

English Reform of Partial Defences to Murder: Lessons for New South Wales

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Abstract

The *Coroners and Justice Act 2009* (UK) significantly revises the defence of diminished responsibility under English law. It also introduces a new defence of ‘loss of control’, which replaces the common law defence of provocation and creates a defence akin to the plea of excessive self-defence. These major developments have a direct bearing on the law of New South Wales (NSW). The revisions made to the defence of diminished responsibility are of interest because they have borrowed some features of the NSW defence, but created others that are arguably improvements on the NSW provision. With respect to provocation, the new English defence has certain innovative features on the type of provocative conduct that may be legally recognised, and clarifies aspects of the ‘ordinary person’ test. The English defence similar to excessive self-defence is worth examining to see if it affords greater justice to accused persons, such as battered women who kill their abusers, compared to the defence under s 421 of the *Crimes Act 1900* (NSW).

Introduction

English penal statutes, especially those of recent origin, are generally of little or no relevance to New South Wales (NSW) due to the fact that it has its own comprehensive set of penal legislation centred around the *Crimes Act 1900* (NSW). However, there are occasions when a recent English statute can be highly significant, because it revises an area of law that the NSW courts or legislature had borrowed from English law. The provisions in the *Coroners and Justice Act 2009* (UK) dealing with the partial defences to murder of diminished responsibility, provocation and excessive self-defence, fit this description.¹

The defence of diminished responsibility (otherwise called ‘substantial impairment by abnormality of mind’ in NSW) appears as s 23A of the NSW *Crimes Act* and, until it was amended in 1997, was virtually identical to s 2 of the English *Homicide Act 1957*. The *Coroners and Justice Act* retains the defence of diminished responsibility, but makes certain material changes to its requirements, with a view to clarifying the law and rendering the defence more workable in practice. In doing so, the drafters of the revised provision said that it had borrowed much from NSW’s amended s 23A. Given this background, it would be

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¹ As we shall see, strictly speaking, the *Coroners and Justice Act* has created a new defence of ‘loss of control’ that contains features of the defences of provocation and excessive self-defence. Nonetheless, its drafters have consciously avoided naming the defence ‘provocation’ and distinguished it from the plea of excessive self-defence. However, for the purpose of this comparative study of the new English defence and the equivalent NSW defences, it would be both appropriate and convenient to use the familiar terms of ‘provocation’ and ‘excessive self-defence’.

pertinent for NSW legislators to evaluate the revised English version of the defence to gauge the extent to which it adopts or varies from s 23A. In particular, where the English version has not followed the NSW provision, it would be beneficial for NSW legislators to examine the reasons for this, and ask whether those reasons are persuasive enough for s 23A to be revised accordingly.

The defence of provocation is governed by s 23 of the NSW *Crimes Act*. The ‘ordinary person’ (sometimes called the ‘reasonable man’) test devised by English common law is expressed in the wording of that provision in the following terms: the ‘conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control’ (s 23(2)(b)). This imprecise statutory rendition of the test has required courts to expound on it, in the course of which they have largely followed English common law pronouncements on the test. The *Coroners and Justice Act* abolishes the common law defence of provocation and replaces it with a defence of ‘loss of control’, which nevertheless retains a test of ordinariness/reasonableness for the provocative conduct and the accused’s response to it. This new test embodies certain aspects of the common law ‘ordinary person’ test, but modifies others. Consequently, NSW courts should no longer follow, without qualification, English decisions based on this new defence provision. It would also be prudent for NSW legislators to ascertain the reasons for the changes to the English law, and whether or not s 23 should incorporate these changes.²

The defence of excessive self-defence is found in s 421 of the NSW *Crimes Act*. It was enacted in 2001 following the demise of its common law equivalent in the High Court of Australia decision in *Zecevic v Director of Public Prosecutions (Vic)* (see also Fairall 1988; Yeo 1988). Prior to this case, the defence appeared to be firmly entrenched in Australian common law by virtue of the High Court decisions in *R v Howe* and *Viro v The Queen*. Over the years, the English courts have studied these Australian decisions and, while somewhat attracted by the reasons for having such a defence, they have stopped short of recognising it, saying that this was a decision that was best left to the legislature (see *R v Clegg* at 498–500). The legislative response to this invitation is the part of the new defence of ‘loss of control’ created by the *Coroners and Justice Act* involving an accused’s ‘fear of serious violence’ from the deceased. Accordingly, it would be of interest to NSW legislators to examine this English defence to see whether it is better equipped than s 421 to deal with cases where a person has responded unreasonably by killing his or her assailant.

The English revisions to the defence of diminished responsibility and the new defence of loss of control were the culmination of lengthy and carefully considered deliberations reported in two Law Commission reports (Law Commission 2004, 2006) and by the UK Government (Ministry of Justice 2008a, 2009). These bodies had consulted extensively with stakeholders, academics, legal practitioners and interested community organisations, and conducted an assessment of the impact that the proposed changes to the law would have on the criminal justice system (Ministry of Justice 2008b). The Government declared that the aim of this comprehensive exercise was ‘to ensure that the law in this area is just, effective and up-to-date, and produces outcomes which command public confidence’ (Ministry of Justice 2008a:[10]). For this reason alone, these English revisions are worth studying in order to see if there are any useful lessons to be gained, with consequent changes to the NSW *Crimes Act*.

² This article will confine itself to the modifications to the ‘ordinary person’ test under the English common law of provocation brought about by the English legislation. It will not, therefore, discuss other features of the new English defence such as that the provocation need not have emanated from the deceased, and the exclusion of self-induced provocation.

