Revisiting Excessive Self-Defence

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In those jurisdictions which recognise the plea, excessive self-defence is available to persons charged with murder who have applied excessive force to kill a perceived assailant. A successful plea reduced the charge of murder to manslaughter in order to account for the fact that the accused had applied force (albeit excessive) in the honest belief that it was reasonably necessary in self-defence. The plea formed part of Australian common law for 23 years until it was abolished by the High Court in *Zecevic v DPP (Vic)*[1]. Since then, supporters of the plea have not permitted it to be buried in the musty annals of legal history. It has been reintroduced into South Australia by legislation,[2] and Victorian[3] and English law reform bodies have proposed the same (Law Reform Commission of Victoria 1991; English Law Commission 1989). On the other hand, two recent Australian law reform bodies have recommended against its reintroduction (Gibbs Committee 1990; Model Criminal Code Officers Committee 1998).

This article argues that the plea of excessive self-defence should form part of Australian criminal law. It begins by canvassing the main arguments for such a plea, drawing upon the views of certain criminal law theorists, judges and commentators, and the general community. There is then an evaluation of the various formulations of the plea by judges, legislators and law reform bodies, with the aim of dispelling the concern that juries are experiencing difficulty in understanding and applying the plea. Next comes a discussion of the way the plea operates in cases where a person has killed in defence of the person, followed by its operation in cases involving killings in defence of property. The discussion is strengthened by the findings of an empirical study conducted in New South Wales on the fatal use of firearms in defence of person and property (Lambeth & Yeo forthcoming).

Before proceeding further, I wish to emphasise that the ensuing discussion is about an accused person's response to a threat, in particular, the use of excessive force in defence. It is not concerned as such with that person's belief as to the nature of the threat and the debate over whether the belief should be subjectively or objectively assessed by requiring such belief to be based on reasonable grounds (for a detailed discussion see Gillies 1997:321-3; Yeo 1990:201-219). The expression 'subjective' refers to the accused's actual mental state, personal characteristics or circumstances, while 'objective' denotes a reasonable person's thinking or response towards a matter. Certainly, in a given case, the determination of an

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1 It was first recognised in Australia by the Victorian full court in R v Mckay.

2 Section 2 of the *Criminal Law Consolidation (Self-Defence) Amendment Act* 1997 (SA), amending s 15 of the *Criminal Law Consolidation Act* 1935 (SA).

3 Strictly speaking, the Commission did not recommend reinstatement of the plea but proposed a new offence of culpable homicide. The point here is that the Commission agreed that a person who killed using excessive force in defence should not be guilty of murder nor be acquitted entirely of any offence. The Commission's proposal will be discussed in further detail below.

accused's response as reasonably necessary or excessive will partly depend on which of the two types of beliefs the response is measured against. However, the question of whether a plea of excessive self-defence deserves a place in the criminal law does not depend on which type of belief is subscribed to.[4] For instance, the very same debate over the recognition of the plea occurs in England and South Australia (where the belief as to the nature of the threat is entirely subjective) or in Canada and New South Wales (where such a belief must be based on reasonable grounds).

I. In Favour of the Plea of Excessive Self-Defence

The plea of excessive self-defence is strongly endorsed by criminal law theory and criminal process considerations, the legal fraternity and the general community.

Support of criminal law theory and criminal process considerations

The plea of excessive self-defence is supported by the criminal law theory of justification and excuse (Fletcher 1978). This theory enables criminal defences to accord closely with moral values and community expectations. A person claiming a justification acknowledges her or his responsibility for the harmful conduct but contends that it was done in circumstances which made the conduct rightful in the eyes of society. Since society approves or at least tolerates the conduct, the actor deserves praise rather than blame. The focus then is on the person's act or conduct rather than the person as an individual. A person claiming an excuse likewise acknowledges the harm done by her or his conduct. Unlike justifications, however, the person concedes that her or his conduct is disapproved of by society. The plea has acknowledged that, while the conduct was wrong, there were particular circumstances which made it right that society should render the actor blameless for the harm committed. The focus then was on the person as actor rather than the conduct performed.

Self-defence is traditionally recognised as a justification because society regards the conduct of the defender as preferable to the conduct of her or his aggressor (Uniacke 1994; Kadish 1976). This may be because society regards the aggressor's wrongful conduct as rendering her or his life less valuable than the defender's. Or it may be that the defender is exercising her or his natural right to resist aggression, or that society views the defender as protecting the general peace of the community as well as her or his own person. Before society is prepared to praise or condone the defender's action, there are several requirements which must be satisfied. One of these is the requirement that the force used by way of self-defence was reasonably necessary to combat the threatened danger. This requirement serves to ensure that the defender's actions resulted in less harm (sometimes described in terms of 'a lesser evil' or conversely 'a greater good') than what would have transpired from the threatened attack (Fletcher 1978:788-98; Uniacke 1994:11).

The doctrine of excessive self-defence, as its name suggests, is concerned with the requirement of the degree of force applied by way of self-defence. Persons relying on the doctrine have an *initial right* (Elliott 1973:734) to taking defensive action in that they honestly believed that they were being threatened with serious personal injury. The defender failed to successfully plead self-defence because the force applied to counter the attack was determined objectively to be not reasonably necessary to counter the threat.

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4 The only qualification to this assertion is Deane J's proposal in *Zecevic* (680-681) for a purely subjective belief as to the nature of the threat to comprise an alternative basis for the plea of excessive self-defence. However, his Honour stands alone in making this proposal.

In these circumstances, society did not approve the defender's conduct because the harm he or she inflicted was in fact greater than that which was sought to be avoided. In other words, in such a case, the defender's actions were not justifiable and he or she could not be acquitted on the basis of a plea of self-defence. However, the defender was not altogether blameworthy because he or she *genuinely* believed that the force applied was reasonably necessary to counter the threat. The doctrine of excessive self-defence highlighted such a genuine belief plus the fact that the defender had an initial right to self-defence. Circumstances therefore exist warranting the defender to be exculpated despite applying excessive force. Hence, the doctrine is excusatory in nature and functions by salvaging those aspects of an unsuccessful justificatory plea which have the effect of rendering the accused less blameworthy than one who kills without recourse to self-defence.

