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EXPANDING THE DEFENCES TO MURDER: A MORE FAIR AND LOGICAL APPROACH

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This piece deals primarily with the question of whether the defences of duress and necessity should be recognised as either complete or partial defences to the crime of murder. Because the article deals with the subject of law reform, the writer deems it essential to preface the proposals contained herein with a lengthy and in depth analysis of the weaknesses in the extant common law doctrine regarding the status of these defences in murder prosecutions. In the writer's view, one cannot construct a cogent argument for law reform without first exposing the inherent flaws in the existing doctrine. For reasons of necessity, therefore, a substantial portion of the piece is devoted to rehearsing cases and various issues which are quite familiar to those who are well-versed in this topic.

It is equally important to emphasise what this article is not about. The writer is acutely aware that there is an abundance of journal articles, committee recommendations (see eg, the Model Criminal Code Committee's report on General Principles of Criminal Responsibility (1992)), and text writers' comments which deal with various aspects of this topic. Within the confines of a lengthy article such as this, it would not be practical, nor advisable in the writer's opinion, to attempt to deal with this mountain of literature. Indeed, to do justice to all this commentary would entail the type of discussion that is best suited for a treatise rather than a law review article such as this. Attention will focus instead, therefore, on the existing common law doctrine and underlying rationale — as well as the recommendations of the Law Reform Commission of Victoria, Report No 9 (1980). Because of the comprehensive and scholarly manner in which this particular report dealt with these issues, it was singled out as an ideal sounding board by which to economically and effectively arrive at the proposals advanced in pt 5 of the piece. It should be emphasised that for the reasons stated in the final footnote, the 1991 recommendations of the Law Reform Commission of Victoria were not addressed in the body of the article.

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INTRODUCTION

There are few who would take issue with the statement that deterrence is the paramount objective sought to be achieved by the criminal justice system. Consonant with that objective, the judicial and legislative branches of government in Australia and elsewhere have been loathe to impose criminal liability on those who are not seen as morally culpable for their conduct. Although the notion of moral culpability is spacious and controversial to say the least, the courts, through their incremental development of the common law, have recognised a number of instances in which persons are not regarded as morally culpable, or at least not sufficiently so to attribute criminal liability to their actions. In the criminal law governing the attribution of causal responsibility, for example, the courts have occasionally refused to impose liability for consequences which were neither intended nor reasonably foreseen by an accused at the time of his or her relevant act or omission — despite the existence of a ‘but for’ connection between the act or omission and its consequences. The defences of insanity, intoxication, self-defence, duress, and necessity represent other instances in which the courts, through judicial fiat, have manifested their conviction that the degree of moral culpability sufficient to attract criminal sanctions is lacking. Moreover, as a concession that human frailty is inextricably intertwined with the degree of moral culpability to be attributed to one’s actions, the courts have recognised provocation as a mitigating factor which reduces what would otherwise be murder to the lesser crime of voluntary manslaughter. Finally, it should be noted that unless displaced by statute, either expressly or by necessary implication, it has long been a common law requirement that an accused must have acted with a culpable mental state, often referred to as a mens rea, in order to incur criminal liability. The underlying rationale for this requirement is that the paramount criminal law objective of deterrence is generally not served by imposing liability on those who act or fail to act without a culpable mental state or, in other words, a bad or guilty mind.

Despite the foregoing observations, the Australian courts have thus far refused, as a matter of common law doctrine, to allow the defences of duress and necessity to be invoked by an accused who is charged with murder as a principal.

2 Ibid: Waller and Williams, 7–8; VLRC, 17–18; Royall v The Queen (1991) 172 CLR 378, 450 (McHugh J).
4 See generally: D O’Connor and F A Fairall, Criminal Defences (3rd ed, 1996); Waller and Williams, above n 1, 654–656, 697–717, 159–200, 551–90.
7 Gillies, above n 6, 46; Waller and Williams, above n 1, 7–9.
in the first degree.\textsuperscript{8} To the contrary, the High Court's decision in Zecevic \textit{v Director of Public Prosecutions}\textsuperscript{9} does not augur well for proponents of the view that these defences should constitute a defence to the crime of murder, irrespective of whether an accused is charged as a principal in the first degree or merely as a secondary party. Specifically, the Court in Zecevic abolished the doctrine of 'excessive self-defence'\textsuperscript{10} or 'excessive force manslaughter'\textsuperscript{11} and held that an accused who interposes a claim of self-defence to a charge of murder must either succeed or fail \textit{completely} in that endeavour;\textsuperscript{12} that is, it is not open to a jury to return an alternative verdict of voluntary manslaughter if it finds that an accused had an honest but objectively unreasonable belief that the amount of force used was necessary to prevent the imminent and unlawful use of force against his or her person.\textsuperscript{13}

The discussion to follow will begin with a critical analysis of the High Court's decision in Zecevic and what it portends for the future of the common law defences of duress and necessity in murder prosecutions. Our attention will then focus on the extant common law doctrine in Australia regarding the availability of these defences in murder prosecutions and, in particular, whether it is logical and consistent with the longstanding tenet that reasonable concessions to human frailty are an integral factor in the attribution of the existence and degree of moral culpability. Finally, and based upon the premise that the extant common law doctrine is neither logical nor consonant with the aforementioned tenet, we shall examine various proposals for reform, particularly that of the Law Reform Commission of Victoria in 1980.

\section*{II. THE HIGH COURT'S DECISION IN ZECEVIC \textit{v DIRECTOR OF PUBLIC PROSECUTIONS}}

In Zecevic, the High Court overruled its decisions in \textit{R \textit{v} Howe}\textsuperscript{14} and \textit{Viro \textit{v} The Queen}\textsuperscript{15} and abolished the doctrine of 'excessive self-defence';\textsuperscript{16} sometimes referred to as 'excessive force manslaughter.'\textsuperscript{17} The doctrine of 'excessive self-defence' allowed a jury to acquit on a charge of murder and convict on the

\footnotesize{\textsuperscript{8} O'Connor and Fairall, above n 4, 154.}
\footnotesize{\textsuperscript{9} (1987) 162 CLR 645 ("Zecevic").}
\footnotesize{\textsuperscript{10} Ibid 676–80 (Deane J); Stanley M H Yeo, 'Excessive Self-Defence, Macaulay's Penal Code and Universal Law' (1990) 7 Australian Bar Review 222.}
\footnotesize{\textsuperscript{11} O'Connor and Fairall, above n 4, 190.}
\footnotesize{\textsuperscript{12} (1987) 162 CLR 645, 654 ('Zecevic') (Mason CJ), 661–62 (Wilson, Dawson and Toohey JJ).}
\footnotesize{\textsuperscript{13} Ibid.}
\footnotesize{\textsuperscript{14} (1958) 100 CLR 448.}
\footnotesize{\textsuperscript{15} (1978) 141 CLR 88 ('Viro').}
\footnotesize{\textsuperscript{16} See above n 10.}
\footnotesize{\textsuperscript{17} O'Connor and Fairall, above n 4, 190.}
lesser offence of voluntary manslaughter if it found that an accused satisfied the subjective, but not the objective component of the plea of self-defence. Although the doctrine created an anomaly which allowed a defective plea of self-defence to be interposed as a partial defence to murder but not other offences involving the unlawful use of force — there were cogent, if not compelling reasons for its existence. The first is that it is both illogical and inimical to the objective of deterrence to equate those who kill under an honest but objectively unreasonable belief in the necessity for using deadly force with those who kill with an awareness that deadly force is unwarranted. Aside from the enormous disparity between the two in terms of moral culpability, there is little doubt that criminal sanctions will have absolutely no deterrent effect on the former, but could have a significant deterrent effect on the latter. And in accordance with the notion that reasonable concessions to human frailty are inextricably intertwined with the degree of moral culpability to be attributed to one’s actions, it is far from clear that the former is any more blameworthy than an accused who successfully invokes the defence of provocation as a partial defence to murder. To be sure, there is much to be said for the view that one who unjustifiably kills in the heat of passion bears a higher degree of moral culpability than one who kills under an honest but objectively unreasonable belief in the necessity for using deadly force. If provocation is a sufficient mitigating factor to negate the malice aforethought component of murder, then why should the same not apply to an honest but objectively unreasonable belief in the necessity for using deadly force? If that is so, as it appears, then how does one explain what appears to be yet another anomaly in the law? Although the High Court did not specifically address this question in Zecevic, some explanation can be gleaned from the various justifications set forth by a majority of the Court for eradicating the doctrine of ‘excessive self-defence.’

