LAW REFORM COMMISSIONER
VICTORIA

Report No. 9

DURESS, NECESSITY AND COERCION

MELBOURNE
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PREFACE

By letter dated the 13th day of February 1978 the Honourable the Attorney-General acting pursuant to Section 8 (b) of the Law Reform Act 1973 referred to the Law Reform Commissioner the following reference —

"To investigate and report on the present scope of the law relating to the defences in criminal prosecutions of duress, coercion and necessity and on the desirability of reform in this area of the law."

In September 1978 Working Paper No. 5 bearing the title "Duress, Coercion and Necessity" was given a wide distribution — approximately 750 copies having been spread amongst the judiciary and magistrates, parliamentarians, the Councils of the Bar and Law Institute, country and suburban law associations, universities, the Education Department, and various interested groups including the executives of the political parties.

In addition press publicity was given to the publication and purpose of the Working Paper.

A number of individuals and organisations (listed in Appendix "A") made written submissions or comments. These have all been carefully considered.

At the end of February 1980 through the good offices of the Vice-Chancellor and the Dean of Law of the University of Melbourne a seminar was held at that university at which were present over 40 persons concerned with the subject matter of this Report. Amongst this number were Supreme and County Court judges, academics involved in research in and teaching of criminal law, representatives of prosecution and defence lawyers, moral philosophers, psychiatrists and psychologists. A valuable and varied expression of views was heard and after further wide discussion this Report was ultimately prepared and is now submitted.

It is desired to express thanks to all those who gave time, thought and expression to assist in the consideration of what is an important and imprecise area of the criminal law. Particular mention should be made of Mrs. Jocelyn Howlett, Professor Waller and Mr. Mark Sibree of the Law Reform Advisory Council, of Professor Lanham and Mr. Ian Elliott of the Melbourne University Law School for their assistance in the conduct of the February Seminar, of the Honourable T. W. Smith Q.C. for his continuing interest and assistance in the work of law reform, Mr. John Dixon, former Legal Assistant to the Law Reform Comissioner and of his successor, Ms Lesley Skillen, and of the patient and indefatigable secretary to the Commissioner, Miss Elizabeth Russell.

JOHN MINOGUE
(LAW REFORM COMMISSIONER)

160 Queen Street,
Melbourne.
1st October, 1980

DURESS, NECESSITY AND COERCION

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DURESS, NECESSITY AND COERCION

PART I INTRODUCTION

General

1.01 This Report will recommend that there be reform and statutory reformulation of the law relating to Duress and Necessity as defences in the criminal law and that the law relating to Coercion contained in Section 336 of the Crimes Act 1958, be repealed.

1.02 Broadly, the purpose of the criminal law is to prevent people doing what society considers to be undesirable and to channel conduct into socially desirable paths. The American Model Penal Code[1] — a document the significance of which is being increasingly recognized — in its first Article, states that purpose to be "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests".[2] The criminal law consists of a series of prohibitions of acts and conduct considered detrimental to the integrity of the person, the peaceful enjoyment of property, and the orderly conduct of the affairs of the community. Embodied in this branch of the law are a number of moral imperatives long accepted by the community, e.g. "Thou shalt not murder"[3] "Thou shalt not steal", "Thou shalt not bear false witness". Breach of a criminal prohibition results in the sanction of punishment of some kind.

1.03 It is inherent in our kind of society that when a person is charged with criminal conduct he is entitled to defend himself in a court of law against the charge. The usual type of defence is a denial of the charge — couched in any of a number of ways, e.g. "I wasn't there" (alibi), "It wasn't me" (mistaken identity), "It was an accident", "I didn't mean to do it" (where intent to perform the prohibited act is essential to conviction), and so on.

1.04 But it sometimes happens that the person charged says "I know that what I did was apparently against the law but I did it to avert or prevent a harm which was far greater than the harm which the legal prohibition against my act was designed to prevent". A simple real-life example will serve to illustrate this type of situation. An auction of effects was being held at a country farm house on a hot and dry summer's day. A great num-

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[1] The highly regarded American Law Institute which was founded in 1923 as a permanent organisation devoted to clarification and improvement of the law in 1952 began the planning and drafting of a Model Penal Code. The word "penal" is somewhat misleading in that in America by "Penal Code" is meant a combined criminal code and a code for the organisation of correctional services. Intensive work was carried on by a body of "reporters" which included lawyers, and other experts including a psychiatrist and a sociologist, and by an Advisory Committee which included some eminent Federal and State Judges, district attorneys, forensic scientists, sociologists and academic lawyers. The Committee had as a consultant Dr. Glanville Williams, one of the most respected writers in the field of criminal law in England, and at one time co-opted Dr. Norval Morris, well-known in Australia and now Dean of the Chicago Law School. The final draft of the Code was arrived at in 1962.

[2] Model Penal Code, Reprint of Proposed Official Draft of May 4, 1962, Article 1, s.1.02.

[3] Exodus 20:13. Although the Authorised Version uses the word "kill" later translations including the modern Jewish translation translate the Hebrew "ratsach" as murder.

ber of cars were parked in a paddock beside the house. The defective and glowing exhaust of one car set fire to dry grass and the fire quickly began to spread. There were no fire-fighting implements immediately visible but a quick-thinking member of the throng at the sale seized a valuable carpet displayed for sale and managed to beat out the fire, and incidentally to ruin the carpet. The seizure and use of another's property in such circumstances could clearly be regarded as justified and it is on the principle of justification that a defence to any charges arising from such an incident as the foregoing would be based.

1.05 It happens too that in the daily work of the courts will be heard the plea of an accused person saying in effect "I know I did wrong but in all the circumstances I couldn't help it, and I shouldn't be blamed. The situation was too much for me". Excuse, a plea that in all the circumstances his act should not be regarded as criminal, is the basis of such a defence.

1.06 In approaching the problems raised by the Reference it at once became apparent that some basic concepts of both human behaviour and the criminal law were involved and that the problems were made no easier of solution because of conceptual confusion and lack of definition. The terms "duress", "coercion" and "necessity" have been used in different senses by judges, academic writers and philosophers and in general use necessity has a large spectrum of shades of meaning. In the criminal law defences under these names rest in varying measure on the principles of justification and excuse and it is thought that a short discussion of these principles will help to dispel the imprecision of terminology and assist in formulating recommendations which are both clear and consistent.

Justification and Excuse

1.07 "Justification" and "excuse" are terms embodying concepts well known to and used by moral philosophers when discoursing on human conduct. They have also for long been used in the law but the distinction between them has become blurred and they seem often to be used interchangeably and sometimes together with no apparent difference of meaning. In moral analysis justification is present when given the circumstances that have arisen it can be said that the act performed was the right thing to do and an impartial observer would say so despite regret that the circumstances had arisen. If the circumstances were not present the act would have been wrongful. Thus we may speak of justifiable homicide but not of justifiable lifesaving.[4] On the other hand to excuse would be for an impartial observer to say that this was the wrong thing to happen but some condition for responsible action was lacking in the person who acted. It is argued that much the same distinction should be made in the field of criminal law.

1.08 The criminal law lays down general rules but cannot possibly legislate for every eventuality. In human affairs there must inevitably be occasions when owing to circumstances out of the ordinary or unforeseen, a breach of the law is the proper course of action. This is well illustrated by a recent case in England. A Mr. Johnson drove his car along a narrow one-way street and his progress was stopped by a stationary ambulance which was taking some injured people aboard. Apparently further ambulances were expected

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[4] See D'Arcy, *Human Acts,* Oxford University Press, p. 79.

and a police constable requested Mr. Johnson to reverse his car so that these ambulances could come in unhindered. He refused, one of his reasons for refusal being that he would be breaking the law in so doing. He was subsequently charged with and convicted of obstructing the officer in the execution of his duty. The Divisional Court in upholding his conviction, said that the law must recognise that in certain circumstances a constable may oblige persons to disobey a traffic regulation and that he would be entitled, and indeed under a duty, to give such instruction if it were reasonably necessary for the protection of life or property.[5] The constable's conduct in the circumstances was justified in that it could be said to have promoted more social good than harm.

1.09 A justificatory defence argues for an exception to a rule prohibiting criminal conduct and thus that the questioned conduct in the circumstances was not criminal. It was the right thing to do. It was the right choice to make. And it follows that given similar circumstances such conduct could be repeated.

1.10 In areas of the criminal law particular rules of justification have been developed and provide well-recognized exceptions to general criminal prohibitions. Self-defence, defence of another, and defence of property provide examples of specifically recognized justifications. Self-defence can justify even homicide in some circumstances. Consent can justify the taking of another's property; defence of one's property can justify force. A court judgment justifies the seizing of property just as a properly obtained search warrant justifies what would otherwise be a trespass and illegal taking of goods.

1.11 The American Model Penal Code which is increasingly providing the basis of criminal law revision and reform in the States of America contains an article (Article 3) styled "General Principles of Justification". The article contains sections covering the use of force in self-protection, for the protection of other persons, and for the protection of property, the use of force in law enforcement and the use of force by persons with special responsibility for care, discipline and safety of others. It begins with a section (section 3.02) styled "Justification Generally: Choice of Evils". The section is as follows:—

> "(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the

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[5] *Johnson v. Phillips* [1976] 1 W.L.R. 65.

necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability."

1.12 This choice of evils (sometimes spoken of as the promotion of the greater good) is the type of defence to which it will be recommended that the characteristic "defence of necessity" be applied.

1.13 To plead excuse on the other hand is to admit the wrongfulness of the act but to urge that the actor because of all the circumstances, including his personal characteristics, should be excused and held free of criminal liability. Holding him free does not create any precedent or an exception which can be relied upon subsequently. The circumstances are unique and personal and peculiar to the actor i.e. the person charged.

1.14 Just as justification takes its place in the criminal law as the principle underlying some defences so does excuse. The defences of insanity and involuntary drunkenness are prime examples. We excuse the person who was legally insane at the time of his act because it would not be fair or just to convict him although we deprecate or abhor his act. Similarly, in the case of a person who becomes intoxicated through no fault of his own. Again where a person acts under a mistake of law in circumstances where, for example, the law has been recently promulgated but where it has not been able to be published widely enough to reach the attention of the person who breaks that law, it would be unfair and unjust to hold him criminally liable and he should be excused for his breach.

1.15 To sum up, whereas an act if justified attracts praise for the actor, an act if excusable calls for compassion for him and a realisation that in his particular circumstances he could not help what he did. Justification looks at the quality of the act; excuse at the distress of the actor.

1.16 What has been written is not to say that justification and excuse are mutually exclusive bases of defence. A man lost and starving in a remote area breaks into a house and takes food. His act can be justified as a choice of the evil of stealing in preference to enduring the evil of death from starvation but he could also be excused by reason of his desperate situation. If in the example of the fire in paragraph 1.04 the new and expensive car belonging to the user of the carpet was in the inevitable path of the fire, he might well be excused for his act of desperation in seeking primarily to save his car.

1.17 It must be stressed that throughout this Report it is criminal defences which are being considered and not civil liability. Although ostensibly criminal conduct may be excused or justified, in most cases where harm is suffered at the hands of another civil liability to compensate will arise. No attempt will be made here to discuss this type of liability.

1.18 Some situations fall clearly within one category or the other. In other situations, one or other principle will tend to predominate, whilst in others again reliance could be placed equally on either, but nonetheless it is submitted that the two principles are distinct.