It is also worth highlighting that the English revisions have been made in the context of leaving the law of homicide intact.³ In particular, murder continues to be a single offence and the newly revised partial defences have the effect of reducing the crime of murder to manslaughter. This accords with the NSW law of homicide, which likewise regards murder as a single offence — with the partial defences of diminished responsibility, provocation and excessive self-defence reducing that offence to one of manslaughter. Accordingly, when studying the English revisions, the NSW legislature need not be concerned that they have been devised in the light of variables pertaining to the structure of murder and the operation of the defences under consideration, which it might not be prepared to adopt.

This comparative study of the recent English reform of partial defences to murder and current NSW law will not engage in the broad question of whether these defences ought to be abolished altogether. That question will have to be tackled by others (see NSW Law Reform Commission 1997a:[3.10]–[3.21]; NSW Law Reform Commission 1997b:[2.22]–[2.38]; Victorian Law Reform Commission 2004:[2.38]–[2.103], [3.90]–[3.115], [5.108]–[5.132]; Law Reform Commission of Western Australia 2007:178–83; 210–22; 256–9; Queensland Law Reform Commission 2008:[21.23]–[21.49]). Rather, this article will assume that the NSW legislature is content to recognise these defences and to retain their basic structure. On this premise, the recent English reforms will be studied to see whether they possess any features that might be improvements on NSW law.

Diminished responsibility

For the purposes of this article, the relevant parts of s 2 of the English *Homicide Act*, as revised by the *Coroners and Justice Act*, read as follows:

- (1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
 - (a) arose from a recognised medical condition,
 - (b) substantially impaired D’s ability to do one or more of the things mentioned in subsection (1A), and
 - (c) provides an explanation for D’s acts and omissions in doing or being a party to the killing.
- (1A) Those things are—
 - (a) to understand the nature of D’s conduct;
 - (b) to form a rational judgment;
 - (c) to exercise self-control.
- (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

The Law Commission, which drafted this provision, said that it was developed from s 23A of the NSW *Crimes Act* (Law Commission 2006:[5.112]). The main criticisms

³ In its 2006 report, the Law Commission had proposed a new structure for homicide, including murder in the first and second degree (Law Commission 2006). However, the Government chose to consider the Commission’s proposals on the partial defences in the context of the existing offence structure of homicide (see Ministry of Justice 2008a:[9]).

against the former English provision were threefold. The first pertained to the uncertain nature of the term ‘abnormality of mind’ and the narrow range of permissible causes stipulated in parenthesis in the provision.⁴ The second was that the provision did not clarify what was involved in a ‘substantial impairment of mental responsibility’. Third, the provision was unclear whether the abnormality of mind must, in some sense, have ‘caused’ the accused to kill. What follows is a brief appraisal of the way the revised English defence resolved these criticisms.

Abnormality of mental functioning

Adopting the recommendations of psychiatrists, the revised defence uses the expression ‘abnormality of mental functioning’, removes the list of permissible causes of such abnormality, and replaces it with the requirement that the abnormality must have arisen from a recognised medical condition (s 2(1)(a)). All these revisions have the single aim of aligning the defence more closely with clinical science. Thus, ‘abnormality of mind’, which is not a clinical term, has been replaced with ‘abnormality of mental functioning’, which clinicians find easier to understand and accept. As for the permissible causes, there has never been an agreed psychiatric meaning to them and, besides, the diagnostic practice in cases of diminished responsibility have long since developed beyond mental malfunctioning as identified by this narrow range of causes (Law Commission 2006:[5.111]).

The following opinion by the Royal College of Psychiatrists supporting these changes is particularly instructive:

The presence of [a recognised medical condition] is, we believe, consistent with the general nature and purpose of ‘diminished responsibility’ as a defence and would ensure that any such defence was grounded in valid medical diagnosis. It would also encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental conditions (WHO ICD10 and AMA DSM) without explicitly writing those systems into the legislation ... Such an approach would also avoid individual doctors offering idiosyncratic ‘diagnosis’ as the basis for a plea of diminished responsibility. Overall, the effect would be to encourage better standards of expert evidence and improved understanding between the courts and experts (Law Commission 2006:[5.114]).

The observation should be made here that the experts performing the function of recognising a medical condition are not restricted to psychiatrists, but, where relevant, could extend to other members of the medical profession and psychologists.

In reply to queries as to how the courts would deal with a new emerging medical condition that had yet to appear on the established classificatory systems, the UK Government expressed confidence that the courts would be able to hear the evidence tendered by advocates of the particular condition and reach a commonsense conclusion (Ministry of Justice 2009:[94]).

It is submitted that s 23A of the NSW *Crimes Act* would be much improved by adopting these changes to the revised English provision on diminished responsibility. With respect to the expression ‘abnormality of mental functioning’, this was previously recommended by the NSW Law Reform Commission after consultations with several psychiatrists (NSW Law Reform Commission 1997a:[3.50]). As these experts saw it, the meaning of the term ‘abnormality of mind’, found in s 23A, was imprecise and almost every person who kills could be said to suffer from some form of ‘abnormality of mind’. Furthermore, the term was

⁴ Namely, that the abnormality of mind must have arisen from ‘a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury’.

so ambiguous as to be unclear whether it covered certain conditions such as antisocial personality disorders, dissociation or excessive jealousy due to relationship breakdown. Replacing 'mind' with 'mental functioning' also describes much more precisely the effect of the accused's mental abnormality on the capacities described in s 23A(1). Such a replacement will result in the provision being read as requiring the accused's *functioning* of his or her 'capacity to understand events, or to judge whether the [accused's] actions were right or wrong, or to control himself or herself' to have been substantially impaired.⁵

