

# THE DEFENCE OF DURESS UNDER THE CRIMINAL CODE (WA)

MICHAEL BUSS\*

*This article examines the historical origins and development of the codified criminal law of duress in Western Australia with particular emphasis on the proper construction and application of s 32 of the Criminal Code (WA) as enacted by the Criminal Law Amendment (Homicide) Act 2008 (WA).*

The *Criminal Code Act 1902* (WA) (the 1902 Act) established a Code of Criminal Law. Section 2 of the 1902 Act provided that on and from 1 May 1902 the provisions contained in the Code set forth in the First Schedule to the 1902 Act shall be the law of Western Australia ‘with respect to the several matters therein dealt with’. The Code adopted substantially Sir Samuel Griffith’s draft Criminal Code, which had been enacted in Queensland by the *Criminal Code Act 1899* (Qld) (the Queensland Code).

By s 2 of the *Criminal Code Act Compilation Act 1913* (WA) (the 1913 Compilation Act), the 1902 Act as amended was repealed, and the compiled Act set forth in Appendix B to the 1913 Compilation Act was enacted under the title of the *Criminal Code Act 1913* (the WA Code).

## I SIR SAMUEL GRIFFITH’S LETTER DATED 29 OCTOBER 1897

Sir Samuel Griffith sent his draft Criminal Code to the Attorney-General of Queensland with a letter dated 29 October 1897.

In the letter Sir Samuel Griffith noted:

- a) The pages of the draft were arranged in two columns, the proposed provisions of the Code being printed in the right-hand column, and the sources from which they were derived, or other analogous provisions, being stated or referred to in the left-hand column.
- b) Where the source was statute law, the corresponding provisions of the statute were reprinted from Sir Samuel’s Digest of the Statutory Criminal Law of Queensland of 1896.
- c) In other cases, the sources or analogous provisions were indicated by a reference to the section of the draft Bill introduced into the House of Commons in 1880 (the 1880 Draft Bill), which was based on a Draft Code of Criminal Law of 1879 prepared by Lord Blackburn, Justice

---

\* President, Court of Appeal of Western Australia.

Barry (of Ireland), Justice Lush and Sir James Fitzjames Stephen, or other authority to which Sir Samuel had had recourse, with such notes as appeared to be desirable to elucidate any particular provision.

- d) When the proposed provision was ‘undoubted Common Law’, Sir Samuel had not thought it necessary to do more than say so.

## II SECTION 31 OF THE WA CODE AS ENACTED BY THE 1902 ACT AND THE 1913 COMPILATION ACT

Section 31 of the WA Code, as enacted by the 1902 Act and the 1913 Compilation Act, provided, relevantly:

A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say: -

- (1) ...
- (2) ...
- (3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence;
- (4) When he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution;

But this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has, by entering into an unlawful association or conspiracy, rendered himself liable to have such threats made to him.

...

Those provisions were identical to s 31(3) and s 31(4) of the Queensland Code, as enacted in 1899.

Sir Samuel Griffith’s notes in his draft Criminal Code stated, in relation to the proposed provision subsequently incorporated in s 31(3) of the WA Code:

*Common Law.*

*Compare Bill of 1880 s.56.*

*Compare German Civil Code of 1896, s.221 [sic: s 227].*

[That mode of defence which is necessary for the purpose of averting an immediate unlawful attack upon the person using such defence is not unlawful under any circumstances.]

Sir Samuel Griffith's notes stated, in relation to the proposed provision subsequently incorporated in s 31(4) of the WA Code:

*Probably Common Law.*  
*Bill of 1880, s.24.*

At common law an accused committed an offence under duress or compulsion when he or she was threatened with physical harm if the criminal act was not done.<sup>1</sup> Although duress or compulsion was accepted as a general (but not necessarily universal) defence at common law, there was uncertainty as to precisely the threats that gave rise to the defence and what, if any, were the offences excepted from it.<sup>2</sup>

In *R v Hurley*,<sup>3</sup> Winneke CJ and Pape J said that '[t]he whole body of [the common law] relating to duress is in a very vague and unsatisfactory state'.<sup>4</sup> Similarly, in *Director of Public Prosecutions for Northern Ireland v Lynch*,<sup>5</sup> Lord Simon of Glaisdale described the common law of duress as 'an extremely vague and elusive juristic concept' (686).

In *Hurley*, Smith J, who dissented in the result, set out the following 'affirmative proposition' in relation to the common law of duress:

Where the accused has been required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending ... and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused, in such circumstances at least, has a defence of duress.<sup>6</sup>

---

2 Ibid 755-62.

3 [1967] VR 526.

4 Ibid 529.

5 [1975] AC 653.

6 *R v Hurley* [1967] VR 526, 543.

That proposition has generally been accepted as an accurate statement of the common law.<sup>7</sup>

An act done or an omission made under duress or compulsion is to be distinguished from an unwilling or involuntary act or omission. An act done or an omission made under duress or compulsion involves an element of choice. The accused does the relevant act or makes the relevant omission as an alternative to a different course of action or inaction.

Duress or compulsion is also to be distinguished from necessity or extraordinary emergency. Duress or compulsion involves a course of action or inaction by the accused as a result of the conduct of another person. Necessity or extraordinary emergency involves a course of action or inaction by the accused as a result of natural or inanimate circumstances.

In *Lynch*, Lord Kilbrandon, in his dissenting speech, expressed the following view regarding the nature of the plea of duress:

[T]he decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and is therefore that of a man with, perhaps to some exceptionally limited extent, a 'guilty mind'. But he is at the same time a man whose mind is less guilty than is his who acts as *he* does but under no such constraint.<sup>8</sup> (original emphasis)

In the WA Code, the defence of unwilling act is currently contained in s 23A and the defence of necessity or extraordinary emergency is currently contained in s 25. The 1880 Draft Bill, to which Sir Samuel Griffith referred in his letter dated 29 October 1897, made provision for the establishment of a Code of Offences for England and Ireland. The 1880 Draft Bill did not become law.