PART II. DURESS

General

2.01 It is clear that duress is a defence to a criminal charge in practically all common law jurisdictions (which means all those jurisdictions which have inherited or adopted the English common law) and as far as is known in most countries which operate under the Continental system — usually termed civil law countries. The defence is not necessarily always called or styled duress. For example, it is included under the heading "Compulsion" in the Queensland and Western Australian Criminal Codes. The Tasmanian Criminal Code Act, section 20, provides that compulsion by threats shall be an *excuse* (emphasis added) for the commission of some offences. And the new German Penal Code brought into force in 1975 provides for freedom from criminal liability in a situation of duress under the heading "Necessity [or Emergency] which excuses".

Some text writers call it compulsion or constraint. By whatever name, it is predominantly a defence of excuse in that it is personal to the person accused and depends upon his particular circumstances for its assessment.

2.02 In Victoria Mr. Justice Smith gave what is perhaps the clearest summary of the law as it was thought to exist before the most recent English pronouncements of the common law when in the course of a judgment in a murder case he had this to say:

> "Where the accused has been required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) 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 and (iii) the threat was present and continuing, imminent and impending, and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused in such circumstances at least, has a defence of duress."[1]

2.03 In this case there was no occasion for a discussion of the general application of the defence and in no case does there appear to have been considered threats of imprisonment or to reputation, livelihood or property, all of which in sufficiently serious circumstances could be thought to give rise to the defence.

2.04 In England duress has been accepted as a defence to criminal damage, arson, theft, perjury and it has been assumed by the courts that it would

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[1] *R. v. Hurley and Murray* [1967] V.R. 526, 543.

apply to buggery and to conspiracy to defraud.[2] In Ireland it has been accepted as a defence to unlawful possession[3] and in Victoria to unlawful and malicious wounding[4] and as a reasonable excuse, and so providing a defence, for unlawful possession of a prohibited import (cannabis).[5]

Recent Developments

2.05 Since the publication of Working Paper No. 5 duress has been considered again in Victoria by the Full Court,[6] this time with a different view of the law taken to that taken in the case of *Harding* to which some attention was given in the Working Paper (see Working Paper No. 5, paras 2.10, 2.11). This was in another macabre case in which a youngish woman and a much younger man were charged with the murder of the man with whom the woman was living, the killing having been brought about either by the shooting of the victim by the man or a combination of that shooting and the deliberate running over him by a car driven by the woman after his body had been dumped on a track. Two of the judges of the Court held that *Lynch's* case[7] (the Northern Ireland case allowing a defence of duress to a principal in the second degree to murder—see Working Paper No. 5, para 2.12) should be followed in Victoria. All three judges accepted that *Abbott's* case[8] (the case in which the defence was denied to a person who actually took part in the killing (Working Paper No. 5, para 2.15) was part of our law.

2.06 In yet another case decided in South Australia[9] the Full Court of that State upheld the defence of duress taken by a woman (apparently of not particularly high intelligence) who lived with her husband in rather sordid circumstances and who was ordered by him to make false claims for social service benefits under threat of a "belting" if she did not accede to his wishes. The Court closely examined the circumstances, including the fact that she had been assaulted before, sometimes with the open hand, sometimes with a closed fist, and was unanimously of the view that this constituted a sufficient threat to overcome any resistance she might have had to perform this prohibited conduct.

Law Still Uncertain

2.07 It cannot be said that either of these cases have provided any authoritative pronouncement of the ambit of the defence, or of the circumstances which can bring it into operation.

2.08 Lord Simon of Glaisdale in *Lynch's* case[10] stated his understanding of the law concerning duress in these terms:

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[2] See Smith & Hogan, *Criminal Law*, 3rd edition, pp. 164-165.
[3] *A.G. v. Whelan* [1934] IR. 518.
[4] *R. v. Smyth* [1963] VR. 737.
[5] *R. v. Tawill* [1974] V.R. 84.
[6] *The Queen v. Darrington*, unreported, 27th November, 1979.
[7] *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653.
[8] *Abbott v. The Queen* [1976] 3 W.L.R. 462.
[9] *Osborne v. Goddard* (1978) 21 A.L.R. 189.
[10] *D.P.P. v. Lynch* [1975] A.C. 653 at 686.

> I take it for present purposes to denote such [well-grounded] fear, produced by threats, of death or grievous bodily harm [or unjustified imprisonment] if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it. I am quite uncertain whether the words which I have put in square brackets should be included in any such definition. It is arguable that the test should be purely subjective, and that it is contrary to principle to require the fear to be a reasonable one. Moreover, I have assumed, . . . that threat of future injury may suffice, although *Stephen's Digest of the Criminal Law* art. 10 is to the contrary. Then the law leaves it also quite uncertain whether the fear induced by threats must be of death or grievous bodily harm, or whether threatened loss of liberty suffices: cases of duress in the law of contract suggest that duress may extend to fear of unjustified imprisonment: but the criminal law returns no clear answer. It also leaves entirely unanswered whether, to constitute such a general criminal defence, the threat must be of harm to the person required to perform the act, or extends to the immediate family of the actor (and how immediate?), or to any person."

The doubts expressed in this passage are to some extent still unresolved and while *Abbott's* case should be followed in Victoria the question raised in that case still remains undecided by the House of Lords and by the High Court of Australia.

2.09 Whilst the defence of duress can be said to be available in Victoria over the whole field of criminal offences except at present to a charge of murder as an actual participant in the act of killing, (and no comment or argument has been received suggesting that the defence be discarded), there is still no clear statement of law enabling a confident answer to be given as to what kind of compulsion leading to or compelling what criminal conduct can provide such a defence. As to the kind of threat or force required to allow the defence to be brought into play except for the South Australian case recently decided[11] the cases all seem to require a threat of imminent death or serious bodily injury. This was so, for example, in an English case in 1971[12], in which threats to "cut them up" were said to excuse perjury by two young women in the course of a criminal trial. Until the South Australian case there does not seem to be any record of lesser threats attracting the defence.

2.10 And it is still fair to say that the law with regard to duress is as it was described by the then Chief Justice and Mr. Justice Pape in *Hurley's* case in 1967 as being "vague and unsatisfactory". It might be added that Lord Simon in *Lynch's* case referred to the "extremely vague and elusive juristic" concept of duress.

Need for Guidelines

2.11 On the assumption that excuse is the true basis of the defence of duress and on the consequent further assumption that the allowing of the defence depends upon the view taken of the culpability of the defendant's conduct

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[11] *Osborne v. Goddard* (supra).
[12] *R. v. Hudson & Taylor*, [1971] 2 Q.B. 202.

in the face of the circumstances he was in and of his own characteristics and the pressure exerted on him, it might be thought sufficient to say with Lord Wilberforce

> "Nobody would dispute that the greater the degree of heinousness of the crime, the greater and less resistible must be the degree, of pressure, if pressure is to excuse".[13]

No doubt any judge in a criminal trial would dwell on the question of proportionality and remind the jury that if the gap between the harm done and the benefit accrued to the accused becomes too great, they might well think that the act is more likely to appear voluntary. The word "voluntary" is here used in the primary sense defined in the Shorter Oxford English Dictionary of being performed or done of one's own free will, impulse or choice; not constrained, prompted or suggested by another. However amongst those with whom this question has been discussed there seems to be general agreement that some guidelines are needed.

Before considering what should be the shape of those guidelines it is first necessary to discuss how far murder should be able to be excused.

Murder

2.12 The distinction between the availability of the defence to those accused of murder in the second degree but not those said to be participants in the direct killing and so principals in the first degree, seems both illogical and unjust. The culpability or moral blame of the counsellor and procurer can be far greater than that of the pliant and terrified wielder of the weapon of death. In discussing this question in the light of the dreadful circumstances in which the victim was killed in *Abbott's* case[14] (see Working Paper No. 5, para 2.15), Lord Wilberforce and Lord Edmund-Davies said this:

> "The sole question of law is whether it is open to such a defendant [i.e. one who was principal in the first degree to the murder in question] to plead that he acted under duress. For the purpose of this appeal, it is unnecessary to consider what *sort* of duress or how *much* duress. If the Crown is right, there is no let-out for any principal in the first degree, even if the duress be so dreadful as would be likely to wreck the morale of most men of reasonable courage, and even were the duress directed not against the person threatened but against other innocent people (in the present case, the appellant's mother) so that considerations of mere self-preservation are not operative. That is indeed 'a blueprint for heroism'; *S. v. Goliath*, 1972 (3) S.A.1. The question is whether it is also the common law, which, being indivisible, has to be applied in Trinidad and Tobago as in Great Britain. In our opinion, it is not.
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> . . . The question that immediately arises is whether any acceptable distinction can invariably be drawn between a principal in the first degree to murder and one in the second degree, with the result that the latter *may* in certain circumstances be absolved by his plea of duress, while the former may never even advance such a plea.

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[13] *D.P.P. v. Lynch* [1975] A.C. 653 at 681.

[14] *Abbott v. The Queen* [1976] 3 WL.R 462 at 472-473.

The simple fact is that *no* acceptable basis of distinction has even now been advanced. In *Lynch* Lord Simon of Glaisdale and Lord Kilbrandon, who dissented, adverted to the absence of any valid distinction as a ground for holding that duress should be available to *neither*, the former saying, at p. 687:

> 'How can an arbitrary line drawn between murder as a principal in the first degree and murder as a principal in the second degree be justified either morally or judicially?'

Lord Morris of Borth-y-Gest restricted himself to saying, at p. 671:

> 'It may be that the law must deny such a defence to an actual killer, and that the law will not be irrational if it does so.'

Of those of their Lordships who are in a minority in the present appeal, Lord Wilberforce found, at p. 681:

> '. . . no convincing reason, on principle, why, if a defence of duress in the criminal law exists at all, it should be absolutely excluded in murder charges whatever the nature of the charge; hard to establish, yes, in case of direct killing so hard that perhaps is will never be proved: but in other cases to be judged, strictly indeed, on the totality of facts. Exclusion, if not arbitrary, must be based either on authority or policy.'

Lord Edmund-Davies (at p. 715) expressed agreement with the observation in *Smith and Hogan*, 3rd ed. (1973) p. 166 that:

> 'The difficulty about adopting a distinction between the principal and secondary parties as a rule of law is that the contribution of the secondary party to the death may be no less significant than that of the principal.' "

And it may be said can be morally far more blameworthy.

2.13 The foregoing reasoning compels the conclusion that there be no distinction made as to the availability of the defence whatever be the degree of participation alleged against the accused person and **it will be so recommended.** It is to be observed that the American Model Penal Code provides that it be a defence

> "that the actor engaged in the conduct charged to constitute an offence 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."[15]

and that this clause makes no exception to the type of criminal conduct charged.

2.14 In the course of discussions at the seminar held at the University of Melbourne to which reference has been made in the Preface to this Report, it was strongly argued that the crime of murder was of so heinous a nature and was so regarded generally by the community, that it should be part of the law that nothing but the gravest threats should be held capable of excusing a participant in that crime. This view is adopted in this Report although it

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[15] Model Penal Code, Section 2.09 Duress (1).

is thought that not every killing which presently comes within the definition of murder should be capable of excuse solely by threats of death or what commonly is understood by the terms serious personal or mental injury.

2.15 Accordingly **it will be recommended** that the defence of duress should be available in the case of murder where the accused has been required to take part in an intentional killing, i.e. where death is the objective aimed at or the expected result of the conduct demanded, only where the harm threatened to the accused person was death or serious personal injury, either physical or mental.