Although the defender who has applied excessive force in self-defence is deserving of exculpation, the doctrine does not completely exonerate her or him of blame. This is because the accused's act of killing is still construed as an act of unlawful homicide because he or she has applied force beyond that reasonably permitted by the circumstances. By applying excessive force, the accused is morally culpable of unreasonably misjudging the type of force needed to counter the threatened danger (Uniacke 1994:46-7). This is consistent with treating gross negligence as the basis of involuntary manslaughter (Law Reform Commission of Victoria 1991: para 214). Having made this comparison, it should be cautioned that the doctrine of excessive force ought to have a place of its own in the criminal law rather than be subsumed under the concept of negligent manslaughter (Fisse 1990:106, 515-8).[5] This is because the doctrine operates as a *defence* to a charge of murder while negligent manslaughter is a type of *offence*. Thus, while the ultimate outcome might be the same, namely a conviction for manslaughter, the doctrine is needed to achieve that result in the event that the prosecution decides to charge the accused with murder rather than negligent manslaughter.

At this juncture, one might ask: if the doctrine of excessive self-defence has only a partially exculpating effect, might it not be taken into account at the sentencing stage? This was advocated by the Model Criminal Code Committee.[6] Of course, such a suggestion is premised upon the replacement of a fixed penalty for murder with some flexibility in sentencing.[7] Proponents of this approach contend that partial excuses to murder such as provocation, diminished responsibility and excessive self-defence owe much of their origin to circumventing the fixed penalty for murder (Thomas 1978:21, 28-9; Gibbs Committee 1990: para 13). Once that is removed, they see no reason why these partial excuses cannot be transformed into pleas for mitigation of sentence.

I contend that the fixed penalty should not be accredited with such significance in the development of partial excuses to murder (Wasik 1982:520-1). Other more influential considerations are at play, one of them being that the partial excuse is applied to murder due to the very expression of the name of the crime itself (Law Reform Commission of Victoria 1991: para 216). As one legislator has put it: 'In our culture, to describe someone as a 'murderer' is to employ the most bitterly and effectively stigmatising epithet available in the language'[8] (Woods 1983:162). That being the case, it would be most inappropriate,

5 The proposal of the Law Reform Commission of Victoria to create a new offence of culpable homicide comes close to doing this: see Part II of this article.

6 At least this was implied. See the Model Criminal Code Officers Committee (1998:113) where it proposed that excessive self-defence should be treated like provocation which the Committee recommended should cease to be a partial defence to murder.

7 This has already occurred in several Australian jurisdictions including New South Wales and Victoria. South Australia continues to prescribe a mandatory penalty of life imprisonment for convicted murderers.

indeed, unjust, to label a person who has acted in excessive self-defence as a 'murderer' and then to proceed to temper her or his sentence. Besides this injustice to the offender, there are also community demands and expectations to consider. My assertion here is that the community will want 'to reserve its major condemnation for the cold-blooded killer, and to have the mistaken victim of an attack convicted of the same crime tends to weaken this condemnation' (Smith 1972:543). Evidence of such a community view will be provided below.

Another reason for maintaining excessive self-defence as an exculpatory plea rather than as a sentencing factor lies in the functioning of the criminal process itself. Relegating the doctrine to the sentencing stage would mean that the evidence supporting it would not be subject to the same exposure and scrutiny as would be the case if it were introduced at the trial proceedings. Consequently, there might be insufficient evidence of excessive self-defence for sentencing purposes. A related matter is that the sentencing judge would not know whether the jury had convicted the defendant of murder because it had rejected the plea of self-defence outright or had found the defendant to have killed in self-defence but with excessive force (Law Reform Commission of Victoria 1991: para 216). Such a determination would be crucial to the judge when deciding on the specific sentence to be imposed on the particular defendant.

Support of the legal fraternity

An impressive body of judges, including most members of the High Court who have considered the matter,[9] would agree entirely with the theoretical and practical considerations presented thus far in favour of reintroducing the plea of excessive self-defence (Yeo 1988:353-4). A few examples will suffice. In the High Court case of *Viro v The Queen*, Aickin J said that there was

> a real distinction in the degree of culpability of an accused who has killed having formed the requisite intention without any mitigating circumstance, and an accused who, in response to a real or a reasonably apprehended attack, strikes a blow in order to defend himself, but uses force beyond that required by the occasion and thereby kills the attacker (at 180, and cited in *Zecevic* at 684, Gaudron J).

In the earlier High Court case of *R v Howe*, when considering a similar fact situation, Dixon CJ had opined that 'it seems reasonable in principle to regard such a homicide as reduced to manslaughter' (at 461). The majority in *Zecevic* who abolished the plea expressly conceded the strength of this reasoning for its retention, with Mason CJ going so far as to say that he still believed 'that the doctrine ... expresses a concept of self-defence which best accords with acceptable standards of culpability' (at 653). A similar sentiment was expressed recently by the House of Lords (Lord Lloyd at 92) in *R v Clegg* when it described the plea as "attractive" but unfortunately stopped short of introducing it on the ground that such law-making was properly a matter for decision by the legislature.

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8 The then NSW Attorney-General, Mr Frank Walker, when introducing amending legislation to the homicide provisions in the *Crimes Act* 1900 (NSW) and justifying why the term "murder" should be retained in the law.

9 Only Gaudron J remains of the High Court judges who considered the matter in *Zecevic*, and she was in favour of the plea. The six members who have since joined the High Court have yet to rule on the matter. Of previous High Court judges who have done so, it appears that only Barwick CJ, Gibbs and Murphy JJ clearly refused to recognise the plea on conceptual rather than pragmatic grounds.

Many commentators have likewise thrown their weight behind the plea of excessive self-defence, having reached this conclusion after detailed legal analysis and moral reflection. Again, only a few examples will suffice. Professor Colin Howard, an eminent Australian criminal law expert, made the following comment in relation to homicide cases involving the use of excessive force in self-defence:

> The prominent question in practically every, perhaps every, case is going to be ... whether D really thought it was necessary to go as far as he did. By hypothesis he is going to be convicted of manslaughter because he went too far. It would not be a good rule to convict him of murder because his beliefs in a violent situation appear later on to a jury to have been unreasonable. If he can induce them to believe him to the extent of feeling reasonable doubt, this should be enough (Howard 1964:452).