The English approach of leaving the aetiology of the mental abnormality entirely to the clinicians by reference to 'a recognised medical condition', is also preferable to the requirement of 'an underlying condition' under s 23A.⁶ The NSW Law Reform Commission's purpose for linking the mental abnormality to 'an underlying condition' was in order to confine the defence to persons whose mental impairment was of a more permanent nature than a simply temporary state of heightened emotions (NSW Law Reform Commission 1997a:[3.51]). This was certainly an improvement on the previous s 23A, which required clinicians to struggle over identifying an accused's mental abnormality with one of the list of causes prescribed by the provision. Nonetheless, the concept of an underlying condition could produce disagreements amongst expert witnesses over whether a particular condition was more than ephemeral or transitory in nature. Furthermore, the concept does not satisfactorily clarify whether conditions like antisocial personality disorders, excessive jealousy and the like can support the defence. The stance adopted by the revised English defence dispenses with these problems by providing simply that the claimed mental abnormality must have been a recognised medical condition. Moreover, it supports the practice of some expert witnesses in NSW who prefer to discuss an accused's mental abnormality with reference to an established classificatory system of mental conditions rather than in terms of 'an underlying condition' (see, eg, *R v Christov* at [168]; *R v Nguyen* at [41]).

One further feature of the English revised provision concerning the requirement of abnormality of mental functioning deserves to be mentioned. The provision states that the abnormality of mental functioning must have substantially impaired the accused's ability: '(a) to understand the nature of D's conduct; (b) to form a rational judgment; [or] (c) to exercise self-control' (s 2(1)). It is observed that (a) and (b) differ from their equivalents in s 23A, which are 'to understand events' and 'to judge whether the person's actions were right or wrong' respectively. The Law Commission, which drafted the English provision, gave as its reason for departing from s 23A with respect to s 2(1)(a) that it was 'to ensure that the accused's lack of understanding of, say, global political events, is not relevant to his or her plea' (Law Commission 2006:[5.112] n 84). As for s 2(1)(b), the Commission agreed with the observation by the Royal College of Psychiatrists that 'to form a rational judgment' could cover cases that the equivalent formulation in s 23A did not. The example given was of a deluded accused who had killed someone who he believed was a reincarnation of Napoleon. The accused might have known that it was morally and legally wrong to take the law into his own hands by killing, and yet be suffering from a substantially impaired capacity to form a rational judgment (Law Commission 2006:[5.112] n 85). All told, it is submitted that s 23A could be improved by replacing the descriptions of the two capacities under consideration with the English versions of them.

⁵ This requirement of substantial impairment will be discussed in detail below.

⁶ But see Mackay (2010:294-5), who criticises this revision for being possibly broader in some respects and narrower in others, compared to the requirement of prescribed causes under the original provision.

Substantial impairment

As noted above,⁷ the revised English provision adopts the arrangement found in s 23A by retaining the notion of ‘substantial impairment’, but relates it to the accused’s capacity ‘to understand the nature of his or her conduct, to form a rational judgment, or to exercise self-control’ (s 2(1)(b) read with s 2(1A)). These stated capacities are derived from the definition of ‘abnormality of mind’ given by Lord Parker CJ in *R v Byrne* (at 403). This arrangement is a vast improvement compared to the one under the former English provision, where the substantial impairment was related to the ambiguous concept of the accused’s ‘mental responsibility’. It has also been explained previously how the impairment of the stated capacities sits well with the expression ‘abnormality of mental *functioning*’ used in the revised provision.

The Law Commission, which drafted the revised provision, thought that it made clearer the relationship between the roles of the expert witness and the jury (Law Commission 2006:[5.117]). As with the NSW provision, the English defence calls for the expert to offer an opinion on: (i) whether the accused was suffering from an abnormality of mental functioning arising from a recognised medical condition; and (ii) whether, and in what way, the abnormality impacted on the accused’s capacities as listed in the revised provision. It was then for the jury to undertake the moral judgment of whether, taking into account the expert opinion and all other relevant evidence, the relevant capacities of the accused had been ‘substantially impaired’. Interestingly, the experts themselves had voiced discomfort over engaging with this ‘ultimate issue’, as is clear from the following comment by the Royal College of Psychiatrists:

Although it is common for the courts to accept, or even encourage a psychiatric expert to comment upon whether the defendant should be seen as ‘substantially impaired’, the College believes that this should be resisted ... Our belief is that this restriction should apply irrespective of the ‘side’ which is calling an expert. We believe that this can be achieved without in any way leaving the jury ‘floundering’ with materials and issues with which they are not in a position to cope ... Hence, for example, an expert can inform the jury in a murder trial of the likely effects of the defendant’s disorder in terms of the various mental capacities, yet still fall short of saying whether these ‘amounted to’ substantial impairment of mental responsibility (Law Commission 2006:[5.118]).

Contrary to the view of the Law Commission, the revised provision does not clearly distinguish the roles of the expert and jury as described above. This would have been achieved had the Commission adopted s 23A(2) of the NSW *Crimes Act*, which states emphatically that ‘evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible’. Accordingly, the revised English provision would have done well to incorporate this sub-clause of the NSW provision.

Another sub-clause of s 23A that was not adopted by the revised English provision is that which states: ‘the impairment was so substantial as to warrant liability for murder being reduced to manslaughter’ (see s 23A(1)(b)). The NSW Law Reform Commission included this sub-clause to reflect the aim of the phrase ‘substantial impairment of mental responsibility’ found in the original provision (NSW Law Reform Commission 1997a:[3.57]). It is submitted that the absence of this sub-clause in the revised English provision is not critical. This is because the same effect is achieved by reading the requirement in the English provision that the abnormality of mental functioning must have

⁷ See the main text accompanying n 5.

