SELF DEFENCE

AND

PROVOCATION

REPORT OF THE LAW REFORM COMMITTEE

OF THE NORTHERN TERRITORY

OCTOBER 2000

INTRODUCTION

A. On 19/4/00 the Attorney-General of the Northern Territory (the Hon Denis Burke, Chief Minister) requested the Law Reform Committee of the Northern Territory to inquire into and report on:

(1) Whether the self-defence provisions of the Northern Territory Criminal Code should be amended to:

(a) reflect a concept of self-defence which is readily understood by a jury;

(b) provide a more specific defence of self-defence against home-invasion which includes immunity from civil and criminal liability.

(2) Whether the partial defence of provocation should be amended to extend its operation to cover what is sometimes known as the "battered wife" syndrome.

B. The Law Reform Committee has now completed its task and makes the recommendations set out hereafter.

C. The reasons for the recommendations follow.

HON AUSTIN ASCHE AC QC
PRESIDENT

RECOMMENDATIONS

The Law Reform Committee of the Northern Territory recommends:

A. that subsections (f), (g), (h), (j) and (n) of s. 27 and subsection (f) of s. 28 of the NT Criminal Code be repealed and in lieu thereof the following section 28A be included in the Code:

SELF DEFENCE

28A (1) A person is not criminally responsible for an offence and the conduct is justified if he or she carried out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary: (a) to defend himself or herself or another person; or (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or (c) to protect property from unlawful appropriation, destruction, damage or interference; or (d) to prevent criminal trespass to any land or premises; or (e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or grievous harm:
(a) to protect property;
(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

(5) The Parliament of the Northern Territory expressly declares that it is the public policy of the Northern Territory that its citizens have the right to enjoy absolute safety from attack within dwelling houses from intruders.

In this subsection the term "dwelling house" includes:

(a) any building or other structure occupied as a dwelling; and

(b) any building or other structure within the same curtilage as a dwelling house, and occupied in connection with the dwelling house or whose use is ancillary to the occupation of the dwelling house.

In this subsection, the term "occupant of a dwelling house" includes an owner, lessee and landlord of the dwelling house and any person invited into the dwelling house.

(6) For the purposes of this section the provisions of s. 31 and s. 32 do not apply.

B. that section 34(1)(c) and section 34(2)(c) of the NT Criminal Code be repealed.

THE WHIRLIGIG OF TIME

In 1999 a Norfolk farmer shot and killed a burglar who had entered his house unlawfully. He was charged with and convicted of murder. The circumstances of the case obviously persuaded the jury (by a majority verdict of 10/2) that the accused had exceeded the limits of permissible self-defence. The case stimulated considerable debate in England as to how far a person could defend his home.' Appendix 1.

In 1811, Mr Purcell, a septuagenarian, of County Cork, killed four burglars with a carving knife. He was knighted. [2]

Although the circumstances of the two cases were no doubt vastly different (and the Norfolk case is on appeal), it would not seem unduly rash or speculative to conclude that the limits of justifiable self-defence were broader two centuries ago than they are now. The extent of permissible violence is measured by judges and juries reflecting the views of their contemporaries.

This is entirely consistent with the history of the common law which only gradually and over centuries moved "from the view that homicide was a wrong to the survivors to the view that it was an offence against the State."[3]

Originally, a homicide was purely a matter for the relatives of the victims to avenge by the killing of the offender. That in turn led his relatives to retaliate, and hence the blood feud which persists to this day in many parts of the world.

In the development of the law in Anglo-Saxon England, the wastefulness of the blood feud was eventually ameliorated by compensation or "wergild". This was an assessment of damages, at first indeterminate, but ultimately on a fixed scale, to be paid to the family of the person killed in compensation for his loss.[4] Similarly, compensation came to be assessed for lesser acts of assault or taking or damaging another person's goods.[5]

The important factor was the value of the person killed or the loss otherwise suffered irrespective of whether the act which caused the damage was intentional or accidental.[6] In extreme cases a community would "outlaw" a particularly troublesome individual and in such cases it was "not only lawful but meritorious" to kill him.[7]

In these early times there was no State interference by an imposed body of criminal law. This came about only gradually as strong men imposed their will on various communities, and gained their support by bringing a semblance of order into what was a fairly chaotic situation, distasteful to those who wanted to live peacefully, or as peacefully as the times would allow. The territorial concept of a King's "peace" or a Baron's "peace" had a real significance since it dictated the area they controlled and a weak King or Baron was despised because the extent of his "peace" was limited.[8]

The Barons or Kings imposed their will by a series of codes, usually with pretty drastic penalties. At first many conducted their own courts ("palm tree justice"), but ultimately, they busied themselves with other tasks and delegated these duties to agents or judges. Judges, in turn, began to analyse their tasks and develop concepts of what conduct was blameworthy and what was not.

Thus, originally, homicide of whatever nature was looked upon as punishable. But, if the homicide was the result of misadventure or an act of self-defence (se defendendo) the act began to be regarded as "clergyable", that is, referred to church authorities for the exercise of mercy, and the actor entitled to a pardon although <u>after</u> conviction.[9] This led to "the growing precision which was coming to be attached to misadventure and self-defence on the one side, and to malice aforethought on the other." '°

Ultimately, the concept of guilt first and pardon (in appropriate cases) later, resolved itself into an enquiry into whether the circumstances of the act were justifiable or excusable or not.

The distinction was important because by the time of Blackstone a "justifiable" act was not considered blameworthy at all, whereas an "excusable" act was thought still to involve some degree of fault and, until 1828, carried with it, (though increasingly less enforced) the penalty of forfeiture.[11]

What was "justifiable" seems to have been determined by the Statute 24 Henry VIII c.5 which provided that if any person attempted the robbery or murder of another or attempted to break open a house in the night-time (which extended also to an attempt to burn it) and should be killed in such attempt, the slayer "shall be acquitted and discharged".

Blackstone's commentary upon this is very positive:

> "In these instances .... the slayer is in no fault whatsoever, not even in the minutest degree, and therefore is to be acquitted and discharged with commendation rather than blame." [12]

Acts of self-defence outside these boundaries were merely "excusable" and subject to strict rules. For instance the rule was early laid down that a person should not use force "unless he can escape in no other way." [13]

The right to defend in the home was emphasised by the well-known and oft repeated remarks in Semayne's case [1603] 5 Co. Rep 91(a): 77ER194 where the court resolved:

> "that the house of everyone is to him as his castle and fortress, as well for his defence against injury or violence as for his repose"[14]

That these sentiments are as strong today as they were three or four hundred years ago is amply demonstrated by the provisions of the NSW Home Invasion (Occupants Protection) Act of 1998.

Section 5 of that Act states:

> "Parliament expressly declares that it is the public policy of the State of NSW that its citizens have a right to enjoy absolute safety from attack within dwelling houses from intruders."

None of the great common law judges down the ages would disagree with this proposition.

The significance of this Act would seem to redraw the old distinction between "justified" acts (particularly within the home) and other "excusable" acts of self-defense, although the common law itself has come to draw no such distinctions, presumably leaving the fact of the act occurring in the home as one of the circumstances (though no doubt an important one) which a jury might take into account in determining whether the prosecution had negated self-defence. The concept of self-defence is drawn in broad general terms in Zecevic 162 CLR 645.

