</sup>

4.06 In recent years the defence has been applied by English courts, most often in a medical context. This includes the use of necessity to justify the sterilisation of a mentally incapacitated woman,<sup>8</sup> and the detention of a person suffering from a mental disorder.<sup>9</sup> In *Re F*,<sup>10</sup> Lord Goff noted that

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that a doctor may lawfully perform an abortion where there is a “real and substantial risk” to the life of the mother, which includes a risk of suicide. The defence is only open, however, where there is a need to preserve the *life*, as opposed to the *health* of the mother. It has been noted that although these cases are usually treated as examples of necessity, they do not involve a requirement that the defendant chose the lesser of two evils: See McAuley and McCutcheon at 821.

<sup>4</sup> As amended by section 21 of the *Non Fatal Offences Against the Person Act 1997*

<sup>5</sup> (1552) 1 Plowd 1, 18.

<sup>6</sup> *Ibid.* See argument of Sergeant Pollard, which appears to have been accepted by the Court.

<sup>7</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 724.

<sup>8</sup> *Re F* [1990] 2 AC 1.

<sup>9</sup> *R v Bournewood Community and Mental Health NHS Trust* [1999] 1 AC 458.

<sup>10</sup> [1990] 2 AC 1, 74 A-C.

“there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful” and in *R v Bournemouth Community and Mental Health NHS Trust*<sup>11</sup> he noted that “the concept of necessity has its role to play ...in our criminal law” and went on to note that it is “a concept of great importance.”

4.07 The doctrine of necessity was used in the *Bournemouth Trust* case as the legal basis for the detention of a person suffering from mental disorder. This decision was subsequently overruled in the European Court of Human Rights because using necessity as a standard meant that there were no procedural safeguards to protect against an arbitrary deprivation of liberty.<sup>12</sup>

4.08 In *R v Shayler*<sup>13</sup> the Court of Appeal stated, *obiter*, that the defence of necessity existed almost entirely in the excusatory defence of “duress of circumstances”. This has been criticised on the basis that the Court denied the existence of the defence of necessity without very compelling reasoning and that it “merely draws together what are really no more than a few incautious remarks in other sources” before denying the distinction between excusatory and justificatory forms of necessity.<sup>14</sup> Indeed, as Lord Bingham noted in the House of Lords, on appeal, it was a little unfortunate that the Court of Appeal had entered this “vexed and uncertain territory”, as the defendant had not raised the issue of necessity or duress.<sup>15</sup>

4.09 In *R v Quayle*,<sup>16</sup> the Court of Appeal outlined some requirements that a defendant must satisfy in order to plead the defence of necessity. Although this case is a medical case also, it appeared to accept a general defence of necessity.

4.10 In any treatment on the defence of necessity in English law, it is appropriate to deal with the leading case *R v Dudley and Stephens*.<sup>17</sup> While the case primarily looks at the scope of the defence and its application to homicide, its influence in English law has been far-reaching.

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<sup>11</sup> [1999] 1 AC 458, 488. The *Bournemouth* case and *Re F* were applied in the more recent conjoined twins case, *Re A (Children)* [2000] 4 All ER 961. See paragraph 4.22 below.

<sup>12</sup> See *HL v The United Kingdom* 45508/99 European Court of Human Rights 5 October 2004.

<sup>13</sup> [2001] 1 WLR 2206.

<sup>14</sup> Gardner “Direct Action and the Defence of Necessity” [2005] Crim LR 371.

<sup>15</sup> *R v Shayler* [2003] 1 AC 247, 266.

<sup>16</sup> [2005] EWCA Crim 1415, discussed below at paragraph 4.27.

<sup>17</sup> (1884) 14 QBD 273.

## (2) *R v Dudley and Stephens*

4.11 In *R v Dudley and Stephens*, the Queen's Bench Division vigorously denied the existence of any doctrine of necessity as a defence to murder. The facts of this case are well-known. The two defendants, a 17 year old cabin boy and another man got into an open lifeboat after their ship, the *Mignonette*, had sunk. They had been in the boat for 18 days, their food and water supplies having run out, when Dudley proposed to Stephens that one of them should be killed and eaten by the survivors. It was decided that the cabin boy would be killed, and he was at that stage very weak. They did so and 4 days later they were rescued. When they arrived in England they were charged with murder. The jury found, as a matter of fact, that the men would probably have died within the four days had they not fed on the boy's body; that the boy would probably have died before them and that, at the time of the killing, there was no appreciable chance of survival by any other means. On these facts, the court, in a judgment delivered by Lord Coleridge, convicted the defendants and sentenced them to death. However, this sentence was later commuted to six months imprisonment.<sup>18</sup>

4.12 Lord Coleridge appeared to base his judgment on two grounds. The first was morality; the judgment appears to suggest that the only morally correct course of action in such circumstances is to sacrifice oneself for others. In this regard, Lord Coleridge stated that “[w]e are often compelled to set up standards we cannot reach ourselves, and to lay down rules we could not ourselves satisfy.” His second reason for denying the defence was “the difficulty of measuring necessity and selecting the victim...By what measure is the comparative value of lives to be measured?”

4.13 However, as noted by Williams “to hinge guilt on [choosing the boy as the victim] would indicate that lots should have been drawn”<sup>19</sup> and, as the Court had already disapproved, *obiter*, of a decision in the United States case of *US v Holmes*<sup>20</sup> that the drawing of lots in similar circumstances to those in *Dudley and Stephens* would afford an accused a defence, this sheds little light on the Court's reasoning. Significantly, the judgment also fails to lay down any alternative rules of action in the circumstances which would allow some lives to be saved. In *US v Holmes*, the defendant, a member of the crew of the wrecked ship the *William Brown*, was cast adrift in an overcrowded boat. In an attempt to prevent the boat from sinking, Holmes, under orders from the first mate, assisted in throwing 16 men overboard.

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<sup>18</sup> It has been suggested that the fact that the death sentence was commuted to such a short sentence was an acknowledgment that although Dudley and Stephens had broken the law, they had done so under conditions of overwhelming necessity.

<sup>19</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 744.

<sup>20</sup> 26 Fed Cas 360 (1842).

The grand jury declined to indict him for murder and, charged with manslaughter, he sought to rely on a defence of necessity. Baldwin CJ in his direction to the jury accepted the existence of a defence of necessity justifying the taking of another's life if the person was in circumstances of imperious necessity, but noted that passengers should be chosen above seamen, with enough seamen left to man the boat. Those passengers whom necessity requires to be cast overboard should be chosen by lot.

4.14 Lord Coleridge in *Dudley and Stephens* dismissed *Holmes* as unlikely to be an "authority satisfactory to a court in this country". No alternative solution to this problem was offered by him and it appears that the intention would be that, in the absence of a self-sacrificing volunteer, it would be the duty of all to die. Lord Coleridge noted that "[t]o preserve one's life is generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it."<sup>21</sup> He went on to reject the defence of necessity as unworkable and dangerous in practice. It has been suggested that this rejection of the principle was obiter as there was no necessity on the facts.<sup>22</sup>

4.15 Lord Coleridge's dismissal of *Holmes* and the lottery principle does not seem to be part of the *ratio decidendi*, given that the boy in *Dudley and Stephens* was not fairly chosen. Also, it should be noted that Lord Coleridge's refusal to accept the necessity plea was as a result of his refusal to accept Bacon's maxim that self preservation was a defence for the deliberate taking of innocent life. The defendant who acts in pursuit of a common agreement to secure a net saving of human life in circumstances where everyone will perish if he does nothing is not an example of the selfish individual Lord Coleridge had in mind. Therefore the principle does not seem to apply where there is no need to select a victim, and there is also a net saving of human life. It follows then that *Dudley and Stephens* could be distinguished if the person sacrificed has innocently imperilled the lives of others. This is used as an argument for the defence of necessity in certain cases where the victim, by creating the peril, has selected himself, for example, as in the case of the man on the ladder in the *Zeebrugge* disaster.<sup>23</sup>

4.16 Some critics suggest that the *R v Dudley and Stephens* judgment was unsatisfactory. The grounds of the decision, that necessity "might be made the legal cloak for unbridled passion and atrocious crime" have been described as "mere rhetoric"<sup>24</sup> and "scarcely realistic".<sup>25</sup>

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<sup>21</sup> *R v Dudley and Stephens* (1884) 14 QBD 273, 279.

<sup>22</sup> Glazebrook "The Necessity Plea in English Law" (1972) 30 CLJ 87 at 114.

<sup>23</sup> See paragraphs 4.23 and 4.102-4.105.

<sup>24</sup> Howard *Australian Criminal Law* (The Law Book Company 1965).

<sup>25</sup> Williams *Criminal Law: The General Part* (2<sup>nd</sup> ed Stevens and Sons Ltd 1961) at 744.