‘substantially impaired D’s ability to do one or more of the things mentioned in subsection (1A)’, together with subsection 3, which states that ‘[a] person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter’.

The causal element

Another deficiency of the former English provision was that it did not make it clear whether the abnormality of mind must, in some sense, have ‘caused’ the accused to kill. The provision simply stated that the abnormality of mind must have substantially impaired the accused’s mental responsibility for his or her acts in doing or being a party to the killing. In its draft provision, the Law Commission proposed that the abnormality of mental functioning must have been ‘an explanation’ for the killing (Law Commission 2006:[5.112]). The revised provision adopts this proposal (s 2(1)(c)), but goes further to state that such an explanation occurs ‘if it causes, or is a significant contributory factor in causing, [the accused] to carry out that conduct’ (s 2(1B); see also Ministry of Justice 2008a:[51]).⁸

The revised s 23A of the NSW *Crimes Act* did not rectify this deficiency in the original provision, so that it remains unclear what the connection is between the abnormality of mind and the killing. To date, this does not appear to have created any significant problems in practice. Nonetheless, some sort of description — such as that proposed by the Law Commission of ‘an explanation’ or the more demanding causal test found in the revised English provision — would certainly improve the operation of s 23A. If a choice had to be made, it is submitted that the Law Commission’s proposal of ‘an explanation’ is preferable, because it avoids having to conduct a formal causal inquiry. On this point, the Royal College of Psychiatrists, while not objecting to a causal requirement as such, warned against creating a situation where experts might be called on to ‘demonstrate’ causation on a scientific basis (Law Commission 2006:[5.123]; Mackay 2010:297–300).

Provocation

The defence, which replaces the common law plea of provocation, appears in ss 54 and 55 of the *Coroners and Justice Act*. For the purposes of this article, the relevant parts of the defence of loss of control involving the qualifying trigger of conduct and words states as follows:

- 54 (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder [but of manslaughter] if—
- (a) D’s acts and omissions in doing or being a party to the killing resulted from D’s loss of self-control,
 - (b) the loss of self-control had a qualifying trigger, and
 - (c) a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

⁸ By way of criticism, the words ‘if it causes’ appears superfluous given the less demanding requirement of ‘a significant contributing factor in causing ...’ found in the subsection.

- (3) In subsection (1)(c) the reference to “the circumstances of D” is a reference to all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

55 (1) This section applies for the purposes of section 54.

...

- (4) This subsection applies if D’s loss of self-control was attributable to a thing or things done or said (or both) which—
 - (a) constituted circumstances of an extremely grave character, and
 - (b) caused D to have a justifiable sense of being seriously wronged.

...

- (6) In determining whether a loss of self-control had a qualifying trigger—

...

- (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

This new defence seeks to solve a number of problems that plagued the plea of provocation. Those problems were that: the defence of provocation was ‘a confusing mixture of common law rules and statute’ (Law Commission 2006:[85]); there was continuing uncertainty over the qualities of the ‘ordinary person’ in the law of provocation; and there was uncertainty over what constitutes legally permissible provocative conduct. Furthermore, the defence privileged men’s typical reaction to provocation over women’s, by being too generous to those who killed in anger and too hard on those who killed from fear of serious violence. The new defence has two parts, which share common features — except that the ‘qualifying trigger’ for each differs. For the first part, the accused’s loss of self-control is attributable to his or her ‘fear of serious violence’ from the deceased against the accused; while for the second, the loss of self-control is the result of conduct or words or both that caused the accused to have ‘a justifiable sense of being seriously wronged’. To distance itself from the former defence, the new one avoids the use of the term ‘provocation’ altogether (Ministry of Justice 2009:[85]).

The ‘fear of serious violence’ part of the new English defence is related to the doctrine of excessive self-defence, which is embodied in s 421 of the NSW *Crimes Act* and will be dealt with separately below. The ensuing discussion will be confined to the ‘conduct and words’ part of the English defence because it is the one that relates most closely with the defence of provocation as embodied in s 23 of the NSW *Crimes Act*.

The ‘ordinary person’ test at common law

A brief description of this test is needed here to facilitate comparison with the new English defence formulation of it. The primary issue with which the courts at common law had to wrestle was what personal characteristics or circumstances of an accused, if any, could be attributed to the ordinary person in the defence of provocation. The following seminal pronouncement was made by Lord Diplock in the House of Lords case of *DPP v Camplin*:

[T]he reasonable man ... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the

accused's characteristics as they think would affect the gravity of the provocation to him (at 718).

Based on this pronouncement, the law's recognition of an accused's personal characteristics or circumstances will depend on the function served by the recognition, namely, to assess the gravity of the provocation or else to measure the power of self-control of an ordinary person.⁹ If it pertains to assessing the gravity of the provocation, *any* of the accused's personal characteristics or circumstances would be relevant if it had the effect of enhancing the provocation. However, over the years, judges and commentators have sought to qualify this aspect of the *Camplin* pronouncement by suggesting that the defence should be withheld when it might be seen as condoning a socially unacceptable response to provocation. Take, for example, a homophobic person killing a person for making a non-violent homosexual advance towards him (*Green v The Queen*); a white racist killing a coloured person for speaking to him (Horder 1992:144); or a carer killing an infant who would not stop crying (*R v Doughty*).

At this juncture, the observation may be made that the question of which of the accused's personal characteristics or circumstances may be attributed to the ordinary person for the purpose of assessing the gravity of the provocation, is intertwined with that of whether the deceased's conduct amounts to 'grave' provocation. Hence, in the example of the killing of a homosexual, whether the accused's characteristic of being homophobic should be recognised depends on whether the law regards the deceased's conduct of making non-violent homosexual advances towards him as constituting grave provocation. Similarly, whether the carer's circumstances of attending to a crying infant should be recognised, depends on whether the infant's incessant crying can amount to grave provocation.