Another eminent Australian commentator, Ian Elliott, concluded his examination of several Australian cases and hypothetical examples involving the use of excessive force in self-defence with the following observation:

> In each of these examples, the defendant who acts unreasonably may be actuated by covert malice. But malice should not be presumed from the fact that the response was disproportionate. It is equally likely that the case is one in which D had made an honest, albeit plainly unreasonable, error of judgment. One would have thought this to be precisely the kind of case in which a verdict intermediate between murder and complete acquittal would be appropriate (Elliott 1973:735-6).

Perhaps the most colourful observation by commentators in support of the plea was the one made by the framers of the Indian Penal Code (Macaulay et al 1888). They justified the inclusion of a provision[10] on excessive self-defence as a partial defence to murder on the following basis:

> [T]hat a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the code if he kills the same assailant, that there should be only a single step between perfect innocence and murder, between perfect impunity and liability for capital punishment, seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly we think, to visit him with the highest punishment if he inflicts death (Macaulay et al 1888:147) [11]

The last sentence in the comment highlights the fact that the accused has killed while exercising her or his legal right of self-defence and should thereby be regarded as less blameworthy than a person who has killed without any similar extenuating circumstances.

Support of the general community

Thus far, I have presented the views of the legal fraternity in support of the plea of excessive self-defence. While these views are critical to the discussion, we should, wherever possible, guard against enacting laws which have the support of lawyers and academics but not of the general community (Yeo 1999:203). The findings of a recent New South Wales survey suggest that the community also supports such a plea (Lambeth & Yeo forthcoming). The survey had the primary aim of determining whether there were significant differences between rural and urban residents concerning the use of firearms in defence of person or property. Selection of the respondents was through friends, family and neighbours of students at Southern Cross University situated in Lismore and, in the case of rural respondents, also through several rural community service organisations.

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10 Namely, exception 2 to s 300 of the Indian Penal Code which operates to reduce the charge from murder to culpable homicide not amounting to murder (which is the equivalent of manslaughter under the Code).

11 The Code presrcibes the death penalty for convicted murderers.

Excluded from the sample were persons involved in the criminal justice system (such as law students and police officers) on the ground that they would have opinions that were driven by their knowledge of the system. Of the 160 questionnaires obtained, 78 were by rural dwellers and 82 were by urban dwellers. The gender distribution was 87 males and 68 females with 5 respondents not disclosing their gender. Age-wise, the sample comprised 19 people who were between 18-24 years of age, 35 people who were between 25-34 years, 46 people who were between 45-54 years, 13 people who were between 55-64 years and 6 people who were 65 years and above. Hence, the sample comprised a reasonably wide spread of people in terms of their location of residence, gender and age. The questionnaire did not ask the respondents for their income, level of education nor their political affiliation since the survey was more concerned with other variables such as the location of residence, knowledge of the use of a firearm and prior experience of threatening situations. However, it is submitted that the sample is nevertheless sufficiently representative of the general community. In any case, sampling variation is unlikely to account for the large difference between the proportion of the sample who holds both that the use of firearms is unnecessary, and that the defendant should not be convicted of murder (ranging between 52.6% to 83.2%), and the state of the present law which would place this proportion as zero[12].

To test the hypothesis that the community supports the plea of excessive self-defence, the respondents were asked whether they thought the accused in three given case scenarios should be convicted of murder, convicted of manslaughter or acquitted of both murder and manslaughter. The respondents were not provided with any information on the laws of unlawful homicide and self-defence. Accordingly, their responses were based on their common sense and intuitive moral judgment. The first case scenario (hereinafter called *Pam's Case*) which the respondents considered was derived from the New South Wales Court of Criminal Appeal case of *R v Walden*. It read as follows:

> Pam, a woman in her forties, is a sheep farmer who lives alone with her aged mother on a farm a 100 kms from the nearest town. Pam had a quarrel with Ian, her male neighbour who was taller and larger than her, over the installation of telephone lines. On a recent occasion, Ian had threatened Pam with an iron bar. One day, Pam came across Ian and an employee of his cutting down her telephone line on her land. She remonstrated with Ian but he carried on cutting the line. Pam then took a rifle from her ute and pointed it at Ian. On seeing this, Ian, who was unarmed, called out to his employee and walked towards Pam in a menacing manner. Pam shot Ian in the chest when he was 4 metres from her, killing him.

To the question 'Do you think that Pam's use of the gun was reasonably necessary in the circumstances?', 54.9% said 'No' and 45.1% said 'Yes'. Of those who had judged Pam's use of the gun to be unnecessary, 68.6% thought that she should not be convicted of murder. This comprised 57.8% who thought that Pam should be convicted of manslaughter, and 10.8% who believed that she should be acquitted of both murder and manslaughter. Presumably, this last group believed that the appropriate offence was a lesser one such as physical assault.

The second case scenario (hereinafter called *Joe's Case*) was based on the Victorian case of *Hackshaw v Shaw* and was as follows:

> Joe is a cattle farmer whose farm is situated 35 kms from his nearest town. He has a petrol bowser near his farmhouse. There has been a history of thefts, particularly of petrol, from Joe's farm. He had put expensive locks on the bowser but they were cut off. Joe had

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12 This is because a person who killed by using unnecessary force in self-defence will invariably be convicted of murder.

> reported the thefts to the police but they told him that he would need to get better evidence, such as the description of the car used in the theft, before they could act. Joe lies in wait at night for the thief or thieves. He is armed with a rifle and plans to fire at any car used by the thieves with the intent of making it undrivable. One dark night, Joe sees a car drive up to the petrol bowser without its lights on. He believes that there is only one person in the car and sees that person get out to put the hose into the car's petrol tank. Joe fires two shots at the car from a distance of 30 metres with the intention of immobilising it, at the same time calling to the thief to abandon the car. [There was a passenger in the car who was killed by one of Joe's shots.]