4.17 One commentator suggests that *R v Dudley and Stephens* in fact casts more shadow than light on the subject of necessity, asserting that the case does not prove that necessity exists, but that another reason must be sought for stating that it does not.<sup>26</sup> It has also been suggested that even in light of the more recent House of Lords approval of *R v Dudley and Stephens* in *R v Howe*<sup>27</sup> it may be “premature to conclude that necessity can never be a defence to murder.”<sup>28</sup>

### (3) *The Application of R v Dudley and Stephens*

4.18 The decision in *R v Dudley and Stephens* was approved by the House of Lords in *R v Howe*<sup>29</sup> in support of their decision that the defence of duress did not apply to a conspiracy to murder charge. Prior to *Howe*, there was some uncertainty as to whether the defence was open to some accessories to murder. In *R v Abbott*<sup>30</sup> a majority of the Privy Council had confirmed that the defence of duress would not be allowed in the case of first-degree murder. However, in *DPP for Northern Ireland v Lynch*<sup>31</sup> the majority of the House of Lords allowed the defence of duress to an alleged principal in the second degree to murder. Lynch was threatened by terrorists and forced to drive them to a place where a shooting was carried out. This finding, however, had been criticised on the basis that a principal in the second degree on a murder charge, may be just, if not more, morally culpable than the actual perpetrator. Accordingly, when the matter came up for re-consideration in *R v Howe* the Lords took the opportunity to restore the law to its pre-*Lynch* position. Lord Hailsham was strongly influenced by the decision in *R v Dudley and Stephens*, describing the distinction between duress and necessity as being one without a difference. He stated: “I do not believe that as a ‘concession to human frailty’ [...those who succumb to the temptation of taking an innocent life rather than their own] should be exempt from liability to criminal sanctions.”<sup>32</sup>

4.19 Lord Hailsham was thus dissociating himself from the view expressed by the South African Supreme Court in *S v Goliath*<sup>33</sup>, and approved in *R v Abbott*<sup>34</sup> that “it is generally accepted... that for the ordinary

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<sup>26</sup> Bennun “Necessity- yet another analysis?” (1986) 21 *Irish Jurist* 186 at 198.

<sup>27</sup> [1987] 1 All ER 771 discussed at paragraphs 3.13-3.16.

<sup>28</sup> Smith and Hogan *Criminal Law* (8<sup>th</sup> ed Butterworths 1996) at 252.

<sup>29</sup> [1987] 1 All ER 771. See paragraph 3.13 above.

<sup>30</sup> [1976] 3 All ER 140.

<sup>31</sup> [1978] AC 653. See paragraphs 3.10-3.12 above.

<sup>32</sup> *R v Howe* [1987] 1 All ER 771, 780.

<sup>33</sup> (1972) (3) SALR 465.

<sup>34</sup> [1976] 3 All ER 140.

person in general his life is more valuable than that of another.”<sup>35</sup> In *Goliath*, Rumpff JA had also noted “I do not think that such an exception to the general rule which applies in criminal law is justified.”<sup>36</sup>

4.20 In *R v Howe* Lord Hailsham concluded that:

“in general I must say that I do not at all accept in relation to the defence of duress it is either good morals, good policy or good law to suggest, as did the majority in *Lynch’s* case and the minority in *R v Abbott* that the 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>37</sup>

4.21 *R v Howe* appears to be authority that the defence of necessity would be not available in cases of murder. However, the conjoined twins case *Re A (Children)*<sup>38</sup> has been said to show an increased willingness of English law to accept the defence of necessity in the case of murder.

4.22 The decision in *Re A (Children)* concerned J and M, conjoined twins, of whom J was capable of an independent existence, but an operation to separate the twins would have caused the death of M. Without any operation, both would die. The twins’ parents refused to consent to the operation, and so the hospital applied for a declaration that performing the operation would be lawful. The judge concluded that the operation would be lawful. While each of the judges appeared to have varying rationales for the decision, Brooke LJ referred considerably to the doctrine of necessity. He held that both *Dudley and Stephens*<sup>39</sup> and *R v Howe*,<sup>40</sup> in which necessity and duress respectively were denied as a defence to murder, were distinguishable on policy reasons. He went on to reject the assumptions of some critics that the recognition of the defence of necessity in such a case would give rise to people being all too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases (at the risk of other people’s lives). He emphasised the rare circumstances of the case, thereby reducing the possibility of the necessity defence being relied upon in subsequent murder cases.

4.23 In his judgment, Brooke LJ, having discussed *R v Dudley and Stephens* in detail, went on to describe some classic examples of the

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<sup>35</sup> *S v Goliath* (1972) (3) SALR 465, 480.

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

<sup>37</sup> *R v Howe* [1987] 1 All ER 771, 779.

<sup>38</sup> [2000] 4 All ER 961.

<sup>39</sup> (1884) 14 QBD 273.

<sup>40</sup> [1987] 1 All ER 771.

necessity doctrine. These included events during the sinking of the ferry *The Herald of Free Enterprise* near Zeebrugge where a man on the sinking ferry was pushed to his death from a rope ladder in order to allow several others to save themselves.<sup>41</sup> Brooke LJ noted academic commentary which suggested that if such a case were to come to court now, it would not be too difficult for a judge to distinguish *Dudley and Stephens*. He gave two reasons for this belief. The first was that there was no question of choosing who had to die (the problem which Lord Coleridge had found unanswerable in *R v Dudley and Stephens*<sup>42</sup>) because the unfortunate young man on the ladder had chosen himself by his immobility there. The second was that unlike the cabin boy on the *Mignonette*, the young man, although in no way at fault, was preventing others from going where they had a right - and a most urgent need - to go, and was thereby unwittingly imperilling their lives.

4.24 The issue of the difficulty of choosing a victim was also discussed by Brooke LJ in *Re A (Children)*.<sup>43</sup> It was noted that to allow a victim to be chosen is to regard the victim's rights as less worthy than the rights of the person protected by the action taken, but that it is surely necessary to make some sacrifice, and a fair procedure for resolving the problem must be found. Brooke LJ held that the 3 requirements for the application of the doctrine of necessity, as laid down by Sir James Stephen, were satisfied. These were that the act is needed to avoid inevitable and irreparable evil; that no more should be done than is reasonably necessary for the purpose to be achieved; and that the evil inflicted must not be disproportionate to the evil avoided, were satisfied.

4.25 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 homicide cases.

4.26 Not only has the decision in *R v Dudley and Stephens* affected homicide cases, but all subsequent decisions in the area. The narrow limits that have been placed on the defence of necessity, coupled with cases which have denied the existence of the defence has led to a situation in which the scope, application and very existence of the defence is unclear. As noted above, the defence has been applied more recently, albeit in the context of medical law, in *Re A (Children)*<sup>44</sup> and *R v Quayle*.

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<sup>41</sup> These circumstances were described by an army corporal at the coroner's inquest in October 1987 into the sinking of *The Herald of Free Enterprise*. See paragraphs 4.14 above and 4.102-4.105 below.

<sup>42</sup> (1884) 14 QBD 273.

<sup>43</sup> [2000] 4 All ER 961.

<sup>44</sup> *Ibid.*

4.27 In *R v Quayle*,<sup>45</sup> a number of defendants, all of whom had been separately charged and tried in relation to the possession and use, and in some cases, supply of cannabis had pleaded the defence of necessity at trial. This was on the basis that the defendants needed to use the cannabis for medicinal purposes. In 3 of the 5 cases the defence had not been left to the jury, and in one of those cases that it had been allowed, the defendant had been found not guilty. One of the cases making up this appeal was a question of law referred by the Attorney General.

4.28 The Court of Appeal dismissed the appeals in *R v Quayle* on the basis that none of the defendants had been able to rely at trial on any facts which could afford them a defence of necessity at common law. The Court outlined some requirements of any defence of necessity which are indicated by the common law authorities, and these are as follows: extraneous circumstances capable of objective scrutiny by judge and jury; an imminent danger of physical injury; imminence and immediacy. Like *Re A (Children)*<sup>46</sup> this case centres on medical necessity, as does and so it is not clear whether a general defence of necessity, based on these requirements, might exist in English law.

#### **(4) Duress of Circumstances**

##### **(a) Road Traffic Law**

4.29 Necessity has been rejected as a general defence in English law for several reasons;<sup>47</sup> that it would cause legal uncertainty, involve judges in difficult policy areas and might have serious human rights implications.<sup>48</sup> The decision in *R v Dudley and Stephens* has also been a major roadblock in recognising necessity as a general defence in English law.

4.30 In *R v Morgenthaler*,<sup>49</sup> a decision of the Supreme Court of Canada, it was noted that “no system of law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher value.”<sup>50</sup> Williams noted that necessity is invoked equally by despots and rebels,<sup>51</sup> while other case-law has discussed

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<sup>45</sup> [2005] EWCA Crim 1415.

<sup>46</sup> [2000] 4 All ER 961.

<sup>47</sup> See Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977) at paragraphs 4.15- 4.33.

<sup>48</sup> Watson “A necessary defence” (1999) *The Criminal Lawyer* No. 90.

<sup>49</sup> *R v Morgenthaler* (1975) 53 DLR (3d) 161.

<sup>50</sup> *Ibid*, per Dickson J.

<sup>51</sup> Williams *Textbook on Criminal Law* (Stevens and Sons Ltd 1978) at 556.

necessity and noted that it could become “the mask for anarchy,”<sup>52</sup> and would “invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions.”<sup>53</sup> Because of the fear that necessity could be misused if developed as a general defence, a limited duress of circumstances was developed by the English courts in a series of road-traffic cases in the late 1980s.<sup>54</sup> In all but name, duress ‘duress of circumstances’ appears to be a form of defence of necessity.