Where the function served by the recognition of an accused's characteristic or circumstances pertains to the measure of self-control expected of an ordinary person, then, according to the *Camplin* pronouncement, only the accused's sex and age are relevant. This area of the law has elicited controversy among the English judges, with the House of Lords holding in *R v Smith (Morgan)* that an accused's mental deficiency could also be taken into account when assessing an ordinary person's power of self-control, which view was not followed by the Privy Council four years later in *Attorney-General for Jersey v Holley* (subsequently endorsed by the Court of Appeal in *R v James; R v Karimi*).

The *Camplin* pronouncement has, save for one qualification to be discussed below, been adopted by NSW courts so as to form part of the defence of provocation under s 23 of the NSW *Crimes Act* (see, eg, *Green* at 340–1; *R v Mankotia* at 493–4). Consequently, the same concerns and controversies besetting the English common law have found their way into NSW law. With respect to personal characteristics and circumstances of an accused affecting the gravity of the provocation, Australian judges and commentators have likewise found it necessary to deny the defence to a person where, otherwise, the law could be seen as condoning socially unacceptable responses to provocation. Thus, in the High Court case of *Green*, Kirby J, in dissent, said:

For the law to accept that a non-violent sexual advance, without more, by a man to a man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill, or to inflict grievous bodily harm, would sit ill with

⁹ As we shall see below, this two part formulation of the 'ordinary person' test has been adopted by Australian law. Recently, the Queensland Law Reform Commission (2008:[21.127]), after reviewing the criticisms against this test, favoured its retention and said that the test was not so complex as to be unworkable.

contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear (at 408).

In support of this proposition, the Australian Capital Territory (ACT) introduced a clause into its provision on provocation stating that '[c]onduct of the deceased consisting of a non-violent sexual advance towards the accused ... is taken not to be sufficient, by itself, to be conduct [amounting to provocation]' (*Crimes Act* (ACT) s 13(3)). There is no equivalent provision in s 23 of the NSW *Crimes Act*.

For the same reason, Australian commentators have suggested that the defence of provocation should be denied to members of a subcultural group that promotes the use of violence against those who disagree or are disagreeable to them (Fairall and Yeo 2005:[11.12]). As for the accused's personal characteristics or circumstances affecting the ordinary person's power of self-control, NSW courts have yet to consider the judicial controversy in England involving cases like *Smith (Morgan)* and *Holley*. As NSW law currently stands — apart from age, it has not been appropriate (since the High Court decision in *Stingel v The Queen*: at 327 and followed in *Green and Mankotia*) to attribute any of the accused's characteristics to the ordinary person for the purpose of assessing his or her power of self-control.

The 'ordinary person' test under the new defence

Although expressions like 'reasonable man' or 'ordinary person' are dispensed with under the new English defence, a test of reasonableness or ordinariness nonetheless features prominently in it. That test appears in two parts: in the description of the type of provocation that the law will recognise; and in the reaction of a person with a normal degree of tolerance and self-restraint to the provocation.

In respect of the description of the provocation, s 55(4) states that it must have comprised things, done or said or both, that 'constituted circumstances of an extremely grave character, and caused the accused to have a justifiable sense of being seriously wronged'. While the description 'extremely grave character' informs the jury that the provocation must have been exceptional, it is the latter portion of this clause that imposes a significant limitation on the legally permissible types of provocation. The Law Commission, which had proposed this restriction, recognised that it was controversial — since the common law of provocation does not have any restrictions on the kinds of provocation that might be considered by the jury (Law Commission 2006:[5.62]–[5.66]). In the following statement, the Commission helpfully elaborated on how the jury is to decide on whether there was a 'justifiable sense of being seriously wronged':

The jury may conclude that the defendant had no sufficient reason to regard [the deceased's conduct] as gross provocation, or indeed that the defendant's attitude in regarding the conduct as provocation demonstrated an outlook (eg religious or racial bigotry) offensive to the standards of a civilized society (Law Commission 2004:[3.70]).

Hence, the idea of a 'justifiable' sense of being 'seriously' wronged directs the jury to consider whether the provocation and the accused's view of it were morally or socially acceptable. Alan Norrie has sought to encapsulate the underlying philosophy of this jury determination in the term 'imperfect justification' — although the accused's conduct is wrong, in the overall circumstances of the case, there is an element of justification (Norrie 2010:277–9). Norrie views this feature of the new defence as professing that 'anger is not a morally impermissible emotion, for it reveals a normal and, at one level, appropriate, even perhaps virtuous, response to certain forms of words or action' (Norrie 2010:277).

This form of limitation on the type of provocative conduct has the effect of confining the personal characteristics or circumstances of the accused to those which could make a jury sharing them to have a justifiable sense of being seriously wronged. It would doubtless exclude characteristics such as those referred to in the quote above, as well as others such as homophobia, misogyny, erotomania (a stalker's sexual possessiveness and jealousy) and possessing the values of a criminal subcultural group. It would also exclude circumstances like being provoked by an incessantly crying infant or a 'nagging' wife.