The vast majority of respondents (83.8%) judged Joe's act of shooting to be unnecessary. Yet, when asked to decide Joe's criminal liability (if any), 83.2% of these respondents said that he should not be convicted of murder. This comprised of 72.5% who thought that Joe should be convicted of manslaughter, and 10.7% who believed that he should be acquitted of both murder and manslaughter. This last group presumably believed that Joe was only guilty of some lesser offence such as physical assault.

The third case scenario (hereinafter called *Bob's Case*) was based on the Victorian case of *R v McKay* and read as follows:

> Bob is a poultry farmer whose farm is situated in the outer suburbs of a city. There has been a history of thefts of his chickens. Bob had reported the thefts to the police but, except for one successful prosecution, the thefts have continued. As daylight was breaking one morning, he spotted a thief holding some chickens among the chicken pens. Without calling out a warning, Bob used his rifle to fire a shot at the thief from a distance of 45 metres. The thief dropped the chickens and started to run and Bob fired another four shots in quick succession, aiming at his legs. Unfortunately, a bullet hit the thief's chest and killed him.

As may have been expected, a vast majority of respondents (86.4%) considered that Bob's conduct of shooting was not reasonably necessary in the circumstances. Yet, when it came to the type of offence, 57% of these respondents thought that he should not be convicted of murder. Of this group, 52.6% said that Bob should be convicted of manslaughter, while 4.4% believed that he should be acquitted of both murder and manslaughter. This finding is similar to those for Pam and Bob, namely, that of those members of the community who regard the force used by Pam, Joe and Bob to have been excessive, a sizable majority would find a murder conviction too harsh. The very likely explanation for this lessening of moral culpability for the killings is because all three case scenarios involved the use of force in defence of the person or of property.

The huge support for the plea of excessive self-defence received from virtually every quarter should have seen it firmly entrenched in Australian criminal law. The single obstacle to this, and the primary reason for the majority of the High Court in *Zecevic* abolishing the plea, was the concern that the law of self-defence would be unduly complicated by the plea and that juries would be unable to comprehend it. Implied by this concern is the view that it is impossible to devise a satisfactory formulation of the plea which could be readily understood and applied by jurors. In the next Part, I examine some formulations of the plea to show that a sufficiently simple formulation is possible.

II. Formulations of the Plea of Excessive Self-Defence

At the outset, I recognise that the formulation of excessive self-defence by Mason J in *Viro* was, without doubt, flawed by its lack of coherence (Fairall 1988:29). However, I query the assessment by the majority of the High Court in *Zecevic* that the formulation 'contain[s] refinements which cannot be expressed in a way which makes them readily understandable'

(at 660). The same conclusion was reached recently by the Model Criminal Code Committee when it said:

> What is required is a test which sets out with some precision how the judge is to direct the jury on excessive self-defence. When this task is embarked upon, the result tends to be an unworkably complicated test more apt to confuse than assist (Model Criminal Code Officers Committee 1998:113).

The Committee made this remark after referring to several post-*Zecevic* formulations of the plea. Unfortunately, the Committee failed to explain why it considered those formulations to be unworkable.[13]

My examination reveals the formulations as subscribing to one of two models. The first model asks whether *the accused* believed, albeit unreasonably, that the force applied by her or him was reasonably necessary by way of self-defence. The second model asks whether *a reasonable person* in the accused's position would regard the force applied by the accused to be unreasonable by way of self-defence. The difference between the two models is that the first model is both subjective and objective, whereas the second is purely objective. Under the first model, its subjective nature lies in its focus on the particular accused's belief as opposed to what a reasonable person would have believed. Its objective nature lies in the objective assessment that the accused's belief was unreasonable. Under the second model, the test is purely objective since it does not pay any regard to the accused's personal characteristics. The only measure of personalisation is that the reasonable person's evaluation of the force is done in the light of the circumstances as perceived by the accused.

There are several reasons why the first model is to be preferred to the second. Its emphasis on the accused's belief ensures that, in the determination of culpability, sufficient account is taken of the personal characteristics of the particular accused. Thus, characteristics such as the accused's age, sex, physical or mental[14] disabilities, religion and ethnicity would be relevant in assessing the reasonableness or otherwise of the accused's belief in the necessity of the force applied by her or him. It is only fair that such personal attributes should be considered. In line with the theory of justification and excuse, the community cannot realistically expect more of a person than to take reasonable defensive action in the face of an actual or perceived threatened danger. When assessing the reasonableness of the defensive action, it accords with community values and expectations to consider some of the accused's personal attributes. For instance, a physical defect such as blindness or deafness should surely form part of the assessment of what the accused's response could reasonably be. The other characteristics listed should likewise be relevant. By contrast, the second model simply speaks of a reasonable person, albeit in the accused's position. This is vastly different from regarding the reasonable person, as the law does elsewhere,[15] as sharing the accused's personal characteristics. However, the main difference between the two models is that the jury would be required under the second model to consider the issue of force from the viewpoint of the reasonable person while the first model would require that consideration to be made, as it were, through the eyes of the accused.

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13 The Committee did so by simply stating (at 113) that '[a]s a concept, excessive self-defence is inherently vague. This aspect has to date resulted in no satisfactory test being promulgated'.

14 In this regard, there are New South Wales case authorities which require an accused's mental disability to be taken into account when assessing the accused's appreciation of her or his response to the danger: see *Conlon* (intoxicated condition) and *Kurtic* (paranoid delusions).

15 Notably, the defences of provocation and duress. For provocation, see *Stingel v The Queen*; and for duress, see *R v Abusafiah*.

Some examples of the two models may now be given. A common law ascription of the first model is contained in Deane J's dissenting judgment in *Zecevic*. Unlike the majority in that case, his Honour was not daunted by any concerns that the plea of excessive self-defence was unworkable and set out to formulate the plea in simple terms. His proposed formulation is worth citing in full:

> The criminal onus of disproof which rests on the Crown in relation to self-defence would, of course, need to be carefully explained. Otherwise, the jury could be instructed to the effect that self-defence constitutes a complete defence if, when the accused killed the deceased, he was acting in reasonable self-defence and that he had been so acting *if he had reasonably believed that what he was doing was reasonable and necessary* in his own defence against an unjustified attack which threatened him with death or serious bodily harm. Those elements of the defence would, of course, need to be adjusted according to the circumstances of particular cases ... [T]*he jury could thereafter be told that, even though they were satisfied that the belief of the accused was not reasonable*, it sufficed to reduce what would otherwise be murder to manslaughter if, when the accused killed the deceased, he believed what he was doing was reasonable and necessary in his own defence against an unjustified attack of the relevant kind (at 681, italics added).