Section 56 of the 1880 Draft Bill was concerned with self-defence against an unprovoked assault.

Section 227 of the German Civil Code of 1896 was also concerned with self-defence.

Section 24 of the 1880 Draft Bill provided that 'compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission by a person subject to such

7 See, for example, *R v Emery* (1978) 18 A Crim R 49, 55-6 (Young CJ, Lush & Brooking JJ); *R v Dawson* [1978] VR 536, 537-8 (Anderson J; Starke J agreeing), 541 (Harris J); *de la Espriella-Velasco v The Queen* [2006] WASCA 31; (2006) 31 WAR 291, [218] - [221] (Miller AJA; Roberts-Smith & Pullin JJA agreeing).

8 *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 703. See, to similar effect, the view expressed by Lord Edmund-Davies (of the majority) at 709-10.

threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy the being a party to which rendered him subject to compulsion of any offence other than high treason ... murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson’.

When the Queensland Code and the WA Code were enacted the list of excepted offences in relation to the defence of duress was narrower than those specified in s 24 of the 1880 Draft Bill.

### III SECTION 32 OF THE WA CODE AS ENACTED BY THE 1902 ACT AND THE 1913 COMPILATION ACT

Section 32 of the WA Code, as enacted by the 1902 Act and the 1913 Compilation Act, provided:

A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband.

But a married woman is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and which is done or omitted to be done in his presence, except in the case of an act or omission which would constitute an offence punishable with death, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, in which case the presence of her husband is immaterial. That provision was identical to s 32 of the Queensland Code, as enacted in 1899. Sir Samuel Griffith’s notes in his draft Criminal Code stated, in relation to the proposed provision subsequently incorporated in s 32 of the WA Code:

*Compare Bill of 1880, s.24.*

At common law, duress or compulsion had a particular application in the case of a husband and his wife. There was a presumption that a wife who committed an offence in her husband’s presence acted under his coercion. The presumption had its origins in a wife’s subjection to her husband.<sup>9</sup>

The presumption was engaged by the husband’s mere presence when the offence was committed. If the presumption was engaged, the only way in which the prosecution could rebut it was to establish that the wife had taken an independent part in the commission of the offence.<sup>10</sup> If the presumption was engaged and the prosecution failed to rebut it, the wife was entitled to an acquittal.

---

<sup>9</sup> Williams, above n 1, 762-3.

<sup>10</sup> Ibid 763.

The ambit of the common law presumption was uncertain. JF Stephen expressed the law in Article 31 as follows:

If a married woman commits a theft or receives stolen goods knowing them to be stolen in the presence of her husband she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case shew that in point of fact she was not coerced.

It is uncertain how far this principle applies to felonies in general.

It does not apply to high treason or murder.

It probably does not apply to robbery.

It applies to uttering counterfeit coin.

It seems to apply to misdemeanours generally.<sup>11</sup>

Section 24 of the 1880 Draft Bill provided, relevantly, that '[n]o presumption shall be made that a married woman committing an offence does so under compulsion, because she commits it in the presence of her husband'.

#### **IV AMENDMENTS TO S 31 AND S 32 OF THE WA CODE AS ENACTED BY THE 1902 ACT AND THE 1913 COMPILATION ACT**

Section 31 and s 32 of the WA Code, as enacted by the 1902 Act and the 1913 Compilation Act, were amended by the *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA). By s 7 of the amending Act, the words 'punishable with death' in s 31(4) were deleted and replaced by 'punishable with strict security life imprisonment'. By s 8 of the amending Act, the word 'death' in s 32 was deleted and replaced by 'strict security life imprisonment'. Otherwise, s 31 and s 32 were not amended before they were repealed in 2008 and 2003 respectively.

##### ***A Appellate decisions on the proper construction of s 31(3) and s 31(4) of the WA Code as enacted by 1902 Act and the 1913 Compilation Act***

There are relatively few decisions of appellate courts on the proper construction of s 31(3) and s 31(4) of the WA Code as enacted by the 1902 Act and the 1913 Compilation Act.

In *Smith v The State of Western Australia*,<sup>12</sup> McLure P (Owen JA agreeing) noted that the scope of s 31(3) had been the subject of 'much speculation but little judicial analysis'.<sup>13</sup> Her Honour referred to commentators who had suggested that

<sup>11</sup> JF Stephen, *A Digest of the Criminal Law* (5<sup>th</sup> ed, 1894) 23.

<sup>12</sup> [2010] WASCA 205; (2010) 204 A Crim R 280.

<sup>13</sup> *Ibid* [8].

s 31(3) was complementary to those provisions of the Code which dealt with self-defence.<sup>14</sup> Her Honour said that their view was supported by the history of the provision.<sup>15</sup>

The relevant history of s 31(3) included Sir Samuel Griffith's notes in his draft Criminal Code, to which I have referred; in particular, s 56 of the 1880 Draft Bill and s 227 of the German Civil Code of 1896, both of which were concerned with self-defence and, also, Sir Samuel's comment that s 31(3) related to that mode of defence which was necessary for the purpose of averting an immediate unlawful attack upon the person using the defence.

A number of propositions in relation to s 31(3) are apparent from the text of the provision. First, there must be actual and unlawful violence threatened to the accused person who did the relevant act or to another person. Secondly, the threat of actual and unlawful violence, whether to the accused person or to another person or to both of them, must have been made in the accused person's presence. Thirdly, actual unlawful violence means the application of physical violence, directly or indirectly, to the accused person or to another person or to both of them. Fourthly, the relevant act of the accused person must have been reasonably necessary in order to resist the threatened actual and unlawful violence.

In *Abbott v The Queen*,<sup>16</sup> the appellants were prisoners who were serving a sentence or sentences in Fremantle prison. They were charged with a number of offences after a riot in the prison. Prison officers were attacked, some with fists, and others with empty buckets and pieces of wood. Officers were taken hostage and the prison itself was set on fire. Each of the appellants appealed against his conviction, after a trial, of various offences. Some of the appellants were convicted of the unlawful detention of a prison officer. Those appellants were given leave at the hearing of the appeal to add an additional ground said to be based on s 31(3) of the WA Code. The additional ground alleged that the trial judge erred in failing to direct the jury that if they were satisfied that the actions of the accused were reasonably necessary, in order to resist actual and unlawful violence threatened to him or another person in his presence, they must acquit.