The judgment of Wilson, Dawson, and Toohey JJJ, with whom Mason CJ and Brennan J concurred, proffered four justifications in support thereof — none of which are particularly convincing. Firstly, the majority reasoned that abolishing the ‘excessive self-defence’ doctrine would have the salutary effect of simplifying the law of self-defence in murder prosecutions, thus better enabling judges and juries to direct on and apply the law respectively. As appealing as this justification may appear, it is premised on the assumption, unsupported by empirical evidence, that trial judges and juries have experienced significant problems in either regard. The transparent weakness of this justification is exemplified in the fact that there is no empirical evidence to suggest that judges and juries will encounter any less difficulty in dealing with the complexities raised by the defence of provocation which remains alive and well.

19 Waller and Williams, above n 1, 560.
20 Parker v The Queen (1964) 111 CLR 665, 676; Waller and Williams, above n 1, 201.
Secondly, the majority opined that the interest of doctrinal consistency would be best served by abolishing the dichotomy that existed between murder and all other offences regarding the law of self-defence. While this justification is also appealing on its face, it simply ignores the very policy considerations which spawned the doctrine of 'excessive self-defence'; namely, that criminal sanctions do little, if anything, to deter those who act with a genuine belief that their conduct is legally and morally correct, reasonable concessions to human frailty cannot be discounted in the attribution of moral culpability, and those who kill under circumstances amounting to 'excessive self-defence' are not in pari delicto with those who kill maliciously and with full awareness that the use of deadly force is unwarranted. Though it is certainly true that the dichotomy between murder and other defences regarding the law of self-defence is at odds with doctrinal consistency, the courts have never decreed, nor do considerations of logic or fairness suggest, that the need for doctrinal consistency in the law is so paramount that it should never be subordinated to countervailing interests such as those underlying the doctrine of 'excessive self-defence.'

Thirdly, the majority concluded that while the abolition of the doctrine could result in the murder convictions of those lacking the requisite degree of moral culpability associated with that crime, the risk of such an injustice is remote. In amplifying this point, Wilson, Dawson, and Toobey JJ wrote:

[It is important to stress that the facts upon which the plea of self-defence is unsuccessfully sought to be based may nevertheless serve the accused in good stead. They may, for example, go to show that he may have acted under provocation.]

As Deane J pointed out, however, excessive self-defence and provocation are separate and distinct defences and the former may be available under circumstances in which there is no viable basis for asserting the latter. Deane J further opined that 'in some circumstances there may be an element of inconsistency between a genuine (albeit unreasonable) belief that what was done was done reasonably in self-defence ... and the loss of control which ordinarily lies at the heart of a defence of provocation.' Finally, Deane J flouted the notion that jury nullification was an adequate safeguard against the potential harshness and injustice of the all or nothing view adopted by the majority. As Deane J so adroitly stated:

It is an indictment, rather than a vindication, of a proposition of criminal law to say that its harshness is such that it will be avoided by a perception ...
that the avoidance of injustice ... requires that what was unreasonable should be rationalised as reasonable so that, given the choice between murder and complete acquittal in a case where the only remaining defence was self-defence, a person who had intentionally killed in ... excessive defence of himself ... can be found not guilty of any crime at all.\(^{30}\)

Although expressing his preference for the approach taken in Howe and Viro,\(^{31}\) Mason CJ ultimately concurred with the judgment of Wilson, Dawson, and Toohey JJ.\(^{32}\) Mason CJ, however, offered an additional justification which is worthy of comment. Mason CJ noted that once an accused satisfies the evidential burden on a claim of self-defence, the onus then falls on the Crown to negate one or more of the elements of the defence beyond a reasonable doubt.\(^{33}\) Mason CJ then added that in cases where the Crown is unsuccessful in discharging this burden on the question of whether an accused honestly believed that deadly force was necessary, juries will be 'slow' to find that the Crown has discharged its burden on the question of whether an accused believed on reasonable grounds in the necessity for using deadly force.\(^{34}\) Mason CJ concluded, therefore, that this would alleviate the risk that those who kill under an honest but objectively unreasonable belief in the necessity for using deadly force will be saddled with murder convictions.\(^{35}\) If Mason CJ was suggesting that there is little or no added risk that juries will be more inclined to convict of murder in the post-Zeevic era, one need only harken back to Deane J's observation to expose the obvious flaw in his reasoning; namely, that the defence of excessive self-defence may be available under circumstances in which there is absolutely no basis for the defence of provocation.\(^{36}\) Moreover, if one were to accept Mason CJ's reasoning, then one might ask why Mason CJ or the other members of the majority felt constrained to overrule Howe and Viro. Finally, if one accepts that it is better to allow a thousand guilty persons to walk free than to convict one innocent person, then is it not equally true that an injustice to one represents an injustice to all? It is noteworthy

\(^{30}\) Ibid.

\(^{31}\) Ibid 653 (Mason CJ).

\(^{32}\) Ibid 653–54.

\(^{33}\) Ibid 654. The evidential and legal burdens apply in the same manner regarding many other defences such as provocation, duress, and necessity. In each of these defences, an accused bears the evidential burden; that is, he or she must be able to point to sufficient evidence in the record that would justify allowing the defence to be considered by the fact-finder. Once an accused satisfies the evidential burden, the legal burden then falls on the prosecution to negate the defence beyond reasonable doubt. To satisfy this burden, the prosecution need only prove beyond reasonable doubt that at least one of the constituent elements of the defence does not exist; Gilles, above n 6, 123, 156, 392. At various times throughout this article, the writer will allude to the question of whether an accused has satisfied one or more of the constituent elements of the duress or necessity defences. To say that an accused has satisfied such an element denotes that he or she has met the evidential burden, as to that element, and the prosecution has failed to negate it beyond reasonable doubt. On the other hand, to say that an accused has failed to satisfy a constituent element denotes that he or she has failed to meet the evidential burden with respect to that element or, that the prosecution has met its legal burden and proved its non-existence beyond reasonable doubt.

\(^{34}\) Zeevic (1987) 162 CLR 645, 654 (Mason CJ).

\(^{35}\) Ibid.

\(^{36}\) Ibid 678–79 (Deane J).
in this regard that the majority was not so bold as to predict that no person would be convicted of murder in the post–Zecevic era who would not have been convicted in the pre–Zecevic era. To the contrary, Wilson, Dawson, and Toohey JJ wrote:

[The departures . . . from Howe and Viro could occasion injustice to persons presently awaiting trial for offences where self-defence may be raised, including the present appellant in the event of a new trial. For the reasons which we have given we think this unlikely. Of course, the risk of injustice, however slight, must be weighed carefully.]

The fourth and final justification for abolishing the doctrine was that doing so would bring the Australian common law doctrine into harmony with that of England and the various code jurisdictions throughout Australia. It is readily apparent, however, that this justification does not withstand careful analysis any better than the others do. Cases such as R v O'Conor, R v Crabbe, and Royall v The Queen, for example, underscore the fact that the High Court has not hesitated to break with precedents in England and other jurisdictions when there has been a perceived necessity for doing so. While the Court has and will undoubtedly continue to evince the utmost respect for precedents in other jurisdictions, this factor alone can hardly serve as a justification for abandoning its own precedent — and particularly so when its own precedent is founded on policy considerations which are as logical and compelling as those underlying the doctrine of 'excessive self-defence'.

If one accepts the writer's view that none of the aforementioned justifications have merit, this raises the all important question of whether the majority merely got it wrong or, perhaps more insidiously, acted with some hidden agenda. Although the answer is purely speculative and lies in the eyes of the beholder, one thing is certain: the result in Zecevic does not bode well for those who advocate extending the defences of duress and necessity to those who are charged with murder as a principal in the first degree. If the justifications set forth by the majority in Zecevic are to be taken at face value, would the interests in simplifying, harmonising jurisdictional conflict, and achieving doctrinal consistency in the law militate in favour of such an extension? And given the majority's willingness to chance the injustices that were all but certain to emanate from its decision, what is the likelihood that the Court would now subordinate these interests to the objective of deterrence, the means by which it is best achieved, and the common law precept that reasonable concessions to human frailty are inextricably intertwined with the degree of moral culpability to be

37 Ibid 664 (Wilson, Dawson, and Toohey JJ).
38 Ibid 665.
39 (1980) 146 CLR 64 (rejecting the English common law doctrine relating to the defence of intoxication).
40 (1985) 156 CLR 464 (rejecting the English common law doctrine relating to the status of recklessness as a sufficient mens rea for the crime of murder).
attributed to one's actions? That brings us to an exposition of the present common law doctrine in Australia regarding the availability of the duress and necessity defences in murder prosecutions. As a prelude to such an exposition, it is appropriate to begin with a truncated discussion of the essential components of these defences.