The italicised parts of the quotation show that Deane J's formulation belongs to the first model.

The Law Reform Commission of Victoria has likewise adopted the first model in its formulation of a new offence of culpable homicide. The Commission recommended that the doctrine of excessive self-defence should not be reintroduced (Law Reform Commission of Victoria 1991: recommendation 26). However, this decision was taken only because the Commission had recommended the abolition of all objective requirements presently contained in the general plea of self-defence (Law Reform Commission of Victoria 1991: recommendation 28). Under this scheme, the general plea (as opposed to the partial defence of excessive self-defence) would acquit a person of murder who genuinely but unreasonably believed that deadly force was necessary and proportionate to the threatened danger. However, the Commission felt that such a person should not be entitled to a complete acquittal given her or his grossly unreasonable mistake. Its solution was to create a new offence of 'culpable homicide' which was less serious than manslaughter (Law Reform Commission of Victoria 1991: recommendation 27).[16] The offence reads:

> A person who kills another in self-defence on the basis of a belief that was grossly unreasonable either in relation to the need for force or in relation to the degree of force that was necessary should be guilty of the offence of culpable homicide.

This formulation exemplifies the first model by referring to the grossly unreasonable basis of the accused's belief. As an aside, casting the doctrine of excessive self-defence as an offence seems a strange way of solving the problem of jury incomprehension. I would have thought that a jury which is told that a killing had allegedly occurred in self-defence would intuitively regard the circumstances from the viewpoint of a defence rather than as an offence. Be that as it may, since the Victorian proposal hinges on the radical change being made to the general plea of self-defence of completely subjectivising the accused's belief as to the reasonableness of the force applied in self-defence, such a proposal is unlikely to find much support. In the event that the proposal becomes law, serious attention should be given to the concern previously expressed that recasting the doctrine of excessive self-defence as an offence would prevent it from being considered should the prosecution decide to charge the accused with murder.[17] The Commission sought to allay this concern

16 The Commission proposed a maximum penalty of 7 years' imprisonment which accorded with the one for the offence of culpable driving causing death under s 318 of the *Crimes Act* 1958 (Vic).

by suggesting that its new offence could be put to the jury as an alternative to murder (Law Reform Commission of Victoria 1991: para 223). I would go further and contend that this should be made a compulsory legislative requirement whenever self-defence is raised in a murder trial.

Turning now to examples of the second model, one of the best common law formulations was devised by Walsh J in the Supreme Court of Eire case of *The People (A-G) v Dwyer*. That decision expressly adopted the Australian common law plea of excessive force prior to its demise in *Zecevic* (McAuley 1991:194). Walsh J had this to say:

> When the evidence discloses a question of self-defence and where it is sought by the prosecution to show that the accused used excessive force, that is to say more than would be regarded as objectively reasonable, the prosecution must establish that the accused knew that he was using more force than was reasonably necessary. Therefore, it follows that if the accused honestly believed that the force that he did use was necessary, then he is not guilty of murder. The onus, of course, is upon the prosecution to prove beyond reasonable doubt that he knew that the force was excessive or that he did not believe that it was necessary. If the prosecution does not do so, it has failed to establish the necessary malice (at 424).

As appears in the opening sentence of the above quotation, it is for the jury to evaluate whether the force used by the accused was reasonable in self-defence. The accused would be guilty of manslaughter, not murder, if the jury found that the force was unreasonable but the accused honestly believed that it was reasonable.

An example of the second model by a law reform body is contained in the draft criminal code of the English Law Commission charged with codifying the criminal law. Clause 59 of the code, entitled 'use of excessive force', provides as follows:

> A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of the force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force in public or private defence),[18] but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.[19]

When making this recommendation, the Commission noted that the High Court in *Zecevic* had abolished the plea of excessive self-defence 'not because it was thought to be wrong in principle, but because it was too difficult for juries to understand and apply' (English Law Commission 1989: para 14.19). The Commission believed that such principle should not be forsaken on account of expediency and, in any case, was confident that its proposed formulation would enable trial judges to direct the jury in readily comprehensible terms (English Law Commission 1989: para 14.9).

A final example of the second model, this time in the form of enacted legislation, is contained in the South Australian *Criminal Law Consolidation Act* 1935. Section 15(2) states:

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17 See the main text accompanying footnote 5.

18 Section 44 of the draft code specifies a number of circumstances where force is lawfully permitted to be used. They include the protection of oneself or another from unlawful force, the prevention or termination of a crime, the protection of property from unlawful appropriation, destruction or damage, and the prevention or termination of a trespass to one's person or property. The plea of use of excessive force is therefore not confined to cases of killings in defence of the person: see further Part IV of this article.

19 This clause is to be read with clause 13 of the draft code which specifies that the Crown bears the onus of proving that the facts supporting the plea of excessive self-defence did not exist.

> It is a partial defence to a charge of murder (reducing the offence to manslaughter) if:
> (a)the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose;[20] but
>
> (b)the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.[21]

As expressed in s 15(2)(b), it is for the jury to decide whether the accused's conduct was reasonably proportionate to the threat which the accused believed he or she was facing.[22]

At the commencement of this Part, I argued in favour of the first model on grounds of criminal law theory and fairness. However, at the practical level, juries are likely to find difficulty applying that model since it requires them to take into account more of the accused's personal characteristics than they can realistically comprehend. How, for instance, is a juror to determine the reasonableness of an intoxicated or a partially blind person's belief in the need for certain force to be applied in self-defence? In this regard, juries would find the second model much more manageable since all they would be required to do is decide the way they themselves might respond to the threatened danger confronting the accused. In the effort to devise a formulation of excessive self-defence which is readily comprehensible to juries, I would contend that the theoretical superiority of the first model should give way to the practicality of the second.