The question of self defence under the NT Criminal Code was considered by the NT Court of Criminal Appeal in R v Secret (1996) 86ACR 119 but the enquiry then was limited to whether the trial judge should have allowed the question to go to the jury. The two judges who constituted the majority reached their decision by somewhat different routes, while the Chief Justice, (who dissented), somewhat presciently commented, (at p.121), that, "the remedy, if there is to be one, lies with the amendment of the Criminal Code (NT) which is a matter for the Parliament".

It was hoped that a definitive statement might have been made by the High Court but, in the special and peculiar circumstances of the case, their Honours felt obliged to refuse special leave to appeal.

Self-defence in both common law and Code States and Territories is a complete defence or, to put the matter more precisely, if the concept of self-defence is properly available (a matter upon which the judge must rule), then an accused is entitled to a complete acquittal unless the prosecution negates it beyond reasonable doubt.

Provocation, on the other hand, merely reduces a charge of murder to one of manslaughter.

The common law developed a fairly strict body of rules for the concept of provocation, and especially emphasised the necessity for a sudden reaction in the heat of the moment. Such a sudden reaction in circumstances of provocative assault, insult or threat might render the reaction sufficiently understandable to reduce a homicide from murder to manslaughter but still punishable as an offence.

The whole idea was that an ordinary human being might, in some circumstances, lose control temporarily and during that temporary loss of control might do what he should not do. But delay between the provocation and the action would negate a defence.

The reason for this brief and necessarily incomplete excursus into legal history is to emphasise that it must be remembered that concepts of self-defence and provocation did not spring suddenly into being but were slowly developed to meet the exigencies of the time and to ameliorate a system which would have been unduly harsh if it had applied the strict letter of the law. There is nothing outrageous or offensive to legal principle to accept that the process is continuing.

Concepts such as self-defence and provocation must change over time, as community perception changes. What was permissible in a violent age may be less so in a more ordered society. Shakespeare's plays are full of casual beatings of servants by masters, accepted as normal by both. Almost certainly the acts of the Norfolk farmer would have caused no concern two centuries ago when, as one researcher puts it:

> "There is good reason to think that violent physical conflict and physical abuse were commonly experienced in seventeenth and eighteenth century society." [15]

Instruments of change in criminal law in Australia, adopting its system from England, have always been the judges, the juries and the legislature. The judges lay down the boundaries within which the juries operate and the juries apply the standards of the community. The legislature can interpose its own rules to change or expand or introduce new concepts and it must be remembered that the legislature does, or at least should, represent the public view. The law does not stand still, nor should it. If psychological research has added new dimensions to concepts such as self-defence or provocation, or if these concepts could now be better defined in light of recent judicial pronouncements, it is important that this be done. The task of this Committee is to deliberate and suggest whether, and if so what, changes should be made.

SELF-DEFENCE AT COMMON LAW

The development of the concept of self-defence was gradual, sometimes erratic, and complicated by a division into "justifiable" and "excusable" conduct. Ultimately it was accepted that there should be a uniform test to cover all aspects but there was considerable difficulty and debate about its terms. It is only necessary to mention the recent history of that debate which can be traced through Viro (1978) 141 CLR88 and Palmer [1977] 1 All E. R. 1077 to Zecevic.

Insofar as any doctrine can be said to have been settled for the forseeable future in the common law in Australia, it would seem that the High Court has done this for the concept of self-defence in Zecevic, though even here some clarification has been thought necessary,[16] and the Law Reform Commission of Victoria considered that two specific problems are left unresolved. These aspects are discussed by Dr Gareth Griffith in Briefing Paper No 17/98 of the NSW Parliamentary Library Research Service. The full text of his paper is attached to this report as Appendix 2.

The significance of Zecevic is that the three judges - Wilson, Dawson and Toohey JJ -in their joint judgement clearly intended, and have since been taken to have intended, to make a definitive statement about self-defence to resolve difficulties associated with earlier interpretations and, in particular, Viro.

The statement appears 162 CLR 645 at 661:

> "There is wisdom in the observation of the Privy Council in Palmer that an explanation of the law of self-defence requires no set words or formula. The question to be asked at the end is quite simple. It is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, he is entitled to be acquitted.

> Stated in that form, the question is one of general application and not limited to cases of homicide. Where homicide is involved some elaboration may be necessary."

Simple though the test may sound, it does seem to require at least the clarification it was given by the NSW Court of Criminal Appeal in Hawes [1994] 35 NSW LR 294 at 305 that "It is the belief of the accused based on circumstances as the accused perceived them to be which has to be reasonable."

Hence Dr Griffith has reformulated the test to "whether the accused believed on reasonable grounds (based upon circumstances as the accused perceived them to be) that it was necessary in self-defence to do what he did."

It has also been made clear (and in fact their Honours specifically refer to it in Zecevic at pp 663-4) that the test removes the Viro requirement that the response of the accused be to an unlawful attack; and the concept (also in Viro) of "excessive self-defence" which contemplated (in homicide) not a full acquittal but rather a reduction of a charge of murder to manslaughter. This latter concept applies in South Australia. See the South Australian Criminal Law Consolidation (Self-Defence) Amendment Act 1997 section 15(2). However, the "proportionality" of the reaction to circumstances as the accused believed them to be would still be a factor in examining the reasonableness of that reaction.

As Dr Griffiths points out (Appendix 2), Zecevic does not specifically deal with defence of another person but there seems no reason to believe that the test would not be the same, that is whether the accused believed on reasonable grounds (based upon circumstances as the accused perceived them to be) that it was necessary in defence of another person to do what the accused did. Their Honours in Zecevic emphasise that "the question is one of general application".

Similarly, although Zecevic does not specifically deal with it, the test could properly be applied to defence of property, although this could not be taken as justifying lethal force because it would seem highly unlikely that, whatever the circumstances the accused believed, he could establish that he believed on reasonable grounds that it was necessary to kill a person who was merely interfering with his property. If, of course, he believed on reasonable grounds that the interference with his property was preliminary to an attempt to assault him that would not be a question of defence of property but rather going to the question of defence of the person.

It would appear then, (and subject to the doubts of the Law Reform Commission of Victoria as to whether the test covers every possible situation) that most of the difficulties that previously beset the concept of self-defence are resolved by Zecevic and the test has become far more simple and understandable than previously at common law. If so, there is a strong argument for suggesting the adoption of the test in Code jurisdictions, particularly when considerable difficulties have been found in instructing juries in accordance with the Queensland, Western Australia and Northern Territory Criminal Codes. These difficulties are set out in the paper prepared by Barbara Tiffin (Appendix 3). The Tasmanian Code stands perhaps in a different position since it has recently been amended (see Appendix 3).

In the Northern Territory it is particularly important to note the cri de coeur of Kearney J of the Supreme Court of the Northern Territory as to the particular difficulties of instructing juries on this aspect under the Northern Territory Criminal Code (Appendix 4).

Before, however, examining these matters, it becomes relevant to consider the provisions of the NSW Home Invasion (Occupants Protection) Act of 1998, itself an amendment of earlier Acts of 1995 and 1997. In introducing the 1998 Bill, the Premier of NSW said it would:

> "establish a simple test that no finding of law will be possible against any person who reasonably believes that he or his family is in danger provided the level of force used is not excessive"

If the NSW Act does achieve this aim in clearer fashion than heretofore there may be good reasons for adopting or adapting it in the NT Criminal Code.