III THE COMMON LAW DEFENCES OF DURESS AND NECESSITY

In _R v Hurley and Murray_, Smith J enunciated what is probably the most comprehensive formulation to date regarding the constituent elements of the common law defence of duress. After reviewing the relevant case law, Smith J opined that the defence is only available under the following conditions:

[T]he 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 he was 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.

In _R v Dawson_, the Full Supreme Court of Victoria affirmed the correctness of Smith J's formulation and clarified the meaning of the word 'required' in the context of the foregoing passage. The judgment of Anderson J, with whom Harris and Starke JJ concurred, held that it is only when an accused has been pressured into committing the particular crimes nominated by the person(s) making the threats that he or she 'has been required to do the acts charged against him' in the relevant sense. It was held in Dawson, therefore, that the defence of duress was not available to an inmate who allegedly escaped from prison in order to avert threats on his life; that is, the crime of escaping from lawful custody had not been nominated by the person(s) responsible for the threats.

Although duress has been recognised as a defence in every Australian common law jurisdiction, necessity is currently recognised as such only in

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43 [1967] VR 526 ("Hurley and Murray").
44 Ibid 543 (Smith J) (emphasis added).
45 [1978] VR 536 ("Dawson").
Victoria and New South Wales. In *R v Loughnan*, Young CJ and King J held that the defence of necessity is comprised of three elements: Firstly, the crime(s) must have been committed for the sole purpose of protecting the accused (or someone he or she was obligated to protect) from some form of irreparable harm. Secondly, the accused must have honestly believed, on reasonable grounds, that he or she (or the person(s) that he or she were obligated to protect) had been placed in a position of imminent danger. Lastly, the crime(s) committed must be no more than a reasonable person in like circumstances would have considered as necessary to avert the danger. In *Rogers*, the Court of Criminal Appeal appeared to apply the *Loughnan* formulation to a set of facts nearly identical to those presented in *Loughnan*. Gleeson CJ, with whom Clarke JA and Ireland J concurred, expressed the view that in the aftermath of *Zeevetic*, the defence might be reformulated as a simple test of whether the accused believed on reasonable grounds that it was necessary to act as he or she did.

**IV THE PRESENT COMMON LAW DOCTRINE IN AUSTRALIA REGARDING THE DURESS AND NECESSITY DEFENCES IN CRIMINAL PROSECUTIONS**

In examining the extant common law doctrine in Australia regarding the duress and necessity defences in murder prosecutions and the extent to which it comports with logic and the longstanding tenet that reasonable concessions to human frailty are an integral factor in the attribution of moral culpability — a logical starting point is to review the English precedents from which the Australian common law doctrine evolved. In *R v Kray* and *DPP (Northern Ireland) v Lynch*, the English Court of Appeal and House of Lords held that duress is available as a complete defence to those charged with murder as either an accessory before the fact or a

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52 Ibid 448–49 (Young CJ and King J).
53 Ibid 448.
54 Ibid.
55 Ibid 448–49.
57 Ibid 546–51 (Gleeson CJ).
58 Ibid 546–47.
59 (1969) 53 Cr App R 569, 576ff ("Kray").
60 [1975] AC 653 ("Lynch").
principal in the second degree\textsuperscript{62} respectively. In \textit{Abbott v The Queen},\textsuperscript{63} however, the Privy Council held that the defence is not available to those charged with murder as a principal in the first degree.\textsuperscript{64} Particularly germane to the balance of this article are the various reasons set forth by the Council in support of its decision.

In writing for the majority, Lord Salmon first noted, as pointed out by the majority in \textit{Lynch},\textsuperscript{65} that murder can be committed with varying degrees of moral culpability.\textsuperscript{66} One who acts under duress while participating in a murder as a secondary party, for example, does so without any assurance that the death of an innocent person will be averted, irrespective of whether he or she succumbs to the demands of the person(s) making the threat.\textsuperscript{67} Moreover, until a killing has actually occurred, the secondary party may act in the sincere hope that the murderous scheme does not reach fruition.\textsuperscript{68} One who acts under duress while participating in a murder as a principal in the first degree, on the other hand, is all but certain of the outcome from the moment that he or she performs the volitional act or omission which results in the victim's death.\textsuperscript{69} While there is much to be said for this line of reasoning, it overlooks the fact that instances will arise in which a secondary party will be at least as morally culpable as a principal in the first degree.\textsuperscript{70} Suppose that a member of organised crime informs A that he will be murdered unless he forces B, at gunpoint, to murder C. Assume further that B then complies with A's demand. Although it is probably correct to say that A and B were both acting under duress in the figurative sense, there is little doubt that A's contribution to the murder is equal to or greater than that of B. In the case of war criminals, for example, it is far from clear that those who commit mass genocide under orders from superior officers are any more blameworthy than their superiors; if anything, the conduct of the superior officers may be more worthy of moral condemnation than that of their subordinates.

The second justification advanced by Lord Salmon is that no form of duress can ever justify the killing of an innocent person.\textsuperscript{71} This reasoning is premised on the rather dubious notion, now elevated to the stature of a rule of law, that a person of ordinary firmness would always choose to sacrifice his or her own life rather

\textsuperscript{62} \textit{Lynch} [1975] AC 653, 671-72, 674-78 (Lord Morris), 685 (Lord Wilberforce), 615-16 (Lord Edmund-Davies). It should be noted that in Victoria, principals in the second degree and accessories before the fact are now referred to as "[a]bettors" under the \textit{Crimes Act 1958} (Vic) ss 323, 324.
\textsuperscript{63} (1977) AC 755 ("Abbott").
\textsuperscript{64} Ibid 764-68 (Lord Salmon).
\textsuperscript{65} [1975] AC 653, 671-72 (Lord Morris), 680-81 (Lord Wilberforce), 715-16 (Lord Davies).
\textsuperscript{66} \textit{Abbott} (1977) AC 755, 763-65 (Lord Salmon).
\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{70} J C Smith and Brian Hogan, \textit{Criminal Law} (3rd ed, 1973) 166. "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."
\textsuperscript{71} \textit{Abbott} (1977) AC 755, 764-65 (Lord Salmon).
than kill an innocent person. In the opinion of this observer, it is an undue compliment to humanity to ascribe such a proclivity for heroism to the ordinary person. Similar sentiments were expressed by the majority in Lynch and the following passage from the judgment of Rumpff J in S v Goliah:

It is generally accepted . . . that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person.

I do not think that such an exception to the general rule which applies in criminal law, is justified.

In addition, even if one were to subscribe to the notion that an ordinary person is possessed of such heroism, it is apparent that this does not lead inexorably to the conclusion that duress can never justify the taking of an innocent life. To illustrate, what is an ordinary person to do if confronted with a choice of either killing one innocent person under duress or, alternatively, refusing to capitulate and allowing another innocent person to be killed? And what if the person against whom the threat is directed is a close friend or relative of the ordinary person? Should our hypothetical ordinary person be branded as a murderer if he or she opts for the former rather than the latter alternative? Is it rational or just for the law to decree that an ordinary person would never regard the former as the lesser of the two evils? These difficult questions are compounded by the fact that the courts have consistently held that duress can consist of threats which are directed at either the accused or another person. Whatever one’s personal views may be, the notion that duress can never justify the taking of an innocent life is, at best, highly controversial and open to severe criticism. Accordingly, its utility as a justification for the Council’s decision should not be overestimated.

A third justification proffered by Lord Salmon is that allowing duress to be raised as a defence to a charge of murder as a principal in the first degree would flout the great weight of authority to the contrary. His Lordship went on to state that the judiciary should not arrogate unto itself the type of legislative power that is properly reserved to Parliament. This is an all too familiar refrain which the judiciary occasionally seizes upon as a means of abdicating its responsibility, as a co-ordinate branch of government, to interpret the law. Indeed, it is far too late to ignore the maxim that as part and parcel of that responsibility, the judiciary has undertaken the incremental development of the common law. The reality is that the line between arrogation of legislative power and fulfilment of the duty to interpret the law is a slippery one to say the least. Be that as it may, the judiciary

72 Ibid 764. Although Lord Salmon did not expressly state this proposition, he did cite with approval a passage from Lord Wilberforce’s judgment in Lynch [1975] AC 653, 680–81 which strongly intimates this.

73 SLR (1972) 3 SA 1 (Translation on page 465).

74 Ibid 480.

75 Abbott (1977) AC 755, 765 (Lord Salmon).

76 Ibid 767.
has travelled down that slippery slope on innumerable occasions, Lord Salmon’s misplaced reliance on the arrogation of power rationale is particularly transparent in light of his concession that neither Lynch nor any other English precedent had authoritatively resolved the question of whether duress could constitute a defence to a charge of murder as a principal in the first degree.\textsuperscript{77}

Lastly, Lord Salmon opined that such an extension of the defence would adversely effect the administration of justice by inviting fabricated claims of duress, especially in cases involving multiple defendants where the risk of collusion is very real.\textsuperscript{78} The counter argument, however, is as simple as it is persuasive; that is, that the risks of fabrication and collusion are just as great regardless of which types of crimes or defences are involved. Juries are routinely entrusted with the responsibility of separating fact from fiction and there is nothing which suggests that they are any less capable of discharging this function when one or more defendants rely on duress as a defence to a charge of murder as a principal in the first degree.