It is important to appreciate that which model is selected directly impacts on the law of general self-defence. The inquiry should properly begin with the test for the force used under the general plea of self-defence. Only then would the formulation for excessive self-defence follow to the effect that even if that test were not met, the accused would be guilty of manslaughter, not murder, if he or she had genuinely believed the force used to be reasonably necessary in self-defence. The Australian common law of general self-defence currently subscribes to the first model as evinced by the ruling in *Zecevic* that the test is 'whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did' (at 661, Wilson, Dawson and Toohey JJ). Had the High Court in that case reaffirmed the plea of excessive self-defence, it would certainly have proceeded to cast the plea in terms of whether the accused believed, albeit unreasonably, that it was necessary in self-defence to do what he or she did. To spare juries the complexities arising from having to determine whether the particular accused's belief was unreasonable, the general law of self-defence needs to subscribe to the second model. Such a change is not as radical as it seems since this appears to have been the law until *Zecevic*.[23]

There are thus ready made and comprehensible formulations of the plea of excessive self-defence awaiting adoption by judges or the legislature. As we have noted earlier, the Model Criminal Code Committee concluded that the formulation by the English Law Commission and the South Australian provision were unworkable but failed to provide any explanation or reasons for thinking so. To the contrary, the House of Lords in *Clegg* appears to have regarded the English Law Commission's formulation as comprehensible to juries,

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20 Section 15(3) states that a person acts for a 'defensive purpose' if he or she acts in self-defence or in defence of another, or to prevent or terminate the unlawful imprisonment of himself, herself or of another.

21 As for the onus of proof, s 15(5) states that where the accused raises the defence, it is taken to have been established unless the prosecution establishes beyond a reasonable doubt that the accused is not entitled to the defence.

22 This may be contrasted with the former s 15(2)(b) which was introduced by the South Australian legislature in 1991. That provision subscribed to the first model by stating that the 'person's belief as to the nature or extent of the necessary force is grossly unreasonable, judged by reference to the circumstances as he or she genuinely believed them to be'.

23 Somewhat surprisingly, none of the High Court judges in *Zecevic* expressed their reasons for the change.

and the South Australian provision appears to be working reasonably well in practice since its inception in 1997.[24] The same may be said of Walsh J's formulation in the Irish case of *Dwyer* with one commentator reporting that there was no evidence that the plea of excessive self-defence has caused confusion or injustice in its operation over the past 27 years (Charleton 1992: 159). There is also the study conducted by the Law Reform Commission of Victoria on all homicide cases which were prosecuted in Victoria from 1981 to 1987 (Law Reform Commission of Victoria 1991). The information supplied for that study included all the instances when the plea of excessive self-defence was used. The study found that, while a direction on the plea would have made the jury's task more difficult, this did not seem to have added significantly to the length of time taken to try such cases (Law Reform Commission of Victoria 1991: para 219). Furthermore, experienced criminal lawyers reported that, despite the complexities, juries frequently reached the appropriate verdict in most of the cases where excessive self-defence was pleaded (Law Reform Commission of Victoria 1991: para 219).

By way of a final observation, I note that the Model Criminal Code Committee's own provision on self-defence lends itself well to the formulation of a plea of excessive self-defence. The relevant part of the provision is as follows:

> 313. A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in self-defence.
>
> 313.1 Conduct is carried out by a person in self-defence if the person believed that the conduct was necessary to defend himself or herself or another person ...[25] and his or her conduct was a reasonable response in the circumstances as perceived by him or her.
>
> 313.2 This section does not apply if force involving the intentional infliction of death or really serious injury is used in protection of property or in the prevention of criminal trespass or in the removal of such a trespasser.

Should the Committee be persuaded to recommend the reintroduction of the plea of excessive self-defence, it could simply add a clause such as the following after the above provision on self-defence:

> A person charged with murder shall have the offence reduced to manslaughter if he or she believed that the conduct was necessary to defend himself or herself or another person ...[26] and his or her conduct was not a reasonable response in the circumstances as perceived by him or her.

This formulation, together with the Committee's general plea of self-defence, subscribes to the second model which makes the law much more readily understandable by juries and easily applicable by them.

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24 Ideally, of course, a survey of trial judges, legal counsel and jurors is required to confirm this observation.

25 The provision also lists the prevention or termination of unlawful imprisonment; the protection of property from unlawful appropriation, destruction, damage or interference; the prevention of criminal trespass to land or premises; and the removal from any land or premises of a person who is committing a criminal trespass.

26 Whether the plea of excessive self-defence should be extended to the other circumstances listed in the Committee's provision on self-defence is debatable. Part IV of this article will suggest that the plea could be so extended.

III. Excessive Force in Defence of the Person

In this Part, I consider in more detail *Pam's Case* which formed part of my study on community attitudes to people who use deadly force in defence of themselves and others. The case was constructed to include a mixture of competing factual considerations. There was Pam, a woman on her own in an isolated spot but armed with a gun; and there was Ian who was unarmed but much bigger, possessing a violent nature and in the company of another man. It would be useful here to apply some of the formulations of excessive self-defence to *Pam's Case* to assess their workability and whether they might in any way be improved. The two formulations chosen for this exercise are the South Australian provision and the one which I suggested could readily be adopted by the Model Criminal Code Committee.[27]

For the South Australian formulation to operate in Pam's favour, she must have genuinely believed that her fatal shooting of Ian was necessary and reasonable in self-defence. Since Ian was fast approaching her in a menacing manner coupled with his recent threat of violence very much on her mind, I envisage that the prosecution would have difficulty persuading the jury to reject Pam's claim that she genuinely believed that her shooting was necessary and reasonable to defend herself against serious physical harm by Ian. The next requirement under the South Australian formulation is for Pam's fatal shooting of Ian to be regarded by the jury as being 'reasonably proportionate to the threat' that she genuinely believed to exist. Pam would be completely acquitted of any offence if the prosecution failed to convince the jury beyond a reasonable doubt that the shooting was not reasonably proportionate to the threatened danger as she perceived it. This is on account of the general plea of self-defence being made out. However, it is quite possible that the jury would decide that Pam's conduct was not reasonably proportionate to the threatened danger as perceived by her, in which case, they would acquit her of murder and convict her of manslaughter instead.