This Committee also notes that there is presently before the Legislative Assembly of Western Australia the "Criminal Code Amendment (Home Invasion) Bill 2000".

The Bill Synopsis states:-

> "The purpose of this Bill is to introduce a new section 244 to the Criminal Code which extends the right to defend against home invasion. It gives home occupiers the power to use such force as they believe, on reasonable grounds, to be necessary to defend against the invasion of their dwellings which includes the whole surroundings of the dwelling as well as the dwelling itself".

THE NSW HOME INVASION (OCCUPANTS PROTECTION) ACT 1998

There is one aspect of the NSW Act to which Dr Griffiths (Appendix 2) does not advert and yet seems to require some comment. It may well be that the Act contains a view of self-defence consistent with Zecevic as interpreted by the NSW Court of Criminal Appeal. Sections 6, 7 and 8 provide respectively that an occupant of a dwelling house may act in self-defence (s. 6) or in defence of any other person (s. 7) or in defence of any property of, or within, the dwelling house (s. 8) against an intruder "if the occupant believes on reasonable grounds that it is necessary to do so". Section 9 then states:

> "Whether grounds are reasonable grounds for the purpose of sections 6, 7 and 8 is to be determined having regard to the belief of the occupant based on the circumstances as the occupant perceived them to be."

This may well be a satisfactory statement of the law post Zecevic and it may be helpful to the courts and to the public to have statutory recognition of that situation. But it must be noted that in the NSW Act such recognition is confined to self-defence in a dwelling house. The title of the Act itself and the repeated phrase "occupant of a dwelling house" make that clear as do the words of section 5:

> "Parliament expressly declares that it is the public policy of the State of NSW that its citizens have a right to enjoy absolute safety from attack within dwelling houses from intruders".

Is one therefore to take it that by confining the test to what occurs in dwelling houses (including such curtilage as is set out in section 3), that the legislation is suggesting that there is another and different test for self-defence in situations occurring outside dwelling houses? Expressio unius est exclusio alterius. And, if so, what test?

The High Court in Zecevic made no such distinction, and indeed it seems clear that their Honours were at pains to produce a uniform approach to all cases where self-defence is raised.

The paradox is that, if one sought for a test of self-defence outside a dwelling house (street attack, attack within a vehicle or ship, in a sporting area etc), a court in NSW would presumably apply the common law as determined by Zecevic and therefore find itself applying the same tests as the Statute.

It does not seem likely that the NSW legislature was reverting to the sort of distinction already mentioned as occurring in earlier centuries, where self-defense in the home was justifiable, but outside, merely excusable. The speech of the Premier introducing the legislation refers to "a simple test" which he seems to consider will cover any situation where a person "reasonably believes that he or his family is in danger". Yet the terms of the Bill are still restricted to "home invasion".

It would seem strange that if a person disturbs an intruder inside the house, and pursues him outside the house on to the street, and the intruder then turns and confronts him, that a different set of rules then applies.

The Act is recent and we do not so far have any judicial authority on the subject but perhaps the most appropriate interpretation would be that the legislature, while accepting the general rule of common law for all cases where self-defence is properly raised, is directing that, in considering all the circumstances, the fact that the events took place inside a dwelling house is a circumstance to which some special weight should be given. For this purpose the declaratory words in section 5 could be relied on, and no doubt defence counsel would do just that, and further, no doubt, would request the trial judge to bring them to the attention of the jury during his or her summing up.

Nevertheless it would seem that the same result would be achieved, say in Victoria, where no such statute exists, but the common law applies, because the fact that an incident took place in a dwelling house would almost invariably be an important circumstance in applying the general rule as stated in Zecevic.

A similar result, though by a different route, might be applied in South Australia in view of the South Australian Criminal Law Consolidation (Serious Criminal Trespass) Amendment Act 1999 where section 168(1) provides that, "a person commits a serious criminal trespass if the person enters or remains in a place (other than a place that is open to the public) as a trespasser with the intention of committing an offence to which this section applies." Again, it would presumably be open to defence counsel to emphasise, as a circumstance to be taken into account in assessing self-defence, that the accused was dealing with a person whom the law stigmatised as someone committing a serious criminal offence.

If it is therefore accepted in common law States and is accepted by the High Court, that the law regarding self-defence has been clarified and can be stated in a simpler manner than previously, should that position now be adopted in the NT by amendments to the Criminal Code?

SHOULD THE NT CRIMINAL CODE BE AMENDED?

The advantage of a Code is said to be that a judge need not seek a principle from a "wilderness of single instances", but has a starting point in the principles enunciated in the Code which he then conveys to the jury using the language of the Code. On appeal, the test is whether he has properly applied those principles and conveyed them to the jury; whereas on appeal from a common law regime the test goes one step backwards to determine first if the judge has properly deduced the principles from the case-law and then whether he has properly applied those principles and conveyed them to the jury. In practice, the distinction is blurred because the Code itself gradually becomes encrusted with authorities through which the trial judge must find a way; and in both regimes the trial judge is gradually encumbered by the sometimes esoteric impedimenta of a sometimes casuistical appeals court. This burden, once cast on the trial judge, must be thereafter carried by him as patiently and uncomplainingly as Christian in "The Pilgrim's Progress"; but as in the "Pilgrim's Progress", the burden can be removed by an all-powerful External Force. In jurisprudence this all-powerful force is the legislature. Thus, to take some of the more recent examples, the Home Invasion (Occupants Protection) Act 1998 of NSW and the Criminal Law Consolidation (Serious Criminal Trespass) Amendment Act 1999 of SA are designed to clarify concepts which were thought to have become confused at common law; while, no doubt for similar reasons, s. 267 of the Queensland Criminal Code (dealing with defence against unlawful entry into a dwelling) was amended in 1996.

Does the Criminal Code of the NT now require any, and if so what, amendment in this area? A summary of the various provisions relating to self-defence at common law and in the Codes of the various States and Territories has been prepared by Barbara Tiffin of the Policy Division of the Attorney-General's Department of the Northern Territory and appears at Appendix 3. The paper concludes by suggesting various alternatives in dealing with the concept of self-defence in the Northern Territory.

The alternatives suggested are:

1. simplify the provisions to provide for “a straightforward conception” of the defence;

2. retain the current provisions, as providing a complete codification of the law, and rely on the courts to provide clear and simple directions on the law to the jury;

3. amend the provisions to do any or all of the following:
   - remove the requirement to fire warning shots;
   - combine sections 27 and 28 to provide one comprehensive statement on self-defence;
   - provide separate provisions for defence of property.

In the view of this Committee, alternative 1 is the only proper course to pursue if it is considered that the present provisions of the Code are no longer adequate or not as clear as they might be, particularly in the light of Zecevic. This would, however, require a comprehensive redrafting of sections 27 and 28.

Alternative 2 is really a counsel of despair in view of the remarks of Kearney J in R v Wurramara & Lalara (set out in Appendix 4).

Alternative 3 is really only a narrower statement of alternative 1, confining it to some specific alterations.