One additional aspect of Lord Salmon’s judgment deserves comment. In concluding his opinion, Lord Salmon acknowledged that those who kill under duress are less blameworthy than those who do so maliciously.\textsuperscript{79} Recognising that this mitigating factor cannot be taken into account in jurisdictions which impose mandatory sentences for the crime of murder, his Lordship expressed sympathy for the view that duress should operate to reduce the crime to one of voluntary manslaughter.\textsuperscript{80} This harkens back to the High Court’s decision in \textit{Zecovic} to abolish the doctrine of ‘excessive self-defence.’

It is important to point out that \textit{Lynch} and \textit{Abbott} were decided prior to the \textit{Australia Act 1986 (Cth)}\textsuperscript{81} when decisions of the Privy Council were considered as binding on the Australian judiciary.\textsuperscript{82} With regard to \textit{Lynch}, the effect of a House of Lords decision is the same now as it was when \textit{Lynch} was decided; it is regarded as highly persuasive but not binding on the Australian courts.\textsuperscript{83} It is not at all surprising, therefore, that the Privy Council’s decision in \textit{Abbott} was followed in 1977 and 1980 by the Full Supreme Courts of New South Wales\textsuperscript{84} and Victoria\textsuperscript{85} respectively. In \textit{R v Brown and Morley},\textsuperscript{86} however, the Full Supreme Court of South Australia adopted the view that duress is not a defence to murder.

\begin{itemize}
\item \textsuperscript{77} Ibid 763.
\item \textsuperscript{78} Ibid 768 (quoting Stephen, \textit{A History of the Criminal Law of England} (1883) vol 2, 107–08).
\item \textsuperscript{79} Ibid.
\item \textsuperscript{80} Ibid.
\item \textsuperscript{81} \textit{Australia Act 1986 (Cth)}, Section 11 of Act precluded any further appeals from Australian courts to the Privy Council. Earlier, the Privy Council (\textit{Appeals from the High Court} Act 1975 (Cth)) prohibited appeals from the High Court to the Privy Council in all cases with the exception of appeals on ‘inter se questions’; \textit{Commonwealth of Australia Constitution Act 1900 (UK)} s 74.
\item \textsuperscript{82} \textit{R v Darrington and McGauley} [1980] VR 355, 365 (’Darrington and McGauley’) (Jenkinson J).
\item \textsuperscript{83} Ibid.
\item \textsuperscript{84} \textit{McConnel v The Queen} [1977] 1 NSWLR 714, 718 (Street CJ), 723 (Taylor CJ at CL), 723 (Beatty J).
\item \textsuperscript{86} [1968] SASR 467.
\end{itemize}
under any circumstances. This may be explicable on the basis that Brown and Morely was decided in the same year as Kray, and several years before Lynch and Abbott. At that juncture, the Full Supreme Court may have been influenced by Blackstone's prescription that irrespective of any form of duress, a person 'ought rather to die than escape by the murder of an innocent'. The Court may have been influenced as well by Smith J's obiter dicta statement in Hurley and Murray that duress is not a defence to 'murder nor any other crime so heinous as to be excepted from the doctrine ...'. Because the Full Supreme Court has not had occasion to revisit this issue in the post Lynch-Abbott era — and the High Court has yet to decide this question — one can only speculate as to the current state of the law in South Australia. This uncertainty is further clouded by the House of Lords' decision in Howe which overruled Lynch and held that duress can never constitute a defence to murder. Although this brings the English law in line with Brown and Morely, it also casts doubt on the status of the law in New South Wales and Victoria. With the thought in mind that House of Lords' precedent is highly persuasive but not binding on the Australian courts, the probable impact of Howe should depend upon the persuasiveness of its underlying rationale. It is this question that will now be addressed.

How then, did the House of Lords justify its decision in Howe? In writing for the majority, Lord Hailsham opined that notwithstanding the reasons set forth in Lynch and Abbott for drawing a distinction between principals in the first degree and secondary parties, such a distinction was not justified by authority and has been subjected to intense criticism subsequent to Abbott. Although his Lordship declined to expound on the nature of this criticism, he strongly intimated that the distinction was nothing more than an ill-advised attempt, through an arrogation of judicial legislative power, to ameliorate the uncertain and anomalous state of the law that existed prior to Lynch. Although Lord Hailsham identified three anomalies which he attributed to the 'intrinsic nature of duress' in the context of murder prosecutions, he concluded that none were relevant to the issues before the court. In any event, it is the writer's opinion, as noted earlier, that no tenable distinction can be drawn in this context between principals in the first degree and secondary parties.

Lord Hailsham further opined that as a 'concession to human frailty', the defence of duress was spawned out of a recognition that a 'reasonable man of average courage' could conclude that committing a crime under duress

87 Ibid 490 (Bright and Mitchell JJ).
91 Ibid 432–36 (Lord Hailsham).
93 Ibid 430.
94 Ibid.
95 Ibid.
96 Ibid 433.
97 Ibid.
represents the lesser of two evils. His Lordship added the qualification, however, that this does not hold true when the nominated crime is one of murder. In amplifying this point, Lord Hailsham wrote:

In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means.

With a slight variation in wording, this is the same justification advanced by the majority in Abbott and, as such, is open to the same criticisms noted earlier; namely, that to attribute such heroism to a person of ordinary firmness is out of touch with reality, unfair to the vast majority of persons for whom such a standard is unattainable, and unworkable in situations where a person under duress must choose between killing one innocent person in order to preserve the life of another.

Lord Hailsham then added that although the Court’s decision may well result in ‘hardships . . . occur in the most agonising cases’ and instances in which ‘the law seems to bear harshly in its operation’ — the availability of various administrative remedies renders this an acceptable price to pay ‘in order to emphasise . . . the sanctity of . . . human life.’ By administrative remedies, his Lordship was referring to the discretion of judges to refrain from making minimum recommendations in sentencing, parole, and the prerogative of mercy. There are a litany of problems with this reasoning. Without a Bill of Rights in Australia, these remedies exist only at the pleasure of the federal, state, and territorial parliaments which can just as easily remove them. Even if they are not abrogated or modified, it borders on the flippant to say that those who would otherwise have been acquitted can still throw themselves upon the tender mercies of judges, parole boards, and the Crown. To be sure, decisions as to whether to make minimum recommendations in sentencing, grant parole, or exercise the prerogative of mercy — are all forms of discretion which, by their very nature, are laden with the potential for abuse. In addition, Lord Hailsham’s reasoning turns a blind eye to the enormity of the distinction between an acquittal based upon a recognised defence and the emotional, financial, and other costs that are necessarily incurred in running the gauntlet of conviction, imprisonment, and an eventual parole, commutation, or pardon. Moreover, if one accepts this reasoning, a legitimate question arises as to why the courts should not adopt a similar approach to other defences such as provocation or even insanity in certain instances. As pointed out in pt II, there is a cogent argument to be made that those who kill under circumstances amounting to legal provocation are more blameworthy than those who kill under an honest but objectively unreasonable

98 Ibid.
99 Ibid.
100 Ibid.
103 Ibid.
104 Ibid.
105 Ibid.
belief in the necessity for using deadly force. Cannot the same be said of those who choose to kill rather than be killed or allow another innocent person to be killed? And what of those who kill while suffering from mental defects which render them incapable of distinguishing between right and wrong in the relevant sense, albeit with the requisite mens rea for murder? Finally, the notion that stripping away the defence is an acceptable price to pay in order to emphasise the sanctity of human life — is predicated on the assumption that this decision will have a deterrent effect on those who might otherwise kill under duress. While the common law precept that ignorance of the law is not a defence may be justified as a matter of policy, the reality is that precious few who kill under the threat of death or grievous bodily harm are aware of, much less influenced by, the House of Lords’ decision in Howe. For all of the aforementioned reasons, therefore, it is fair to say that despite the limited protections afforded by the various judicial and administrative remedies, the loss of the defence is an egregiously high price to pay for whatever nominal deterrent effect may be derived therefrom.