Other Homicides and Serious Assaults

2.16 There remain four other categories of killing a human being presently classed as murder in Victoria. They are

(a) where a person intentionally causes serious bodily injury and death results from that injury;

(b) where he causes death by an act of violence done in the course of or in furtherance of a felony involving violence;

(c) when he causes death by an act of violence done to a person whom he knows to be an officer of justice acting in the execution of his duty or a person assisting him and done with the object of preventing lawful arrest or detention (or done to a person known to be acting to suppress an affray or apprehend a felon);

(d) where a person causes the death of another and his act is accompanied by knowledge that death or grievous bodily harm would probably result from that act.[16]

2.17 In cases of these types and in all cases where injury to the person involved is more serious than common assault, the ambit of the defence ought, it is thought, to be widened to allow of its availability as well where there have been threats of torture, rape, buggery or unlawful imprisonment. Of course it will be understood in all cases that as Lord Wilberforce said, the greater the harm contemplated the greater should be the threat and degree of pressure exerted to allow an excuse for the perpetrator of the harm. And **it will be so recommended.**

2.18 The foregoing recommendations have received strong but not unanimous support. There are however some who hold to the view that murder is a crime of such gravity and human life so sacrosanct in nature that there should not be a complete defence to its commission in any circumstances. They would allow a qualified defence in that if there was considered sufficient excuse by a jury a verdict of manslaughter would be permissible. Yet another qualified defence suggested was that thought satisfactory and in accordance with principle by Mr. Justice Glass in the case of *McCafferty*.[17] He instructed the jury that duress producing a minor participation in a

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[16] *La Fontaine v. The Queen* (1977) 51 A.L.J.R. 145.

[17] *R. v. McCafferty & others*, [1974] 1 N.S.W.L.R. 89. (See Working Paper No 5, para 2.25.)

murder could operate as a complete defence and that it was for them to determine whether any act proved was major or minor. However he instructd them that an act which involved the handling of the rifle with which the fatal shot was fired or other similar act could not be regarded as minor. He went on to tell the jury that it was the law that duress producing a major participation in a murder could, like provocation and excessive retaliation in self-defence, reduce murder to manslaughter. The Court of Criminal Appeal in New South Wales in a subsequent case[18] in 1977 disapproved of this charge as being not in accord with the recent pronouncements of the law in England.

It has also been suggested that if the belief in the threat of death or serious bodily or mental harm is based on reasonable grounds in the sense that it is a belief which an ordinary individual placed in the circumstances of the accused person might reasonably hold, a defence of duress could succeed, but if the belief was plainly unreasonable, even though honestly held, then at best a verdict of manslaughter could be returned.

2.19 These views have to be and have been given earnest consideration. Nevertheless it is thought that the time has come for a greater degree of flexibility in this area of the criminal law — flexibility which will recognise and make allowance for the impossibility in some cases of expecting reasonable or even rational conduct in the face of implacable pressure. Cases can be envisaged when the weak-willed, the dull-witted or the simple-minded could be pressured to kill by a person possessed of a strong and vicious personality. And towards the other end of the spectrum of humankind there could be circumstances where threats to kill or seriously injure a child or in the words of the German Criminal Code "a dependant or any other person closely attached to him"[19] could lead to an agonized but nonetheless fully reasoned act of homicide by a person generally regarded as a good and average citizen. So it is submitted that where on a charge of murder duress is properly in issue the law should allow for a verdict of acquittal where it can fairly be thought that there is no moral culpability and that it would be unjust to convict and taint the person accused with criminal guilt.

2.20 In the criminal law increasing attention is being devoted to this concept of moral culpability. It can be said to underlie the present law of theft and recently it has been considered by judges of the High Court of Australia in relation to the law of murder. This was in the case of *Viro v. The Queen*[20] in which the defence of self-defence was in issue. Mr. Justice Mason speaking of an earlier case of *Howe*[21] (which was followed by him and three other judges of the Court) had this to say:—

> "The underlying rationale of *R. v. Howe* is to be found in a conviction that the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated

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[18] *R. v. McConnell* [1977] 1 N.S.W.L.R. 714.

[19] German Criminal Code of 1975, Section 35.

[20] (1978) 141 C.L.R. 88.

[21] (1958) 100 C.L.R. 448.

with murder. The notion that a person commits murder in these circumstances should be rejected on the ground that the result is unjust. It is more consistent with the distinction which the criminal law makes between murder and manslaughter that an error of judgment on the part of the accused which alone deprives him of the absolute shield of self-defence results in the offence of manslaughter."[22]

In this case as in *Howe*[23] the court held that where the degree of force used in self-defence is excessive in the circumstances and death occurs as a result a verdict of manslaughter may be returned.

2.21 Both logic and justice would seem to call for an examination of the degree of moral culpability where killing under the stress of duress falls for consideration. The scope of human evil is boundless and it would be impossible to list or prescribe circumstances which might excuse from culpability. It should be for the jury to decide whether in all the circumstances the intentional killing of another should be excused either wholly or partly.

2.22 In a trial for murder the jury has a power to return a verdict of manslaughter although the courts have been reluctant to venture upon any general examination of the scope or limits of the power. However it is submitted that where there is evidence of duress it should be left to the jury to decide

(1) whether they cannot be satisfied that in all the circumstances there is any moral culpability for which the accused person could fairly or justly be blamed. If they cannot be so satisfied then they should be directed to acquit; or

(2) whether they are satisfied beyond reasonable doubt that the accused is fully culpable and should be found guilty; or

(3) whether there is some degree of moral culpability that falls short of that which in their minds is associated with murder — in which case the proper verdict should be manslaughter;

and **it will be so recommended.**

Other Offences

2.23 There remain for consideration the other offences known to the criminal law, on the commission of all of which duress could be imagined as being brought to bear. A threat to property could, in some cases, be as potent in overbearing the actor's wish not to perform the prohibited act as a threat of physical harm. Examples are given by Lord Simon in *Lynch's* case. The threat may be to burn down his house unless the householder merely keeps watch against interruption while a crime is committed or a fugitive from justice may say "I have it in my power to make your son bankrupt. You may avoid that by merely driving me to the airport." And Lord Simon goes on to say:[24]

"Any sane and humane system of criminal justice must be able to allow for all such situations as the following, and not merely for

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[22] *Viro v. The Queen* (1978) 141 C.L.R. 88, at 139.

[23] *R. v. Howe* (1958) 100 C.L.R. 448.

[24] *D.P.P. v. Lynch* [1975] A.C. 653 at 687.

some of them. A person, honestly and reasonably believing that a loaded pistol is at his back which will in all probability be used if he disobeys, is ordered to do an act prima facie criminal. Similarly, a person whose child has been kidnapped, and whom as a consequence of threats he honestly and reasonably believes to be in danger of death or mutilation if he does not perform an act prima facie criminal. Or his neighbour's child in such a situation. Or any child. Or any human being. Or his home, a national heritage, threatened to be blown up. Or a stolen masterpiece of art destroyed. Or his son financially ruined. Or his savings for the old age of himself and his wife put in peril. In other words, a sane and humane system of criminal justice needs some general flexibility and not merely some quirks of deference to certain odd and arbitrarily defined human weaknesses."

2.24 Lord Simon proceeds to use this argument to conclude that the greatest flexibility is obtained by taking the kind of circumstances set out above into account in the sentence of the court. His principal reason for concluding that the defence of duress should be denied in such circumstances was that it would enable gangsters and terrorists to confer on members of their organisation immunity from the criminal law. However it is thought that such a conclusion underestimates or fails to recognise the collective commonsense residing in a jury. It is noteworthy that in the case in which these comments were uttered a majority of the law lords allowed the appeal and a new trial was ordered. At this trial the defence of duress was considered, the jury rejected the defence and Lynch was again convicted. And it may be said that juries rarely give credence to an unmeritorious defence. Lord Simon's argument set out above can be equally well used to support a widening of the defence of duress and the taking of a further step in the criminal law to recognise and excuse human weakness and frailty.

2.25 It is felt that the community would approve of such a widening of the defence and **it will be recommended** that in all other cases compulsion or threats of harm to property or reputation or livelihood, inducing criminal conduct, may provide a defence of duress where in the opinion of the jury in all the circumstances it would be fair and just to free the accused of culpability.

Defence — Subjective or Objective?

2.26 When the defence of duress is raised the first question for consideration is whether the will of the person accused was truly overborne. Did he really believe that the threat to him was genuine? That he could not resist the threat? and that no other course was open to him but to obey the dictates of the threatener? Answers to these and like kinds of questions can involve an assessment of the character of the person threatened, of his veracity and of his weaknesses. All these are matters peculiar to the particular individual and their consideration is spoken of as the subjective test.

2.27 When limitations are placed upon the availability of the defence which apply regardless of the individual characteristics of the person claiming the defence they raise objective considerations. The limitations to the types of threat which are suggested in the preceding paragraphs are objective

and are not affected by any subjective considerations applicable to the individual charged.

2.28 As a matter of public policy judges have tended to place limitations on the use of the defence by suggesting a standard of conduct by which that of the person accused can be measured, viz. conduct which would or might be expected of the reasonable or ordinary man. This was the test used by Mr. Justice Barry in instructing the jury in the case of *Hurley*[25].

"Threats of immediate or serious personal violence", he said, "so great as to overbear *the ordinary power of human resistance* [emphasis added] should be accepted as justification for acts which would otherwise be criminal", and further, "The fear that governs his acts must be of the kind that will affect the will of a man of ordinary courage and fortitude".[26]

When that case went on appeal Mr. Justice Smith spoke of a similar test (see requirement (ii) in para. 2.02 *ante*). And the Law Lords in both *Lynch's* and *Abbott's* cases referred to a similar objective limitation.

2.29 A recent decision of the Court of Criminal Appeal in New South Wales[27] provides what can be regarded as an authoritative exposition of the present law in regard to this objective test. This was a case in which a number of men were charged with a conspiracy to import cannabis valued at over $25m. De Graaff was the navigator of the two vessels used in carrying the consignment from Thailand to Australia. He claimed that it was not until the cargo was taken aboard that he knew of its nature and that at the earliest opportunity he left the first vessel. (This vessel developed engine trouble and its cargo was unloaded into a wrecked Japanese ship on a reef east of the New Guinea mainland, whence the disabled ship proceeded to Honiara from which place De Graaff left it and went to Sydney.) He claimed then to have been threatened with a pistol and advised to do as he was told otherwise his kneecaps would be blown off and he would be crippled for life. So threatened he assisted in the purchase of a second vessel, navigated it to the Japanese ship (from which part of the cargo was transshipped) and back to an Australian port, subsequent to which he was arrested. Another conspirator, McCallum, also claimed that because of violence sustained and threats of further violence to himself, his wife and child, he also took part in this second leg of the voyage. The trial judge invited the jury to consider the defence of duress and instructed them that it must appear that the duress was of such a kind that a person of ordinary firmness of character would be likely to yield in the way that the accused did. The threats must be so great as to overbear the ordinary power of human resistance. Both men were convicted.

On appeal counsel for the appellants put forward the proposition that in principle the test for duress is wholly subjective. He argued that the rationale of the defence is that a civilized system of criminal justice would not convict a man of a serious crime unless he knows the nature and quality of his actions, foresees their consequences and freely carries them out.