As stated above, however, the condition for adopting alternative 1 is that the present provisions of the NT Code are inadequate or not as clear as they might be. There are four reasons why this Committee considers this to be so:

(1) The provisions of sections 27 and 28 are somewhat of a jumble, mixing up (a) circumstances where force may be properly applied, and (b) circumstances where self-defence may apply. These are really two difference concepts, albeit sometimes closely related. Thus, s. 27(a) to (e), (k), (m), (q) and (r) and s. 28(a) to (e) are directed to justifying the application of necessary force in the execution of the law, or in pursuance of a right given by the law, eg. in the course of arrest, or preventing escape from lawful custody, to prevent a breach of the peace or the commission of an offence etc. Although s. 27(a) to (e) grants these powers to any person, they would normally be used only by police officers, and s. 28(a) to (e) specifically confines certain wider powers to police or prison officers alone and s. 28(g) specifically confines those powers to persons in command. S. 27(k) relates to powers of taking possession of something to which a person is legally entitled, s. 27(m) relates to powers of control over legally occupied premises or things, and s. 27(q) relates to control on board an aircraft. S. 27 (p) and s. 27 (pa) are rather broader powers of discipline or rescue but certainly do not bear any connection with self-defence. All, however come under the conception that force in certain circumstances is justified but do not necessarily raise any question of self-defence.

Now, while one can envisage the concept of self-defence arising in, say, the action of a police officer in arresting a person who violently resists that arrest, usually the question would not arise since the primary investigation would be whether the powers given were properly applied. If they were, then no investigation of self-defence would be necessary, and indeed, the actions would be justified and lawful.

It would make for greater clarity if these subsections were divorced from the subsections where the concept of self-defence is raised, ie. s. 27(f), (g), (h), (j) and (n) and s. 28(f).

(2) So far as self-defence is concerned, and if the test propounded by the High Court in Zecevic were applied, there would be no necessity to divide the concept, as it is divided between s. 27 and 28, into circumstances in which force not being such force as is likely to cause death or grievous harm, (s. 27), and circumstances causing death or grievous harm (s. 28).

The test in Zecevic is "whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did".

If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal." (162 CLR at 661)

If one adds the rider stated in Hawes [1994] 35 NSW LR 294 at 305 that, "it is the belief of the accused, based upon circumstances as the accused perceived them to be, which has to be reasonable", then the test is general and the occurrence of death or grievous harm is merely one of the circumstances to be taken into account in applying the overall test.

(3) The cri de coeur of Kearney J (a judge of great experience in these matters) should be heeded. In R v Wurramurra & Lalara (February 1999) His Honour said, inter alia:

> "This case has once again illustrated the difficulty in trying to explain to any jury the requirements of self-defence as spelled out in sections 27(g) and 28(f) of the Criminal Code.
>
> They are complicated concepts and it's difficult to explain them, to my mind, in a way in which any jury can readily understand; and it's sufficient indeed to point to paragraph (B) of the aide-memoire which I prepared in this trial for the jury in relation to the charge in court against Cain Wurramara.

> It seems to me that in the 16 years or so that have passed since the Criminal Code was introduced, the common law itself has moved on, in a very useful way, particularly in relation to the defence of self-defence.
>
> The result of that is that it is now very easy to explain the defence of self-defence to a jury and for them to understand it. All of this has come about as a result of the High Court's decision in the case of Zecevic...."

His Honour then requested that his remarks be conveyed by the DPP to the Attorney-General.

The remarks of His Honour and the aide-memoire to which he refers appear in Appendix 4.

Any examination of this aide-memoire, paragraph B, (and this Committee respectfully agrees that this was the most appropriate way in which this question could be put to the jury as containing all the matters required by the Code on this point) will demonstrate how exceedingly difficult it was to explain the concept to the jury as the Code required it to be explained. Indeed, one might take the not unreasonable view that it would have been an easier task for His Honour to have explained to the jury the general theory of relativity, and with a greater likelihood that the jury would understand it.

The inevitable conclusion is that there must be a better way.

(4) Finally, that better way has been demonstrated not only by Zecevic but also by s. 10.4 of the Draft Model Criminal Code prepared by the Model Criminal Code Officers Committee, a body reporting to the Standing Committee of Attorneys General and within which the Attorney-General's Department of the Northern

Territory has had representation. This s.10.4 is now s. 10.4 of the Commonwealth Criminal Code 1995.

The provisions of this proposed section are as follows:

"10.4(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or
(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
(c) to protect property from unlawful appropriation, destruction, damage or interference; or
(d) to prevent criminal trespass to any land or premises; or
(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury;

(a) to protect property;
(b) to prevent criminal trespass; or
(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and
(b) he or she knew that the conduct was lawful.

> However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it."

These draft provisions are the product of much thought and discussion and have now become s. 10.4 of the Commonwealth Criminal Code 1995. It is, of course, not an automatic guarantee that something is better than something else merely because it is more recent. But, in this case, it can at least be submitted that the advocates of this legislation are persons of experience in the field, have had the advantage of surveying all past and present approaches both in codification and at common law, and have attempted to draft provisions acceptable to all States and Territories.

It is by no means certain that all States and Territories would adopt these provisions. The common law States, for instance, might take the view that Zecevic has sufficiently clarified the position, and in Tasmania, it may be thought that the amendments to section 46 of the Tasmanian Criminal Code are adequate.

However, the argument for a uniform Criminal Code (or Statute) throughout Australia is gaining momentum and in the Territory there are excellent reasons why it should lead the way. This is particularly so in the area of self-defence where clearly the provisions of the Code require amendment.

The draft section suggested by the Model Criminal Code Officers Committee is plainly based upon Zecevic as interpreted by the NSW Court of Criminal Appeal - see 10.4(2). The conduct relied upon as self-defence must be believed by the actor to be necessary and must be a reasonable response in the circumstances as he or she perceives them.

Subsection (3) however, provides three exceptions when force that involves the intentional infliction of death or really serious injury is not permitted.

This relates to protection of property, prevention of criminal trespass and removing a person committing criminal trespass. No doubt it could be argued that this could be implied from the broad general rule stated in Zecevic since it would be unlikely that an accused could "believe on reasonable grounds" that it was necessary to kill a person doing no more than trespassing on property.

If however the trespasser then became violent or the accused believed that the circumstances were such that the trespasser was becoming violent, that could (depending on the circumstances) become a question of the accused defending himself and come under subsection 2(a).

The rationale for differentiating subsections 2(c), (d) and (e) from subsections 2(a) and (b) is obviously to draw the line between self-defence in one's peril and self-defence at one's peril, or between the major and minor incodences where self-defence may ve permitted to a major or minor degree. The emphasis is on clarification and it may be important, despite Zecevic, to remind a jury of these primary distinctions, and it may well assist the jury if they are so drawn.

But, if this is so, there may be an equally good case for reminding a jury that the legislature accepts the fundamental principle - certainly fundamental to the outlook of most Australian citizens - that, to use the words of the NSW Act, "citizens have a right to enjoy absolute safety from attack within dwelling houses from intruders".

The fact that this may be a statement of the obvious, and in any event well within Zecevic guidelines, does not mean that such a provision should not be enacted. To some lawyers it may appear superfluous because they would argue that a jury of citizens would always take that into account in appropriate circumstances. But lawyers sometimes tend to forget that laws are not made for lawyers but for all citizens.

No doubt many members of the NSW Parliament were well aware that s. 5 of the Home Invasion (Occupants Protection) Act was merely declaratory of what a jury would think anyway, but they also clearly had in mind that it was important for many members of the public to have the principle clearly expressed. The Premier of NSW, introducing the Bill, said that the amendments would:

> "establish a simple test that no finding of law would be possible against a person who reasonably believes in the circumstances that he or his family is in danger, provided the level of force used is not excessive."