Finally, Lord Hailsham balked at the alternative suggestion that analogous to the defence of provocation, duress should operate as a mitigating circumstance which reduces the offence to one of voluntary manslaughter. In so holding, his Lordship opined that the creation of a ‘half way house’ between murder and outright acquittal would be repugnant to ‘any pretence of logic or consistency in the criminal law’; specifically, it would run afoot of the longstanding rule that when invoked successfully, the defence of duress entitles an accused to a complete acquittal which is unmarred by the stigma resulting from a conviction. Lord Hailsham then added that such a suggestion is also at odds with basic principle. In addressing the latter point his Lordship wrote:

Provocation … is a concession to human frailty due to the extent that even a reasonable man may, under sufficient provocation temporarily lose his self control towards the person who has provoked him enough. Duress, as I have already pointed out, is a concession to human frailty in that it allows a reasonable man to make a conscious choice between the reality of the immediate threat and what he may reasonably regard as the lesser of two evils.

With all due respect, it is his Lordship’s comments — rather than the rule of law advocated by the appellant — which are at odds with principle and the laudable pursuit of consistency and logic in the criminal law. To characterise a defence as a ‘concession to human frailty’ is to proclaim, in legal parlance, that while a person’s conduct is neither excusable nor justifiable, it occurred under circumstances which attenuate the person’s moral culpability to such an extent as to warrant a conviction for a lesser crime. This observation is buttressed by the

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106 O’Connor and Fairall, above n 4, 50; Gillies, above n 6, 78; Perkins and Boyce, above n 3, 1029.
108 Ibid.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid (emphasis added).
113 Waller and Williams, above n 1, 201.

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High Court's decision in *Stingel v The Queen*. In *Stingel*, the Court went to great lengths in drawing a distinction between the 'reasonable'\(^{115}\) and 'ordinary'\(^{116}\) person. In an opinion in which all seven justices joined, the Court wrote:

The doctrine of provocation is often stated in terms which make its application depend upon whether the provocation was such as could have destroyed the self-control of a 'reasonable' man. In this field, however, the 'reasonable' man is not that model of prudence that he tends to become in the law of torts. Here he is, by hypothesis, a person capable of losing his self-control to the extent of intentionally wounding or even killing another, when there is no need to do so for his own protection... It is preferable, we think, to refer to him, as many of the cases do, as the 'ordinary' man. That expression points to the fact that he is brought into the doctrine for the purpose of denying the benefits of it, not to all those who react unreasonably to provocation, but only to those whose reactions show a lack of self-control falling outside the ordinary or common range of human temperaments.\(^{117}\)

A defence bearing the 'concession to human frailty' epithet, therefore, presupposes conduct which, though objectively unreasonable, is at least within the normal range of human behaviour. Assuming arguendo that a decision to kill rather than be killed is objectively unreasonable, even the most ardent idealist would be hard pressed to characterise such a decision as 'falling outside the ordinary or common range of human temperaments.'\(^{118}\) Lord Hailsham all but conceded so much when he commented that the prerogative of mercy is particularly appropriate in cases of this type.\(^{119}\) If his Lordship is correct in stating that the defence of duress is predicated upon the notion that there are circumstances in which a reasonable person could regard the commission of a crime as the lesser of two evils, then it is simply wrong to characterise this defence as a 'concession to human frailty.' Accordingly, the 'half-way house'\(^{120}\) urged by the appellant is anything but contrary to principle.

Although Lord Hailsham is correct in pointing out that the notion of a 'half-way house'\(^{121}\) is at odds with the longstanding rule that a successful claim of duress entitles an accused to an outright acquittal, it does not necessarily follow that this is inimical to the pursuit of logic and consistency in the criminal law. As noted in our discussion of 'excessive self-defence', the courts have never subscribed to the view that the interest of doctrinal consistency is so sacrosanct that it should never give way to other countervailing interests. If it were otherwise, then the courts would find it difficult, if not impossible, to discharge their responsibility to incrementally develop the common law in a manner which comports with fairness and logic. Aside from these observations, if one accepts

\(^{114}\) (1990) 171 CLR 312 ('*Stingel*').
\(^{115}\) Ibid 326.
\(^{116}\) Ibid.
\(^{117}\) Ibid 328-29 (quoting *R v Enright* [1961] VR 663, 669 (Herring CJ, Smith and Hudson JJ)). Emphasis added.
\(^{118}\) Ibid 329.
\(^{119}\) *Howe* [1987] AC 417, 413 (Lord Hailsham).
\(^{120}\) Ibid 425.
\(^{121}\) Ibid.

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that a decision to kill rather than be killed is well within the normal range of human temperaments, then the “half way house” position advanced by the appellant is not only logical, but comports well with the precept that reasonable concessions to human frailty are an integral factor in the attribution of the existence and degree of moral culpability.

If the probable impact of Howe on the Australian common law doctrine is assessed by the persuasiveness of its underlying rationale, it is evident that it should have no impact at all. With the advent of the Australia Act 1986 (Cth) and the conflicting authority among the common law jurisdictions yet to be resolved by the High Court, the status of duress as a defence to murder may be viewed as an open question. To the extent that none of the Australian common law jurisdictions have recognised duress as a complete or partial defence to a charge of murder as a principal in the first degree, it is respectfully submitted that the present common law doctrine is neither logical nor consistent with the tenet that reasonable concessions to human frailty are inextricably intertwined with the degree of moral culpability to be attributed to one’s actions. In South Australia, where duress is not recognised as a defence to murder under any circumstances, this can be said with even greater conviction. That brings us to the extant common law doctrine regarding the defence of necessity in murder prosecutions.

There are currently no reported cases in Victoria or New South Wales — the only Australian common law jurisdictions in which the defence is recognised — which afford even the slightest guidance on this issue. Regrettably, therefore, we are once again relegated to English precedent in searching for answers. In R v Dudley and Stephens, four mariners found themselves clinging to life in an open boat some sixteen hundred miles from land after their yacht had been shipwrecked. With no supply of water and only two one-pound tins of turnips, the men subsisted for the next eleven days on a combination of the turnips, a small turtle they had caught, and some rainwater they had accumulated in their oilskin caps. On the twentieth day, after they had been without food and water for nine and seven days respectively, Dudley and Stephens, over the objection of Brooks, killed Parker and all three men survived for the next four days by consuming his body parts and blood. Fortuitously, Dudley, Stephens, and Brooks were then rescued by a passing vessel and Dudley and Stephens were eventually charged with the murder of Parker. By way of special verdict, the jury found, inter alia, that the men would probably not have survived to be rescued if they had not fed on Parker’s body and further, that Parker’s condition was such that he was likely to have perished before them. The jury also found that at the time of the killing,
there appeared to be no reasonable chance of survival other than by killing someone for the others to feed upon. Finally, the jury found that assuming there was a necessity to kill someone, there was no greater necessity for killing Parker than any of the others. The jury, however, expressed no view as to whether these findings amounted to murder and sought the advice of the court on this question. The trial judge then reserved this question for argument before a panel of the Queen's Bench Division which held that Dudley and Stephens were guilty of murder.

In writing for the panel, Lord Coleridge emphatically rejected the argument that the killing was justifiable or excusable on the basis of necessity. In a passage that was later cited with approval by the House of Lords in Howe, his Lordship wrote:

To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children ... these duties impose on men the moral necessity, not of the preservation but of the sacrifice of their lives for others, from which ... it is to be hoped ... will men never shrink ... It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's own life ... It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No.'

In concluding his judgment, Lord Coleridge opined:

It is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime ... and if in any case the law appears to be too severe on individuals to leave it to the Sovereign to exercise that prerogative of mercy ... We are often compelled to set up standards we cannot reach ourselves, and to lay down the rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse ... nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.

His Lordship's reasoning is similar in certain respects to that of Lord Hailsham in Howe. This should come as no surprise when one considers that duress is but a

130 Ibid.
131 Ibid.
132 Ibid.
133 Ibid 275, 288.
137 Ibid 288.
species of necessity which is brought about by unlawful threats of violence from human beings rather than other forms of danger confronting an accused. Many of the arguments canvassed in our discussion of duress, therefore, apply with equal force to necessity. In instances where the defence of necessity is raised, for example, is it not just as unrealistic to expect the average person to place a lower value on his or her own life than that of another? Did Lord Coleridge not readily concede that the standard imposed by the panel is one which the judges themselves could not satisfy? Is that not patently unfair to the vast majority of persons for whom the standard is equally unattainable? And will there not be instances in which dangers other than threats of violence from human beings will force an ordinary person to choose between killing one innocent person in order to preserve the life of another? In the event of a sudden flood, for example, what is a parent to do if it is only possible to save one of his or her two children from drowning? Does the law not impose a legal duty to act with respect to both children? If the parent elects to save the life of one child with an awareness that doing so is certain to result in the death of the other, is Lord Coleridge’s position feasible? While there is truth in his Lordship’s observation that recognising necessity as a defence to murder raises profoundly difficult questions concerning the standards by which the comparative value of human lives are to be measured, this provides little solace to the parent confronted with such a choice.