Malcolm CJ, Brinsden and Rowland JJ held that the effect of s 31(3) was that 'the appellant who relies upon it must concede, in order to make out the defence, that he was detaining the officers, but contend that the detention was not unlawful because the detention was reasonably necessary to resist actual and unlawful violence threatened to him or the officers he was detaining'.<sup>17</sup> Later, their Honours elaborated:

---

14 Ibid.

15 Ibid.

16 (Unreported, Court of Appeal of Western Australia, 1 September 1989).

17 Ibid 108.

The act for which the appellant escapes criminal responsibility under s 31(3) must be the act of unlawfully detaining the officer, and the reason or the purpose of such detention must be to resist the threat of unlawful violence to himself or to the officer detained. It is necessary, therefore, to have evidence before the jury to show that the appellant was detaining the officers because he feared unlawful violence either to himself or to those officers from other prisoners. Once that evidence exists, the onus is on the Crown to negate the defence.<sup>18</sup>

In *Quartermaine v The State of Western Australia*,<sup>19</sup> Beech AJA (Pullin & Miller JJA agreeing) noted that s 31(3) does not make any explicit reference to the accused's belief.<sup>20</sup> The provision requires that there be an objectively determined relationship between the actual and unlawful violence threatened to the accused, on the one hand, and the relevant act or omission of the accused which constitutes the offence, on the other.<sup>21</sup> The act or omission must be 'reasonably necessary' to resist the threatened violence.<sup>22</sup> His Honour held that s 31(3) contained only the objective requirement of reasonable necessity.<sup>23</sup> Beech AJA was of the view that consideration by the fact-finding tribunal of the defence under s 31(3) involved the following steps:

1. The jury must first identify what is said to be the possible threat of violence to the accused and consider whether, on the evidence, there was or may have been actual and unlawful violence threatened to the accused;
2. If the jury is satisfied beyond reasonable doubt that there was no such violence threatened to the accused, then the prosecution has excluded s 31(3) and it need not be considered further;
3. If, on the other hand, they are not so satisfied then the jury should:
  - (a) identify the threat to the accused;
  - (b) focus on the act (or omission) of the accused said by the prosecution to constitute the offence; and
  - (c) consider whether the accused's act (or omission) was reasonably necessary to resist the threat of violence to the accused;
4. The question of whether the accused's act was reasonably necessary is to be determined in all the circumstances in which the accused found himself or herself.<sup>24</sup>

In *Smith*, McLure P reiterated that the test of what is 'reasonably necessary', within s 31(3), was objective. What is reasonably objective must be determined

18 Ibid 109.

19 [2008] WASCA 22; (2008) 36 WAR 384.

20 Ibid [34].

21 Ibid.

22 Ibid.

23 Ibid [39].

24 Ibid [48].

by reference to the circumstances in which the accused was placed, at the material time, including what the accused knew or ought reasonably to have known.<sup>25</sup>

McLure P made these observations in relation to the expression ‘in order to’ in s 31(3):

The expression ‘in order to’ requires that there be a causal connection between the threat and the accused’s (prima facie) criminal act or omission. As a matter of fact, it is unlikely that the objective test could be satisfied in the absence of evidence from the accused as to what caused him to engage in the conduct in question. Indeed, the court in *Abbott v The Queen* (Unreported, CCA SCt of WA, Library No 7814, 1 September 1989) concluded that the defence in s 31(3) is only available if the accused concedes the existence of the relevant act(s) or omission (111). It is unnecessary to determine the correctness of that proposition.<sup>26</sup>

McLure P then examined the meaning of the word ‘resist’ in the phrase ‘act ... in order to resist ... violence threatened to him, or to another’, within s 31(3). After deciding that, in its context, the word must be a reference to resisting the threat of unlawful violence made by the maker of the threat, her Honour continued:<sup>27</sup>

To resist is to ‘oppose’ or ‘strive against’ the maker of the threat carrying it out. That is consistent with the requirement that the accused must be in the presence of the person making the threat at the time it was made. If ‘resist’ has the restricted meaning of opposing or striving against the maker of the threat, the appellant’s duress defence had to fail.

It is instructive to compare the use of the word ‘resist’ in s 31(3) with the language of s 31(4). The relevant act in s 31(4) must be in order to ‘save himself from’ a threat of death or grievous bodily harm. That expression is wider than ‘resist’ and would cover a contingent threat (eg ‘I will cause you grievous bodily harm if you do not act as a drug courier’).

It is unlikely to have been the legislative intention to have a duress defence in s 31(3) that was freed from the stringent limitations incorporated in s 31(4). My preliminary view is that the word ‘resist’ in s 31(3) is intended to have the restricted meaning. However, it is not appropriate to determine that issue in this appeal. I will proceed on the unstated assumption on which all parties proceeded at trial and in the appeal namely that ‘resist’ means save himself or another from the threat of violence. That is consistent with the broad approach of this court in *Quartermaine v Western Australia* (2008) 36 WAR 384 where the construction

25 *Smith v The State of Western Australia* [2010] WASCA 205; (2010) 204 A Crim R 280, [12].

26 *Ibid* [13].

27 *Ibid* [14]-[17].

issue was not raised or considered.

On the wide view of ‘resist’, s 31(3) becomes an additional avenue for raising the defence of duress. In that event s 31(3) must be construed against the background of the strong policy considerations in that area of the law. They were identified by Gleeson CJ in *Rogers v The Queen* (1996) 86 A Crim R 542 and King CJ in *R v Brown* (1986) 43 SASR 33, both of which were approved by the High Court in *Taiapa v The Queen* [2009] HCA 53 [31] - [32], [36]. King CJ said in *R v Brown*:

‘The ordinary way in which a citizen renders ineffective criminal intimidation is to report the intimidators and to seek the protection of the police. That must be assumed, under ordinary circumstances, to be an effective means of neutralising intimidation. If it were not so, society would be at the mercy of criminals who could force pawns to do their criminal work by means of intimidation (40).’