While the above discussion indicates that the South Australian formulation is workable, one of its features requires alteration. This is the expression 'reasonably proportionate to the threat' which should be replaced with 'necessary and reasonable to counter the threat'.[28] The preferred expression is a much more generalised measure which may include a consideration of the proportionality between the force used and the perceived danger but is not confined to such a consideration. Ease of application is therefore facilitated by adopting the generalised inquiry since juries would not be required to balance the force applied and the perceived threatened danger with any great precision. This was certainly the opinion of Gaudron J (at 687) in *Zecevic* when she said that the isolation of the issue of proportionate force in the fourth proposition of the *Viro* direction on self-defence led to unnecessary complexity for juries. Her Honour preferred to relegate that issue to one of many factors by reference to which the jury would decide on the reasonableness of the belief held by the accused. Likewise, the use made by the South Australian provision of reasonable proportionality runs counter to the following observation by Wilson, Dawson and Toohey JJ in their joint judgment in *Zecevic*:

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27 See the main text accompanying footnote 26.

28 This suggested alteration would need to be done for both s 15(1)(b), which is part of the plea of general self-defence, and s 15(2)(b) which is part of the plea of excessive self-defence under the South Australian legislation. The expression 'necessary and reasonable' conforms with the same expression contained in ss 15(1)(a) and 15(2)(a) which are concerned with the accused's belief concerning the force used.

> In attempting to identify those considerations [which may assist the jury to reach its conclusion on the issue of self-defence] ... there is a danger of appearing to elevate matters of evidence to rules of law. For example, it will in many cases be appropriate for the jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part. There is no rule which dictates the use which a jury must make of the evidence and the ultimate question is for it alone (at 662).[29]

This observation is accounted for under my proposed formulation of excessive self-defence in the Model Criminal Code. Applying it to *Pam's Case*, the jury would firstly have to consider whether Pam believed that her fatal shooting of Ian was necessary to defend herself. If so, the jury would then proceed to consider whether, in their view, the shooting was a reasonable response in the circumstances as perceived by Pam. The jury would acquit her completely should they decide that her shooting was reasonable. They would, however, convict her of manslaughter should they decide that it was unreasonable. Surely, juries are competent to undertake such a systematic and logical exercise. This ready and workable formulation of the plea of excessive self-defence, with its sound underlying principle and the strong support received from both the legal fraternity and the general community, makes it a prime candidate for reintroduction into Australian criminal law.

IV. Excessive Force in Defence of Property

Here, I will consider the appropriateness of recognising a plea of excessive force in defence of property. Often, circumstances involving killing to protect property will include other considerations such as the prevention of a felony or apprehension of a felon. Both *Joe's Case* and *Bob's Case* described in my study of community attitudes towards killings in defence were good illustrations of this. I shall now apply the South Australian legislation to Joe and Bob, followed by my proposed formulation of excessive self-defence under the Model Criminal Code.

Section 15A of the *Criminal Law Consolidation Act* 1935 (SA) prescribes the general plea of defence of property which, if successfully pleaded, completely acquits the accused of any offence. Subsection (1) reads:

> (1)It is a defence to a charge of an offence if:
>
> (a)the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable-
>
> (i)to protect property from unlawful appropriation, destruction, damage or interference; or
>
> (ii)to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
>
> (iii)to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and
>
> (b)if the conduct resulted in death - the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and
>
> (c)the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

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29 It is unfortunate that, despite this ruling, the Model Criminal Code Committee has continued to treat proportionate force as a separate legal requirement when discussing the law of self-defence: see Model Criminal Code Officers Committee (1992:69); Model Criminal Code Officers Committee (1998:107, 109, 113).

It would be helpful to apply the above provision to Joe and Bob ahead of considering the South Australian formulation on the use of excessive force in defence of property. In respect of Joe, the prosecution may be hardpressed to prove beyond a reasonable doubt that he did not genuinely believe that his shooting at the car in order to immobilise it was necessary and reasonable to protect his petrol from unlawful appropriation or, alternatively, to make or assist in the lawful arrest of the thief. After all, Joe had previously tried other preventive measures without success and had been advised by the police to provide better evidence such as a description of the thief's car. Secondly, the prosecution must prove beyond a reasonable doubt that Joe intended to cause death or was reckless in realising that his shooting at the car could result in death. This is unlikely on the facts as Joe believed that the only person in the car had left it before he shot at the car, that Joe's intention was to immobilise the car, and that he had called out to the thief to abandon the car. Thirdly, the prosecution may contend that Joe did not genuinely believe that his shooting at the car was reasonably proportionate to the threat of the unlawful appropriation of his petrol or else the failure to lawfully arrest the thief. On the facts, it is again unlikely that the prosecution would succeed in doing so, with the overall result that Joe would most probably be acquitted of any charge.

With regard to Bob, the prosecution has a better prospect of proving beyond a reasonable doubt that Bob did not genuinely believe that firing several shots at the thief's legs was necessary and reasonable to protect his chickens or to make or assist in the lawful arrest of the thief. Arguably, Bob should have delivered a warning shout or shot before firing at the thief. Without such a warning, the thief may have been led to think that Bob was intent on shooting him and that he should flee in fear of his life. Even if Bob had such a genuine belief, the prosecution may contend that in firing several shots in quick succession at the moving figure from a distance of 45 metres, Bob must have realised the risk of fatally shooting the thief. Finally, the prosecution may try to prove beyond a reasonable doubt that Bob's shooting was not reasonably proportionate to the threat of losing his chickens or of failing to arrest the thief. This may succeed on the basis that no warning was issued before Bob commenced firing at the thief. All told, the likelihood is that Bob would not succeed in his plea of defence of property and would likely be convicted of murder (cf Yeo 2000:745).

Dealing now with the South Australian formulation of excessive force in defence of property, s 15A(2) of the legislation provides:

> (2)It is a partial defence to a charge of murder (reducing the offence to manslaughter) if -
>
> (a)the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable -
>
> [circumstances (i), (ii) and (iii) of s 15A(1)(a) are repeated here];
>
> (b)the defendant did not intend to cause death; but
>
> (c)the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

With regard to Joe, I had earlier on tentatively concluded that he would be able to successfully rely on the defence under s 15A(1) to secure a complete acquittal. However, were the jury to decide that Joe's act of shooting was not reasonably proportionate to the threat to his property, Joe may then contend that he had genuinely believed his conduct to have been reasonably proportionate. A failure by the prosecution to rebut this contention beyond a reasonable doubt would result in Joe being found guilty of manslaughter only, not murder.