Aside from being unrealistic, unfair, and unworkable in scenarios such as the one postulated above, Lord Coleridge’s reasoning is open to most, if not all of the other criticisms that were levelled at the extant common law doctrine relating to the defence of duress in murder prosecutions; in particular, that imposing criminal liability on those who kill under circumstances that would otherwise constitute necessity will have little or no deterrent effect, reasonable concessions to human frailty are an integral factor in the attribution of the existence and degree of moral culpability for one’s actions, and the law should recognise, as reasonable concessions to human frailty, defences which take into account behaviour which, though neither justifiable nor excusable, falls within the ordinary range of human temperaments.

As with Howe, if the probable impact of Dudley and Stephens on the Australian common law is to be assessed by the persuasiveness of its underlying rationale, then its impact should be minimal at best. In light of the fact that there are no reported cases which have addressed the status of necessity as a defence to murder as a matter of Australian common law doctrine, it is evident that this too remains an open question. This brings us at last to an examination of various proposals for reform, particularly that of the Law Reform Commission of Victoria in 1980.139

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139 VLRC, above n 1.
V PROPOSALS FOR REFORM

In 1980, the Law Reform Commission of Victoria promulgated several recommendations for reform in regard to the common law defences of duress and necessity. For present purposes, however, our discussion will include only those recommendations, and the reasons in support thereof, which are pertinent to the status of these defences in murder prosecutions.

A Duress

The Commission recommended that:

(a) *the scope of the defence should be expanded to include compulsion which arises from human origin, other circumstances surrounding the commission of the offence, or both.*

Earlier in its report, the Commission explained that the defences of ‘justification’ are premised upon the notion that the relevant act or omission is not criminal because it is done in order to prevent what society deems to be an evil greater than that prohibited by the offence. The defences of ‘excuse’, on the other hand, concede the unlawfulness of the relevant conduct, but absolve the accused of criminal liability on the basis that the circumstances surrounding the conduct are such that allowing him or her to escape liability does not set a dangerous precedent. As necessity is widely regarded as a defence of ‘justification’, the importance of these categories in evaluating this particular recommendation cannot be overstated. The Commission emphasised that where the source of the compulsion is a threat by one person against another or others which is not coupled with a demand for criminal action, an accused cannot rely on the *Hurley* and *Murray* formulation of duress; the same is true where the compulsion emanates from inanimate sources such as a storm, fire, shipwreck and the like. The facts presented in *Dawson* serve well to illustrate the former situation. Since the threat made against the prisoner was not coupled with a demand for criminal action, the defence of duress was unavailable. As the Commission pointed out, the defence of necessity might also fail under such circumstances on the basis that as a defence of ‘justification’, a jury might

140 Ibid 45.
141 Ibid 9.
142 Ibid.
143 Ibid 10.
144 Ibid.
145 Ibid 22, 36, 40, 45; Gillies, above n 6, 359; O’Connor and Fairall, above n 4, 103.
146 VLRC, above n 1, 41–42.
147 Ibid 42–44.
149 Ibid 538 (Anderson J), 542–43 (Harris J), 544 (Stark J).
objectively conclude that escaping from prison was not the lesser of the two evils. As the Commission explained:

[The court . . . 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.]

In the latter situations, as in *Dudley and Stephens* for example, the defences of duress and necessity would encounter the very same difficulties. The Commission recommended, therefore, based upon the illogicality of drawing a distinction between compulsion arising from human as opposed to inanimate origin, that the scope of duress be broadened to include both forms of compulsion. On the dubious assumption that the Commission was correct in classifying duress as a defence of ‘excuse’, this would enable an accused to successfully raise the defence in circumstances such as those presented in *Dawson* and *Dudley and Stephens*. In the Commission’s view, therefore, an accused could prevail by persuading the jury that the relevant conduct should be excused because the surrounding circumstances were such that a failure to impose criminal sanctions would not set a dangerous precedent.

The Commission’s recommendation is to be commended in so far as it attempts to simplify the law and redress many of the iniquities that are evidenced by cases such as *Dawson* and *Dudley and Stephens*. The writer agrees with this recommendation, but not with the reasoning in support thereof. The Commission readily conceded, for example, that the terms ‘justification’ and ‘excuse’ have ‘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 addition, the English precedents from which the Australian common law doctrine evolved, most notably *Howe*, are distinctly at odds with the view that duress is properly classified as a defence of the ‘excuse’ genre. The clear import of cases such as *Lynch, Abbott, and Howe* is that the defence of duress is predicated upon the notion that under appropriate circumstances, a person of ordinary firmness could reasonably conclude that the commission of a crime represents the lesser of two evils. The most serious flaw in this recommendation, however, is the conspicuous lack of precision which inheres in the concept of ‘excuse’ as defined by the Commission. The criterion for allowing defences of ‘excuse’ is so nebulous and ill-defined as to virtually guarantee that defendants who are similarly situated will be subjected to disparate treatment under the law. Without consistency in the criminal law, there can be no semblance of the fairness which is required to ensure that justice is not only done, but seen to be done. To adopt the Commission’s recommendation would, for all

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150 VLRC, above n 1, 42.
151 Ibid.
152 Ibid 44.
153 Ibid 45.
154 Ibid 10.
155 Ibid 10, 45.
156 Ibid 8.
practical purposes, be tantamount to directing juries to acquit or convict on the basis of what they perceive to be a fair and just result. Subject to the qualification that duress be viewed as a defence of 'justification' and the other qualifications set forth in the balance of this article, the writer believes that the defence should be expanded to include both human as well as inanimate forms of compulsion;

(b) based upon the rationale set forth in the discussion of Lynch and Abbott, no distinction should be drawn between principals in the first degree and secondary parties in so far as the availability of the defence is concerned.\textsuperscript{157}

The writer agrees with this recommendation.

(c) in cases where an accused has been coerced into an intentional killing, only threats of death or serious physical or mental injury should be sufficient to make out the defence. In all other cases of murder, threats of 'torture, rape, buggery or unlawful imprisonment' should suffice.\textsuperscript{158}

This is predicated upon the notion that '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.'\textsuperscript{159} Although this recommendation bears a certain ring of logicality, problems lurk beneath the surface. While the distinction between intention\textsuperscript{160} and recklessness\textsuperscript{161} as a sufficient \textit{mens rea} for murder is easily defined, in practice the disparity between the two may or may not be significant, depending upon the facts. If one's relevant act or omission is accompanied by an awareness that it is substantially certain to result in death, the law will regard this as an intention to kill.\textsuperscript{162} On the other hand, if the relevant act or omission is accompanied by an awareness that there is a serious or substantial risk that death will result, the law will regard this as 'probability' type recklessness.\textsuperscript{163} Although the High Court has yet to decide the question of how serious or substantial a risk can be without entering the realm of intention, there are certain to be cases in which the line between the two mental states will be tenuous. One's act or omission, for example, may be accompanied by an awareness that there is an 85%, as compared to a 95% per cent chance, that death will result therefrom. When this occurs, there is little or no justification for making the success or failure of the defence hinge upon the precise nature of the threat confronting an accused. Moreover, where there is a significant gulf between intention and recklessness, or some other category of murder is involved, threats of rape, torture, buggery, and unlawful imprisonment can be just as daunting as the threat of serious injury.

If that is so, then the desired correspondence will be lacking between the harm contemplated and the nature of the threat that will serve to excuse the perpetrator of the harm. It is therefore recommended that no distinction be drawn among the

\textsuperscript{157} Ibid 15.
\textsuperscript{158} Ibid 16.
\textsuperscript{159} Ibid.
\textsuperscript{160} Gilles above n 6, 49-50.
\textsuperscript{161} Ibid 55-60, 65, 630-34.
\textsuperscript{162} Ibid 59.
\textsuperscript{163} Ibid 630-34.
various types of murder in relation to threats of death, serious mental or physical injury, torture, rape, buggery, and unlawful imprisonment. The writer agrees with the Commission's recommendation that the scope of the defence be expanded to include threats of torture, rape, buggery, and unlawful imprisonment;

(d) based upon the notion that criminal liability should be imposed in accordance with the existence and degree of moral culpability to be attributed to one's conduct, a jury should have three options when there is evidence of duress:

[I]t 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.164

Although the Commission was somewhat vague in distinguishing between the degrees of moral culpability that would justify convictions for murder and manslaughter, guidance can be gleaned from its comment 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 impecuniable pressure.'165 This smacks of the distinction drawn in Stringer between conduct which is objectively reasonable and that which, although not fitting this description, is nonetheless regarded as falling within the ordinary range of human temperaments. The point has been made time and again that disallowing duress as a defence to murder cannot be justified on the basis that an ordinary person could never regard the taking of an innocent life as the lesser of two evils. It has also been stressed repeatedly that analogous to the defence of provocation, the law should recognise, as reasonable concessions to human fraility, other partial defences to murder in instances where an accused's conduct, although objectively unreasonable, falls within the ordinary range of human temperaments. On the assumption that the construction ascribed to the Commission's comment is accurate, it is the writer's view that the tripartite approach recommended by the Commission should be adopted in principle. Opponents of this view might argue, with justification, that the very notion of conduct which is objectively unreasonable, but falling within the ordinary range of human temperaments — is so amorphous that it is repugnant to the pursuit of consistency and fairness in the law. Opponents will further argue that this flaw is exacerbated by the

164 VLRC, above n 1, 18, 45.
165 Ibid 17. Emphasis added.
Commission’s next recommendation that the objective components of duress be eliminated in favour of an entirely subjective approach. 166 In addressing these criticisms, it is appropriate to examine the underlying rationale for the Commission’s next recommendation.