In *Pickering v The Queen*,<sup>28</sup> the High Court considered s 31(1)(c) and s 31(2) of the Queensland Code, which provide:

- (1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say -
  - ...
  - (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person ...
- (2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element ...

Section s 31(1)(c) of the Queensland Code is equivalent to s 31(3) of the WA Code (as enacted by the 1902 Act and the 1913 Compilation Act). Section 31(2) of the Queensland Code is equivalent to the second paragraph of s 31(4) of the WA Code (as enacted by the 1902 Act and 1913 Compilation Act).

The issue before the High Court was as follows. Does s 31(2) of the Queensland Code apply to an act only if the accused has been *charged* in relation to that act with an offence of the kinds described in s 31(2) and seeks to invoke s 31(1) to deny criminal responsibility on that charge? Alternatively, does s 31(2) apply wherever the evidence discloses that the act done by the accused constitutes one of the described offences regardless of the charge?

Gageler, Gordon and Edelman JJ held that:

<sup>28</sup> [2017] HCA 17; (2017) 91 ALJR 590.

- (a) the former, not the latter, is the correct construction of s 31(2);
- (b) s 31(1) is not available to deny criminal responsibility on a charge of any of the offences described in s 31(2); and
- (c) s 31(1) may, if it is open on the evidence, be available in relation to any other offence that is charged or that is available as an alternative verdict.<sup>29</sup>

Kiefel CJ and Nettle J arrived at the same conclusion by this process of reasoning:

Because s 31(1) and s 31(2) are concerned with an act for which a person may be criminally responsible, the offence to which those provisions refer is that with which an accused is charged or a lesser included offence of which the accused may be convicted. Properly construed, therefore, s 31(2) relevantly provides that if, but for s 31(1), the offence charged or a lesser included offence of which the accused is liable to be convicted is murder or one of which grievous bodily harm is an element, the accused cannot be excused under s 31(1)(c) from the act constituting the offence.<sup>30</sup>

A number of features of s 31(4) of the WA Code, as enacted by the 1902 Act and 1913 Compilation Act, are apparent from the text of the provision. First, it was necessary that the threat be made by a ‘person actually present’. Secondly, it was necessary that the threat be directed to the accused and not to a third party. Thirdly, it was necessary that the threat be a threat of immediate harm. Fourthly, it was necessary that the threat be to cause the death of or grievous bodily harm to the accused. Fifthly, the second paragraph of s 31(4) provided that the defence under s 31(4) did not extend to a number of offences.

Section 31(4) was considered by the Court of Criminal Appeal in *P (a child) v The Queen*.<sup>31</sup> Kennedy J (Malcolm CJ & Pidgeon J agreeing) said that the defence under s 31(4) was of ‘restricted application’:

It clearly appears from the section, and it has been so held by Stanley J, with whom Townley and Stable JJ agreed, in *R v Pickard* [1959] Qd R 475, at 476, that the word ‘immediate’ qualifies the words ‘death’ and ‘grievous bodily harm’. The word ‘immediate’, Stanley J considered, obviously cannot mean some wholly indefinite future time and place and must relate to some very short time after the doing or the omission of the act in question. The threat itself must be to inflict death or grievous bodily harm immediately if the person concerned fails to do (or omits to do) the act in question. It is also clearly the case that the compulsion or coercion must be operative at the time of the doing of the act or the omission to do the act - see *R v Pickard* (supra), at 477 - 478. The defence is one of

<sup>29</sup> Ibid [36].

<sup>30</sup> Ibid [27].

<sup>31</sup> (Unreported, Court of Appeal of Western Australia, 7 September 1995).

restricted application - see O'Regan, *Essays on the Australian Criminal Code*, at 112 (9 - 10).

***B Appellate decisions on the proper construction of s 32 of the WA Code as enacted by the 1902 Act and the 1913 Compilation Act***

There do not appear to have been any decisions of appellate courts on the proper construction of s 32 of the WA Code as enacted by the 1902 Act and the 1913 Compilation Act.

**V THE MURRAY REPORT ENCOMPASSING  
A REVIEW OF THE WA CODE**

In 1983, Mr MJ Murray published his report entitled, 'The Criminal Code. A General Review', which encompassed a review of the WA Code.

Mr Murray recommended that s 31(3) be repealed. Otherwise he recommended no change to s 31.

Mr Murray explained, in the course of making his recommendations on the defence of self-defence in s 248, s 249 and s 250 of the WA Code, why he recommended the repeal of s 31(3):

In my view, the only change required to Section 31 is in relation to paragraph (3), the repeal of which is recommended. The paragraph is inconsistent with the provisions of Sections 248 - 250 and it is unnecessary because it adds nothing to those provisions in my view. There is no equivalent provision in the Tasmanian Criminal Code, and I note that in 1966, its deletion was recommended by the drafting committee of the Australian Law Council in relation to a proposed Criminal Code for the Australian Territories.<sup>32</sup>

Mr Murray also recommended, for the following reasons, that s 32 be repealed:

In my view, unless good reason can be seen for retaining special rules with respect to the criminal responsibility of spouses they should generally be abolished. Husbands and wives should with respect to offences committed by them with respect to each other or persons outside the marriage be in the same position as ordinary persons from the point of view of criminal responsibility.<sup>33</sup>

---

32 MJ Murray, *The Criminal Code. A General Review* (1983) 160.

33 *Ibid* 48.