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[25] [1967] V.R. 526.

[26] ibid at 528-529.

[27] *R. v. Lawrence & others* [1980] N.S.W.L.R. 122.

The Court of Criminal Appeal rejected this argument, approved of the trial judge's instruction to the jury and stated the law to be that where a person does acts otherwise criminal by reason only of his mind being then overborne by threats of death or serious bodily violence whether to himself or another, the defence of duress will be available provided that an average person of ordinary firmness of mind, of a like age and sex in like circumstances, would have done the acts.

Mr. Justice Moffit in the course of his reasons for judgment expressed the policy of the law thus:

> "[It] is to discourage persons, at the moment of pressure, from giving way too easily to pressure to commit a crime. This it does by confining the defence by limitations based on an expectation of the law, and hence the community, that there shall be resistance to pressure to commit crimes according to the resistance to be expected from an ordinary person."[28]

2.30 The American Model Penal Code uses the test of coercion which "a person of reasonable firmness in his situation would have been unable to resist" and the English Law Commission recommendation fastens on a threat which must be such that the defendant could not be reasonably expected to resist it in all the circumstances of the case including the nature of the defendant, the defendant's belief as to the reality and immediacy of the threatened harm and any other relevant circumstances personal to him. The former test is undoubtedly objective. The English test in incorporating the defendant's belief and relevant circumstances personal to him, seems to come very close to being subjective.

2.31 A strong view has been put forward that it would be unwise to abolish the foregoing objective requirement and put in its place a subjective requirement that the particular accused found himself unable, whether from cowardice or otherwise, to stand out against the pressure applied to him. In support of this view it is argued that it appears to be the settled policy of our criminal law to limit the availability of defences of justification or excuse by an objective test which prevents an accused person from obtaining the benefit of them merely by raising a reasonable doubt as to whether his conduct was not due to some special defect such as exceptional lack of judgment, lack of powers of self-control, cowardice or susceptibility to mistake. Examples of this policy have been put forward — the limitation to action in lawful defence of property that no more force be used than *necessary;* the limitation that what the accused did was *necessary* for the protection of a third person against attack where this is his defence; the requirement that the accused's belief be based on reasonable grounds where his defence is of mistake as to the existence of facts which would have made his actions innocent; and the objective limitations both as to necessity and as to proportion which the Criminal Code Bill Commissioners in England in their report of 1879 expressed as "the great principle of the common law" to which the rights to defend one's person, liberty and property against illegal violence are subject.

2.32 As will appear in Part III support is expressed for an objective test

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[28] ibid at 136

when the justificatory defence of necessity is in question. But it must be stressed that duress, as it is treated in this Report, is not a defence of justification but of excuse. It involves no argument that the accused person was justified, but rather consideration whether, in all the circumstances, it is fair to blame that person for what was undeniably criminal conduct. In this area the difficulties of applying the reasonable or ordinary man test has become increasingly apparent and of increasing concern. That test has come under strong attack, particularly by Mr. Justice Murphy in the High Court of Australia.

In a recent case dealing with a defence of provocation to a charge of murder and the question of whether an ordinary man would or might have lost control to the extent of killing the deceased or to the extent of killing in the manner he did, he had this to say:

> "Is he a complete stranger, subjected to the provocative conduct or a person in the same circumstances as the accused? To be in the same circumstances, he should be taken to be in the same relationship with the deceased (in this case, a marital relationship) and must have experienced the relationship. In a case such as this, he should have lived the life of the accused, or it would be impractical to speak of what a reasonable or ordinary man would do in the circumstances. For example, it might have been an unbearable insult to a person of the accused's origin to be called a 'black bastard'. Once the full circumstances are taken into account, the objective test disappears because it adds nothing to the subjective test. For this reason, those who adhere to the objective test have rigidly excluded individual peculiarities of the accused (for example, low intelligence, impotence, pugnacity).
>
> The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances."[29]

So, too, with duress it is suggested that it is impossible to construct a model of a reasonable or ordinary Victorian for the purpose of assessing a breaking point under the stress of threats. Is she a pregnant woman? Or a person under treatment for a neurological condition? Or a person with some or no religious background? Or a Greek father whose sixteen-year-old daughter is under threat of defilement? What common denominator can be applied to the foregoing or to any other random selection of persons in our present diverse society?

2.33 It is not without significance to note that in *Viro's Case*[30] the first task of the jury when the issue of self-defence arises was put in this way by the majority of the judges in the High Court:

> "It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack

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[29] *Moffa v. R.* (1977) 51 A.L.J.R. 403 at 412.
[30] *Viro v. R.* (1978) 141 C.L.R. 88 at 146, per Mason J.

which threatened him with death or serious bodily harm was being or was about to be made upon him."

And they went on to explain that by the expression "reasonably believed" is meant "not what a reasonable [and it is supposed an ordinary] man would have believed but what the accused himself might reasonably have believed in all the circumstances in which he found himself". "Reasonably" here seems to be equated with "rationally".

2.34 To continue to lay stress on and search for the ordinary person, it is submitted, is to put the emphasis in the wrong place and to permit injustice to be done to the individual. If a person is really in a desperate situation, honestly believing that the threat of danger is real and that person is genuinely unable to resist the threat, it would seem that no policy of the law will deter or discourage. The renowned philosopher Hobbes, writing in the 17th century, made the point forcefully when he wrote:—

> "If a man by the terror of present death, be compelled to do a fact against the law, he is totally excused, because no law can oblige a man to abandon his own preservation. And supposing such a law were obligatory; yet a man would reason thus, if I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained; nature therefore compels him to the fact."[31]

Hobbes was stressing the elemental desire of self-preservation. But desire for the preservation of a wife, child or other human to whom one is bound by close emotional ties can be of equal or greater compulsion "to the fact".

Once the criminal act is established and there is evidence of duress compelling that act it is thought that the heart of the jury's inquiry should be whether they can be satisfied that the person accused as they see and understand that person, was not genuinely overcome by the pressure exerted upon him or whether in reality his actions were dictated by callous indifference, selfishness, greed, revenge or some other motive appearing in the circumstances. Whatever view the jury takes it must be remembered that if the pressure is of human origin both moral and criminal guilt lie in the threatener. (Malik, the instigator of Abbott's conduct, was hanged.)[32]

Accordingly it will not be recommended that the objective test of the reasonable or ordinary man be retained in the case of duress.

Law Commission of England Report

2.35 The Report of the Law Commission of England on Defences of General Appliction was referred to at length in Working Paper No. 5 and it was there suggested that the recommendations of that Commission with regard to duress should form the basis of legislative enactment in Victoria together with certain qualifications and additions. For convenience, the English recommendations are set out hereunder.

"(1) Duress should be retained as a defence to criminal liability, and should be restated in statutory form.

(2) Duress should be available as a defence to all offences, including murder, whether the defendant is charged as an accessory or as the actual perpetrator.

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[31] *Leviathan*, p. 160 (Everyman ed., 1943).
[32] *Abbott v. R.* [1977] A.C. 755.

(3) The basis of the defence should be that the defendant is induced by a threat of harm to himself or another to commit the offence with which he is charged.

(4) The defendant must believe that —

(a) the harm threatened is death or serious personal injury, whether physical or mental;

(b) the threat will be carried out immediately, or, if not immediately, before he can have any real opportunity of seeking official protection; and

(c) there is no other way of avoiding or preventing the harm threatened.

(5) 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 three matters in subparagraph (4) above, and any other relevant circumstances personal to him.

(6) There should be an evidential burden on the defendant to ensure that there is sufficient evidence to raise duress as an issue, whereupon there should be a persuasive burden on the prosecution to negative the defence.

(7) In proceedings on indictment the defendant should give notice of his intention to rely on duress, subject to a discretion in the court to allow him to advance the defence where he has not given notice.

(8) The defence should be excluded where the defendant is voluntarily and without reasonable cause in a situation in which he knows he will or may be subjected to duress to induce him to commit such an offence as that with which he is charged."

The main thrust of the suggestion made in the Working Paper stands, but as will already have been observed, some alterations have been considered necessary.

2.36 Discussions and further consideration have led to some revision and alterations of the recommendations. Recommendation (3) has been expanded in the light of what has been said in paragraphs 2.12 to 2.25. The English recommendations (4) (a) and (b) will be appropriately expanded. Recommendation (5) too will be amended to accord with a more subjective approach.

Thus **it will be recommended** not only as was suggested in Working Paper No. 5 that the defendant must believe that the threat will be carried out before he has had any opportunity of seeking official protection but also as a further alternative "or that to seek official protection would not give any real protection from the harm threatened to him".

Burden of Proof.

2.37 So far nothing has been said as to the burden of proof and no submissions have been received on that matter. The English Report recommends that where the defendant relies on duress there must be sufficient evidence — either from a prosecution witness, or from the defendant or a witness called on his behalf — to raise duress as a live issue. If there is such evidence the burden should be on the prosecution to negative the defence so

as to leave no reasonable doubt that the defendant cannot be absolved from criminal liability on the ground of duress. This accords with the position already existing in Victoria in relation to defences in the criminal law and **it will be recommended** that the position be specifically extended to the case of duress.

Notice of Defence.

2.38 With regard to the English recommendation as to notice of intention to rely on the defence of duress, this has come under cogent criticism in England.[33] It was described as ill-considered and more importantly that in giving such a notice the accused would not be naming those who might happily and readily corroborate his story, but instead would be asked to provide a list of names and other particulars which would enable the police to tip off those from whom he already has most to fear and from whom the police may not be able to protect him. **It is not recommended** that notice of the defence be required.

An Exclusion from the Defence.

2.39 In the Working Paper nothing was said in support of the exclusion of the defence where the defendant voluntarily in effect subjects himself to duress or to a position where duress is foreseeable and likely. In substance the English Commission took the view that a person who had voluntarily and with knowledge of its nature, joined a criminal association which he knew might bring pressure to bear on him to commit an offence, and was an active member when he was put under pressure to commit an offence, should not be entitled to avail himself of the defence. The Commission further thought a person who has joined a criminal association without knowledge of its criminal nature, which he only discovers when forced by a member to commit an offence, should not be precluded from relying on the defence. It regarded the vital issue as being whether at the time of the threat which induces him to do the act required of him, the defendant has voluntarily put himself in a situation in which he knows that he will or may be subjected to duress to do such an act. If he has, the defence should not be available to him; if he has not, then he should be able to rely on it. And the English Report goes on to say:—

> "If the test is expressed in this way we think that a properly instructed jury will be able to take into account all the relevant circumstances, such as whether the defendant joined a criminal association with knowledge of its nature, and what steps he had taken to dissociate himself from it. Of course, less may be required of him if he joined in ignorance but subsequently ascertained its true nature than if he joined with full knowledge but maintains he has since dissociated himself. There may also be cases where a person, employed, for example, by the police to infiltrate a ring of drug smugglers or to seek out information about an illegal organisation, has to put himself in a situation in which he knows that he may be subjected to duress because of his activities. It would be wrong to deny him the defence in those circumstances, and for that reason we think that the defence

[33] See article by A. T. H. Smith in [1978] *Criminal Law Review* 122 at 127.

should be excluded only where the person has acted without reasonable cause in putting himself in that situation."[34]

Both this reasoning and the conclusion are adopted.

Recommendations.

2.40 The precise formulation of recommendations will be postponed until the defence of necessity has been considered[35] and to the consideration of that defence this Report now turns.