Properly analysed this says no more than Zecevic if one examines the phrases "reasonably believes in the circumstances that he or his family are in danger" and "provided the level of force used is not excessive". But there is every reason to accept that these expressions will be of more assistance (and comfort) to the public than a perfunctory statement that the common law covered the situation. (See, further, Appendix 2.2. pas 1-2)

Again, properly analysed, there is nothing in sections 6-8 of the NSW Act which is inconsistent with the proposed section 10.4 of the Draft Model Criminal Code. Although the terminology is different, the result is the same. Each of the sections 6, 7 and 8 of the NSW Act conclude with the words "if the occupant believes on reasonable grounds that it is necessary to do so", and s. 9 defines "reasonable grounds" as "to be determined having regard to the belief of the occupant, based on the circumstances as the occupant perceives them to be".

Contrast these expressions with those in the Draft Model Criminal Code (which is wider in encompassing all forms of self-defence) but where the opening expression of subsection (2) contains the phrase "if and only if he or she believes the conduct is necessary", and concludes, after subclauses (a)-(e), with the words, "and the conduct is a reasonable response in circumstances as he or she perceives them."

In the view of this Committee it would conduce to a clarification of the concept of self-defence if subsections (f), (g), (h) and (j) of s. 27 of the Code and subsection (f) of s. 28 were repealed and replaced by the provisions of s. 10.4 of the Draft Model Criminal Code under a separate heading "Self-Defence".

The remaining subsections of sections 27 and 28 should remain under their present headings since they apply not to self-defence but to various other circumstances where, as the headings state, force is justified.

However, at least until the Draft Criminal Code is adopted in totol there must necessarily be one modification so that an expression used in 10.4 becomes, for the present, consistent with a definition given in the Code rather than one introduced by 10.4. 10.4(3) uses the expression "really serious injury", and this is not defined in Chapter V of the Discussion Paper accompanying the Model Criminal Code, although there are suggested definitions of "harm" which include physical harm. There is an accepted definition of "grievous harm" in the NT Code as "any physical or mental injury of such a nature as to be likely to endanger life or to cause or be likely to cause permanent injury to health".

The expression "really serious injury" may well encompass the expression "grievous harm" but it would be unwise to introduce into the NT Code an undefined expression when a defined one is contained therein. Hence, until further developments, the expression "really serious injury" in 10.4(3) should be replaced by the expression "grievous harm".

Some members of this Committee have also suggested that the expressions "unlawful imprisonment", "unlawful appropriation" and "criminal trespass" may also need to be defined.

Similarly, and until national uniformity is achieved, subsection (1) of the proposed s. 10.4 must correlate with the Northern Territory Criminal Code which provides that:

"A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorised, justified or excused" (section 23, and note also sections 24 and 25). Self-defence in its various forms in sections 27 and 28 is "justified" within the meaning of the Code and it is necessary to keep that expression as part of the general theory of criminal responsibility categorised in Part II of the Code. As the Code is presently drafted, the defence must come within one of the categories, "authorised, justified or excused". Consequently, to keep the proposed s. 10.4 within the conceptual framework of the Code it will be necessary to add in the words "and the conduct is justified" in subsection (1).

In the view of this Committee, and although it may not be strictly necessary, it would conduce to public confidence if a declaratory subsection in the form of section 5 of the NSVV Home Invasion (Occupants Protection) Act 1998 were added or, alternatively, that to subsection (3) of 10.4 of the Draft Model Criminal Code there be added after subclauses (a), (b) and (c) the words "provided that no serious violence or threat of serious violence is offered to the person using that force".

The Committee believes that without one or other of these additions to the proposed section, many members of the public would read subsection (3) of 10.4 as rendering them powerless to take appropriate action against an aggressive intruder or wrongdoer.

If, however, the Code is amended as suggested, it would seem unnecessary and extremely confusing if s. 31 of the Code still applied to the self-defence provisions. The reason for this is that 10.4 of the Draft Model Criminal Code is in effect a Code within a Code and carries its own qualifications.

The phraseology of s. 31 which excuses a person from criminal responsibility unless the "act, omission or event" was "intended or foreseen as a possible consequence of his conduct" is inconsistent with the concept of self-defence where a person might intend or foresee the consequences but is impelled to the act because "he or she believes the conduct is necessary" and "the conduct is a reasonable response in the circumstances as he or she perceives them".

The emphasis in self-defence is not on intent but on whether the response was reasonable in the perceived circumstances but, of course, as the High Court emphasises in Zecevic, the onus remains on the prosecution to prove beyond reasonable doubt that the actions of the accused were not necessary and not a reasonable response in the circumstances as the accused perceived them.

Similarly the provisions of s.32 of the NT Code "Mistake of Fact" should be excluded from the Self-Defence provisions since the wording of 10.4 of the Model Criminal Code allows for that contingency. A person may believe his or her conduct may be necessary and in the circumstances as he or she perceives them may act on a mistaken belief. Section 34 therefore becomes redundant.

This Committee stresses that it is not otherwise proposed to interfere with s.31 and s.32 save in these circumstances, although a case may well be made for some revision of s.31 generally. But that is not within the scope of this enquiry.

HOME SELF-DEFENCE AND IMMUNITY FROM CRIMINAL LIABILITY

The NSW Home Invasion (Occupants Protection) Act contains a special provision (section 11) headed "Immunity from Criminal Liability".

Subsection 11(1) would seem to go somewhat further than the common law position. The words are:

> "(1) An occupant of a dwelling house who acts in accordance with sections 6, 7 or 8 is immune from criminal liability resulting from his or her acts."

Insofar as this provides that, where in a prosecution an occupant of a dwelling house successfully raises self-defence within the meaning of sections 6, 7 and 8, or where, in a prosecution, the court permits the question to be raised and the prosecution fails to negate it beyond reasonable doubt, it does no more than restate the common law or code provisions.

But the expression is "immune from criminal liability". That may be suggesting a threshold test ie. before any prosecution can be launched. Presumably it would then be the task of the prosecuting authority to launch a prosecution only if it is satisfied that there is at least a likelihood that the provisions of sections 6, 7 and 8 are not present. It is true that, if that was intended, the section should read "is immune from prosecution", but it might still be interpreted as giving the prosecution a wider discretion than usual to refrain from taking proceedings.

Alternatively, or in addition, it might be construed as permitting the court, more frequently than it presently does, to direct an acquittal at the end of the prosecution's case if it considers that the case has not been made out.

Again, it is true that a court will do this in any event in what it considers a clear case, but, again, it might widen the ambit of what the court considers a clear case.

So far as this Committee can ascertain, no decision has yet been given as to the meaning or significance of this section and this Committee would not suggest a similar provision in the NT Criminal Code because the meaning is unclear, and if it is to be construed as directing immunity from prosecution it would case a considerable burden of pre-judgement on the Director of Public Prosecutions (who in any event already has a reasonable discretion in this area), and it would seem illogical to confine the discretion to a "home defence" situation and not other circumstances of self-defence, thereby defeating the broad test propounded in a Zecevic.

Subsection 11(2) creates a limitation period for prosecutions arising out of home defence situations. The subsection provides that if such proceedings are commenced the "occupant" (within the meaning of that word as defined in section 3), then that person must be brought before the court "whether by way of preliminary proceedings or otherwise", within 9 months after the proceedings are commenced unless the delay is attributable to the occupant.