## VI THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA, REVIEW OF THE LAW OF HOMICIDE, FINAL REPORT (2007)

In the Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007), the Commission reviewed in chapter 4 the defence of duress (in s 31 of the WA Code) and the defence of necessity or extraordinary emergency (in s 25 of the WA Code). The final report recommended that:

- (a) s 31(3) be repealed (recommendation 24);
- (b) s 31(4) be repealed (recommendation 27);
- (c) s 32(1) provide that a person is not criminally responsible for an act or omission if he or she does the act or makes the omission under duress (recommendation 27);
- (d) s 32(2) provide that a person does an act or makes an omission under duress if he or she reasonably believes that:
  - (i) a threat has been made that will be carried out unless the offence is committed;
  - (ii) there is no reasonable way to make the threat ineffective; and
  - (iii) the act or omission is a reasonable response to the threat (recommendation 27); and
- (e) s 32(3) provide that s 32(1) and s 32(2) do not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out an act or omission of the same kind actually carried out or for the purpose of carrying out unlawful conduct in circumstances where it is likely that such threats would be made (recommendation 27).

## VII THE REPEAL OF S 31 AND S 32 OF THE WA CODE AS NACTED BY THE 1902 ACT AND THE 1913 COMPILATION ACT

Section 32 of the WA Code, as enacted by the 1902 Act and the 1913 Compilation Act, was repealed by s 118(2) of the *Acts Amendment (Equality of Status) Act 2003* (WA).

The effect of the repeal of s 32 was that the defence of duress in s 31, as then enacted, applied to all accused persons, irrespective of their gender or marital status.

Section 31 of WA Code, as enacted by the 1902 Act and the 1913 Compilation Act, was repealed by s 6 of the *Criminal Law Amendment (Homicide) Act 2008* (WA) (the 2008 Amending Act). Section 6 also inserted a new s 32.

## VIII SECTION 32 OF THE WA CODE AS ENACTED BY THE 2008 AMENDING ACT

Section 32, as enacted by the 2008 Amending Act, provides:

- (1) A person is not criminally responsible for an act done, or an omission made, under duress under subsection (2).
- (2) A person does an act or makes an omission under duress if -
  - (a) the person believes -
    - (i) a threat has been made; and
    - (ii) the threat will be carried out unless an offence is committed; and
    - (iii) doing the act or making the omission is necessary to prevent the threat from being carried out; and
  - (b) the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be; and
  - (c) there are reasonable grounds for those beliefs.
- (3) Subsections (1) and (2) do not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of -
  - (a) doing an act or making an omission of the kind in fact done or made by the person under duress; or
  - (b) prosecuting an unlawful purpose in which it is reasonably foreseeable such a threat would be made.

The term ‘criminally responsible’, referred to in s 32(1), is defined in s 1 of the Code to mean ‘liable to punishment as for an offence’.

The term ‘offence’, referred to in s 32(2)(a)(ii), is defined in s 2 of the Code, as follows:

An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.

## IX THE PROPER CONSTRUCTION OF S 32 OF THE WA CODE AS ENACTED BY THE 2008 AMENDING ACT: RELEVANT PRINCIPLES OF CONSTRUCTION

The proper approach to the construction of the WA Code was enunciated by Dixon and Evatt JJ in *Brennan v The King*:<sup>34</sup>

[The Code is] intended to replace the common law, and its language

---

34 [1936] HCA 24; (1936) 55 CLR 253.

should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.<sup>35</sup>

As Gibbs J noted in *Stuart*:

- (a) 'it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground'; but
- (b) 'it should be remembered that the first duty of the interpreter of [the provisions of the Code] is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance'.<sup>36</sup>

Subject to those principles in relation to the proper approach to the construction of the WA Code, the following general principles of statutory interpretation are relevant.

In *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd*,<sup>37</sup> French CJ, Hayne, Crennan, Bell and Gageler JJ observed:

'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.<sup>38</sup>

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of

35 Ibid 263. See also *Kaporonovski v The Queen* [1973] HCA 35; (1973) 133 CLR 209, 236 (Gibbs J; Stephen J agreeing); *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426, 437 (Gibbs J; Mason J agreeing).

36 *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426, 437. See also *Vallance v The Queen* [1961] HCA 42; (1961) 108 CLR 56, 74-5 (Windeyer J).

37 [2012] HCA 55; (2012) 250 CLR 503.

38 Ibid [39]. See also *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252, [31] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ); *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664, [22] (French CJ, Hayne, Kiefel, Gageler & Keane JJ).

the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the existing state of the law, the history of the legislative scheme and the general purpose and policy of the provision (in particular, the mischief it is seeking to remedy).<sup>39</sup>

The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions.<sup>40</sup> The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose.<sup>41</sup>

As Crennan J noted in *Northern Territory v Collins*,<sup>42</sup>

‘[s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (*Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ), not least because such material may confuse what was “intended ... with the effect of the language which in fact has been employed” (*Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC)’.<sup>43</sup>

That statement of principle applies to extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act 1984* (WA). In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount.<sup>44</sup>

## X SECTION 32 OF THE WA CODE AS ENACTED BY THE 2008 AMENDING ACT: THE PUBLIC POLICY CONSIDERATIONS RELEVANT TO THE DEFENCE OF DURESS

Duress, as a general defence which the State must negative where the accused has satisfied the evidential burden, is difficult to rationalise or explain by reference to

39 See *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby & Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan & Kiefel JJ).

40 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378, [26] (French CJ & Hayne J).

41 *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194, [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

42 [2008] HCA 49; (2008) 235 CLR 619.

43 *Ibid* [99].

44 *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529, [22] (Gleeson CJ, Gummow, Hayne & Heydon JJ).

any coherent principle of criminal jurisprudence.<sup>45</sup> The accused has chosen, in response to a threat, to inflict harm on or sacrifice an innocent person to preserve his or her own life or well-being. As a matter of public policy, it is essential to limit the scope of duress as a general defence by an objective criterion formulated in terms of reasonableness.<sup>46</sup>

In *Howe*, Lord Hailsham of Marylebone LC affirmed, in the course of deciding that it was not a defence at common law to a charge of murder that the accused had acted under duress in order to protect his own life or that of his family, that:

[W]hile there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure, and, in the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.<sup>47</sup>

## XI SECTION 32 OF THE WA CODE AS ENACTED BY THE 2008 AMENDING ACT: THE EVIDENTIAL BURDEN ON AN ACCUSED

Section 112 of the *Criminal Procedure Act 2004* (WA) states, relevantly, that ‘the judge must instruct the jury on the law applicable to the case and may make any observations about the evidence that the judge thinks necessary in the interests of justice’.