4.31 In *R v Willer*,<sup>55</sup> the defendant was charged with reckless driving after he had driven very slowly on a pavement in order to escape from a gang of youths who were intent on doing violence to him and his passengers. He sought to raise the defence of necessity but the trial judge did not allow that plea to go to the jury and the defendant subsequently pleaded guilty. The English Court of Appeal quashed the conviction on the basis that the defence of *duress* should have been left to the jury. It is clear that this marked a departure from the previous decisions on duress in that the accused was not compelled to act as a result of any direct threats made by the attackers. Watkins LJ held that the jury should have been invited to determine whether or not “the appellant was wholly driven by *force of circumstances* into doing what he did.”<sup>56</sup>

4.32 In *R v Conway*<sup>57</sup> it was noted that, for the sake of convenience, the defence of duress of which Watkins LJ spoke should be referred to as “duress of circumstances”. In *R v Conway*, which also involved a charge of reckless driving, the defendant drove in a reckless manner in order to escape two men whom he understood to be attackers. The Court of Appeal followed *R v Willer*, holding that “necessity can only be a defence to a charge of reckless driving where the facts establish ‘duress of circumstances’”, that is, when the defendant is constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person. Woolf LJ referred to Smith and Hogan who pointed out that to admit a defence of ‘duress of circumstances’ is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, that

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<sup>52</sup> *London Borough of Southwark v Williams* [1971] 2 All ER 175.

<sup>53</sup> *R v Pommell* (1995) 2 Cr App Rep 300.

<sup>54</sup> *R v Willer* (1986) 83 Cr App Rep 225, *R v Conway* [1989] QB 290, *R v Martin* [1989] 1 All ER 652.

<sup>55</sup> (1986) 83 Cr App Rep 225.

<sup>56</sup> *Ibid.*, 227. Emphasis added.

<sup>57</sup> [1989] QB 290.

is, 'do this or else'.<sup>58</sup> He went on to say that this approach recognises duress as an example of necessity and he referred to Smith and Hogan stressing that "whether 'duress of circumstances' is called 'duress' or 'necessity' does not matter. What is important is that, whatever it is called, it is subject to the same limitations as the 'do this or else' species of duress." The Court cited Lord Hailsham in *R v Howe*,<sup>59</sup> who had noted that the distinction between duress and necessity as possible defences is one which is without, in his Lordships opinion, a relevant difference, since duress is merely the specific type of necessity caused by wrongful threats.

4.33 Since duress of circumstances must be subject to the same limitations as duress, Woolf LJ went on to say that for the defence to be available, the accused must have been acting in order to avoid a threat of death or serious injury, and that the defence would be limited by means of an objective criterion formulated in terms of reasonableness, as laid down by Lord Lane in *R v Graham*.<sup>60</sup> In that case the Court of Appeal held, in relation to duress, that the defendant is required to have the "steadfastness reasonably to be expected of the ordinary citizen in his situation".<sup>61</sup> The court in *R v Conway* indicated that the defence of duress of circumstances should be subject to this objective standard. The Court also quashed the conviction.

4.34 Elliot has criticised the use of the objective standard for duress of circumstances<sup>62</sup> and argued that in many cases where the defence of duress of circumstances is raised, the facts are such that self-defence and prevention of crime are just as analogous as duress.<sup>63</sup> He suggests that in considering a defence of duress of circumstances it would be more appropriate to adopt the partly subjective, partly objective, approach applicable to self-defence and prevention of crime, rather than the wholly objective approach of duress in *R v Graham*.

4.35 In *R v Martin*<sup>64</sup> the Court of Appeal went even further in recognising duress of circumstances as a species of necessity. The defendant, while disqualified from driving, drove his stepson, who had overslept, to work. He claimed that he had done this because his wife feared

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<sup>58</sup> *R v Conway* [1989] QB 290 Woolf LJ citing Smith and Hogan *Criminal Law* (6<sup>th</sup> ed Butterworths 1988) at 255.

<sup>59</sup> [1987] 1 All ER 771, 777. See paragraph 3.13 above.

<sup>60</sup> [1982] 1 All ER 801. See paragraphs 2.65-2.66 and 2.75 above.

<sup>61</sup> *Ibid*, 805-806.

<sup>62</sup> Elliot "Necessity, Duress and Self Defence" [1989] Crim LR 611.

<sup>63</sup> *Ibid*.

<sup>64</sup> [1989] 1 All ER 652.

that the stepson would lose his job if he was late for work and she threatened to commit suicide if he (the defendant) did not drive the stepson to work. The defendant's wife had suicidal tendencies, and there was medical evidence before the trial Court that she would have carried out the threat of suicide. The Court of Appeal held that the trial judge ought to have left the defence of duress to the jury and overturned the conviction.

4.36 Simon Brown LJ stated that English law recognises a defence of necessity in extreme circumstances – and that where it arises from objective dangers, it is called duress of circumstances. He adopted the limitations on the defence as outlined in *R v Conway*<sup>65</sup> and *R v Graham*<sup>66</sup>. The defence is available 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. If so, then the jury should be invited to answer two questions:

- was the accused impelled to act as he did because, as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious injury would result, and if so,
- would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused did?

The court held that if both of these questions can be answered by the jury in the affirmative, the defence of duress of circumstances will be established.

**(b) *Outside Road Traffic Law***

4.37 It was once thought that the defence of duress of circumstances might be restricted in its application to road traffic offences, since it was developed and used primarily in relation to these cases and it was in fact predicted that the defence would “experience severe restrictions on its growth”.<sup>67</sup> One commentator suggested however that since the defence is an extension of the defence of duress, then, following *R v Howe*,<sup>68</sup> it should be applicable in any offence other than murder.<sup>69</sup> It has been pointed out however that this would constitute a significant change to the law;<sup>70</sup> in fact it has been applied outside the sphere of road traffic offences.

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<sup>65</sup> [1989] QB 290.

<sup>66</sup> [1982] 1 All ER 801.

<sup>67</sup> Norrie *Crime, Reason and History* (Butterworths 1993) 163.

<sup>68</sup> [1987] AC 417.

<sup>69</sup> Elliot “Necessity, Duress and Self Defence” [1989] Crim LR 611 at 614.

<sup>70</sup> Slapper “Public Policy under Duress” 145 (1995) *New Law Journal* 1063.

4.38 In *R v Cole*, duress of circumstances was held to be a potential defence to theft.<sup>71</sup> In *R v Pommell*,<sup>72</sup> the defence was applied to unlawful possession of firearms and ammunition. In *R v Pommell*, police officers discovered the defendant in possession of a firearm without a firearms certificate. The defendant sought to raise the defence of necessity. He claimed that he had been visited in the early hours by a friend who intended to kill another person. The defendant had taken the gun in order to prevent the killing, and had intended handing over the gun to the police the following day. The trial judge ruled that the defendant's failure to go to the police immediately deprived him of the defence. The defendant was convicted and appealed.

4.39 The Court of Appeal ordered a retrial holding that the trial judge's ruling that the defendant's failure to hand over the gun to the police at the earliest opportunity effectively denied him the right to have the matter left to the jury. The Court acknowledged that there is no general defence of necessity, but accepted the *R v Conway* position that necessity can be a defence where the facts establish duress of circumstances. It was held that regardless of the fact that all the previous cases establishing duress of circumstances had involved road traffic offences, the defence was not limited to such cases, and could, because of its relationship with duress, be applied in relation to "all crimes, except murder attempted murder, and treason."<sup>73</sup>

4.40 This was approved by the English Court of Appeal in *R v Abdul-Hussain*<sup>74</sup> in which Rose LJ agreed, citing *R v Pommell*, that the defence of duress (whether by threats of human or circumstantial origin) was generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason. In this case, the defendants formed the idea on 8 August 1996 to hijack a plane to avoid being deported to Iraq where they feared persecution. On 27 August they hijacked a plane which subsequently landed in England where they were charged with offences under the UK *Aviation Security Act 1982*. The trial judge refused to let the defence of duress go to the jury on the basis that the threat was insufficiently close and immediate to give rise to a spontaneous reaction to the risk arising. The Court of Appeal quashed their convictions and held that the trial judge had interpreted the law in this regard too strictly.

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<sup>71</sup> [1994] Crim LR 582

<sup>72</sup> (1995) 2 Cr App Rep 607, 615.

<sup>73</sup> *Ibid*, 615 per Kennedy J quoting Smith *Case and Comment on DPP v Bell* [1992] Crim LR 176.

<sup>74</sup> [1999] Crim LR 570.

4.41 Rose LJ noted that the decision in *R v Martin*<sup>75</sup> afforded the clearest and most authoritative guide to the relevant principles in relation to both forms of duress. He added that the imminent peril of death or serious injury to the defendant (or those for whom the defendant has responsibility) was an essential feature of both forms of duress, and that this peril must operate in the mind of the defendant at the time when he or she commits the otherwise criminal act (so as to overbear his will). The execution of the threat need not, however, be immediately in prospect. He went on to note that the defence of duress had been developed by the English courts on a case by case basis and that its scope remained imprecise. Indeed, it is noteworthy that he emphasised the urgent need for legislation to define duress with precision.

**(c) Conclusion on Case Law in England**

4.42 To summarise, the English case law indicates that the following criteria apply to the defence of duress of circumstances:

- an imminent threat of death or serious injury;
- reasonable steadfastness in the face of such threats;
- reasonable grounds for believing in their existence; and
- the absence of any prior fault on behalf of the defendant.

4.43 The English courts have clearly attempted to develop the defence of duress of circumstances by analogy with duress. To the extent that they recognise it as an aspect of necessity, the English courts have outlined its parameters by aligning it to duress rather than by reference to necessity.