[34] The Law Commission, *Report on Defences of General Application*, No. 83, 1977, para 2.37.

[35] The recommendations are set out in para. 4.19.

PART III NECESSITY

Introduction.

3.01 Necessity is an unruly term and has made its way into the criminal law without either clear recognition or control. The Shorter Oxford Dictionary defines it in a number of ways — the constraining power of something; constraint or compulsion having its basis in the natural constitution of things; the constraining power of circumstances; a condition of things compelling to a certain course of action; something unavoidable; an unavoidable compulsion or obligation of doing something.

3.02 In the law it has lacked definition but has received varied recognition, has formed the subject of many a maxim and has served a variety of uses and purposes throughout the ages. The maxim "Necessity hath no law" has been attributed to a Roman jurist of the first century. Bracton, one of the early great writers in the English law, writing in the middle of the 13th century, says that what is not otherwise lawful necessity makes lawful. A later writer, Britton, writing in the 16th century, says that necessity overrides the law and the Judges of the Exchequer Court in England in 1550 appear to have accepted the following statement as good law:—

> " . . . 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, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken. And therefore the words of the law of nature, of the law of this realm, and of other realms and of the law of God will also yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion . . ."[1]

3.03 The 19th century saw many projected reforms of the law in England and its dependencies. The Indian Penal Code introduced in 1860 dealt with necessity and included a section expressed in the following way:—

> Section 81 **Act likely to cause harm; but done without criminal intent, and to prevent other harm**
> Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.
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> **Explanation** — It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

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[1] *Reniger v. Fogossa,* (1552) 1 Plowden 1 at 18.

Illustrations (summarised)

(a) A, a ship's captain, without fault, finds that, before he can stop the ship, he must inevitably collide with vessel B containing 20 people, unless he changes course; but by so doing he must risk colliding with vessel C containing two people, although he may clear it. If A so alters his course to avoid danger to B he is not guilty of an offence, although he may collide with C.

(b) A, in a great fire, pulls down houses to prevent it spreading, in order to save human life or property. If it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of an offence.

3.04 Sir James Fitzjames Stephen, an eminent 19th century English judge and one of the great expositors of English criminal law compiled a Digest of the Criminal Law of England in 1877 in which he included Article 32 under the heading "Necessity" and which read:

> "An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided."[2]

3.05 This article formed the basis of a section under the title "Necessity" which Stephen in 1878 (as one of the Criminal Code Bill Commissioners) drafted as part of a Criminal Code Bill. However the Commissioners failed to include the section in the Code as it was finally submitted because, it would seem, they found the subject too difficult. So we find Stephen, writing in his *History of the Criminal Law* in 1883, describing the defence of Necessity as being —

> "a subject on which the law of England is so vague that, if cases raising the question should ever occur, the judges would practically be able to lay down any rule which they considered expedient."[3]

3.06 Sir Samuel Griffith, when drafting the Queensland Criminal Code at the end of the 19th century, included what is now section 25 headed "Extraordinary Emergencies" which frees a person from criminal responsibility for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise.[4] In a note to this section in the Draft Code, Sir Samuel Griffith stated:—

> "This section gives effect to the principle that no man is expected (for the purposes of the criminal law, at all events) to be wiser or

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[2] Stephen, *Digest of the Criminal Law*, 1st edition, p. 19.

[3] *History of the Criminal Law*, Vol 2., p. 108.

[4] An identical section appears in the Criminal Code of Western Australia.

better than all mankind. It is conceived that it is a rule of the common law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the common law rules as to excuses for an act which is prima facie criminal."[5]

3.07 Modern writers both in England and America do not show any consistency of approach. Professor Perkins classifies necessity as duress of circumstances and compulsion as duress, both within the general conception of "impelled perpetration" of an offence.[6] Another American text book asserts the existence of the defence of necessity when under the pressure of natural physical forces confronting a person in an emergency with a choice of two evils he violates the criminal law with less resultant harm than if he had obeyed the law and suffered a greater evil.[7] Professors Smith and Hogan, the authors of a much-quoted English textbook on the criminal law, take the view that there is no general principle of necessity existing or likely to be developed (i.e. by the courts) in English law.[8]

Professor Glanville Williams, one of the most distinguished modern writers on English criminal law, on the other hand takes a different view — *viz.* that there is a general defence of necessity. By necessity he means the assertion that conduct promotes some value higher than the value of literal compliance with the law.[9]

Statutory Prohibitions — Defence of Necessity

3.08 In Victoria, as elsewhere, a defence of necessity has either expressly or impliedly been held to exist in the case of breaches of statutory prohibitions where adverbs which qualify the prohibitions have been used. The much publicised case of *The Queen v. Davidson*[10] is one such. The *Crimes Act* 1958[11] provides that whoever with intent to procure the miscarriage of a woman *unlawfully* administers to her any poison or any noxious thing or *unlawfully* uses any instrument or other means with the like intention shall be guilty of felony. Mr. Justice Menhennitt held in that case that the defence of necessity could be availed of where the necessity to preserve a woman from a serious danger to her life or her physical or mental health (beyond the normal dangers of pregnancy and childbirth) outweighed the preservation of the foetus. In effect he held that such a necessity could render an abortion lawful.

3.09 In another case[12] a car driver was charged with causing death by culpable driving in that he failed *unjustifiably* and to a gross degree to observe the standard of care which a reasonable man would have observed in all the

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5 See Carter, *Criminal Code of Queensland*, 5th edn., p. 86.

6 Professor Perkins, *Criminal Law*, 1st edition, pp. 847 and 842.

7 La Fave & Scott, *Handbook on Criminal Law*, 1972, pp. 381 et seq.

8 *Criminal Law* 3rd ed., 1973 pp. 159, 163.

9 Glanville Williams, *Criminal Law — The General Part*, 2nd edition, para 229, p. 722.

10 [1979] V.R. 667.

11 s. 65.

12 *R. v. Lucas* [1973] V.R. 693.

circumstances of the case. It was held that the court should take into account evidence of a pursuit by another car creating a predicament which made it necessary to weigh any advantage which the accused's manner of driving (i.e. in avoiding injury from the pursuing car) was likely to bring to himself or others against the risk to life or limb which it created. This was made clear to the Court by the presence of the words "unjustifiably" and "in all the circumstances of the case" in the section creating the offence with which he was charged.

3.10 Some statutes deal specifically with situations of necessity. For example the *Country Fire Authority Act* 1958 confers wide powers on the Chief Fire Officer and certain other officers to enter upon land, to force open doors, and to take measures which in the circumstances are reasonable and which appear to be necessary or expedient. These powers go to the extent of causing a house or building to be pulled down, destroyed or removed, and trees and undergrowth to be burnt or destroyed. Similar powers are contained in the *Metropolitan Fire Brigades Act* 1958. The Road Traffic Regulations make provision for drivers of emergency vehicles in the appropriate circumstances to disobey traffic signals. An "emergency vehicle" is defined to mean *inter alia* a motor vehicle conveying members of the police force on urgent police duty, fire brigade vehicles travelling on duty to or at any place in consequence of a fire or alarm of fire, an ambulance answering an urgent call or conveying persons urgently requiring treatment to hospital. However there are no specific provisions which appear able to exculpate off-duty policemen, firemen or ambulance drivers in an emergency situation, and there is no provision covering members of the public in general.

3.11 In an English case in 1971[13] in which the duty of firemen to obey traffic signs and in particular road traffic lights was discussed, an illustration was given in the following terms:—

> "A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost."

Lord Denning expressed the view that the defence of necessity could not be allowed in such a case and that the only use of the circumstances was in mitigation. The particular situation cannot arise in Victoria because of the existence of the Road Traffic Regulations but the same sort of construction may be adopted in a Victorian court and prevent a defence of necessity being allowed to those mentioned at the end of the preceding paragraph.

3.12 Despite Lord Denning's remarks a Divisional Court (which included the Lord Chief Justice) in 1976 had no hesitation in allowing the existence of necessity justifying a breach of traffic laws (see para 1.08 *supra*) — albeit the necessity was used here as a weapon of offence rather than defence.[14]

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[13] *Buckoke v. Greater London Council* [1971] Ch. 655.
[14] *Johnson v. Phillips* [1976] 1 W.L.R. 65.

Prison Escapes

3.13 Working Paper No. 5 paras 4.22-4.24 dealt with the growing number of criminal cases arising out of escapes from prisons in America. Intolerable prison conditions and brutal guards were often urged as the reasons for escape, although in recent years violent homosexual assaults and beatings have proliferated. Duress and necessity have both been urged as appropriate defences. Initially the courts were reluctant to consider these defences no matter how well founded they appeared to be, principally because of the fear of interfering with prison discipline. However since the cases of *Lovercamp*[15] and *Harmon*[16] judicial attitudes appear to have changed. The former was a case in which two women (one of whom was mentally defective and in the protection of the other) escaped from a Californian gaol because of serious homosexual harm already endured and still feared at the hands of a group of lesbian inmates of the same prison. The latter was an appeal to the Court of Appeal in Michigan by an 18 year old male who shortly after entry to prison was accosted by 7 or 8 inmates who demanded sex and when refused beat and kicked him. The day prior to the escape this conduct was repeated and Harmon was told that the beatings would continue until he submitted. He failed to inform prison officials of the threats because of fear of reprisals. In each case the appeals were allowed and it appears on the basis of necessity justifying the conduct of the escapers. The availability of the defence has been accepted in a numbr of subsequent cases the latest reported at the time of this writing being a case decided in Washington D.C. in mid 1978 where it was held that evidence that defendants had left the prison in order to avoid beatings by prison guards and in order to avoid inadequate medical treatment was admissible to establish the "choice of evils" or "necessity" defence.[17]

3.14 It is to be observed that in all the gaol escape cases the threats have never been directed to the compelling of an escape but have always been of some violence and harm to the prisoner if he fails to conduct himself in the manner commanded by his threateners; or as in the case next to be mentioned, threats of harm in retribution for past conduct.

3.15 The Full Court of Victoria has recently been called upon to consider the defence of necessity in a case of escape from gaol.[18] A prisoner claimed that he had been wrongly suspected of "planting" a weapon in the cell of another prisoner and that as he had been threatened and was in fear of his life he requested the authorities to transfer him to another Division of the prison. No action was taken on his request and he effected his escape. The Court had no difficulty in coming to the conclusion on the facts that no case of necessity had been made out and so in rejecting his appeal against his conviction for the escape. However the judges saw fit to express views on necessity as a defence to charges of gaol escape. The prisoner had sought to rely on both duress and necessity. The Court indicated that it was not

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[15] *People v. Lovercamp* 43 Cal. App. 3rd 823; 117 Cal. Repts. 110 (1974).

[16] *People v. Harmon* 53 Mich. App. 482: 220 N.W. 2d 212 (1974).

[17] *US. v. Bailey and others* 484 F.2d. 1987 (1978).