The law in Western Australia concerning a summing up in a criminal trial before a judge and jury is not relevantly different from the law in trials at common law.<sup>48</sup> If it is necessary for a trial judge to consider, at the close of the evidence in a criminal trial, whether a particular defence should be left to the jury, the relevant question, in a case where (as in the case of duress) the legal burden is on the State and the evidential burden is on the accused, will be: is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that each of the elements of the defence or an element of the defence, as the particular case may require, had been negatived? Questions as to the weight to be given to the evidence and the credibility of the accused are matters for the jury.<sup>49</sup>

45 *R v Howe* [1987] AC 417, 436 (Lord Bridge of Harwich).

46 *R v Graham* [1982] 1 WLR 294, 300 (Lord Lane CJ giving the judgment of the Court of Appeal of England and Wales (Criminal Division)).

47 *R v Howe* [1987] AC 417, 430.

48 *Fingleton v The Queen* [2005] HCA 34; (2005) 227 CLR 166, [77]-[78] (McHugh J).

49 *Braysich v The Queen* [2011] HCA 14; (2011) 243 CLR 434, [17], [36] (French CJ, Crennan & Kiefel JJ).

A trial judge must leave the defence of duress to the jury if, at the close of the evidence, there is evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt as to whether the State had negated the defence, even if the accused's counsel has not put that defence and even if counsel has expressly abandoned it.<sup>50</sup>

## XII ASPECTS OF THE PROPER CONSTRUCTION OF S 32 OF THE WA CODE AS ENACTED BY THE 2008 AMENDING ACT

Section 32 of the WA Code, as enacted by the 2008 Amending Act, was Parliament's response to the Law Reform Commission's recommendation 24 and recommendation 27.

The new s 32 did not precisely reproduce the Commission's recommendations. In particular, the Commission recommended that s 32(2) provide, relevantly, that a person 'does an act or makes an omission under duress if he or she reasonably believes that ... the act or omission is a reasonable response to the threat', whereas s 32(2)(b), as enacted, provides that a person 'does an act or makes an omission under duress if ... the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be'.

In *Lau v The State of Western Australia*,<sup>51</sup> I made a number of observations (Mazza & Mitchell JJA agreeing) concerning the proper construction of s 32 as currently enacted. The observations were not exhaustive. It was unnecessary in *Lau* to analyse in depth the proper construction of s 32(2)(b). More recently, in *Marchesano v The State of Western Australia*,<sup>52</sup> both Mitchell JA and I (Mazza JA agreeing) examined in detail the proper construction of s 32(2)(b). The balance of this article sets out my views in relation to various aspects of s 32.

Section 32 does not have the effect that an accused will necessarily be unable to raise the defence of duress unless the accused concedes that he or she has done the relevant act or made the relevant omission referred to in s 32(1) and the chapeau of s 32(2).<sup>53</sup> As I have mentioned, the Court of Criminal Appeal held in *Abbott* that the defence of duress under s 31(3) (as in force prior to the enactment of the 2008 Amending Act) was only available if the accused conceded the existence of the relevant act or omission.

50 *Pemble v The Queen* [1971] HCA 20; (1971) 124 CLR 107, 117-18 (Barwick CJ, Windeyer J agreeing), 132-3 (Menzies J); *Van Den Hoek v The Queen* [1986] HCA 76; (1986) 161 CLR 158, 161-2 (Gibbs CJ, Wilson, Brennan & Deane JJ); *Fingleton v The Queen* [2005] HCA 34; (2005) 227 CLR 166, [83] (McHugh J); *Braysich v The Queen* [2011] HCA 14; (2011) 243 CLR 434, [32].

51 [2017] WASCA 16.

52 [2017] WASCA 177.

53 *Lau v The State of Western Australia* [2017] WASCA 16, [140]-[144].

By s 32(1), a person is not criminally responsible for an act done, or an omission made, under duress as specified in s 32(2).

Section 32(2) states in effect that a person does an act or makes an omission under duress if the conditions set out in s 32(2) apply and are satisfied. There are in essence five conditions.

First, the person must believe that a threat has been made: s 32(2)(a)(i).

Secondly, the person must believe that the threat will be carried out unless an offence is committed: s 32(2)(a)(ii).

Thirdly, the person must believe that doing the act or making the omission is necessary to prevent the threat from being carried out: s 32(2)(a)(iii).

Fourthly, the act or omission must be a reasonable response to the threat in the circumstances as the person believes them to be: s 32(2)(b).

Fifthly, there must be reasonable grounds for the beliefs stated in the first, second, third and fourth conditions: s 32(2)(c).

Each belief referred to in the first, second, third and fourth conditions is the person's subjective belief. So, the person must have a subjective belief: that a threat has been made (the first condition); that the threat will be carried out unless an offence is committed (the second condition); that doing the act or making the omission is necessary to prevent the threat from being carried out (the third condition); and as to the circumstances (the fourth condition).

As to the fourth condition, the act or omission by the person must be a reasonable response (that is, an objectively reasonable response) to the threat in the circumstances as the person subjectively believes them to be.

As to the fifth condition, there must be reasonable grounds (that is, objectively reasonable grounds) for the person's subjective beliefs in relation to each of the first, second, third and fourth conditions.

The 'act' or the 'omission' referred to in s 32(1) and the chapeau of s 32(2), which the person allegedly did or made under duress, must be an element of the charged offence. This follows from the nature and content of s 32(1), which operates, in effect, to excuse a person from criminal responsibility for an act done, or an omission made, under duress if the conditions set out in s 32(2) apply and are satisfied. If the relevant act or omission was not a criminal act or omission, for the purposes of the charged offence, s 32 would be otiose.