(e) where the offence is one of murder, the objective components of duress be eliminated in favour of a purely subjective approach. 167

The pertinent constituent elements of duress, as recommended by the Commission, are as follows:

(a) In the case of murder where that person intended ... 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 else closely connected with him. 168

(b) In all other cases of murder ... he likewise believed that the harm threatened was of the nature and to the persons in (a) above or was torture, rape, buggery, or unlawful, imprisonment to be suffered by those same persons. 169

... 

(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. 170

(f) In all cases that the person threatened believed that there was no other less harmful way of avoiding or preventing the harm threatened. 171

It is readily apparent that the Commission’s proposal, although similar in many respects to the Hurley and Murray formulation, purports to reject the objective reasonable or ordinary person standard that serves as its core foundation.

166 Ibid 23.
167 Ibid 23, 45–46. It should be noted that under the Hurley and Murray formulation (see p111), elements II, IV, VII, and VIII are predicated upon an objective reasonable or ordinary person standard. Although element VIII does not refer to such an objective standard in express terms, it was construed as including such a standard in R v Lawrence (1980) 32 ALR 72, 101 ("Lawrence") (Moffitt P) 131–34, 144–45 (Nagle CJ and Yeldham J) (quoting R v Williamson (1972) 2 NSWLR 281, 306 (Lee J and Kerr CJ)). The law of duress relevant to the present case is as follows: (2) Where it appears that the accused ... fails to avail himself of an opportunity reasonably open to him for his will to be reassessed the defence will not be available to him. Answer to this question will depend upon whether an average person of ordinary firmness ... in like circumstances involving like risks in respect of the alternatives open would have availed himself of the opportunity in question. "Lawrence (1980) 32 ALR 72, 101 (Moffitt P).
169 Ibid 45.
170 Ibid.
171 Ibid 46.
172 Ibid.
In support of its proposal, the Commission re-emphasised the distinction between defences of ‘justification’\(^{173}\) and ‘excuse’\(^{174}\) as well as its view that duress falls within the latter category.\(^{175}\) It went on to state that ‘[i]n this area the difficulties of applying the reasonable or ordinary man test has become [sic] increasingly apparent and of increasing concern.’\(^{176}\) While application of the reasonable or ordinary person standard is hardly free of difficulty, it is fair to say that both criminal and tort law have long regarded its advantages as outweighing any disadvantages. The advantages have been expressed in many ways, but all share the common thread that in order to avoid the injustice of some persons being more equal before the law than others, the law must devise an objective standard of conduct to which all persons are expected to conform.\(^{177}\) In the words of the Commission:

A strong view has been put forward that it would be unwise to abolish the ... 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 ... from obtaining the benefit of them by merely raising a reasonable doubt as to whether his conduct was not due to some special defect such as exceptional 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 ...; 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.\(^{178}\)

There are important disadvantages however, in applying an objective standard. The first is that it lacks fairness by failing to take into account individual differences such as ethnicity and personal background which can significantly affect one’s behaviour.\(^{179}\) The second is that there has been controversy and

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173 Ibid 9, 42, 45.
174 Ibid 10, 45.
175 Ibid 22.
176 Ibid.
178 VLRC, above n 1, 21.
179 In regard to the defence of provocation, for example, the High Court held in Singel (1990) 171 CLR 312, 337, that only an accused’s age would be credited to the ordinary person in deciding whether such a person might have been provoked into using deadly force. This was reaffirmed in Masciannone v The Queen (1995) 183 CLR 58, 66–67 (Brennan, Deane, Dawson, and Gaudron JJ). In Hurley and Murray [1967] VR 526, the Full Supreme Court of Victoria declined to state which of an accused’s personal attributes are to be credited to the ordinary or reasonable person in applying the objective components of the defence of duress; this remains an open question in Victoria. In Loughnan [1981] VR 443 the Full Supreme Court of Victoria also left this issue unresolved in regard to the objective components of the defence of necessity (see pt III). In Lawrence, (1980) 32 ALR 72, 101 however, the Court of Criminal Appeal of New South Wales held that an accused’s age and sex are to be credited to the person of ordinary firmness. With regard to self-defence, the High Court did not address this issue in Zerovic (1987) 162 CLR 645, nor has it done so in any subsequent decision.
uncertainty surrounding the question of which of the accused’s personal attributes are to be credited to the reasonable or ordinary person, depending upon the nature of the defence involved.\textsuperscript{180} Finally, there is the troubling circumstance, as in ‘excessive self-defence’ situations for example, in which criminal liability is imposed upon those who act with an honest but objectively unreasonable belief that their conduct is morally and legally justified. In the writer’s view, there is a middle ground position which is adequately accommodating to the arguments for and against the abolition of the objective components of duress. More importantly, this position comports well with the fundamental tenets that the objective of deterrence is not served by imposing criminal sanctions on those who are not seen as morally culpable for their actions and further, that reasonable concessions to human frailty are inextricably intertwined with the degree of moral culpability to be ascribed to such actions.

The proposed middle ground position adopts, augments, and clarifies the formulation of the defence enunciated by Smith J in \textit{Hurley and Murray},\textsuperscript{181} subject to the qualifications (above) that duress can constitute a defence to any crime, an accused need not have been required to commit the crime under compulsion of a human origin, the compulsion need not be limited to threats of death or grievous bodily harm, and (below) the defence is available irrespective of whether an accused is at ‘fault’ in exposing himself or herself to the duress. The middle ground position is thus stated as follows:

1. if an accused satisfies each and every element of the qualified version of the \textit{Hurley and Murray} formulation, then the verdict should be one of acquittal, irrespective of whether an accused is charged as a principal in the first or second degree or as an accessory before the fact; or

2. if an accused satisfies the elements of the qualified version with the exception of one or more of the objective components, then he or she should be convicted of voluntary manslaughter; or

3. if an accused fails to satisfy one or more of the subjective components of the qualified version, then he or she should be convicted of murder;

4. the qualified version should incorporate the tort law’s approach in deciding which of an accused’s personal attributes are to be imputed to the reasonable or ordinary person; and

5. the qualified version should require a direction that a person of ordinary firmness would have been likely to yield to the threat in the same manner as the accused if such a person could reasonably regard the commission of the offence as the lesser of the two evils.

This proposal not only comports with the aforementioned tenets regarding the objective of deterrence and the impact of concessions to human frailty in the attribution of moral culpability, but affords a framework which is sufficiently precise and understandable to be applied by juries with the degree of consistency

\textsuperscript{180} See above n. 179.

\textsuperscript{181} \cite{1967} VR 526, 543 (Smith J).
and fairness which the interests of justice demand. Secondly, it achieves what the writer considers to be a fair accommodation of the arguments for and against the abolition of the objective components of the defence. Finally, it achieves a reconciliation between the underlying rationale for the defence as enunciated in Howe and the Hurley and Murray requirement that a person of ordinary firmness would have been likely to yield to the threat in the same manner as the accused did. If one accepts that there are circumstances in which an ordinary person could reasonably regard the taking of an innocent life as the lesser of two evils, it follows that no degree of moral culpability should be ascribed to one who kills under such circumstances. This is the type of scenario envisaged by section (1) above. It is submitted that section (1) represents an improved version of section (1) of the Commission’s proposal in that the circumstances under which an accused is completely absolved of moral culpability are now defined rather than left to be decided on an ad hoc basis by individual juries; it also represents an improvement, by virtue of section (4) above, to the extent that it eliminates any uncertainty as to which of an accused’s personal attributes will be credited to the ordinary or reasonable person in applying the objective components of the defence. In the writer’s view, the tort law’s approach to this issue\(^{182}\) is the one which best accommodates the arguments for and against the abolition of the objective components of the defence. Not only are its parameters well-settled, but it strives to adequately account for individual differences and, at the same time, set a standard that will ensure, in so far as it is practicable to do so, that all persons will stand on equal footing before the law. This is not to suggest that this or any other legal standard is beyond criticism. Indeed, any rule of law emanates from a balancing of competing interests, and it is simply unrealistic to expect that such a process can ever be undertaken with perfection.