Such a limitation does not appear in the NT Criminal Code nor, apparently, in any other State or Territory jurisdiction in this area of the criminal law.

Clearly the subsection is based on the belief that it is intolerable for any person who has acted in defence or purported defence of the home to be subjected to the law's delays. Such a person is assumed to be an ordinary law-abiding citizen not originally engaged in any criminal activity, possibly over-reacting to a situation he himself has not caused, in circumstances which would normally arouse considerable public sympathy.

This Committee considers that there is some merit in this idea, provided that it was extended to all cases of self-defence within the meaning of the Draft Model Criminal Code. The private citizen, caught up in such situations, not originally of his own making, is entitled at least to speedy resolution of initial proceedings and this Committee would suggest a similar, though shorter, provision in the NT Criminal Code. Why, exactly the NSW legislature chose a 9 month period does not appear (unless it was a subconscious correlation with the human gestation period) and this Committee would suggest no more than 6 months. After all, all that is required is that a preliminary hearing be held, and if this placed undue pressure on the prosecuting authorities, they would, no doubt, concentrate on the more serious cases.

SELF-DEFENCE AND CIVIL LIABILITY

The NSW Home Invasion (Occupants Protection) Act contains a section relating to civil liability. Section 12 reads:

> "An occupant of a dwelling house who acts in accordance with sections 6, 7 or 8 is immune from civil liability resulting from his or her acts."

Sections 6, 7 and 8 all commence with the words "an occupant of a dwelling house" and to that extent preclude a general rule about self-defence as contemplated in Zecevic. The sections then go on respectively to provide that the occupant "may act in self-defence against an intruder" (s. 6); "may act in defence of any other person in the dwelling house against an intruder" (s. 7); and, "may act in defence of any property of, or within, the dwelling house against an intruder" (s. 8). In every case the "occupant" must "believe on reasonable grounds that it is necessary to do so."

Under the common law, if an "intruder" as defined by s. 4 took civil proceedings for damages, the claim would be for physical injury, or possibly psychological injury, sustained by him by the actions of the occupier. The onus would be on the intruder to prove on the balance of probabilities that the actions of the occupier exceeded the boundaries of self-defence on the occupier's part. However, such an immunity does extend the common law in a significant respect. As Dr Griffiths, in his paper (Appendix 2) notes, this "would alter the common law position in relation to……..the defence of property……by introducing a subjective element into the test of the reasonableness of (the occupier's) conduct". This approach places greater weight upon the interests of the person acting in self-defence than upon those of the person thereby injured, including a third party who may not have been involved in the actions giving rise to the conduct constituting self-defence.

The Committee also questions why s. 12 should be confined to the actions of the occupant of a dwelling house? The section may well create confusion because, if it is so confined (and it clearly is by the use of the words "an occupant of a dwelling house"), does this mean that a different, and if so, what, test must be applied to cases where a person is attacked outside a dwelling house and claims self-defence as justification for any actions he may take against the assailant if the assailant takes civil proceedings against him.

In this Committee's view, any statutory provision of this kind should not differentiate as to the circumstances where self-defence may apply but proclaim a general civil immunity in cases of self-defence, thus according with the approach taken in Zecevic.

If the provisions of the Draft Criminal Code are enacted as suggested, a further subsection could be added to the provisions presently appearing as 10.4 and the subsection could simply state:

> "(7) A person acting in self-defence is immune from civil liability resulting from his or her acts."

However the Committee is not unanimous that this should be so and no specific recommendation is therefore made. The case against such a subsection is set out by Richard Bruxner as follows:

> *"The proposed amendments to the Criminal Code involve a clarification and an extension of the circumstances in which self-defense will be available as a defence to a criminal charge. If there are policy considerations favouring an expansion of criminal immunity then the same considerations may favour a commensurate expansion of civil immunity; however I am concerned that the proposed amendments go much further.*

Presently, the civil immunity arises in the following way:

1. *sections 27 and 28 of the Code provide that certain applications of force are justified;*

2. *section 25 provides that acts declared by the Code to be justified are lawful; and*

3. *section 7 of the Code Act provides that no action shall be brought in respect of an act declared by the Code to be lawful.*

Under the proposed amendments:

1. *Section 28A(1) provides that conduct constituting an offence is justified if carried out in self defence – thus triggering section 7 of the Code Act in the manner above; and*

2. *Section 28A(7) further provides that a person acting in self-defence is immune from civil liability.*

If A shoots B in self-defence, then A has civil immunity as against B under both the existing and the proposed laws. The difference is that the new law would treat A as acting in self-defence in a broader range of circumstances than the present law - with a corresponding reduction in the circumstances in which B could sue A.

Consider, however, a situation where an innocent bystander X is wounded as the result of A taking a shot at B in self-defence. Under the existing law X could sue A and, provided X could establish the elements of a cause of action (for example in negligence), recover damages.

If there were no section 28A(7) the effect of section 28A would be the same.

Whereas section 28A is generally (and understandably) concerned with "the conduct constituting the offence, section 28A(7) introduces a new notion of "acting in self-defence". The result is that a person could claim to have been "acting in self-defence" in circumstances where there was no (alleged) offence in the first place – for example because A missed B (and unintentionally hit X).

When it is recalled that section 28A otherwise expands the circumstances in which self-defence is available – so that an honestly but negligently formed belief will not necessarily rule out the defence – the dangers of section 28A(7) to someone like X are all the more apparent.

The above ramifications are not made clear in the draft report. Moreover, the justifications offered for including the proposed section 28A(7) are unpersuasive.

Section 12 of the NSW Home Invasion (Occupants Protection) Act - which recognises civil immunity in circumstances where an occupant of a dwelling house acts against an intruder (see sections 6,7, and 8) - may serve some sort of a declaratory purpose in NSW where there is no codified criminal law. A provision in similar terms is unnecessary in the NT because of section 7 of the Code Act. Even if it were thought desirable to have a declaratory provision in the NT, the modified form of the NSW section proposed as section 28A(7) is not such a provision':

It may also be significant that the WA Criminal Code Amendment *(Home Invasion)* Bill which, by its synopsis, purports to "extend(s) the right to defend against home invasion" does not include a provision relating to civil liability.

Caution should therefore be exercised in enacting a subsection such as that set out above without further consideration both as to policy and terminology.

PROVOCATION

Like self-defence, the concept of provocation developed as State administered criminal law emerged from earlier self-appointed or clan-appointed vengeance, and then compensation in lieu of vengeance.

The original approach that any homicide was a crime had to be modified at first by pardon in "clergyable" cases and ultimately by allowing such cases to be converted into true defences before verdict rather than as circumstances permitting of mercy after verdict. Unlike self-defence, which, if properly raised and not negated, entitled the accused to a complete acquittal, provocation if properly raised and not negated merely converted the charge of murder to one of manslaughter.[16] Furthermore, in the common law, the excuse of provocation applied only to cases of murder and this has remained the position in the common law States of Australia.

The idea that provocation, if properly raised and not negated, entitles the accused to a complete acquittal in other charges (wounding, assault, attempted murder etc) was introduced by the Codes; though somewhat illogically, the Codes retain the rule that, on a charge of murder, provocation, if properly raised and not negated, entitles the accused not to acquittal but to a verdict of manslaughter. c.f. Section 34(1) and 34(2) of the NT Criminal Code.