4.44 In *R v Quayle*,<sup>76</sup> the Court of Appeal considered the defence of necessity, which Mance J, at one point in the judgment, terms “necessity of circumstances.”<sup>77</sup> In looking at the defence of necessity the Court considered some cases which had been found to involve the defence of duress of circumstances, including *R v Martin*,<sup>78</sup> *R v Pommell*<sup>79</sup> and *R v Abdul-Hussain*.<sup>80</sup> The Court made reference to Woolf LJ’s comment in *R v Shayler*,<sup>81</sup> that “the distinction between duress of circumstances and

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<sup>75</sup> [1989] 1 All ER 652.

<sup>76</sup> [2005] EWCA Crim 1415.

<sup>77</sup> *Ibid* at paragraph [35].

<sup>78</sup> [1989] 1 All ER 652.

<sup>79</sup> (1995) 2 Cr App Rep 607, 615.

<sup>80</sup> [1999] Crim LR 570.

<sup>81</sup> [2001] 1 WLR 2206.

necessity has, correctly, been by and large ignored or blurred by the courts.<sup>82</sup>

4.45 The Commission concurs with the view that the defence of duress of circumstances is a defence of necessity in all but name,<sup>83</sup> and one commentator goes as far as to note that “this conceptual innovation was a substantial step towards recognising a general defence of necessity by linguistic sleight of hand.”<sup>84</sup> Because of the continuing impact of the decision in *R v Dudley and Stephens*, the English courts have studiously avoided any analogy with necessity, preferring instead to model duress of circumstances on duress.<sup>85</sup>

4.46 One commentator argues that although the defence itself is a welcome development, the term duress of circumstances is “clumsy and inappropriate,”<sup>86</sup> adding that the concept of duress implies a threat or physical danger which forces a defendant to commit a crime, the threat being “so great as to overbear the ordinary powers of human resistance.”<sup>87</sup>

4.47 Smith and Hogan however note the danger of treating duress of circumstances as a defence of necessity, arguing that the stringent requirements of the defence of duress which it incorporates may inhibit the development of a broader defence of necessity.<sup>88</sup> Whether duress of circumstances is related more closely to necessity or duress, it is certainly a recognised and well-established defence at common law in England.

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<sup>82</sup> [2001] 1 WLR 2206, 2226.

<sup>83</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 822.

<sup>84</sup> Smith “Duress and Steadfastness: In Pursuit of the Unintelligible” [1999] Crim LR 363 at 367.

<sup>85</sup> Section 18(3) of the Irish *Non Fatal Offences Against the Person Act 1997*, which deals with the justifiable use of force against a criminal act, provides that such an act will be deemed to have occurred even where the actor would have a defence on grounds of “duress, whether by threats or of circumstances.” It has been tentatively suggested that this would seem to indicate legislative acceptance of the defence of duress of circumstances, but such a defence has not been recognised by the Irish courts, and it remains unclear as to whether this constitutes legislative acceptance of the defence.

<sup>86</sup> Watson “A Necessary Defence” (1999) *The Criminal Lawyer* No 90.

<sup>87</sup> *Ibid*, as noted by Murnaghan J. in *AG v Whelan* (1934) IR 518. See paragraph 3.02 above.

<sup>88</sup> Smith and Hogan *Criminal Law* (10<sup>th</sup> ed Butterworths 2002).

(5) ***Reform Proposals in England***

4.48 The Law Commission considered the defence of necessity in its Working Paper on the *Codification of the Criminal Law: General Principles Defences of General Application* in 1974<sup>89</sup> and the subsequent *Report on Defences of General Application* in 1977.<sup>90</sup> It will be necessary to deal with both these publications as the Report reflects a reversal of policy from the Working Paper. The Working Paper concluded that a general defence of necessity is justified provided that it could “be framed in terms which would obviate its being invoked in extravagant and inappropriate cases.”<sup>91</sup> Broad policy considerations were discussed and the general defence was proposed with the following elements. The defence would be available where the defendant believed that his or her conduct was necessary to avoid some greater harm. The harm to be avoided should, objectively, be out of proportion to that caused and need not necessarily be directed against the defendant. The defence would be available to all offences.

4.49 The Law Commission rejected this general defence in the Report which followed.<sup>92</sup> It concluded that no attempt should be made by legislation to establish the defence of necessity, and although improbable, if any such defence exists at common law the proposed act should abolish it.

4.50 The rationale behind the rejection of the defence was that many issues arise in relation to the defence of necessity that do not arise with that of duress. The Report outlined two main differences between the defences of duress and necessity; first, in cases of duress the source of the harm is another’s wrongdoing, and second, necessity can be discussed more frequently in relation to minor offences. As regards the latter difference, the difficulties with a general defence extending to minor offences outweigh the advantages. In relation to the former, the Law Commission felt that the defence of duress is capable of dealing with exceptional and difficult cases in a way that necessity may not be. Asserting that necessity situations are not classifiable, the commission expressed doubt as to “whether a defence

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<sup>89</sup> Law Commission of England and Wales *Codification of the Criminal Law: General Principles Defences of General Application* (Working Paper No 55 1974).

<sup>90</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977).

<sup>91</sup> Law Commission of England and Wales *Codification of the Criminal Law: General Principles Defences of General Application* (Working Paper No 55 1974) at paragraph 38.

<sup>92</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977).

operating with such a degree of uncertainty ought to find a place in a Code”.<sup>93</sup>

4.51 The *Report on Defences of General Application* received much academic criticism, not least by Williams who suggested that the proposal to abolish any existing common law defence displayed a misunderstanding of the rationale of codification. His view was that it shouldn’t be the purpose of a code to get rid of open-ended defences, or fetter the power of the courts to create new common law defences.<sup>94</sup>

4.52 The Law Commission’s 1985 *Report on the Codification of the Criminal Law*<sup>95</sup> refers to the recommendations of the 1977 Report. Referring to the “totally negative” proposals of that Report, the Commission presented two main criticisms. First, in relation to the analogy with duress, they noted that the impact of some situations of peril on the persons affected is no different from that of threats giving rise to a defence of duress. Reference was made to Cross who had described the proposal to provide for a defence of duress while excluding the defence of necessity as “the apotheosis of absurdity.”<sup>96</sup> The second criticism was in relation to saving the common law, whereby it was noted that if there is no general defence of necessity, the power of the judiciary at common law to recognise a situation of necessity as affording a defence must be preserved.

4.53 The Commission noted that it was satisfied that “[t]he impact of some situations of imminent peril upon persons affected by them is hardly different in kind from that of threats such as give rise to the defence of duress.”<sup>97</sup>

4.54 The Law Commission pointed out that necessity doesn’t allow for restatement, and therefore its main proposal was that necessity should remain a matter of common law, unaffected by the *Criminal Code Act*, and the courts should retain power to clarify and develop the defence. The Commission did however concede to a general necessity provision in Clause 46, allowing for the defence in circumstances so obviously analogous to the duress defence that it would amount to “an apotheosis of absurdity” not to

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<sup>93</sup> Law Commission of England and Wales *Criminal Law: Report on Defences of General Application* (No 83 1977) at paragraph 4.30.

<sup>94</sup> As noted by Williams “Defences of General Application: Necessity” [1978] Crim LR 128.

<sup>95</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law A Report to the Law Commission* (No 143 1985).

<sup>96</sup> Williams *Textbook of Criminal Law* (2<sup>nd</sup> ed Stevens and Sons Ltd 1983) at 602.

<sup>97</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law A Report to the Law Commission* (No 143 1985) at paragraph 13.25.

include it.<sup>98</sup> This provision allows for the defence of necessity (also known as “duress of circumstances”) if the person does the act believing it to be immediately necessary to avoid death or serious injury to himself or another, and the danger he believes to exist is such that in all the circumstances he could not reasonably be expected to act otherwise. This would apply to all crimes except murder and attempted murder.<sup>99</sup>

4.55 This defence was again proposed in Clause 43 of the 1989 draft Criminal Code for England and Wales published by the Law Commission.<sup>100</sup> Rather than refer to the defence as necessity, the Commission opted to propose the defence of duress of circumstances, and the accompanying commentary models the defence, as far as is appropriate, on duress. In the 1989 Commentary on the Code, the Commission acknowledged criticisms that it had in the past not recognised the force of the analogy of duress of circumstances with duress, and so placed the defence under the title of “duress of circumstances.”<sup>101</sup> The Commission recognised the analogy with duress and acknowledged the need for the defence in the Code.

4.56 Like duress, duress of circumstances is only applicable in cases of threat of death or serious personal harm, and is limited by an objective criterion formulated in terms of reasonableness. The defence does not apply to murder or attempted murder. This above defence is excusatory in nature, as was the subsequent defence which proposed in Clause 26 of the *Draft Criminal Law Bill* accompanying the 1993 Law Commission Report.<sup>102</sup>

4.57 The 1993 report noted the authority in other common law jurisdictions for a general defence, and modelled this defence on duress. It proposed a defence of duress of circumstances in Clause 26 of the *Draft Criminal Law Bill* which accompanied the Consultation Paper. *Draft Criminal Code Bill* Clause 26 states that a person does not commit an offence if the act is done under duress of circumstances. The criteria for an act to satisfy the clause are as follows:

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<sup>98</sup> Law Commission of England and Wales *Criminal Law: Codification of the Criminal Law A Report to the Law Commission* (No 143 1985) at 120.

<sup>99</sup> *Ibid.* Clause 46 *Draft Criminal Code Bill*.

<sup>100</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill* and *Volume 2: Commentary on Draft Criminal Code Bill* (No 177 1989).

<sup>101</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill* and *Volume 2: Commentary on Draft Criminal Code Bill* (No 177 1989) at paragraph 12.20.