The same can be said of sections (2) and (3) above which correspond with sections (3) and (2) of the Commission’s proposal respectively. If the Commission’s comment that ‘the time has come for . . . flexibility which will recognize and make allowance for the impossibility in some cases of expecting reasonable . . . conduct in the face of implacable pressure’\(^{183}\) is the guiding principle by which the degree of moral culpability that would justify a conviction for manslaughter is to be measured — then section (2) of the writer’s proposal should also be seen as an improvement over its counterpart. The writer’s proposal again has the salutary effect of defining the circumstances under which the law will make an allowance for conduct which, though not objectively reasonable, lacks the degree of moral culpability commensurate with the crime of murder. The writer’s proposal is premised upon the notion that those who fail in the defence only by reason of their failure to satisfy one or more of its objective components — have nonetheless acted within the ordinary range of human temperaments.

\(^{182}\) Fleming, above n 171, 106–14; Francis Trindade and Peter Cane, The Law of Torts in Australia (2nd ed, 1993) 420–26; R P Balkin and J L R Davis, Law of Torts (1991) 271–87. The writer assumes that the tort law’s reasonable person standard is well known and, therefore, will not be discussed here.

\(^{183}\) VLR, above n 1, 17 (emphasis added).
If unlawful killings that are committed under a state of loss of self-control resulting from provocative acts are considered as falling within this range, cannot the same be said with even greater conviction of those who fail to satisfy one or more of the objective components of duress? It is important to keep in mind that unlike an accused who succeeds in raising a defence of provocation, an accused who kills under duress has been forced, ordinarily through no fault on his or her part, to choose between killing or being killed or suffering serious injury. There appears to be no sound reason in logic or principle, therefore, as to why the former should be regarded as any less blameworthy than the latter. In addition, unlike the ambiguous wording of section (2) of the Commission’s proposal, section (3) of the writer’s proposal spells out the specific circumstances under which the defence should completely fail. It is difficult to find fault with the position that one who fails to satisfy the subjective components of the defence acts in bad faith and, therefore, outside the ordinary range of human temperaments. Once again, the proposal affords a framework that is sufficiently precise and understandable to be applied with the degree of consistency which fairness demands. Moreover, the proposal does nothing to offend the arguments for or against the abolition of the objective components of the defence. Finally, although the clear import of Howe is consonant with section (5) above, Lord Hailsham’s judgment declined to express the matter in these terms. If duress is truly a defence of ‘justification’ as the writer believes, then section (5) achieves the necessary reconciliation between the underlying rationale for the defence and its central requirement that a person of ordinary firmness would have been likely to yield to the threats in the same manner as the accused did.

(f) The Hurley and Murray restriction that ‘the accused did not, by fault on his part when free from the duress, expose himself to its application’ be eliminated.184

There is precious little authority on the question of what constitutes ‘fault’ in this context. The term ‘fault’ in the traditional common law sense denotes conduct which, at a minimum, involves negligence in bringing about some proscribed condition or consequence. Thus, one who acts with one or more of the mens reas of recklessness, knowledge, belief, or intention in bringing about such a condition or consequence is likewise deemed to be at ‘fault’ in the relevant sense. In a common law jurisdiction such as Victoria, words are to be accorded their common law meaning, if any, unless Parliament has expressly, or by necessary implication, indicated a clear intention to the contrary. It must be assumed, therefore, that an accused is at ‘fault’ in the present context if he or she negligently, recklessly, knowingly, or intentionally exposes himself or herself to duress at a time when it was not operating. It is difficult to envision a set of circumstances, however, in which an accused would knowingly or intentionally

184 Ibid 45–46. (Quote taken from Hurley and Murray [1967] VR 526, 543 (Smith J)).
186 Gillies, above n 6, 80–81.
187 Ibid 81.
188 Baker v Campbell (1983) 153 CLR 52, 120–24, 132 (Dawson J); Gillies, above n 6, 8.
expose himself or herself to compulsion to commit an offence. For practical purposes, therefore, an accused is at 'fault' if he or she is negligent or reckless in exposing himself or herself to duress. Accordingly, it has been held that one who voluntarily becomes a party to a criminal enterprise and is thereafter coerced into following through with the plan despite a change of heart — has forfeited the right to assert the defence. Assuming this correctly states the law and that duress is properly classified as defence of 'justification', the 'fault' restriction appears to be founded on the notion that an accused's negligence or recklessness in such cases tips the balance to such an extent that as a matter of law, the commission of the offence cannot be regarded as the lesser of the two evils. This raises an important question as to whether the underlying rationale for the 'fault' disqualification can withstand careful analysis.

Because the law has long recognised negligence and recklessness as culpable forms of conduct, it is only logical that any argument for a defence of duress which is predicated on an attenuation or lack of moral culpability loses much of its vitality when an accused is at 'fault' in bringing about a choice of evils. On the other hand, the justification for the defence, according to the English precedents from which it evolved, is that there are circumstances in which the commission of an offence is necessary to prevent a greater harm. Assume that a person chooses to go hiking in a remote area despite weather forecasts that have warned of impending and dangerous conditions. If the hiker is later confronted with a choice of forcibly entering a dwelling or freezing to death in the wilderness, should he or she now be forced to incur criminal liability as the price for survival? Despite his or her negligence in ignoring the forecast, is it not correct to state that the crime was committed solely for the purpose of preventing a far greater harm? Is it not illogical and Draconian to regard the hiker's fault in bringing about the choice as a factor which somehow transforms the forcible entry into the greater of two evils? Although the hiker's fault in bringing about the choice enhances his or her moral culpability in effecting the forcible entry, this does not alter the fact that the hiker's death represents a far greater evil than that sought to be protected by the proscription against forcible entry. It is the writer's view, therefore, that negligence or even recklessness in bringing about a such a choice should not necessarily result in a forfeiture of the defence; rather, in each case the success or failure of the defence should ultimately depend upon whether a person of ordinary firmness could regard the commission of the offence as the lesser of the two evils.

It is important to emphasise that recklessness is an aggravated form of negligence which involves advertent as opposed to inadvertent risk taking of an unreasonable nature. Thus, irrespective of whether an actor's conduct is characterised as negligent or reckless, it is regarded as falling short of an objective standard imposed by law to protect others from unreasonable risks of harm. It is correct to say, therefore, that the 'fault' restriction is one of the objective

189 Gillies, above n 6, 353–54.
190 Ibid 80–81.
192 Ibid; Fleming, above n 177, 105.
components of the Hurley and Murray formulation. Although scenarios such as the one confronting the hiker militate in favour of dispensing with this objective component on the basis that it has little or no bearing on the question of whether the commission of a crime represents the lesser of two evils, the same cannot be said of the other objective components (see pt III). The writer believes that a failure to satisfy one or more of the others patently tips the balance to such an extent that as a matter of law, the commission of the offence cannot be regarded as the lesser evil.

B Necessity

The Commission 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.

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.193

As the Commission correctly pointed out, there is no logical reason to distinguish between compulsion arising from human as opposed to inanimate origin.194 If the Commission was therefore prepared to expand the scope of duress to include both forms of compulsion and allow it to operate as a complete as well as a partial defence to murder — then what is the rationale for recognising a separate and distinct defence of necessity which is far more restrictive than duress, particularly where the crime of murder is concerned? The rationale appears to be the Commission’s ill-founded belief that duress is a defence of ‘excuse’ rather

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193 VLRC, above n 1, 40.
194 Ibid 44.
than ‘justification.’ If one accepts that the fundamental distinction between duress and necessity is in the nature of the threat confronting an accused, then the expansion of duress to encompass both forms of compulsion effectively subsumes, and therefore obviates the need for, a separate defence of necessity. Especially noteworthy in this regard is the following passage from Lord Hailsham’s judgment in Howe:

There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other.195

Based upon all of the aforementioned considerations, the writer recommends that the judiciary or Parliament modify the defence of duress in accordance with the changes set forth in this article.197

195 Ibid 22.
197 In 1991, the VLRC recommended that both duress and necessity should constitute complete defences to a charge of murder, regardless of whether an accused is charged as a principal in the first degree or merely as a secondary party. The Commission’s discussion of this matter was very brief and canvassed many, but not all of the arguments discussed throughout this article. It is noteworthy that no ‘half way house’ was proposed, analogous to the defence of provocation, that would allow duress or necessity to constitute a partial defence to murder; see VLRC, above n 42, 100–06.