An 'act' which constitutes or is an element of an offence refers to some 'physical

action, apart from its consequences'.<sup>54</sup>

The term 'threat' referred to in s 32(2)(a), s 32(2)(b) and s 32(3) is not defined for the purposes of those provisions. The term is defined in s 332(4) and s 338 of the Code, but neither of those definitions applies to s 32. The term 'threat' in s 32 bears its ordinary and natural meaning. A 'threat', for the purposes of s 32, includes an express or implied statement of an intention to kill or injure another, or to cause loss or damage to another or his or her property. This explanation of the content of 'threat' in s 32 is not an exhaustive account. The broad ambit of the term 'threat' in s 32 is circumscribed in its application by the requirement in s 32(2)(b) that the relevant act or omission be a 'reasonable response' to the 'threat' in 'the circumstances' as the person believes them to be, and the requirement in s 32(2)(c) read with s 32(2)(a) and s 32(2)(b) that there be 'reasonable grounds' for the person's 'beliefs'.

Section 32(2)(a)(ii) requires that the person do the act or make the omission in the belief that the threat will be carried out unless 'an offence' is committed. Section 32(2)(a)(ii) must be read with the definition of 'offence' in s 2. When that is done, it is apparent that s 32(2)(a)(ii) requires that the person do the act or make the omission, within s 32(1) and the chapeau of s 32(2), in the belief that the threat will be carried out unless an act or omission, within the definition of 'offence' in s 2, which renders the person doing the act or making the omission liable to punishment, is committed. The requisite belief must relate to the whole of the subject matter of s 32(2)(a)(ii). The act or omission, within the definition of 'offence' in s 2, must necessarily be a criminal act or omission because the definition requires that the doing of the act or the making of the omission will render the person concerned liable to punishment. However, the focus of s 32 is on 'an act' done or 'an omission' made, within s 32(1) and the chapeau of s 32(2), as distinct from 'an offence' committed. The act done or the omission made by the person, within s 32(1) and the chapeau of s 32(2), is not necessarily co-extensive with the acts or the omissions which constitute the 'offence' referred to in s 32(2)(a)(ii). It is not essential that the 'offence' referred to in s 32(2)(a)(ii) be identical to the charged offence. Section 32 distinguishes between an act or omission, on the one hand, and an offence, on the other. Section 32(1) excuses a person from criminal responsibility for 'an act' done, or 'an omission' made, under duress within s 32(2). Section 32(1) does not excuse a person from criminal responsibility for 'an offence' committed, even though that may be the effect, in a particular case, of the person being excused from criminal responsibility for an act done, or an omission made, under duress within s 32(2).

By s 32(2)(a)(iii), the doing of the act or the making of the omission must be 'necessary' to prevent the threat from being carried out. The word 'necessary' is

<sup>54</sup> *Kaporonovski v The Queen* [1973] HCA 35; (1973) 133 CLR 209, 231 (Gibbs J; Stephen J agreeing); *Pickering v The Queen* [2017] HCA 17; (2017) 91 ALJR 590, [39] (Gageler, Gordon & Edelman JJ).

susceptible of various meanings. Its meaning in a statute must be determined by reference to the context in which it is used. In s 32(2)(a)(iii), the word ‘necessary’ connotes that the doing of the act or the making of the omission by the person is essential (and not merely useful, convenient or expedient) to prevent the threat from being carried out.

Section 32(2)(b) incorporates two concepts. First, the concept of the person’s belief as to ‘the circumstances’. Secondly, the concept of whether the act or omission is a ‘reasonable response’ to a threat which satisfies s 32(2)(a). The composite requirement embodied in s 32(2)(b) from these concepts is that the person’s act or omission is a ‘reasonable response’ by the person to the threat in ‘the circumstances’ as the person believes them to be. The expression ‘reasonable response’ connotes an *objectively* reasonable response and the expression ‘as the person believes’ connotes as the person *subjectively* believes. By s 32(2)(b), therefore, the person’s act or omission must be, objectively, a reasonable response by the person in the circumstances as the person, subjectively, believes them to be.<sup>55</sup>

The text of s 32(2)(b) does not restrict or confine the concept of a ‘reasonable response’ to a threat which satisfies s 32(2)(a), apart from stipulating that the act or omission must be a reasonable response ‘to the threat in the circumstances as the person believes them to be’. The text of s 32(2)(b), in the context of the text of s 32 as a whole and the apparent policy underpinning s 32, provides no justification for construing the expression ‘reasonable response’ in s 32(2)(b) narrowly or other than in accordance with its ordinary and natural meaning. In particular, there is no justification for restricting or confining the concept of a ‘reasonable response’ in s 32(2)(b) to an inquiry about whether the act or omission in response to the threat, in the circumstances as the person believes them to be, was proportionate to the threat. The expression ‘reasonable response’ in s 32(2)(b) has a broader connotation. It is not synonymous with the expression ‘proportionate response’.

It is not apparent from the text of s 32(2), in the context of the text of s 32 as a whole and the apparent policy underpinning s 32, that a fact or circumstance cannot be relevant both to s 32(2)(b) and s 32(2)(c). I consider that a fact or circumstance may be relevant to whether the act or omission is a ‘reasonable response’ within s 32(2)(b) and, also, to whether there are ‘reasonable grounds’ within s 32(2)(c) for the beliefs specified in s 32(2)(a) and s 32(2)(b).

The determination of the objective ‘reasonableness’ of the act or omission as a response to the threat, in ‘the circumstances’ as the person subjectively believes them to be, within s 32(2)(b), involves an evaluation of the nature and quality of

---

<sup>55</sup> See, in the context of the analogous provision with respect to self-defence in s 248(4)(b) of the WA Code, *Goodwyn v The State of Western Australia* [2013] WASCA 141; (2013) 45 WAR 328, [88]-[90] (Buss JA; Martin CJ agreeing generally); *Egitmen v The State of Western Australia* [2016] WASCA 214 [69]-[71] (Buss P; Mazza JA agreeing).

the act or omission, in the context of:

- (a) the nature and quality of the threat, including its magnitude;
- (b) the severity of the consequences if the person does the act or makes the omission;
- (c) the existence of any available alternative courses of action, of which the person is subjectively aware, apart from doing the act or making the omission; and
- (d) the character of ‘the circumstances’ as the person subjectively believes them to be.