[18] *The Queen v. Loughnan* (unreported) Judgement delivered on 1 Oct. 1979.

prepared to reconsider the decision in an earlier case where it was held that the defence of duress is confined to cases where the accused is compelled to perform some criminal action under threat of physical harm, and that the defence is not available to exculpate an accused who commits a crime in order to avoid possible consequences of threats made against him.[18]

3.16 All three judges accepted the proposition that necessity could operate as a defence to the crime of gaol escape. An early example cited was the statement by Sir Matthew Hale in 1736 that if a prison caught fire and a prisoner escaped to save his life, that 'excuseth the felony'. Difficulty was seen in describing the elements of the defence and also danger in attempting to describe those elements in general terms. The Court shied away from attempting a definition applicable to crimes in general or even to a particular class of crime. Two of the judges expressed reliance on the views of Sir James Fitzjames Stephen in his *Digest of the Criminal Law* expressing the principle of necessity upon which Mr. Justice Menhennitt relied in *Davidson's* case, which in essence they saw comprised three elements:

(1) 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.

(2) That the accused must sincerely believe on reasonable grounds that he was placed in a situation of imminent peril.

(3) That the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

A theory of excuse seems to underlie their reasoning.

3.17 The third judge expressed the essential conditions of the defence to be —

(1) The harm to be justified must have been committed under pressure either of physical forces or exerted by some human agency so that "an urgent situation of imminent peril" has been created.

(2) The accused must have acted with the intention of avoiding greater harm or so as to have made possible "the preservation of at least an equal value".

(3) There was open to the accused no alternative, other than that adopted by him, to avoid the greater harm or "to conserve the value".

His reasoning seems to contain more of a "choice of evils" approach and to regard the defence as justificatory.

Need for Reform

3.18 In Victoria entering upon the last decades of the 20th century it is not difficult to agree with Stephen's view of just on a century ago that "compulsion by necessity is a subject on which the law . . . is so vague that . . . the judges would practically be able to lay down any rule which they consider expedient." It is interesting to note that Stephen went on to say "the old instance of the two drowning men on a plank large enough to

[18] *R. v. Dawson* [1978] V.R. 536.

support one only and that of ship wrecked persons in a boat unable to carry them all are the outstanding illustrations of the principle. It is enough to say that should such cases arise it is impossible to suppose that the survivors would be subject to legal punishment".

3.19 So far as the practical application of the law is concerned it would seem that there is still no comprehensive statement of principle in relation to necessity nor has the defence of necessity any reliable precision of definition.

Reform Elsewhere

America

3.20 In the context of justificatory bases for defences necessity has been given increasing consideration and prominence. Section 3.02 of Article 3 of the American Model Penal Code (*supra*, para 1.11) is a prime example. This section has been substantially received in the States of Pennsylvania, Hawaii and Texas, and other versions of it have been adopted in Colorado, Delaware, Kentucky, New York and Wisconsin.

3.21 The Penal Law of New York as revised and re-enacted in 1965 is a good example of Section 3.02 being translated into actuality. Section 35.05 of that Law dealing with Necessity says:

> " . . . Conduct which would otherwise constitute an offense is justifiable and not criminal when: . . . 2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."

The exclusion of the defence in cases where a statutory prohibition has been breached in protest against the "morality" and "advisability" of the statute is obviously intended to render the provision unavailable to the crusader who considers a penal statute unsalutory because it tends to obstruct his cause and the like. The enactment of this section does not seem to have caused any legal difficulties.

Germany

3.22 Since the introduction of the Penal Code of 1871 Germany has had a defence of necessity. As it was originally framed it covered situations of immediate peril to life or limb of the person who committed an unlawful act to avoid such peril to himself or to a relative. The defence was not confined to human threats nor did it exclude the taking of life and it was inclusive of and wider than the defence of duress as known to English and Victorian law. The German Code had no justificatory base. The first appearance of such a base was in 1927 in a case before the German Supreme Court. A

physician was charged in relation to an abortion after he had diagnosed a serious risk of suicide if the mother were compelled to give birth to an illegitimate child. The Code at that time forbade the killing of the foetus. The Court recognised that the abortion would be justified if after conscientious weighing of the competing interests the doctor properly concluded that the interests of the mother outweighed those of the foetus. Thenceforth an extra-statutory justification was added to German criminal defences.

3.23 From the turn of the century moves have been afoot for a new German Penal Code. The first full draft of this Code was completed in 1962 and from then until its being brought into operation at the beginning of 1975 it received constant and careful consideration not only by German lawyers but also by a body of American lawyers specialising in comparative law. It is a document of the greatest importance and is so regarded in Europe. In its general part it contains two defences of necessity, one based on justification (Sec. 34) and the other on excuse (Sec. 35). Section 34 reads as follows:

"Section 34. **Necessity[20] which Justifies.**

1. A person who commits an act to avert from himself or another person a present danger to life, body, freedom, honour, property or any other legally recognised interest which cannot otherwise be averted does not act illegally if a weighing of the opposing interests in particular the affected rights and the degree of the threatening danger to them, shows that the protected interest significantly outweighs the interest which he harms (by his act).

2. This however only applies insofar as the act is an appropriate means for averting the danger."

England

3.24 A Working Party of wide experience and high repute considered the need for a general defence of necessity in England and in a Working Paper issued by that body[21] in 1974 made provisional proposals to the Law Commission of England recommending a general defence. The Working Party treated the term "necessity" as connoting those situations in which a person charged is able to choose between two courses, one of which involves breaking the criminal law and the other some evil to himself or others of such magnitude that it may be thought to justify infraction of the criminal law.

3.25 The Working Party thought that whether or not the defence should be allowed in any particular case should be dependent upon whether the defendant subjectively considered that it was necessary to commit the offence to avoid the harm. In other words, if he genuinely believed that its commission was necessary then the defence would need consideration.

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[20] In Working Paper No. 5 a translation of the German 'notstand' as 'emergency' was used. All other translations which have been available use the word 'necessity'. Dr. Peter Sack of the Research School of Social Sciences at the Australian National University and a scholar well-versed in German law regards 'emergency' as better conveying the meaning of 'notstand'. At any rate it seems better to describe the type of necessity which can provide a defence to a criminal charge. Nevertheless in this Report deference has been made to the more common translation.

[21] The Law Commission, Working Paper No. 55 (1974), *Defences of General Application.*

3.26 The next step would be one of comparing the impending harm with the harm done by the defendant — for example saving the life and property of many people as against crossing the traffic lights at red, or saving one's entire property as against inflicting nominal economic damage upon another. A basic test should be that the harm averted was substantially greater than the harm done and this, the Working Party considered, should be found to be objectively so.

3.27 For reasons which to some extent are not entirely clear and for the rest seem unconvincing, the Law Commission did not recommend that there be a general defence of necessity and indeed for the avoidance of doubt as to whether such an offence existed at common law, recommended that it should be abolished. The recommendation has come under strong criticism, particularly from Professor Glanville Williams[22] who was a member of the Working Party.

The Direction of Reform

3.28 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 could create injustice and justifiably breed resentment of the law. It is beyond the wit of man to encompass the multiplicity of circumstances in which emergency or sudden action may be called for, and in which a legal prohibition may be breached, about which it can be said "Well, that was the right thing to do". As a writer has said:

> "The legislature cannot envision the full range of cases in which someone might be motivated to commit larceny, destroy property or engage in such peccadilloes as violating the truancy laws. To work out the details of the prohibition, the court should decide in particular cases whether the defendant's conduct furthers an interest greater than that sought to be prevented by the law defining the offense charged."[23]

3.29 It is thought that the time has now arrived for a general defence to provide for the exculpation of conduct which can be justified by necessity and **it is so recommended.** Whether conduct should be excused by necessity will be considered in Part IV (*infra*).

3.30 In the formulation of the general defence suggested, three basic requirements need to be borne in mind. Firstly the breach of the criminal law must be undertaken to save an interest greater than the anticipated harm following the violation. In short, no act is justifiable unless its benefit exceeds its cost. Second, there can be no justification if there is an alternative, less harmful and reasonable means of avoiding harm. And thirdly, conduct is

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[22] [1978] *Criminal Law Review*, 128 et seq.
See also article "Proposals and Counter-Proposals on the Defence of Necessity" by P. H. J. Huxley in the same journal.

[23] Professor George P. Fletcher in *Rethinking Criminal Law*. (Little Brown & Company 1978).

justifiable only if it is undertaken to avoid the imminent and impending danger of harm.[24]

Choice of Evils

3.31 The choice of evils requirement raises two immediate problems — can murder ever be justified, and who is to decide whether the benefit exceeds the cost?

Murder

3.32 With regard to murder, there is a division of opinion as to whether murder can ever be justified and so be subject to a defence of necessity. On the one hand are those who regard human life as sacrosanct in any circumstances, and who would not allow any evil to be greater than the taking of human life. On the other are the utilitarians* who for the most part would allow that a nett saving of life was for the greater good. The framers of the Model Penal Code belong to this latter category. In a Commentary written in explanation[25] of Article 3 (*supra*, para 1.11) they purported to recognise that the sanctity of life has a supreme place in the hierarchy of values but argued it to be nonetheless true that conduct which results in taking life may promote the very value sought to be protected by the law of homicide. They supposed by way of example the case of a person who has made a breach in a dyke knowing this will inundate a farm but is the only course available to save a whole town. If charged with homicide of the inhabitants of the farmhouse it is argued that he can rightly point out that the object of the law of homicide is to save life and that by his conduct he has effected a nett saving of innocent lives. The framers of the Code do not enter into the ethical question of the comparative value of human lives and regard every life to be of equal value, and the numerical preponderance in the lives saved compared to those sacrificed, as establishing a legal and ethical justification for the act.

3.33 The view is taken in this Report that the defence of necessity should extend to cases of murder. This is not to say that a numerical comparison of lives saved is necessarily the determinant. Factors may differ in weight, according to circumstances. It is not without point to observe that where a judicial execution takes place, it is justified as being for the good of society. Of course the cases in which the defence could be available would be extremely rare but the hypothetical example at para 4.09 of Working Paper No. 5 provides an argument in its favour. It is not difficult to imagine a situation in which a hijacked aircraft is on the tarmac at Tullamarine with a full complement of passengers including five or six desperate terrorists. A decision has to be and is taken to "shoot it out" in the almost certain realisation that to save the aircraft being blown up one or more of the innocent

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[24] These are propounded by Professor Fletcher as the basic outlines of the defence of justification by choosing the lesser evil, *op. cit.* pages 774-775.

* This term is used to describe adherents to the theories of Jeremy Bentham (1748-1832), who has had a profound influence on English legal thought and who argues that punishment is justified only so far as it furthers the general good, primarily by deterring others from harmful conduct, and further that if punishment does not contribute to the general good it inflicts pain without a commensurate benefit and therefore is wrong.
J. Bentham, *Introduction to the Principles of Morals and Legislation.* (Burns & Hart ed. 1970) Ch. XIII.

[25] Model Penal Code; Reprint — Tentative Draft No. 8 pp. 5-10.

passengers will be killed in the course of the shooting. Without such a defence what would have been the position if, in the recent freeing of the hostages held by terrorists in the Iranian Embassy in London, one or more of the hostages had been killed by the rescuers? It is easy to say that no prosecutions would have been lodged, but in such a case could one ever be comfortably assured that the shooting was justified without a full judicial investigation into the circumstances?

Judge or Jury?

3.34 The second problem calls for consideration of the nature of the "choice of evils" defence. It goes without saying that the person relying on such a defence must sincerely believe in the necessity to avoid immediate harm to person or property when he performs the prohibited act. Some would have it that his belief must be based on reasonable grounds. This would involve an objective test — could a reasonable person have such a belief in the circumstances then existing? However in testing in the calm of a court room the genuineness of beliefs or emotions in emergency situations, whilst their reasonableness or otherwise might give some indication of their genuineness, to insist upon their passing such a test would, it is suggested, be both unreal and unjust. On the other hand whether the action or course of conduct chosen resulted in the lesser evil or promotion of the greater good is, it is suggested, a question of community values and to be looked at objectively in weighing those values.