Before psychology emerged from philosophy, the idea of provocation was restricted to something easily understood by the ordinary citizen who needed only his own commonsense and common observation to know that, confronted with a sudden provocative act or insult, even the most law-abiding person could lose self-control and, in the heat of the moment, do something which he might not do on calmer reflection.

Since, as Holmes J famously remarked, the life of the law has not been logic but experience the common law adopted the position that such circumstances could ameliorate though not entirely excuse, a homicide, and the result would be a verdict of manslaughter for which a full range of sentencing would be available from the lightest to the heaviest, though excluding the death sentence. But, conforming to the accepted view of the times, the courts carefully restricted the circumstances to immediate or almost immediate reaction and only to those cases where an ordinary person might properly be considered to have been derived of self-control.

Hence the generally accepted view that a man might kill both his wife and her paramour if he found them in flagrante but not if he found them in less passionate circumstances, and not if he waited too long before acting.[17] Hot blooded Frenchmen and Italians had a far more generous (if that is the word) view of the “crime passionelle".

This notion of immediate reaction is contained in the NT Criminal Code. One of conditions for provocation to arise is contained in section 34(1)(c) that the accused "acted on the sudden and before there was time for his passion to cool". See also section 34(2)(c).

Obviously influenced by modern psychiatry and research, NSW introduced 23(1) of the Crimes Act which provides:

> "(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negative if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;

(b) the act or omission causing death, was not an act done or omitted suddenly; or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

> (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
>
> (5) This section does not exclude or limit any defence to a charge of murder."

The Attorney-General of NSW in introducing the Bill said:

> "The current law of provocation is based on a theory of human behaviour which assumes that all people respond to provocation suddenly - as the present section says, in heat of passion. This is not true. It is certainly not true for women and it is also not true for men."

The sort of circumstances which this section is meant to cover is commonly but erroneously known as the "battered wife syndrome". Kirby J in Osland v the Queen [1998] 197 CLR 316 at 371-2 says: "There are particular reasons why "battered wife syndrome" is a complete misnomer. In my view the expression should not be used."

The reasons for His Honour's observation are clear. Modern psychiatry and indeed many if not most Australians, now accept that there can be instances where a wife, after many assaults and degradations, can become so dazed and humiliated as to lose self-control and kill her persecutor even if the killing does not take place immediately after an event of violence, threats or intimidation. But this is only an instance of a more general rule that any person may similarly react if placed in a position where another person continually humiliates, dominates, bullies and drives him or her to distraction.

A teenage child of a violent parent, an elderly parent of a violent child, a student bullied incessantly by a classmate - the list is endless. But the circumstances must be severe. This must be emphasised. For the defence would otherwise become a vade mecum for less excusable killings.

Kirby J in Osland at pages 375-8 makes this important point very clear:

> "The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. While these circumstances may be affected by contemporary conditions and attitudes, there is no legal carte blanche, including for people in abusive relationships, to engage in premeditated homicide. Nor, in my view, should there be."

However, it is now accepted - as it would not have been accepted earlier - that psychiatric evidence can be introduced to establish the state of mind of the accused in cases where it is suggested that the act of the accused was the result of some form of persecution by the person whom the accused killed.

In Osland, Gaudron and Gummow JJ said, (at p.37),

> "Given that the ordinary person is likely to approach the evidence of a battered woman without knowledge of her heightened perception of danger, the impact of fear in her thinking, her fear of telling others of her predicament, and her belief that she can't escape from the relationship, it must now be accepted that the battered wife syndrome is a proper matter for expert evidence."

Their Honours the noted that such evidence had been received in SA, NSW, Tasmania, NT, NZ, England and USA.

Although the judgement of their Honours Gaudron and Gummow JJ was a dissenting judgment, the majority judges do not seem to have disagreed with this observation and Kirby J at page 376 said:

> "Although BWS (sic) does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert."

Mr Milliken, a psychologist of considerable experience, who has frequently been called to give evidence in court as an expert, discussed these matters with the Law Reform Sub-Committee. He considered that it was now accepted by most psychologists that a person in an abusive relationship might put up with the situation for an indefinite time but ultimately might undergo a complete breakdown where the personality may be said to have disintegrated and the person would be in an altered state of mind where one did not access one's sense of right and wrong (conscience). The situation differed from the legal definition of insanity insofar as the person might still know that what he or she was doing was wrong but in this altered state of mind that was irrelevant because what was being done was regarded as simply a matter of self-preservation.

The amended section 23 of the NSW Crimes Act was considered by Gleeson C J of the High Court at a time when he was Chief Justice of NSW in the case of Chay [1994] 72 ACR 1. His Honour said at pages 13-14:

> "The effect of these legislative changes needs to be considered at two levels: the relevant legal principles and the forensic problems of a particular case.

As a factual matter, for the reasons stated in Ahluwalia, depending upon the evidence and circumstances of the individual case, the longer the time that elapses between the allegedly provocative conduct of the deceased, and the killing of the deceased by the accused, the harder it may be for an accused to raise an argument of provocation, and the easier it may be for the Crown to prove that what was involved was, for example, a deliberate and premeditated act of revenge, rather than the loss of self-control.

That having been said, it is still necessary to address the question of the nature of the distinction between killing as the result of a loss of self-control, and killing which, even though it follows ill-treatment of an accused by a deceased, is nevertheless regarded as murder. This is because, with all its theoretical imperfections, and practical roughness, the law of provocation is still only a limited concession to a certain type of human frailty, and is not intended to allow a jury to reduce what would otherwise be murder to manslaughter upon a view that a deceased person received his or her just deserts. The law is not intended to encourage resort to self-help through violence.

It will probably remain the case that, for many people, loss of self-control is a concept that is most easily understood, and distinguished from, a deliberate act of vengeance in the factual context of a sudden eruption of violence. However, times are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident. The presence of such an incident will assist a case of provocation, but its absence is not fatal. This is an area in which psychiatric evidence may assist juries to develop their understanding beyond the commonplace and the familiar.

There are, for example, circumstances in which a psychiatrist's explanation of post-traumatic stress syndrome may help make a case of provocation even where there is a substantial interval of time between the provocative act of the deceased and the accused's response. This, however, is a matter for evidence and argument in individual cases. What the law still requires is that it should be explained to the jury that the key concept for them to bear in mind, whether for the purposes of the subjective or objective aspect of the problem, is that of a killing which results from a loss of self-control.

Emotions such as hatred, resentment, fear, or the desire for revenge, which commonly follow ill-treatment, and sometimes provide a motive for killing, do not of themselves involve a loss of self-control although on some occasions, and in some circumstances, they may lead to it. What the law is concerned with is whether the killing was done whilst the accused was in an emotional state which the jury are prepared to accept as a loss of self-control.

As has been observed, the distinction which the law regards as critical in this area has never been amenable to rigorous analysis, and it is usually expressed in language which is metaphorical and in terms of concepts that are imprecise. The breaking down, and ultimate removal, of the requirements of immediacy of the deceased's provocative conduct and suddenness of the accused's response, in aid of extending the scope of the concession made by the law to human frailty, has made the distinction even less precise, although it has served what many regard as an important social purpose. The requirements of justice and certainty are often in tension; and it can hardly be claimed that the earlier law on this subject was a model of certainty in its practical application.