In order not to endorse male violence against women who confess to adultery or seek to leave a relationship for another man, the new English defence explicitly provides that 'the fact that a thing done or said constituted sexual infidelity is to be disregarded' (s 55(6)(c)). This measure was opposed by several respondents to the UK Government's consultation paper, who contended that the defence should succeed if the other requirements of the defence were met, namely: that the sexual infidelity constituted an exceptional circumstance giving the accused a justifiable sense of being seriously wronged, and the jury accepted that a person of ordinary tolerance and self-restraint could have acted in the same way (Ministry of Justice 2009:[48]). In response, the Government did not accept that sexual infidelity should ever provide the basis for a partial defence to murder, and was adamant that it should be made explicitly clear statutorily that sexual infidelity should not provide an excuse for killing (Ministry of Justice 2009:[54]).

Regarding the objective appraisal of the reaction to the provocation, s 54(1)(c) embodies the *Camplin* pronouncement by stating that 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D'. For added clarity, s 54(3) goes on to say that 'the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint'. These statutory provisions put to rest the controversy under English common law represented in cases like *Smith (Morgan)* and *Holley* over whether other personal characteristics of the accused, besides age and sex, might be relevant when assessing the power of self-control that is expected of the ordinary person in the circumstances of the accused.

The recognition of an accused's age (by which is meant 'youthful immaturity') is relatively uncontroversial, the underlying rationale being that the law would be unrealistic and unduly harsh to insist on an emotionally and mentally immature youth possessing the capacity for tolerance and self-restraint of an older person. However, issue may be taken over recognising an accused's sex. The implication of doing so is to condone the highly debatable proposition that women generally have a higher capacity for tolerance and self-restraint than men. Such stereotyping perpetrates the image of women who kill as either aberrational and evil monsters or excessively pathological. This would have explained why the Law Commission only included age, but not sex, in its proposed reformulation of the defence of provocation (Law Commission 2006:[5.11]–[5.38]). The UK Government does not explain its inclusion of sex in the new defence provision, and it is quite possible that this was an oversight — since the Government's assessment report describes the new defence as 'retaining a requirement for a loss of self-control, but amended to make it more gender-neutral' (Ministry of Justice 2008b:13; see also Law Commission 2004:[3.78]). If the inclusion of sex was deliberate, the Government might have had in mind the purportedly *lower* capacity for tolerance and self-restraint of battered women in violent domestic relationships who kill their male battering partners. Should this have been the case, the Government may be criticised for not accepting the social reality that female homicides might be exceptional because they are rare, but they are the actions of ordinary or normal

women who have been pushed to the extreme. Furthermore, the Government's stance fails to recognise that the battered partner of a domestic violent relationship need not always be a woman, but could be a male (see *Osland v The Queen* at [160]). In sum, it is submitted that the new English defence should have insisted on a single standard of tolerance and self-restraint for both sexes. This is the position taken by the Australian High Court in *Stingel* (at 327, 329) and is to be applauded.¹⁰

NSW law on provocation could benefit greatly by incorporating into s 23 of the NSW *Crimes Act* the description under the new English defence of the legally permissible types of provocation. Presently, all that the section says is that the provocation could be 'any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused' (s 23(2)(a)) and that the conduct 'was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased' (s 23(2)(b)). This description affords little guidance to the courts as to the legally permissible types of provocation. By requiring the provocation to have caused the accused 'to have a justifiable sense of being seriously wronged', the English defence provides an objective test based on contemporary community values and standards by which to measure the provocation experienced by the accused. Certainly, NSW courts have the ability to adopt this test or devise a similar one without waiting for the legislature to do so. However, having the test expressed in statutory form ensures that the law has the qualities of precision, comprehensibility, being democratically made and accessible.¹¹

Regarding the express exclusion of sexual infidelity as a legally permissible form of provocation, it is submitted that the social mores and customs of NSW society may well differ from those of England on this score. Given the extended debate and opposing views expressed during the consultation process leading up to the enactment of the English defence, the NSW legislature should exercise great circumspection when deciding whether or not to adopt this English exclusion.

NSW law on provocation would likewise be significantly improved were the English defence's requirement of 'a person of [the accused's] age, with a normal degree of tolerance and self-restraint', be incorporated into s 23 of the NSW *Crimes Act*. Once again, it would be preferable for such a requirement to be statutorily expressed rather than left to be pronounced by NSW courts. Such a development would not comprise a radical departure from NSW current law, which — as previously noted — has adopted the relevant pronouncement in *Camplin* on this matter. The only change would be that the accused's sex would be taken out of the equation, which is what the Australian High Court has done. This legislative move would also resolve the controversy over whether an accused's ethnicity should be recognised.¹² The fact that England, which has much larger numbers of migrants on its shores, has chosen not to recognise ethnicity as having a bearing on the normal degree of tolerance and self-restraint, is strong reason for NSW to do the same.

¹⁰ But see the reference to sex in the trial judge's direction to the jury in the NSW case of *R v Goebel-McGregor*, reproduced in the NSW Court of Criminal Appeal's judgment in *Goebel-McGregor v The Queen* at [65].

¹¹ These were the qualities that Thomas Macaulay, the principal framer of the Indian Penal Code said made for good legislation: see Macaulay et al (1838:v).

¹² See *Masciantonio v The Queen* (at 74) where McHugh J, dissenting, held that the principle of equality before the law required an accused's ethnic or cultural background to be recognised, alongside age, as affecting the power of self-control of an ordinary person. A submission based on that ruling was rejected by the New South Wales Court of Criminal Appeal in *Mankotia*. For a good summary of the controversy, see the Queensland Law Reform Commission (2008:[11.45]–[11.52]).