3.35 Who should speak for the community — a judge or jury? Where breach of a statutory prohibition is in question it must of course be for the judge or magistrate to decide as a preliminary matter whether the legislation has shown an intention to foreclose or forbid any defence based on a choice of evils. The case of the obdurate motorist cited in paragraph 1.08 shows how a court (when pressed) will not and need not hesitate to decide such matters. However, that being said, it is submitted that wherever a jury is involved it should be the body to pronounce upon community values by its verdict in criminal trials. It was pointed out in Working Paper No. 5 that to it is entrusted the task of deciding whether criminality exists in cases of manslaughter brought about by negligence, and in that type of case it, as it were, sets the community standard.

3.36 The second requirement mentioned in paragraph 3.29 needs no elaboration.

Imminence of Harm

3.37 As to the third, the English Working Party thought that the very term "necessity" implies that the situation confronting the defendant is an emergency. However in every statutory formulation of the defence which has been perused pains seem to have been taken to stress its emergency nature.

3.38 Fears have been expressed that if the weighing of comparative evils and the choosing of the lesser is to be allowed to provide a defence in criminal trials, committed groups will be encouraged to contravene the criminal

law. For example, an anti-uranium group might be encouraged to destroy the working machinery of a uranium mine and its members would know that there would be a massive body of scientific evidence to support a defence of this kind. Anti-abortionists, environmentalists, and supporters of claims to aboriginal land rights are other groups who might regard it as reasonable to breach some laws in furtherance of what they regard as higher social goals. The dangers envisaged can be met in a number of ways.

3.39 In the first place it is part of the function of judges and magistrates to discern and decide whether the law either expressly or impliedly excludes a defence of necessity. For example, it might be enacted that in no circumstances whatever would euthanasia be lawful or, if the legislature were to lay down a comprehensive statement of circumstances in which abortions would be permitted, it might appear clear to a court that an abortion performed under any other circumstances would be unlawful no matter how necessary it appeared to those performing it. And if the trial were by jury a jury would be so instructed.

3.40 Secondly, it can be expected that legislation will be enacted in areas of great public interest and concern, or if not enacted that the prevailing mood of the community will be obvious to and shared by courts. Further, in legislating upon necessity generally it is suggested that it could be provided that the necessity and justifiability of the defendant's conduct may not rest upon considerations pertaining only to the morality and advisability of the criminal prohibition in question.

3.41 Considerable material has been received in support of the legalising of euthanasia under what has been suggested as proper guidelines. On the other hand, opposition has been expressed to any general law of necessity being framed in such terms as to permit a defence to a "mercy killing". It has been urged that its is a matter so emotionally charged and of such major importance that euthanasia should be the subject of wide public debate and specific legislation. The English Criminal Law Revision Committee in a Working Paper on Offences against the Person in 1976 put forward for comment a suggestion that there should be a separate offence of mercy killing with a maximum penalty of 2 years imprisonment. It was tentatively suggested that there should be a new offence which would apply to a person who, from compassion, unlawfully kills another person who is or is believed by him to be, (1) permanently subject to great bodily pain or suffering, or (2) permanently helpless from bodily or mental incapacity, or (3) subject to rapid and incurable bodily or mental degeneration.

Two years imprisonment was thought to be appropriate as a maximum penalty; however in its Report presented to Parliament in March of this year the Committee unanimously decided to withdraw the suggestion "if only" (as the Report says) "on the ground that it is too controversial for the exercise in law reform on which we are engaged." It is thought that the defence suggested in this Report would not apply to deliberate action to terminate life, save in the most exceptional circumstances. Nonetheless it is suggested that if there be no specific legislation then it should be open to a jury to consider the defence if there be evidence of extreme circumstances and urgency.

3.42 Thirdly and most importantly, the defence of necessity can be regarded and is so regarded in this Report as a defence available in a situation of urgency, a situation where there is no call for the considered dictates of conscience, but rather a weighing up of the situation in the belief that immediate action is called for. As has been well said, it is a defence dictated by compulsion of circumstances and not by compulsion of conscience.

3.43 In an American case in 1971 the defendants who had been charged with wilfully and knowingly attempting to hinder and interfere with the administration of the *Military Service Act* in that they had forcibly entered a Selective Service Office and forced open file drawers and removed Selective Service Draft Registration cards, admitted these acts and that they were done with the express intention to shorten the war in Vietnam and thus save endangered human lives, claiming by way of defence that they were justified. The justification was based on the theory that the Vietnam War was evil, and the evil sought to be avoided by the defendants was greater than the law defining the defence. The Court of Appeal concluded that neither Article 3 of the Model Penal Code nor the cases supported the defendants' view, and went on to say that the common thread running through most of the cases in which the defence of necessity was asserted was a belief on the part of the defendant that it was necessary for him to act to protect his life or health or the life or health of others from "a direct and immediate peril".

3.44 The court went on to point out that none of the cases ever suggested that the defence of necessity would be permitted where the actor's purpose is to effect a change of government policies which, according to the actor, may result in a future saving of lives. Although the Model Penal Code extends the defence beyond the cases in which the evil to be avoided is death or bodily harm, nevertheless it did not, in the view of the Court, extend the defence to cases in which the relationship between the defendant's act and the "good" to be accomplished was as tenuous and uncertain as in the case before the Court.[26]

3.45 The New York Penal Law referred to in paragraph 3.21 above spells out the conduct to attract the defence as being required "as an emergency measure to avoid an imminent public or private injury", and the Delaware Code allows the defence "to avoid an imminent injury . . . which is about to occur", and it will be noted that the German Penal Code refers to averting a present danger.

Recklessness and Negligence

3.46 Where the criminal law penalizes negligence or recklessness as it does for example in the case of manslaughter by negligence or in the statutory offences relating to reckless driving the American Model Penal Code provides that —

> "When the actor was reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity for

[26] *United States v. Kroncke*, 459 F. 2d 697 (1972).

his conduct the justification afforded by this section [Section 3.01] is unavailable in a prosecution for any offence for which recklessness or negligence, as the case may be, suffices to establish culpability."

The English Working Party expressed concern as to the ambit of this provision but the reason for its concern seems untenable and it is thought that there is nothing contrary to principle in denying the defence in such a case.

Recommendations

3.47 With the foregoing considerations in mind **it is therefore recommended:**

1. That there be a general defence of necessity and that it be based upon the principle of justification by choosing the lesser evil.
2. The defence should be available where the defendant himself believes that his conduct is necessary to avoid imminent injury which is about to occur to person or property.
3. That the injury must be of such gravity that according to ordinary standards of intelligence and morality the desirability of avoiding such injury clearly outweighs the desirability of avoiding the injury sought to be prevented by the law governing the offence charged.

For better understanding of the limits of the defence it could be stated that the necessity and justifiability of the defendant's conduct may not rest upon considerations pertaining only to the morality and advisability of the criminal prohibition.

4. That the harm to be avoided need not be directed against the defendant; it may, subject to the requirements set out in 3 above, be directed against himself or his property (which includes his livelihood) or against the person or property of another.
5. That the defence should not be available where the defendant was reckless or negligent in bringing about a situation requiring a choice of evils or in appraising necessity for his conduct where he is charged with an offence for which recklessness or negligence, as the case may be, suffices to establish culpability.
6. That the defence should be available to a charge of any offence, however serious.
7. That the burden should be on the defendant to point to or produce sufficient evidence to raise an issue as to necessity but the persuasive burden should remain with the prosecution.

PART IV

DURESS OF CIRCUMSTANCES OR NECESSITY WHICH EXCUSES?

4.01 Section 25 of the Queensland Criminal Code (*supra* para 3.06) provides a defence for action taken in extraordinary emergencies and was regarded by its author as summing up nearly all of the common law rules as to excuses for an act which is *prima facie* criminal. In a recent case it was held that the section could apply to exculpate a motor car driver who had been convicted of driving dangerously and thereby causing the death of a passenger in his car. There was evidence that the high speed at and dangerous manner in which his car was being driven was caused by the necessity of the driver to escape from another car which was pursuing him dangerously and to such effect that he was doing his best to escape from this car when he lost control of his own vehicle.[1]

4.02 Section 35 of the 1975 German Penal Code specifically provides for what it calls "Necessity which excuses" in the following words:

I 1. A person committing an unlawful act to avert from himself, a relative or another person close to him a present danger to life, limb or freedom which cannot otherwise be averted acts without guilt.

2. This does not apply if the person could be expected under the circumstances, in particular because he has himself caused the danger or because he has special legal obligations to suffer the danger. However in this case the punishment can be [mitigated in accordance with other provisions of the Code].

II If a person erroneously assumes the existence of circumstances which would have exculpated him in accordance with sub-section I he can only be punished if he could have avoided his error. [In such a case punishment is to be mitigated according to other provisions of the Code].

4.03 Nowhere in the criminal law of Victoria is there to be found any general statement of a defence as comprehensive and explicit as either of the foregoing.

4.04 It is submitted that there is a clear need for a new dimension of excuse to be recognised and for the principle behind the defence of duress to be extended to cases where the conduct of the accused is compelled by circumstances, whether of human or non-human origin.

There are three types of situation to be considered:—

(1) Where there is a threat to a person made by another that if he does not commit some breach of the criminal law he or another or others to whom he stands in a close relation will suffer harm.

(2) Where there is a threat of harm to one person by another or others, not coupled with a demand for criminal action, but criminal action is taken to avoid the harm threatened.

(3) Where the harm is not threatened by a human agent but springs from inanimate circumstances — shipwreck, fire, storm and such like forces and criminal action is taken to avoid that harm.

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[1] *The Queen v. Warner.* Unreported judgment of Court of Criminal Appeal of Queensland, delivered 23 Aug. 1979.

4.05 The first category gives rise to the present law of duress and is the subject of Part I of this report.

4.06 The second cannot attract duress as the law is at present in Victoria, but necessity can be called in aid although perhaps somewhat uneasily. Somewhere in the circumstances it would seem that a choice of the lesser evil must be discovered if that defence is to succeed. Prison escapes have given rise to difficulties in fixing on the appropriate principle to apply in considering guilt or innocence. As already discussed the defence of duress has been denied in such cases but approval in principal has been given to necessity.

4.07 If allowing a defence of necessity is to be treated as giving approval to the choice of the lesser evil and thus to a justificatory defence, then it should be able to be said that the action taken by the escaping prisoner was the right action to take and therefore not unlawful. The difficulty is that whilst it may be able to be shown that from the prisoner's point of view to escape was a lesser evil than to remain and be violently assaulted, the court treating the matter objectively might well have to put the escape in a wider context and consider the effect of a permitted escape upon prison discipline. This consideration has until recently generally led to the defence being denied in the American cases.

It is submitted that problems of this kind could be avoided if the emphasis is able to be placed upon the desperate straits in which a prisoner finds himself and his understandable struggle to achieve personal integrity.

4.08 The third category provides perhaps the greatest difficulty in deciding both what the law is and what it should be. The difficulty arises largely because the actual cases which have come before the court have been both bizarre and rare.