Appendix 5 contains the full text of His Honour's examination of this matter.

Victoria does not have a similar amendment to its Crimes Act but the case for such an amendment now has the powerful support of the present Chief Justice Phillips C J. In the Lesbia Harford Oration 21/4/99 reported in Victorian Bar News 110 of 1999 he says:

> "As with self-defence, so should the directions of the judge change focus when provocation is an issue. In my opinion, juries should be directed that a last provocative incident is simply to be regarded as a component of the woman's experience and that it is the sum total of the deceased's provocative conduct to which the focus of the jurors' attention should be turned. Such directions would complement the legislative change I shall later propose. In saying this I acknowledge that judges do direct juries along the lines of a last act other than of a trivial nature being "the last straw".
>
> It is sufficient for present purposes to note that with respect to the law concerning provocation, it is beyond dispute that the common law in this State has, as its centre, the notion of a killing during a sudden and temporary loss of self-control in the accused person resulting from the provocative conduct of the deceased.
>
> In 1980 the NSW parliament taskforce on domestic violence submitted a report and as a result, amendments were made to the NSW Crimes Act by the Crimes (Homicide) Amendment Act 1982. These amendments provided that the conduct of the deceased which induced the loss of self-control in the person accused need not have occurred immediately before the act or omission causing death, nor need the act or omission causing death be done or omitted suddenly. In other words, these amendment removed the need for an immediate response and for the conduct causing death to be proportionate to the provocation.

> If the killing occurred while the accused person lacked self-control, provocation was available as a defence although the response was delayed. The requirement of immediacy of response was abandoned. These amendments also allow the provocation to be assessed having regard to previous provocative conduct.
>
> In my opinion, consideration should be given to similar provisions being enacted by the Victorian parliament."

(The full text of His Honour's address appears at Appendix 6)

In the light of these observations, and given the willingness of courts to accept psychological or psychiatric evidence on questions of provocation, there seems now an overwhelming case for an amendment of s. 34 of the NT Criminal Code.

The simplest way to achieve this would be to repeal subsections 34(1)(c) and 34(2)(c). Both these subsections contain the requirement that the accused "acted on the sudden and before there was time for his passion to cool".

Some might suggest that it might be advisable to substitute for the whole of section 34(2) the provisions of s. 23 of the NSW Act insofar as they are more specific but, in this Committee's view it would not be necessary to do so since, once s. 34(2)(c) is repealed, judges would necessarily direct juries on the lines of s. 23 of the NSW Act.

One difference between the NT Criminal Code and the common law has already been mentioned, namely that s. 34(1) and s. 34(3) of the Code provide a complete defence to non-homicidal acts induced by provocation.

There seems, however, no rational argument for differentiating between provocation in the one or the other circumstance, although it is conceded there remains a somewhat strange distinction in the Code when the issue of provocation properly raised and not negated can result in a verdict of manslaughter on a charge of murder but a complete acquittal on a charge of attempted murder. The rationale seems to be that the crime of murder is sui generis and demanding a conviction albeit a lesser conviction if provocation is successfully pleaded.

Some members of this Committee have taken the view that, at least in the case of murder, and particularly if the requirement of sudden reaction is removed and bearing in mind that psychiatric or psychological evidence is now permissible in cases where provocation is an issue, that there is no need for s. 34(2) at all. This is also the view of some of those with whom the Sub-Committee on this matter have consulted. The basis of this approach is that on the charge of murder all situations of provocation could come under the broader terms of section 37 diminished responsibility. The section reads:

> "When a person who has unlawfully killed another under circumstances that, but for this section, would have constituted murder, was at the time of doing the act or making the omission that caused death, in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control the act, make the omission or cause that event, he is excused from criminal responsibility for murder and is guilty of manslaughter only."

The words "substantially to impair his capacity to understand what he was doing" the words "or his capacity to control his actions" and the words "or his capacity to know that he ought not to do the act" might all be relevant to provocation particularly since all three expressions are governed by the verb "impair".

The stumbling block to this approach however is provided by the definition in section 1 of "abnormality of mind" which means "abnormality of mind arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease, illness or injury". The emphasis therefore is on some "inherent" cause pre-existing in the accused rather than brought about by circumstances as would induce an otherwise "normal" person to commit the crime. Possibly, something could be made of the word "injury", but this would seem unduly procrustean, and it is doubtful if a judge could be persuaded to regard this section as covering provocation.

This Committee therefore takes the view that the effect of s.23 of the NSW Act would be substantially achieved in the Northern Territory by the repeal of section 34(1)(c) and 34 (2)(c).

NOTES

1. See Appendix 1

2. Kenny - Outlines of Criminal Law -15"Edition - pg 116 - & subsequent editions.

3. Stephen - History of the Criminal Law of England - Vol 3 - pg 24.

4. A similar development occurred in Nordic countries. The great Icelandic Saga, "Njal's Saga" illustrates the ideas in transition. Two just and honourable men who are friends try desperately to arbitrate various killings in their households instigated by their wives who are Implacable enemies. They cannot ultimately control the situation and both are killed in the blood feud that results. But the man who kills Njal - and hates doing it but must because it is his "duty" - finally achieves peace by arbitration and reparation between the two clans.

5. Encyclopaedia of English Law under the reference "wergild".

6. Holdsworth - HEL Vol 2 Pg 51

7. Pollock and Maitland - HEL - Vol I - pg 53

8. The advantage to a strong ruler of a criminal law imposed from above rather than as a haphazard local issue was threefold. Firstly, because it brought some semblance of safety which enabled his subjects to trade, farm and prosper, and therefore pay taxes; secondly, because it discouraged his subjects from wastefully killing each other when they could be more gainfully employed in killing his enemies; and thirdly, because the most enthusiastic proponent of law and order is a successful robber who fervently wishes to prevent others doing to him what he did to them; and the Barons were not called "robber Barons" without good cause.

9. Holdsworth - HEL - Vol III - pp 312-3

10. Holdsworth - HEL - Vol III - pp 436-7

11. See Lawson & Forsyth [1986] V R 515 at 560

12. Blackstone - Vol IV - pp 183-4: See also R v Hussey 18 CAR 160 at 161 where Hewart LCJ quotes from Archbold - 266' Ed at p. 887 that, "In defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary". Hewart LCJ then comments, "That is still the law:. (emphasis added).

13. Holdsworth - HEL - Vol III Pg 313

14. See also - Hale - Pleas of the Crown [1736] Vol I - Pg 487

15. J M Beattie - Crime and the Courts in England - Clarendon Press -1986

16. Conlon [1993] 69 ACR 92: NCudic [1995] 85 ACR 57: Hawes; [1994] 35 NSW LR 294

17. For purposes of convenience, (since this Report does not call for a detailed elucidation of legal history), it is accepted here that even before Woolminaton's case (1935) the onus was on the prosecution to negate self defence or provocation, once properly raised. In fact, although Woolmington suggests a "golden thread" running back to early times confirming this view, it seems far more likely that, before Woolmington, the courts regarded these concepts as defences in which the onus lay on the accused to prove them if he wished to rely upon them. The judgements in Woolmington are an interesting example of the fiction that the common law was unchanged and unchangeable since the time when the memory of man runneth not to the contrary"

18. Kenny - Criminal Law - 19" Ed - P 9