<sup>102</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993).

“(a) he does it because he knows or believes that it is immediately necessary to avoid death or serious personal harm to himself or another; and

(b) the danger that he knows or believed to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to act otherwise.”<sup>103</sup>

4.58 The burden of proof is on the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraph (a). The section does not apply to those who knowingly and without reasonable excuse expose themselves to the danger known or believed to exist.

4.59 This provision allows the defence to apply to any offence, which the Commission recognised would represent a departure from *Dudley and Stephens*<sup>104</sup> and from the Draft Criminal Code<sup>105</sup> but which would mirror their recommendation that duress should apply to all offences.

4.60 The Law Commission has been intent on ensuring that any provisions proposing the duress of circumstances closely follow the defence of duress of threats. In the 1993 Report it notes that it was the analogy between “threats” and other “circumstances” promising an evil unless a crime is committed that prompted the Court of Appeal to name the new defence “duress of circumstances” and to model it on duress by adopting the *R v Graham* test with modifications.<sup>106</sup>

4.61 The Law Commission acknowledged that duress is often spoken of as if it is a species of necessity, but that the law may recognise a defence of “necessity” on a different basis from that underlying duress as a defence.<sup>107</sup> By contrast with the recognised defences of duress, the Law Commission argued that there are also cases more properly called cases of necessity, where the actor does not rely on any allegation that circumstances placed an irresistible pressure on him but rather claims that his conduct was not unlawful as it was, in the circumstances, justified.<sup>108</sup> Such claims do require a comparison between the harm caused and the harm avoided,

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<sup>103</sup> Law Commission of England and Wales *Criminal Law: A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill* Clause 26.

<sup>104</sup> (1884) 14 QBD 273.

<sup>105</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993) at paragraph 35.11.

<sup>106</sup> *Ibid* at paragraph 35.3.

<sup>107</sup> *Ibid* at paragraph 35.4.

<sup>108</sup> *Ibid* at paragraph 35.5.

because if the harm avoided was not the greater then the law cannot even consider accepting justification.

4.62 The report pointed to the fact that English courts have not expressly recognised a general defence of necessity to circumstances where the actor's will is not overborne but the conduct is freely adopted, yet the court can still decide that such conduct is justified.<sup>109</sup> The report goes on to say that as part of the policy of retention of common law defences, this specific defence should be left open as something potentially separate from duress, and this is provided for in the Bill. This is done by the provision of Clause 36(2) which expressly saves "any distinct defence of necessity" when repealing the common law defences of duress and duress of circumstances.

## **D Other Jurisdictions**

### **(1) Australia**

4.63 The defence of necessity has been recognised in certain states of Australia. In Victoria, in the decision in *R v Davidson*<sup>110</sup> concerning the statutory offence of unlawfully procuring the miscarriage of a woman, the court ruled, relying on a statement by Stephen in which the defence of necessity is laid out as an excuse, that there was a defence of necessity, but added that it was justificatory rather than excusatory.

4.64 The general, if limited, defence of necessity was recognised in *R v Loughnan*,<sup>111</sup> where it was a defence to escaping from prison, where there was a fear that the defendant would be killed by the other prisoners. The court relied on the same statement by Stephen as did the *R v Davidson* court, but presents necessity as more of an excuse, outlining the elements involved in the defence as follows:

"First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect...

The [second] element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril... Thus if there is an interval of time between the threat and its expected execution it will be rarely if ever that a defence of necessity can succeed.

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<sup>109</sup> *Re F* [1990] 2 AC 1.

<sup>110</sup> [1969] VR 667.

<sup>111</sup> [1981] VR 433.

The [third] element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?”<sup>112</sup>

4.65 The criminal codes of Western Australia,<sup>113</sup> Queensland<sup>114</sup> and the Northern Territory<sup>115</sup> recognise the defence of “extraordinary emergency” which is applicable to murder. Under the Commonwealth and ACT Criminal Codes the defence of sudden or extraordinary emergency is available where the person reasonably believes:

- Circumstances of sudden or extraordinary emergency exist;
- Committing the offence is the only reasonable way to deal with the emergency; and
- The conduct is a reasonable response to the emergency.<sup>116</sup>

**(a) Reform**

4.66 In 1978, the Law Reform Commission of Victoria published a Working Paper on *Duress, Necessity and Coercion* in which it referred to various criminal codes which incorporate a defence of necessity.<sup>117</sup> This paper made a tentative recommendation that there should be a general defence of necessity. It discusses justification and excuse, the bases on which the defence rests. It notes that the justification-based, choice of evils option is the one used in the Model Penal Code and the German Penal Code where a legally prohibited act is justified because it will result in the least harm done to society. It is then regarded as a lawful act. An excuse-based defence forgives the actor for an act which is still unlawful, but the doing of which, in the particular circumstances, renders the actor blameless. This does not involve the promotion of the greater good. It involves the circumstances where it may be one life in exchange for another, and the value of the lives may not be measured, whereby the actor cannot be blamed for his self-preservation instinct. The working paper contains the provisional suggestion that a defence of necessity based both on justification and excuse should be provided by statutory enactment.

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<sup>112</sup> [1981] VR 433, 448.

<sup>113</sup> Section 25 *Criminal Code Act Compilation Act 1913*.

<sup>114</sup> Section 25 *Criminal Code Act 1899*.

<sup>115</sup> Section 33 *Criminal Code Act 1983*.

<sup>116</sup> Sections 10.2 and 10.3 *Criminal Code Act 1995* (Cth).

<sup>117</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (Working Paper 5 1978).

4.67 The Report on *Duress, Necessity and Coercion* was published two years later.<sup>118</sup> It noted that there is no comprehensive statement of principle in relation to necessity nor has the defence any reliable precision of definition and goes on to state that “[A] rational and humane system of law should take into account that there will always be situations where to insist on the strict letter of the law would create injustice and justifiably breed resentment of the law.”<sup>119</sup> The report recommends the provision for the exculpation of conduct which can be justified by necessity. This takes into account three requirements - the harm avoided must be greater than the harm caused, there must be no alternative, less harmful and reasonable means of avoiding harm, and the danger of harm must be imminent. It is noted in the report that this raises two immediate problems, as it is a choice of evils scenario. The first problem is whether murder can ever be justified and the second is who decides whether the benefit exceeds the cost?

4.68 The Report ultimately recommended a general defence of necessity based upon the principle of justification by choosing the lesser evil. This defence would be available where the defendant believes his conduct is necessary to avoid imminent injury to person or property. The desirability of avoiding the injury should clearly outweigh the injury prevented by the law governing the offence, according to ordinary standards of intelligence and morality.<sup>120</sup>

4.69 The Report also recommended an excuse-based defence of “duress of circumstances” or “necessity which excuses”.<sup>121</sup> The Commission acknowledged the clear need for a new dimension of excuse to be recognised and for the principle behind the defence of duress to be extended to situations where the accused is compelled by circumstances, whether of human or non-human origin.

4.70 Three situations were outlined for which there is a need for a defence of duress or necessity. These are:

- Where there is a threat from another that the actor or another will suffer harm if the demand for criminal action is not met – this is dealt with by the law of duress;
- Where there is a threat of harm from another with no demand for criminal action but criminal action is nevertheless taken to avoid the harm - necessity can be used, but the report suggested that this

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<sup>118</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980).

<sup>119</sup> *Ibid* at paragraph 3.28.

<sup>120</sup> *Ibid* at paragraph 3.47.

<sup>121</sup> *Ibid* at paragraph 4.19.

would be done uneasily. It would seem that a choice of the lesser evils must be discovered for it to succeed;

- Where there is a threat from inanimate circumstances. This would cover bizarre and rare cases such as *R v Dudley and Stephens*<sup>122</sup> where the instinct of self-preservation is an issue. It can be said that a choice of evils may never be said to justify the killing of another human being, but in such a case, “to excuse such conduct is not to say that it was right or justifiable, but to realise that there can be a point at which normal or ordinary or reasonable human conduct can no longer be expected.”<sup>123</sup>

4.71 As noted below, the German Penal Code embraces all three of the above situations,<sup>124</sup> and the Report suggests that if the necessity recommendation is acceptable then it seems simpler, tidier and more convenient to widen the ambit of duress to embrace them. The Commission then goes on to recommend a duress defence which will cover compulsion, whether of human origin or arising from circumstances surrounding the commission of the offence.<sup>125</sup>

4.72 In 1991, the Law Reform Commission of Victoria suggested that necessity is similar to duress, except that the source of the compulsion is impersonal.<sup>126</sup> It went on to note that even if necessity is accepted as a general defence, it is doubtful that the defence applies to murder and uses *R v Dudley and Stephens*<sup>127</sup> as authority on this point.

4.73 In the 2004 *Report on Defences to Homicide*, the Law Reform Commission of Victoria discussed the defences of duress and extraordinary emergency under the Model Criminal Code.<sup>128</sup> This allows, as a defence to any offence, the defence of sudden or extraordinary emergency, where the person reasonably believes:

- Circumstances of sudden or extraordinary emergency exist;
- Committing the offence is the only reasonable way to deal with the emergency; and

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<sup>122</sup> (1884) 14 QBD 273.

<sup>123</sup> *Ibid* at paragraph 4.04.

<sup>124</sup> See paragraph 4.86 below.

<sup>125</sup> Victorian Law Reform Commission *Duress, Necessity and Coercion* (No 9 1980) at paragraph 4.19.

<sup>126</sup> Victorian Law Reform Commission *Homicide* (No 40 1991).