4.09 The problem of the two seamen killing and eating the cabin boy after they had been adrift without food and water for many days has troubled and been deliberated upon by and has divided lawyers and philosophers for generations.[2] Dudley, Stephens, another man named Brooks and a youth of 17 were cast adrift in an open boat 1600 miles from the Cape of Good Hope. Their food was all consumed in 12 days and they had been for eight days without food and six days without water when two of the men (Dudley and Stephens) killed the youth, who by this time was lying at the bottom of the boat unable to make any resistance. The question of his killing had been previously discussed; he naturally did not assent to it and neither did the third man, he at that time taking the view that they should all die together. After the boy was killed the third man joined the other two in feeding on his body and drinking his blood. After four days the surviving three were picked up by a passing vessel.

4.10 At the trial of Dudley and Stephens in England a jury found that if they had not fed upon the body of the boy the *probability* was that they would not have survived to have been picked up, and rescued, but within the four days would have died of famine. The boy, because of his weak condition, was likely to have died before them. The jury also found that at the

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[2] *R. v. Dudley & Stephens* (1884) 14 Q.B.D. 273.

time of the killing there was no sail in sight, nor any reasonable prospect of relief. There was no appreciable chance of saving life except by killing someone for others to eat. They also found that, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men. A special panel of judges, on considering the jury's findings, held that the facts constituted no justification for the killing of the boy, and that the prisoners were guilty of wilful murder.

4.11 The Chief Justice (Lord Coleridge), after brief reference to passage after passage from classic authors laying down the duty of dying for others reminded himself and his fellow Christians of the "Great Example" which all (in 1884) professed to follow. As he said "to preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it" and he went on to express the view that these duties impose on man the moral necessity, not of the preservation, but of the sacrifice of their lives for others and to state that a principle of necessity in circumstances such as existed in this case once admitted might be made the legal cloak for "unbridled passion and atrocious crime". In concluding his reasons for judgment he set a goal in these terms:— "We are often compelled to set up standards we cannot reach ourselves and to lay down rules which we could not ourselves satisfy". We do not find modern day judges expecting this standard of perfection. For example we find Lord Morris of Borth-y-Gest saying:—

> "If then someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable, agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crises behave is not to make the law weak but to make it just. In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed".[3]

4.12 The Chief Justice took comfort from the fact that Sir James Fitzjames Stephen would have come to the same conclusion as did the court. However Stephen in a footnote to his article on Necessity in the Fourth Edition of his *Digest of the Criminal Law* published three years after the judgment of the court wrote that he would not have agreed in all the reasoning of the judgment. He would have based his judgment on the fact that the jury in the special verdict delivered by it found only that if the boy had not been killed and eaten the survivors "would *probably* not have survived". In other words if it has been found that they *certainly* or *almost certainly* would have perished his view might have been different. In another respect he disagreed for to him self sacrifice as advocated by the court seemed to be a duty of which the law can take no notice, if indeed it is a duty at all, and he said further that he could discover no principle in the judgment. To him the case depended entirely on its peculiar facts. He thought it quite different from any of the following cases.

1. The two men on a plank. The successful contender leaves the other man the chance of getting another plank.

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[3] *D.P.P. v. Lynch* [1975] A.C. 653 at 670.

2. Several men are roped together on the Alps. They slip and the weight of the whole party is thrown on one man who cuts the rope in order to save himself. Here the question is not whether some shall die but whether one shall live.
3. The choice of evils. The captain of a ship runs down a boat as the only means of avoiding shipwreck. A surgeon kills a child in the act of birth as the only way to save the mother.

It would seem that Stephen would allow necessity both as a justification and an excuse.

4.13 The illogicality of allowing duress to operate as a defence only where compulsion by a human being has induced criminal conduct has been well illustrated by two hypothetical cases devised in an American discussion on the Model Penal Code.[4] The first has a driver unwillingly driving a car along a narrow and precipitous mountain road falling off sharply on both sides under the command of an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running over them. The driver is prevented from stopping by the threat to shoot him dead if he declines to drive straight on. If he does go on and kills the drunks in order to save himself he would be excused under section 2.09 of the Model Penal Code if the jury finds that "a person of reasonable firmness in his situation would have been unable to resist" although he would not be justified under the lesser evil principle of section 3.02. (Section 2.09 bears some resemblance to the present law of duress in Victoria.)

4.14 However, given the same situation as above except that the driver is prevented from stopping by suddenly inoperative brakes, his alternatives are either to run down the drunks or to run off the road and down the mountainside. If he chooses the first alternative to save his life a defence based upon the choice of evils principle would not be open in that it would not allow the saving of one life at the expense of two. And duress as at present understood and applied could not excuse him.

4.15 Both these latter circumstances and the case of the hapless cabin boy looked at as a choice of evils has troubled the many that hold the view that such a choice can never be said to justify the killing of another human being. But whether this be so or not, in a situation such as Dudley and Stephens found themselves, where the instinct of survival was at its starkest and strongest, 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.

4.16 The circumstances in which such problems arise of course will always be extraordinary and rare but they are not impossible and sometimes happen. In comparatively recent times we have read of an air crash in the Andes and the survival of some by eating parts of deceased passengers. It is submitted that there is no reason in logic or justice why room should not be

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[4] Paulsen & Kadish *Criminal Law, its Processes; Cases & Materials* (1962).

made in the criminal law for a defence to excuse conduct where a tribunal of fact could clearly arrive at a conclusion that a person in the circumstances under consideration should not fairly be held responsible for his or her breach of the criminal law.

4.17 Whether the defence in such cases should be described as "duress of circumstances" or "necessity which excuses" is not of any great consequence. It will be noted that the formulation of Section 35 of the German Penal Code is wide enough to embrace all three types of situation in para 4.04 above. If the recommendation with regard to necessity is acceptable then it would seem to be simpler, tidier and more convenient to widen the ambit of duress so as to similarly embrace them. In this way matters of excuse can be dealt with and the law expressed under a single broad principle whilst necessity can be give ' a clearly expressed base of justification.

4.18 It is now possible to formulate recommendations in relation to duress as discussed in Part I of this Report and to the other classes of duress set out in para. 4.04.

Recommendations

4.19 Accordingly **it is recommended:—**

The defence shall be available to a person who commits an offence under compulsion whether of human origin or arising from the circumstances surrounding the commission of the offence or both subject to the following conditions and qualifications —

(a) In the case of murder where that person intended or expected that death should result from his acts he believed (whether or not on reasonable grounds) that the harm threatened was death or serious personal injury (mental or physical) to himself or someone closely connected with him.

(b) In all other cases of murder and in cases of indictable injuries to the person, he likewise believed that the harm threatened was of the nature and to the per ons in (a) above or was torture, rape, buggery, or unlawful imprisonment to be suffered by those same persons.

(c) Where the charge is one of murder and where there is evidence of duress it shall be left to the jury to decide —

(i) whether they cannot be satisfied that in all the circumstances there is any moral culpability for which the person charged could fairly or justly be blamed. If they cannot be so satisfied then acquittal should be the proper verdict; or

(ii) whether they are satisfied beyond reasonable doubt that the accused is fully culpable and should be found guilty of murder; or

(iii) whether there is some degree of moral culpability that falls short of that which in their minds is associated with murder — in which case their verdict should be one of manslaughter.

(d) In all other cases that the harm threatened was any of the foregoing or was to property, reputation or livelihood, and in such cases where the tribunal is of opinion that the person threatened could not fairly be expected in all the circumstances to suffer the risk he believed to be impending, the verdict should be one of acquittal.

(e) In all cases that the person threatened 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 or if he believed that to seek official protection would not give any real protection from the harm threatened.

(f) In all cases that the person threatened believed that there was no other less harmful way of avoiding or preventing the harm threatened.

(g) That there should be an evidential burden on the defendant to ensure that there is sufficient evidence to raise duress as an issue whereupon there should be a persuasive burden on the prosecution to negative the defence.

4.20 The defence recommended in 4.19 should not apply in any case where, on the occasion in question the defendant was voluntarily and without reasonable cause in a situation in which he knew or believed he would or might be called upon to commit the offence with which he is charged, or any offence of the same or a similar character under such of the applicable threats of harm as are hereinbefore set out if in the event he should refuse to do so.

PART V. COERCION

5.01 Coercion can be described as a special form of duress in that in law it refers to compulsion which arises in the context of the marriage relationship.

5.02 In June 1975 the Law Reform Commissioner gave detailed attention to the subject of coercion and reported thereon in Report No. 3 — *Criminal Liability of Married Persons (Special Rules)* — Part I. As a result of this Report statutory formulation was given to his recommendations by the enactment of the *Crimes (Married Persons' Liability) Act* 1977, sec. 2 (b) which inserted a new section 336 embodying them into the Crimes Act 1958. That section reads as follows:—

> "336. (1) Any presumption that an offence committed by a wife in the presence of her husband is committed under his coercion is hereby abolished.
>
> (2) Where a woman is charged with an offence other than treason, murder or an offence specified in section 4, 11 or 14 of this Act, that woman shall have a complete defence to such charge if her action or inaction (as the case may be) was due to coercion by a man to whom she was then married.
>
> (3) For the purposes of this section "coercion" means pressure, whether in the form of threats or in any other form, sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged.
>
> (4) Without limiting the generality of the expression " the circumstances in which the woman was placed" in sub-section (3), such circumstances shall include the degree of dependence, whether economic or otherwise, of the woman on her husband.
>
> (5) The accused shall bear the burden of adducing evidence that she conducted herself in the manner charged because she was coerced by her husband, but if such evidence has been adduced, the prosecution shall bear the burden of proving that the action or inaction charged, was not due to coercion by the husband.
>
> (6) This section shall operate in substitution for the common law as to any presumption or defence of marital coercion.
>
> (7) This section shall not affect the law relating to the defence of duress."

5.03 In Working Paper No. 5 the suggestions there made were thought to be complementary to the provisions of the foregoing section. However the recommendations in regard to duress now made have proved to be rather wider than those tentatively suggested in the Working Paper. In view of the subjective approach now adopted and the stress laid on the need to consider all the circumstances of excuse, it is thought that the defence as recommended would encompass all the special considerations set out in the section and that there is no longer any need to retain the defence of coercion.

Recommendation

5.04 **It is therefore recommended** that section 336 of the Crimes Act 1958 be repealed.

APPENDIX A
SUBMISSIONS AND COMMENTS RECEIVED IN WRITING

The Executive of the Australian Psychological Society.

Mr. W. F. Bowker, Q.C., Director Emeritus of the Institute of Law Research and Reform, Alberta, Canada.

Dr. R. C. Bretherton.

Mr. L. R. F. Crane, Sydney, Protagonist for and Writer of Articles on Voluntary Euthanasia.

Mr. Ian Elliott, Senior Lecturer in Law, University of Melbourne.

Mr. D. W. Hammond, S.M.

Professor D. J. Lanham, Kenneth Bailey Professor of Law, University of Melbourne.

The Law Institute of Victoria.

The Honourable T. W. Smith, Q.C., former Victorian Law Reform Commissioner.

Ms. Gillian Triggs, Lecturer in Law, University of Melbourne.

The Victorian Crown Prosecutors Association.

The Voluntary Euthanasia Society of Victoria.

New South Wales Branch of the Australian Voluntary Euthanasia Society.

Professor Louis Waller, Sir Leo Cussen Professor of Law, Monash University.

Mrs. Maureen Wright (Volunteer in welfare area).

The Honourable Mr. Justice Zelling, Chairman, Law Reform Committee of South Australia.

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