As for Bob, s 15A(2) would most likely enable him to avoid a murder conviction. This is provided the prosecution failed to prove beyond a reasonable doubt that Bob did not genuinely believe that his shooting was necessary and reasonable to protect his property or else to assist in the arrest of the thief. Assuming that the jury decided that his shooting was not reasonably proportionate to the threat, Bob may then contend that he had genuinely believed that his conduct was reasonably proportionate. Such a belief, plus the fact that he had not intended to kill the thief, would render him liable for manslaughter, not murder. This finding compared favourably with the illustration supplied by the English Law Commission for its proposed plea of use of excessive force (English Law Commission 1985:234).[30] This finding of manslaughter also conformed with the outcome of the real case of *McKay* where a chicken thief was shot and killed in closely similar circumstances. Indeed, there appeared to have been a section of the community at the time who believed that McKay should have been acquitted altogether of any criminal charge (Morris 1958:432-4; Law Reform Commission of Victoria 1991: para 215).[31] Although the South Australian provision does not go so far, it would at least spare someone like McKay from a murder conviction which would have troubled an even larger section of the general community.

The above discussion shows that the South Australian provisions on defence of property are workable and permit juries to arrive at verdicts which are in keeping with their common sense and perceptions of moral justice. However, as with the provisions on defence of the person discussed in Part III of this article, it is submitted that they could be improved considerably by replacing the words 'reasonably proportionate to the threat' with "necessary and reasonable to counter the threat". This change would provide the jury with greater flexibility in determining the degree of culpability, if any, in a given case where an accused had used fatal force in defence of property.

I turn now to consider the Model Criminal Code Committee's proposed general defence of property. In respect of Joe, it is likely that the defence would acquit him entirely of any offence. On the facts, the jury would probably accept Joe's contention that he believed his act of shooting at the car to be necessary to protect his petrol from unlawful appropriation.[32] Furthermore, the jury would probably decide that his shooting was a reasonable response to the circumstances as perceived by him. The resulting complete acquittal would therefore be the same as that arrived at by applying the South Australian general plea of defence of property.

With regard to Bob, however, the Committee's proposed general defence would not succeed. This is so quite apart from whether the jury accepted his contention that he believed his shooting to be necessary to protect his chickens or that the shooting was a reasonable response in the circumstances as perceived by him. Under the Committee's proposal, the defence would not apply in cases where force was used with the intention of inflicting death or really serious injury (Model Criminal Code Officers Committee 1992: draft code, s 313.2).[33] On the facts, it is very likely that Bob intended to cause really serious harm when he fired several shots at the thief's legs. Accordingly, he would be found guilty

30 In its subsequent report (English Law Commission 1989), the Commission reaffirmed the earlier report's proposal to recognise a plea of excessive self-defence. However, the Commission did not include the above mentioned illustration in its report.

31 The public outcry over Mckay's conviction occurred in the 1950s when it could be argued that society was more tolerant of the use of guns to shoot someone stealing chickens.

32 Unlike the South Australian provision, the Model Criminal Code Committee's draft provision does not include the use of force to make or assist in the lawful arrest of an offender or alleged offender. This is probably an oversight.

of murder unless the Model Criminal Code provided for a plea of excessive force in defence of property. The Committee's recommendation not to do so goes against the finding of my study that 57% of respondents believed that Bob should not be convicted of murder. Furthermore, given the public outcry against McKay's conviction for manslaughter, it is envisaged that Bob's conviction for murder would be rejected by a large section of the general community. It is therefore imperative that the Committee revise its thinking and propose the reintroduction of a plea of excessive force in defence of property.

Conclusion

A major contention of this article has been that the majority of the High Court in *Zecevic* abolished the plea of excessive self-defence too readily because they failed to properly comprehend and apply the criminal law theory of justification and excuse underlying the plea. The theory would have initally directed the judges to set the doctrine of excessive self-defence in its wider context by relating it to the general and justificatory plea of self-defence. They could then have proceeded to discuss the relevant legal and moral principles which dictate that the doctrine should be regarded as a defence (albeit a partial one) and not as a sentencing matter. In concluding that the doctrine was best served by its recognition as a defence under Australian criminal law, the judges would have been pleased to know that such a conclusion accords with the values, demands and expectations of the general community.

Although it is still conceivable that the High Court could reinstate the plea, this appears unlikely. The most promising avenue for this to happen is through legislative innovation as has occurred in South Australia. Regrettably, in its initial response to this issue, the Model Criminal Code Committee has recommended against this course for the sole reason that no satisfactory formulation of the plea could be devised. I have sought to show this to be untrue and that existing formulations such as the South Australian one are workable and comprehensible to juries. I have also suggested that the general plea of self-defence proposed by the Model Criminal Code Committee lends itself well to a workable formulation of the partial defence. It is hoped therefore that the Committee together with legislators of the various Australian jurisdictions, will have the resolve to quickly reinstate the doctrine of excessive self-defence to its rightful place in the criminal law.

List of cases

Hackshaw v Shaw (1984) 144 CLR 614

Palmer v The Queen [1971] 2 WLR 831

People (A-G) v Dwyer [1972] IR 416

R v Abusafiah (1991) 24 NSWLR 531

R v Clegg [1995] 2 WLR 80

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33 Herein lies another difference between this defence and the South Australian one which denies the defence in cases where a person either intended to cause death or recklessly realised that her or his conduct might cause death. The South Australian provision retains the comparable part of the original provision enacted in 1991. Accordingly, the Model Criminal Code Committee was not quite correct in saying that its draft provision was 'consistent' with the 1991 provision: see the Model Criminal Code Officers Committee (1998:69).

R v Conlon (1993) 69 A Crim R 92

R v Howe (1958) 100 CLR 448

R v Kurtic (1996) 85 A Crim R 57

R v McKay [1957] VR 560

R v Walden (1986) 19 A Crim R 444

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