<sup>127</sup> (1884) 14 QBD 273.

<sup>128</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004).

- The conduct is a reasonable response to the emergency.<sup>129</sup>

4.74 The report goes on to discuss the arguments for applying duress and necessity to murder and the arguments for necessity are similar to those for duress. It notes that a person should not be criminally liable, if in the face of extraordinary emergency and an agonising choice between evils, he or she acts reasonably. The Commission recommended that the *Crimes Act 1958* be amended to make it clear that duress and necessity are defences to murder and attempted murder.<sup>130</sup> It also recommends that a person shall not be held criminally responsible for murder or manslaughter if the persons conduct is a response to circumstances of sudden or extraordinary emergency.<sup>131</sup> This defence is only available in the above circumstances.

## (2) *Canada*

4.75 In Canada, the Supreme Court considered the defence of necessity in *R v Perka*.<sup>132</sup> It concluded that necessity may be an “excuse” but not a “justification” for an act which is “inevitable, unavoidable and afford[s] no reasonable opportunity for an alternative course of action that does not involve a breach of the law.”<sup>133</sup> This judgment appears to be an endorsement of the defence on an excusatory basis.

4.76 Although the doctrine of necessity exists in Canada, it is clear from such cases as *R v Perka*,<sup>134</sup> *R v Morgenthaler*<sup>135</sup> and *R v Latimer*<sup>136</sup> that its scope is narrow. In the latter two cases, it is apparent that Canadian courts see it as very unlikely that the defence of necessity will be available in cases where the taking of innocent life is involved. The *Perka* requirements were that in order for necessity to be accepted as a defence the act must be inevitable, unavoidable and the situation must afford no reasonable opportunity for an alternative course of action.

4.77 In *R v Morgenthaler* it was held that there was no evidence that there was a necessity for the defendant, a doctor, to carry out a number of unlawful abortions, rather that the defendant considered the law against the act to be objectionable. The Court formed no very clear foundation for the

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<sup>129</sup> Sections 10.2 and 10.3 of the *Criminal Code Act 1995*.

<sup>130</sup> Victorian Law Reform Commission *Defences to Homicide: Final Report (2004)* Recommendation 13.

<sup>131</sup> *Ibid* at Recommendation 16.

<sup>132</sup> [1984] 2 SCR 232.

<sup>133</sup> *Ibid*, 406.

<sup>134</sup> *Ibid*.

<sup>135</sup> (1975) 53 DLR (3d) 161.

<sup>136</sup> (2001) 150 CCC (3d) 129.

defence of necessity and with the exception of Laskin CJC dissenting, did not give the defence much import or treat the defence as a general defence to criminal liability.

4.78 In *R v Latimer*, the Court relied heavily on *R v Perka*. Here, it was decided that the requirements of the doctrine of necessity were not satisfied by a man who killed his daughter, a cerebral palsy sufferer. The court reinforced the *R v Perka* requirement of urgency, as well as the requirement that there be no reasonable alternative to breaking the law. These were both “modified objective” tests, the belief being reasonable, but as measured by a reasonable person with the characteristics and in the situation of specific accused. The court held, on the facts that there was no emergency situation, and there was in fact a reasonable alternative. The third requirement was wholly objective - being that the belief that the harm avoided was greater than the harm of breaking the law was one that must be held by society rather than the individual accused. In this case the court felt that ending pain where the pain is medically manageable is not proportionate. The court noted, *obiter*, that “[i]t is difficult at the conceptual level, to imagine a circumstance in which the proportionality requirement could be met for a homicide.”<sup>137</sup>

**(a) Reform**

4.79 The Canadian Law Reform Commission dealt with the defence of necessity in the 1982 Working Paper on *Criminal Law: The General Part - Liability and Defences*.<sup>138</sup> It noted the four possible approaches to a situation where necessity arises:

- The defendant can be convicted with no note taken of the extenuating circumstances;
- The defendant may be convicted with the judge having discretion in relation to sentencing. The Commission noted that while this allows flexibility, it may still be unfair, as the actor would still be found guilty when morally he is not guilty. The Commission pointed out that the law would be convicting him with one hand and letting him off with the other. It was also argued that leaving it to judicial discretion could undermine the rule of law;
- The law could leave it to prosecutorial discretion. It was noted by the Commission that this would however result in a lack of development of jurisprudence, and a divergence between law in code and law in practice;

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<sup>137</sup> *R v Latimer* (2001) 150 CCC (3d) 129, 148.

<sup>138</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper No 29 1982) at 91-96.

- The law could provide a defence of necessity. This could be done either section-by-section for specific instances, or a general rule. The paper argues that the latter is more preferable as the former would be too detailed and complicated.

4.80 The paper refers to the clear rationale of necessity, and notes that it involves two factors. These are the avoidance of greater harm or the pursuit of a greater good, and the difficulty of compliance with law in emergencies. The two principles emerging are the utilitarian idea of justification and the humanitarian one of excuse.

4.81 A justificatory defence is included in the draft legislation. This states that “everyone is excused from criminal liability for an offence committed out of necessity arising from circumstances other than unlawful threat or attack,” as long as he acts to avoid immediate harm to persons and property, and that harm substantially outweighs the harm caused by the offence, and the harm couldn’t have been avoided by lesser means.

4.82 The humanitarian principle to which the Commission refers is that the law should not ask more of ordinary individuals than can be fairly asked of people of ordinary courage, strength and fortitude. The Commission suggests that refusal of the law to make concessions for those who were faced with overwhelming pressures would be “unfair, unrealistic and inconsistent.”<sup>139</sup>

4.83 The phrase “substantially outweighs” in the draft clause rules out the use of the defence in “life for life” cases such as *R v Dudley and Stephens*.<sup>140</sup> The Commission suggests that in such cases the use of discretion of prosecutors, courts, juries and cabinets could be used to conclude that in the circumstances the defendants own life would have seemed to him to have substantially outweighed the other persons. The Commission comes to the conclusion that although it involves a derogation from the rule of law this seems the most appropriate way to deal with these difficult and rare cases.

4.84 In 1987, the Commission proposed a necessity clause in its report on *Recodifying Criminal Law*.<sup>141</sup> This was very similar to the clause proposed in the working paper, and contains a general rule, as per the Working Paper, and also has an exception that states that the clause does not apply to anyone who himself purposely kills or seriously harms another

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<sup>139</sup> Law Reform Commission of Canada *Criminal Law: The General Part - Liability and Defences* (Working Paper No 29 1982) at 94.

<sup>140</sup> (1884) 14 QBD 273.

<sup>141</sup> Law Reform Commission of Canada *Recodifying Criminal Law Volume 1* (No 30 1987) at 33-34.

person.<sup>142</sup> This clause incorporates and codifies the rule laid down in *R v Perka*<sup>143</sup> by the Supreme Court of Canada. As at common law, the defence is not available to murder, and the Commission added a proviso similar to the one relating to duress whereby a person may not rely on the defence if he purposely kills or seriously harms another person.

### (3) *South Africa*

4.85 A defence of necessity has been recognised in South Africa.<sup>144</sup> In South Africa, for an act to be justified on the ground of necessity, five requirements must be met:

- A legal interest of the accused must have been endangered;
- The threat must have commenced or be imminent;
- The accused must not bear any responsibility for the duress;
- The actions taken must have been reasonably necessary for the accused to avert the danger; and
- The means used for this purpose must have been reasonable in the circumstances.<sup>145</sup>

### (4) *Germany*

4.86 German law takes the approach of recognising two separate kinds of necessity, distinguishing, in the German Federal Penal Code, between justifying necessity<sup>146</sup> and excusable necessity.<sup>147</sup> This approach has attracted a certain degree of academic support,<sup>148</sup> and it has been noted that the introduction of one defence covering the existing defences would have the advantage of removing certain anomalies that exist at present due to current classifications. It would also resolve controversy as to whether

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<sup>142</sup> Law Reform Commission of Canada *Recodifying Criminal Law Volume 1* (No 30 1987) at 33-34.

<sup>143</sup> [1984] 2 SCR 232.

<sup>144</sup> This was discussed in the context of homicide above at paragraph 3.60 and in the context of the nature of the threats at paragraph 2.38.

<sup>145</sup> Burchell and Hunt *South African Criminal Law and Procedure Volume 1: General Principles of Criminal Law* (3<sup>rd</sup> ed Juta 1997) at 89.

<sup>146</sup> Section 34 German Federal Penal Code.

<sup>147</sup> Section 35 German Federal Penal Code.

<sup>148</sup> Williams "The Theory of Excuses" [1982] Crim LR 732; Robinson "Criminal Law Defences: A Systematic Analysis" 82 Col L Rev (1982) 199.

necessity exists as a defence and clarify its relationship with the defence of duress of circumstances.<sup>149</sup>

4.87 The first part of the German Penal Code, justifying necessity, allows a person to be justified in their actions if they commit an act in order to protect a *superior* legal interest from imminent peril.<sup>150</sup> A clear case of lesser evils, this defence recognises that the actions of the accused would be unlawful if they do not involve averting an imminent and otherwise unavoidable danger. The actions are seen as the appropriate means to a lawful end. Thus the act committed is not unlawful, but justified. The chief characteristic of the defence is the proportion between harms - in cases of a life for a life this defence cannot be used. This section cannot be used to justify the killing of another human, even when there are more human lives saved by the sacrifice of one. Some German writers recognise an exception in the case of joint risky ventures, such as rock climbing expeditions, in which it may be necessary to kill one member of the party to save others.<sup>151</sup> However if the approach taken in *R v Dudley and Stephens*<sup>152</sup> were applied it is likely that justification would be denied in such cases.