Loss of self-control and a considered desire for revenge

Besides requiring a loss of self-control, the new English defence is denied to an accused person who had ‘acted in a considered desire for revenge’ (s 54(4)). The UK Government thought that this additional requirement was needed to safeguard against the defence being available to cases of ‘honour killings’ or ‘tit-for-tat gang killings’ (Ministry of Justice 2009:[56], [74] respectively). It is submitted that having this requirement unjustifiably downplays the role of loss of self-control in exculpating the accused of murder. In support of this, reference may be made to the Australian High Court case of *Osland*, which held that ‘neither as a matter of law or logic is there any inconsistency in finding that [the accused] was acting ... under provocation and at the same time acting pursuant to an understanding or agreement’ (at 360). The Court referred (at 360, n 185) to the facts of the well-known case of *Parker v The Queen* where, had the accused set out with his brother-in-law to catch up with the victim and kill him, it would have been open to the jury to find that the accused had acted under provocation and also pursuant to an agreement to kill. Extending this holding to the issue at hand, it is legally and logically possible for an accused person to have killed while under loss of control due to provocation, as well as having a considered desire for revenge. Certainly, if the accused had killed solely out of revenge and not while deprived of his or her self-control, the defence of provocation would fail.

Excessive self-defence

The *Coroners and Justice Act* created another new partial defence to murder of killing due to fear of serious violence from the deceased against the accused or another identified person. The factual circumstances where this defence operates is likely to be the same or closely similar to those covered by the plea of excessive self-defence provided for under s 421 of the NSW *Crimes Act*. Nonetheless, the English defence has several features that make it questionable to categorise it as a form of self-defence and, as such, its requirements cannot be strictly compared with those of s 421. Indeed, the Law Commission, which had formulated the prototype of this defence, regarded it as different to excessive self-defence and better served accused persons such as battered women who killed their partners from fear of serious violence by them (Law Commission 2006:[1.53]). What follows is, therefore, not so much a comparison between the new English defence and s 421, as a critical appraisal of the English defence with the aim of determining whether it is superior to s 421 in nature and operation.

The new defence shares all the requirements as the one replacing the common law defence of provocation discussed above, except for the following subsections that are specific to it:

- 55 (3) This subsection applies if D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person.
- ...
- (6) In determining whether a loss of self-control had a qualifying trigger—
 - (a) D’s fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence.

The salient requirements of this defence are that: (i) D must have killed as a result of his or her losing self-control (s 54(1)(a)); (ii) the loss of self-control was attributable to D’s fear

of serious violence from V against D or another identified person (s 55(3)); (iii) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D (s 54(1)(c)); (iv) in doing the killing, D must not have acted in a considered desire for revenge (s 54(4)); and (v) D's fear of serious violence is to be disregarded insofar as it was caused by a thing that D had incited in order to provide an excuse to use violence against V (s 55(6)(a)).

It is noteworthy that in the prototype of this defence proposed by the Law Commission, loss of self-control was deliberately left out and in its place were the two 'negatively expressed subjective conditions' — namely, that D must not have acted in a considered desire for revenge, and that D's reaction must not have been incited by him or her for the purpose of providing an excuse to use violence (Law Commission 2006:[5.19]–[5.20]). The new defence reinstated loss of self-control besides maintaining these subjective conditions. The UK Government's reasons for doing so appear in the following passage:

[Without the requirement of loss of self-control] there is a risk of the partial defence being used inappropriately, for example in cold-blooded gang-related or 'honour' killings. Even in cases which are less obviously unsympathetic, there is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence (Ministry of Justice 2008a:[36]).

These reasons may be questioned. The defence might not be available to gang-related or 'honour' killings because there is likely to be a strong motive of revenge in such cases (Law Commission 2006:[5.25]). Hence, the condition that D had not acted in a considered desire for revenge would suffice to exclude such killers, without depending on loss of self-control to achieve this result. As for an accused person who had killed while in full possession of his or her senses, it is difficult to appreciate the Government's reservation over permitting him or her to successfully plead this defence. Conceivably, that reservation stems from the Government's view that the explanation for partially excusing the accused for using unreasonable (ie excessive) fatal force lies in his or her 'loss of senses'; hence its insistence on having the requirement of loss of self-control. However, a sounder exculpatory explanation is the conventional one that the accused was genuinely *mistaken* in his or her need to use such force. This concept of mistaken belief underlies the doctrine of excessive self-defence. Section 421(1) of the NSW *Crimes Act* embraces this explanation by stating that, while the accused's use of fatal force was not a reasonable response, he or she may successfully rely on the defence if the accused believed the conduct to be necessary to defend himself or herself or another person. It is entirely conceivable for an accused pleading s 421 (unlike the new English defence) to have formed this mistaken belief while in full possession of his or her senses.

Bearing in mind that the primary impetus for reforming the English law was to better accommodate the experiences of battered women who kill, perhaps the strongest criticism against the English defence's requirement of loss of self-control is the following observation by the Law Commission:

It was clear to us that when a battered woman uses excessive force against her abusive partner only because she fears for her safety in any direct confrontation, it would be wrong to rule out her plea simply because there was no evidence of a loss of self-control (Law Commission 2006:[5.29]; see also Norrie 2010:288).

In sum, the inclusion of loss of self-control as a requirement of the new English defence makes it unattractive, both from the point of a misplaced explanation for partially excusing an accused's use of excessive force, and for denying the defence in deserving cases.

By contrast, s 421 of the NSW *Crimes Act* strikes the right note by affording an accused a partial defence to murder on account of his or her mistaken belief that the use of fatal force was necessary when it was not.

There is another feature of the new English defence that should dissuade NSW legislators from adopting it. It concerns the requirement under s 54(1)(c) that ‘a person ... with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D’. The Law Commission commented on this requirement as follows:

[Under this defence] [i]t would be open for the jury to convict of manslaughter if they thought that the killing was the type of response which a person of ordinary tolerance and self-restraint might make in the circumstances *notwithstanding that the force used was unreasonable so as to deny the defendant the complete defence of self-defence* (Law Commission 2004:[4.23] (emphasis added); see also [4.19]).