The evaluation of the objective ‘reasonableness’ of the act or omission must be undertaken by reference to a hypothetical reasonable person of ordinary firmness of mind and will and of the same age as the person. The notion of a hypothetical reasonable person of ordinary firmness of mind and will is well recognised in this area of the law.<sup>56</sup> The abstract formula of the hypothetical reasonable person of ordinary firmness of mind and will is an appropriate standard by which to measure the objective ‘reasonableness’ of the act or omission in question for the purposes of s 32(2)(b). It is plain that the notion of reasonableness, on the one hand, and substance abuse impairment, on the other, are contradictory.<sup>57</sup> Otherwise, it is an open question whether any of the person’s personal characteristics, apart from age, are to be attributed to the hypothetical reasonable person.<sup>58</sup>

It is well accepted that people who are under threat should take reasonable opportunities to render those threats ineffective, by reporting their circumstances to police or other appropriate authorities and seeking their protection, rather than commit serious criminal offences.<sup>59</sup>

In *Taiapa v The Queen*,<sup>60</sup> French CJ, Heydon, Crennan, Kiefel and Bell JJ said, in the context of s 31(1)(d) of the Queensland Code:

The applicant’s belief that police protection may not be 100 per cent safe provided no basis for a reasoned conclusion that it was not. It may

<sup>56</sup> See, for example, *R v Hurley* [1967] VR 526, 542-3 (Smith J); *R v Abusafiah* (1991) 24 NSWLR 531, 538-45 (Hunt J; Gleeson CJ & Mahoney JA agreeing); *de la Espriella-Velasco v The Queen* [2006] WASCA 31; (2006) 31 WAR 291, [218]-[219] (Miller AJA; Roberts-Smith & Pullin JJA agreeing); *Quartermaine v The State of Western Australia* [2008] WASCA 22; (2008) 36 WAR 384, [43] (Beech AJA; Pullin & Miller JJA agreeing).

<sup>57</sup> *Aubertin v The State of Western Australia* [2006] WASCA 229; (2006) 33 WAR 87, [44] (McLure JA; Roberts-Smith & Buss JJA agreeing).

<sup>58</sup> See, however, the comments of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Stingel v The Queen* [1990] HCA 61; (1990) 171 CLR 312, 327-32, in the context of the defence of provocation under s 160 of the *Criminal Code* (Tas).

<sup>59</sup> *Morris v The Queen* [2006] WASCA 142; (2006) 201 FLR 325, [112] (Roberts-Smith JA), [153]-[156] (McLure JA). See also *Ajayi v The Queen* [2012] WASCA 126; (2012) 263 FLR 465, [51]-[54] (Buss JA; McLure P & Mazza JA agreeing); *Lau v The State of Western Australia* [2017] WASCA 16, [158].

<sup>60</sup> [2009] HCA 53; (2009) 240 CLR 95.

explain the applicant's preference for complying with the unlawful demands. However, *an unparticularised concern that police protection may not be a guarantee of safety cannot without more supply reasonable grounds for a belief that there is no option other than to break the law in order to escape the execution of a threat.*

The Court of Appeal was correct to hold that no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that there were not reasonable grounds for the applicant's belief within s 31(1)(d)(ii).<sup>61</sup> (emphasis added)

Ultimately, the determination as to whether the act or the omission of the person was a reasonable response is a value judgment.

By s 32(3), neither s 32(1) nor s 32(2) applies if the threat is made by or on behalf of a person 'with whom the person under duress is voluntarily associating' for the purpose of:

- (a) doing an act or making an omission of the kind in fact done or made by the person under duress; or
- (b) prosecuting an unlawful purpose in which it is reasonably foreseeable such a threat would be made.

Section 32(3) replicates the essence of a provision recommended by the Law Reform Commission. The Commission noted that the proposed limitation embodied in s 32(3)(a) followed the Model Criminal Code published by the Model Criminal Code Officers Committee that was established in 1991 by the Standing Committee of Attorneys General.<sup>62</sup> The Commission also noted its conclusion that the defence of duress should not be available where the accused is voluntarily associating with the person making the threat for the purpose of carrying out unlawful conduct and in circumstances where it is likely that such a threat would be made.<sup>63</sup> Hence the recommendation for the inclusion of s 32(3)(b). The Commission gave this example of the intended operation of s 32(3)(b):

For example, an accused who is voluntarily part of an organised crime group which is involved in illegal drug activities should not be entitled to rely on the defence of duress as a defence to murder if a member of that group threatened the accused unless he or she killed a competitor.<sup>64</sup>

---

61 Ibid [40]-[41].

62 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 199 n 177.

63 Ibid.

64 Ibid.

## XII SECTION 32 OF THE WA CODE AS ENACTED BY THE 2008 AMENDING ACT: THE LEGAL BURDEN ON THE STATE

If the accused satisfies the evidential burden in relation to the defence of duress, the legal burden is on the State to negative the defence:

- (a) by excluding at least one of the conditions in s 32(2) beyond reasonable doubt; or
- (b) by proving beyond reasonable doubt that s 32(1) and s 32(2) do not apply by virtue of s 32(3).<sup>65</sup>

## XIV CONCLUDING OBSERVATIONS

Section 32 of the WA Code, as enacted by the 2008 Amending Act, represents Parliament's endeavour to state the law of duress for Western Australia by reference to concepts which will accommodate the fundamental public policy considerations adverted to in *Howe* and *Graham*.

Accused persons have sought to rely on s 32 in a number of cases. That is likely to continue, especially in drug trafficking and murder trials. The Court of Appeal examined s 32 in *Lau* and *Marchesano* but the provision will, no doubt, be subject to further exegesis by the court.

---

<sup>65</sup> *Taiapa v The Queen* [2009] HCA 53; (2009) 240 CLR 95, [5] (French CJ, Heydon, Crennan, Kiefel & Bell JJ).