4.88 The second element of the German Penal Code states that whoever commits an unlawful act in order to avert an imminent and otherwise unavoidable danger to his own life, limb or liberty, or to that of a relative, or person close to him acts without guilt.<sup>153</sup> But rather than the act being justified, their actions are excused. This defence is less limited in its application as there is no requirement of a weighing of interests. The classic example of this section in action is that of two sailors each seeking to overthrow the other from a plank that will only hold one of them. The one who removes the other to save his own life cannot have his actions justified, but can be excused, according to the second element of the German Penal Code. It is suggested that the rationale behind this could be either of 2 approaches - psychological and normative.<sup>154</sup> In the psychological approach, the actor's blameworthiness is reduced by the extraordinary stress of the situation and his commendable intention to save a legal interest. The

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<sup>149</sup> Clarkson "Necessary Action: A New Defence" [2004] Crim LR 13.

<sup>150</sup> Section 34 German Federal Penal Code.

<sup>151</sup> Bernsmann "Private Self-defence and Necessity in German Penal law and in the Penal law Proposal- some remarks" 1996 30 Is LR 1-2 171 at 183.

<sup>152</sup> (1884) 14 QBD 273.

<sup>153</sup> Section 35 German Federal Penal Code.

<sup>154</sup> Bernsmann "Private Self-defence and Necessity in German Penal Law and in the Penal Law Proposal- Some Remarks" (1996) 30 Is LR 1-2 171 at 185.

normative approach recognises that punishment in this situation would yield no legitimate penological benefits.<sup>155</sup>

4.89 The defence of duress is not specifically included in the German Penal Code as such cases would generally be covered by the necessity sections. It has however been pointed out that there are difficult cases of duress which are not covered by these provisions, and that as a result, duress has been left in a “no-man’s land between justification and excuse.”<sup>156</sup>

#### (5) *Italy*

4.90 It has been noted<sup>157</sup> that the distinction between justification and excuse is also firmly entrenched in the analytical architecture of another civilian criminal code, the Italian *Codice Penale*. Italian law treats duress as a species of the larger genus of necessity. In cases of lesser evils, necessity is a complete defence, on the grounds that the defendant has made the right choice in difficult circumstances not of his own making. Where the defendant cannot claim to have chosen the lesser of two evils, the plea of necessity fails completely, although the courts are at liberty to give effect to the element of compulsion at the sentencing stage. The Italian distinction between justificatory excusatory defences differs in a number of significant respects from its German counterpart. But in the specific context of the defence of necessity, the *Codice Penale* shares the German view that necessity is justificatory in nature – by contrast, the common law conception of necessity is excusatory in nature. While the Commission acknowledges the pre-eminence of the excusatory approach to necessity in the common law tradition, it sees merit in leaving open the possibility, in particular in the context of codification,<sup>158</sup> that the different architecture adopted in the *Codice Penale* is also worthy of consideration.

#### (6) *Other*

4.91 Necessity has also been provided for to an extent in a number of other criminal codes. These include the Indian Penal Code<sup>159</sup> and the Australian Model Criminal Code,<sup>160</sup> as well as the German Federal Penal Code.<sup>161</sup> In the Scottish Law Commission’s 2003 Draft Criminal Code for

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<sup>155</sup> Bernsmann “Private Self-defence and Necessity in German Penal Law and in the Penal Law Proposal- Some Remarks” (1996) 30 Is LR 1-2 171 at 185.

<sup>156</sup> *Ibid* at 187.

<sup>157</sup> See McAuley, ‘The Theory of Justification and Excuse: Some Italian Lessons’ (1987) 35 AJCL 359.

<sup>158</sup> See Introduction at paragraph 1 above.

<sup>159</sup> Section 81.

<sup>160</sup> Division 10.

<sup>161</sup> Title 4.

Scotland necessity is recognised as a defence, if the acts done are “immediately necessary and reasonable in order to prevent a greater harm... and the commission of what would otherwise be an offence could reasonably be regarded as justifiable in the circumstances”.<sup>162</sup> This is only if the acts are done in order to save a human life.

4.92 Williams believes however that the best formulation of the defence of necessity is to be found in The American Law Institute’s Model Penal Code, which provides that:

“conduct which the actor believes to be necessary to avoid an evil to himself or another is justifiable, provided that... the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged...”<sup>163</sup>

## **E Necessity as a Justificatory or Excusatory Defence**

4.93 It has been suggested that duress should be regarded as an excusatory defence, while necessity should be seen as justificatory. If there is an element of choice of evil in the necessity defence then the defendant can argue that he or she took the best course of action in difficult circumstances and that the defendant’s actions are *justified* rather than *wrong but excusable*. This point of distinction between the two defences was emphasised by the Law Commission of England and Wales in its *Report on Offences Against the Person and General Principles*.<sup>164</sup>

“By contrast with the defences of duress... there appear to be some cases, more properly called cases of ‘necessity’ where the actor does not rely on any allegation that circumstances placed an irresistible pressure on him. Rather, he claims that his conduct, although falling within the definition of an offence, was not harmful because it was, in the circumstances, justified. Such claims, unlike those recognised by the duress defences, do seem to require a comparison between the harm that the otherwise unlawful conduct has caused and the harm that that conduct has avoided; because if the latter harm was not regarded as the greater

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<sup>162</sup> Scottish Law Commission *Draft Criminal Code for Scotland* (2003) at 66.

<sup>163</sup> American Law Institute Model Penal Code paragraph 3.02. It is noteworthy that the Scottish High Court of Justiciary have recently observed in Lord Advocate’s Reference (No. 1 of 2000) (2001) SCCR 296 that “the formulation of the defence of necessity in the American Law Institute’s Model Penal Code... appeared to suffer from a number of defects” and that “American codifications of the criminal law were unlikely to provide a reliable basis for ascertaining Scots law.”

<sup>164</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993).

the law could not even consider accepting that the conduct was justified. Nor, fairly clearly, does the defence depend on any claim that the actor's will was 'overborne': on the contrary the decision to do what, but for the exceptional circumstances, would be a criminal act may be the result of a careful judgment..."<sup>165</sup>

This approach chimes well with the Law Commission's view that, in contrast to necessity, the duress defences normally operate on an excusatory basis.

4.94 In Irish and English case-law, the Commission notes that the terms justification and excuse have been used almost interchangeably by the courts.<sup>166</sup> Examples given include Murnaghan J's alternate use of justification and excuse in *Attorney General v Whelan*<sup>167</sup> and Lord Wilberforce's synonymous use of the two terms in the same paragraph in *DPP for Northern Ireland v Lynch*<sup>168</sup>. The Commission considers that in *R v Howe*<sup>169</sup> the confusion appears to have been overcome, although parts of the judgment belie a degree of misunderstanding of the nature of the terms.

4.95 The Canadian Supreme Court in *R v Perka*<sup>170</sup> recognised that necessity could be conceptualised as either a justification or as an excuse but that in Canada it should be operated as an excuse. Dickson J noted that this concedes that the act was wrongful, but withholds criminal attribution to the person because of the dire circumstances surrounding the person at the time of the commission of the crime. He summarised the rationale of necessity by noting that "[a]t the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was unavoidable."<sup>171</sup>

4.96 Some commentators have argued that the distinction between justification and excuse is irrelevant, on the grounds that no significant legal consequences flow from it, and indeed Walker LJ in *Re A (Children)* stated

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<sup>165</sup> Law Commission of England and Wales *Criminal Law: Legislating the Criminal Code Offences against the Person and General Principles* (No 218 1993) at paragraph 35.5.

<sup>166</sup> Walters "Murder under duress and judicial decision making in the House of Lords" (1988) 8 *Legal Studies* 61 at 71.

<sup>167</sup> [1934] IR 518, 526.

<sup>168</sup> [1975] AC 653, 680.

<sup>169</sup> [1987] All ER 771.

<sup>170</sup> [1984] 2 SCR 232.

<sup>171</sup> *Ibid*, 250.

in relation to defences of necessity “I do not think it matters whether these defences are regarded as justifications or excuses”.<sup>172</sup>

4.97 In some jurisdictions the distinction is not regarded as important and in South Africa, necessity may be an excusatory defence or a justificatory one, depending on the circumstances.<sup>173</sup> As noted above, the German Penal Code also distinguishes between justifiable and excusable necessity, recognising them as two separate kinds of necessity.<sup>174</sup>

4.98 However, it has been pointed out that acquittals are not always neutral in respect of the issue of justification and excuse.<sup>175</sup> The basis for an acquittal can be of some importance when discussing criminal liability. For example, in the context of legitimate defence, it is clear from an acquittal that a defendant has a right to use force in the face of unlawful attack. An acquittal in these circumstances implies that his or her actions were consistent with the fundamental objectives of the criminal law.

4.99 The Commission acknowledges 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. At the same time the Commission acknowledges the pre-eminence of the excusatory approach to necessity in the common law tradition; and, while provisionally recommending the adoption of that approach in Ireland, also invites submissions on the viability of the justificatory approach.

4.100 *The Commission provisionally recommends that the defence of necessity be continued on its traditional excusatory basis. However, the Commission also accepts that there is a defensible case for treating the defence of necessity as a justification, and accordingly invites submissions on this point.*

## **F Conclusion on the General Scope of Necessity**

4.101 As already noted, in England the defence of duress of circumstances covers any situations in which necessity might be used as a defence.