By way of criticism, it is extremely difficult to imagine a case where an accused’s fatal response would be assessed by the jury to be ‘unreasonable’ when they have determined, pursuant to s 54(1)(c), that it was a type of response that a person of ordinary tolerance and self-restraint might make in the circumstances. This is compounded by the complete defence of self-defence under English being quite generous towards the accused with respect to its requirement of reasonable response, as evinced by the following oft-quoted ruling of the Privy Council in *Palmer v The Queen*:

If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defence action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken (at 832).¹³

This state of affairs produces the practical difficulty of having to differentiate between a reasonable response required for the complete defence of self-defence, and an unreasonable one for the new partial defence.

A final criticism of this new defence pertains to the negative subjective condition in s 55(6)(a) that ‘D’s fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence’. The rationale for this condition is to deny the defence to accused persons who were largely responsible for the situation in which they found themselves. This may have some merit, and a form of the condition could be seriously considered for the NSW s 421 defence. Should such a course be taken, the same condition should also be required for the complete defence of self-defence under s 418 of the NSW *Crimes Act*. However, as it presently reads, s 55(6)(a) is defective for stating that D’s purpose was to provide ‘an excuse to use violence’, when it should read ‘an excuse to kill’. One could imagine a situation where the accused had incited the deceased for the purpose of using non-fatal violence on him or her, but the deceased’s reaction was such that the accused found it necessary to use fatal force to defend himself or herself. The UK Government, in its response paper, acknowledged as much when it said that s 55(6)(a) was meant to ensure ‘that those who incite violence, or the threat of it, in order to have an excuse for killing cannot use the defence’ (see Ministry of Justice 2009:[74]). Consequently, it appears to have been an oversight not to have expressed the sub-clause in this manner.

¹³ This ruling is now embodied in the *Criminal Justice and Immigration Act 2008* (UK), s 76(7).

Conclusion

The *Coroners and Justice Act* has made several major changes to the defences of diminished responsibility and provocation under English law. Lawmakers in NSW, be they judges or legislators, could learn much from studying these changes because they by and large improve the law by adding clarity and precision, and updating it to accord with societal standards and scientific thinking.

Regarding the defence of diminished responsibility, all the changes to the former defence made by the *Coroners and Justice Act* are decided improvements that bring the law up-to-date with scientific thinking about abnormal mental malfunctioning. While many of those changes were borrowed from s 23A of the NSW *Crimes Act*, the new English provision has a number of features that NSW could adopt in turn. The first is to replace the expression ‘abnormality of mind’ with ‘abnormality of mental functioning’, which is used in the English provision and is more acceptable to clinicians. Second, the requirement under s 23A that the mental abnormality must have arisen from an ‘underlying condition’ could be replaced with the much more comprehensible and manageable English requirement that it must have arisen from a ‘recognised medical condition’. Third, the NSW provision could be enhanced by including a clause specifying the causal connection between the accused’s mental abnormality and the killing. Drawing on the English provision, that clause could state as follows: ‘The abnormality of mental functioning must provide an explanation for D’s conduct in doing or being an accessory to the killing’.¹⁴

Although the *Coroners and Justice Act* abolishes the common law defence of provocation and replaces it with a defence of loss of control, the new defence contains an improved version of the ‘ordinary person’ test. A significant problem with that test at common law was the controversy over which of the accused’s personal characteristics or circumstances could be attributed to the ordinary person. The new defence settles this controversy in two ways. First, it does so by describing the type of legally permissible provocative conduct as constituting ‘circumstances of an extremely grave character, which caused the accused to have a justifiable sense of being seriously wronged’. As a direct consequence of this description, only those personal characteristics or circumstances of the accused that caused him or her to have such a sense of wrongness will be material. Second, the new defence adopts the latest English judicial pronouncement on the accused’s personal characteristics that are permitted to affect the power of self-control expected of the ordinary person. It does so by providing that ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D’. This article has argued against recognising the accused’s sex as affecting the normal degree of tolerance and self-restraint, which is the position under Australian common law. Apart from this, there is much to be said for incorporating the English provision’s rendition of the ‘ordinary person’ test into s 23 of the NSW *Crimes Act*. Certainly, there have been occasions when the courts have made pronouncements that are the same or closely similar to these features of the new English defence. However, it would be infinitely better for these judicial pronouncements to be in statutory form.

Finally, there is the English defence of loss of control attributable to fear of serious violence. This article has contended that the defence is conceptually problematic for making

¹⁴ Alternatively, should a causal element be considered necessary, the clause could continue on with the words ‘with such explanation provided for if the mental abnormality was a significant contributing factor in causing D to carry out that conduct’.

loss of self-control the exculpatory explanation for the defence when it should be the accused's genuine mistake that the use of fatal force was necessary when it was not. Additionally, it is very difficult, both conceptually and practically, to differentiate between a case where the complete defence of self-defence succeeds, and one that is covered by this new partial defence. It is clear enough that the differentiating factor is the reasonableness of the accused's reaction, with the complete defence requiring that it was reasonable, and the partial defence applying to cases where the response was unreasonable. Yet therein lies the problem — which is that it is hard to imagine a case where an accused's reaction would be found by a jury to have been unreasonable, in spite of their concluding (as the partial defence requires of them) that a person of normal tolerance and self-restraint might have reacted in the same or similar way to the accused. These significant problems make this English defence unattractive, especially when accused persons such as battered women who kill their abusers are far less likely to have their offence of murder reduced to manslaughter under this defence, compared to s 421 of the NSW *Crimes Act*.

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