4.102 It is rare that cases arise in which the facts call for the use of a defence of necessity. However, it is arguable that a defence of necessity would be more appropriate than duress of circumstances in those cases

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<sup>172</sup> [2000] 4 All ER 961, 1064.

<sup>173</sup> *S v Bailey* (1982) 3 SA 772.

<sup>174</sup> See paragraph 4.86 above.

<sup>175</sup> *McAuley and McCutcheon Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 787.

which do occur. This would mean that the defence would be explicitly outlined in the law, rather than allowing inappropriate defence labels to be used, or allowing the case simply to be left to prosecutorial discretion. The Commission appreciates that leaving cases to the prosecutorial discretion system ensures that those who should not be charged with certain offences are not so charged.

4.103 In the case of the Zeebrugge situation, the facts of which are discussed above,<sup>176</sup> a decision was made not to prosecute the person who had removed another person from a ladder to which he was frozen with fear, in order to save the lives of many more. It is likely that had a case been initiated the defence of necessity would have sufficed to excuse the person involved, but it is appreciated that the fact that prosecutorial discretion was exercised in this case also led to an appropriate outcome.

4.104 Chapter 3 of this Consultation Paper discussed in detail the possibility of allowing duress to be a defence in homicide cases. It also outlined the advantages and disadvantages of extending duress to murder, both as a full defence and as a partial defence.

4.105 The argument in favour of extending duress to murder also applies to necessity. To the extent that it is accepted that the law should make a concession to human frailty in the case of someone who kills under extreme moral compulsion, it is difficult to resist the conclusion that the application of this principle should not be made to turn on the accident of whether the threats faced by the defendant were human rather than circumstantial. Similarly, to the extent that it is accepted that duress should be made available as a form of lesser evils in murder cases, there is no reason in principle why the same logic should not be applied to necessity.

4.106 Clearly, the availability of necessity to a murder charge is one which has broad legal and moral ramifications. The authority of *R v Dudley and Stephens*<sup>177</sup> appears to be entrenched and has cast what has been referred to as an “unhelpful shadow” on subsequent decisions on necessity.<sup>178</sup> However, noting the apparent acceptance, albeit limited, of the defence in certain cases, along with the emergence and development of the defence of duress of circumstances, many commentators have come to believe that the defence of necessity could in fact be relied upon in extreme circumstances. An example cited by Smith and Hogan regarding the destruction of the World Trade Centre is that that necessity may have been a defence to murder had one of the planes been shot down, killing all of the passengers, but

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<sup>176</sup> See paragraphs 4.15 and 4.23 above.

<sup>177</sup> *Ibid.*

<sup>178</sup> Bennun “Necessity - Yet Another Analysis?” (1986) *Irish Jurist* 186 at 198

preventing a much greater disaster.<sup>179</sup> Here the suggestion is that necessity may even be a defence to murder, but this opinion is without authority.

4.107 It has been suggested that it may be possible to introduce in Ireland a defence of duress of circumstances which can incorporate the current defence of necessity. However, the defence of duress of circumstances was only introduced in English law to allow a defence to be pleaded which in effect is a defence of necessity. Thus, there is no need for such a defence to be introduced in Ireland because a defence of necessity could equally be developed.

4.108 Section 18(3) of the *Non Fatal Offences Against the Person Act 1997*, which deals with the justifiable use of force against a criminal act, provides that such an act will be deemed to have occurred even where the actor would have a defence on grounds of “duress, whether by threats or of circumstances.” It has been tentatively suggested that this would seem to indicate legislative acceptance of the defence of duress of circumstances, but such a defence has not been recognised by the Irish courts, and it remains unclear as to whether this constitutes legislative acceptance of the defence.

4.109 The Commission is of the opinion that the defence of duress of circumstances is a defence of necessity in all but name and makes no recommendation on the possibility of introducing a defence of duress of circumstances in Irish law. Rather, it is recommended that a defence of necessity exist for cases which might come under the scope of duress of circumstances.

4.110 Necessity is a defence which excuses the behaviour of the person who committed what would otherwise have been a crime, if it were not for the constrained choice which the person faced in the circumstances. It is therefore the opinion of the Commission that the defence of necessity should co-exist with duress, and that there should be no need for a further defence of duress of circumstances.

4.111 Whether this defence is termed necessity or duress of circumstances, it has been pointed out that in effect there is a limited general defence of necessity in existence in English (and possibly Irish) law.<sup>180</sup> One commentator has ventured to say that it is difficult to see how a return to the ancient defence of necessity can be avoided.<sup>181</sup> However, it has also been suggested that the development of the necessity defence will be inextricably linked with the defence of duress, so much so that there is now merely “a

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<sup>179</sup> Smith and Hogan *Criminal Law* (10<sup>th</sup> ed Butterworths 2002) at 273.

<sup>180</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 825.

<sup>181</sup> Watson “A Necessary Defence” (1999) *The Criminal Lawyer* No. 90.

remote likelihood that the defence of necessity as a full blown plea of lesser evils will be recognised.”<sup>182</sup>

4.112 There is the possibility that a defence of necessity be introduced that is based on a plea of lesser evils, similar to section 34 of the German Federal Penal Code on justifying necessity.<sup>183</sup> This would involve an element of choice, albeit the choice would still be constrained. The defence would involve the recognition that there are two courses of action which may be taken and the person then chooses the one which results in the least overall harm. A rational choice is made which arguably results in the more preferable outcome. It has been suggested that making a choice of this kind surely “conforms with what a rational legal system ought to regard as the preferred outcome in these circumstances”.<sup>184</sup>

4.113 In relation to choice of evils, it is, of course, difficult to establish how a decision that the choice was the ‘right choice’ should be made. If there is no life lost then a simple weighing up of interests may be done. If life is lost, and this defence is applicable to homicide cases, then it is arguable that a weighing up of interests may not be done, due to the sanctity of human life. However, it has been suggested that where there is no need to select a victim, that is, the victim selects himself, and there is a net saving of human life, for example, the person on the ladder in the Zeebrugge situation, then such a principle may be used. It seems that the evils avoided outweighs that caused, - one dies instead of many - and so it has been argued that it is right that a defence should exist in these circumstances.<sup>185</sup>

4.114 The distinction between this defence of lesser evils and the defence of necessity as dealt with throughout this chapter is that with the latter defence it is not necessary that the individual weigh up the choices involved, it is merely that the person has committed the crime because he or she was compelled by the circumstances to do so.

4.115 In relation to the labelling of the defence of necessity, it is possible that it may be developed under different nomenclature. Because the defence of duress of circumstances was introduced as a result of the pejorative status which the term “necessity” has attracted in England, it may be more appropriate to develop the defence of necessity under a different heading.

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<sup>182</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 826.

<sup>183</sup> See paragraph 4.86-4.89 above.

<sup>184</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 786.

<sup>185</sup> McAuley and McCutcheon *Criminal Liability* (Roundhall Sweet and Maxwell 2000) at 801.

4.116 The Commission is of the opinion that this area is one which will need a good deal of consideration during the consultation process. It is with this in mind that the Commission would particularly invite submissions on this defence and a potential defence of lesser evils. For the purposes of this Consultation Paper, the Commission provisionally recommends that a defence of necessity should apply in those situations where duress does not apply and that it would apply in certain exceptional circumstances. This 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.

*4.117 The Commission provisionally recommends that a defence of necessity should apply in those situations where duress does not apply and that it would apply in certain exceptional circumstances. This 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.*

## **CHAPTER 5      SUMMARY OF PROVISIONAL RECOMMENDATIONS**

5.01      The provisional recommendations contained in this Paper may be summarised as follows:

### **A            Duress**

5.02      The Commission provisionally recommends that the status of the defence of duress as an excusatory defence in general terms should be retained. [Paragraph 2.24]

5.03      The Commission provisionally recommends that the threat which underpins the defence of duress should be one of death or serious harm. [Paragraph 2.49]

5.04      The Commission provisionally 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 2.61]

5.05      The Commission provisionally recommends that, in establishing whether the response of the accused was a reasonable one, an objective test should be applied. [Paragraph 2.97]

5.06      The Commission provisionally recommends 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. [Paragraph 2.106]

5.07      The Commission provisionally recommends that while the threat should be imminent, no requirement of immediacy should exist in relation to the harm threatened. [Paragraph 2.135]

5.08      The Commission provisionally recommends that the person threatened should be required to seek official protection if possible but that a failure to do so will not automatically preclude the availability of the defence. [Paragraph 2.136]

5.09 The Commission provisionally 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 2.159]

5.10 The Commission provisionally recommends 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. [Paragraph 2.181]

5.11 The Commission provisionally recommends that the onus should remain on the prosecution to disprove the defence of duress beyond a reasonable doubt. [Paragraph 2.192]

5.12 The Commission provisionally recommends that the defence of duress should apply to all offences excluding murder and attempted murder. Moreover, while acknowledging that the plea might be made available as a partial defence to those offences, the Commission accepts 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, and invites submissions on this matter. [Paragraph 3.102]

## **B Necessity**

5.13 The Commission provisionally recommends that the defence of necessity be continued on its traditional excusatory basis. However, the Commission also accepts that there is a defensible case for treating the defence of necessity as a justification, and accordingly invites submissions on this point. [Paragraph 4.100]

5.14 The Commission provisionally recommends that a defence of necessity should apply in those situations where duress does not apply and that it would apply in certain exceptional circumstances. This 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. [Paragraph 4.117]