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Self-defence in New South Wales in its historical context: A simpler test?

A thesis represented in fulfillment of the requirements of the University of Notre Dame for the degree of Doctor of Philosophy

School of Law
Sydney Campus
November 2021
I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary institution.

Mamdouh Mourid Self ElmaraaZeY
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ABSTRACT

The right to use force in self-defence is recognised by law. The idea of self-defence in criminal law history can be traced back to medieval England’s daily life and ‘the peace’ that the king was trying to establish as his contribution to the good of English society as a whole. The Crown enacted several statutes during the medieval period to ensure that those responsible for homicides were convicted, but would occasionally pardon offenders when the jury qualified their guilty decisions with self-defence explanations. But because the king did not always grant a pardon, juries developed a reputation for handing down not guilty verdicts when the jury considered that alleged offenders should be exonerated on the grounds of self-defence. The king’s statutes about homicide were passed in an effort to control juries. Those statutes are part of the story of how juries became independent triers of fact, how the role of public prosecutor was developed and how juries asserted their independence against executive overreach and criminal laws they considered draconian. That story assists understanding of how self-defence laws achieved their current complexity. In particular, that story explains the long history of jury concern about the line between murder, manslaughter and acquittal in self-defence cases.

The thesis also explains how self-defence law was developed in Australia during the 20th century and how the parliaments of the Australian states and territories responded to the continuing uncertainty caused by diversity in High Court and Privy Council opinion in homicide cases involving self-defence claims. It also analyses the effectiveness of the self-defence provisions in ss 418 and 421 of the Crimes Act 1900 (NSW) which were passed to resolve the problems that arose because of the diversity in High Court and Privy Council legal opinion. This analysis shows that the New South Wales statutory provisions have not improved clarity. Rather, they have compounded the complexity and made it nearly impossible for trial judges to give jury directions that adequately explain the relevant self-defence law in homicide cases.

The purpose of this thesis is to formulate and recommend a simple self-defence test that lay jurors in New South Wales can understand and apply in all self-defence cases, including cases that involve homicide. The intent is to make New South Wales self-defence law simple enough that jurors can understand it without judicial explanation.
The thesis also recommends appropriate general directions that a trial judge could give any jury in a self-defence case if the recommended changes were implemented.
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I acknowledge that I would not have been able to reach this significant milestone without the dedication and the exemplary supervision of Professor Keith Thompson throughout my Ph. D degree.

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CHAPTER ONE
INTRODUCTION AND METHODOLOGY

Introduction

The defence of self-defence is a fact of everyday life. In October 1959 Martin Luther King, Jr wrote that '[t]he principle of self-defense, even involving weapons and bloodshed, has never been condemned, even by Gandhi.'\(^1\) As the Australian High Court Justice Sir William Deane put it in \textit{Zecevic}:

> The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of the school child who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.\(^2\)

The idea of self-defence is simple. But expressing that idea in law has always been challenging because the violence involved is unacceptable unless self-defensive intent is proven, and that proof relies on access to the inviolable precincts of the human mind. The practical challenge for a lay jury is to determine the accused’s intent without access to her mind. Was she just defending herself, or did she do more than was

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\(^1\) Martin Luther King Jr., 'The Social Organization of Nonviolence" (October 1959) \textit{Libertarian} 299, 302 citing what Gandhi said in his essay “The Doctrine of the Sword” of 11 August 1920. Gandhi said:

> I do believe that where is only a choice between cowardice and violence I would advise violence … I would rather have India resort to arms in order to defend her honour than that she should in a cowardly manner become or remain a helpless victim to her own dishonour.


\(^2\) \textit{Zecevic v Director of Public Prosecutions (VIC)} (1987) 162 CLR 645, 675 (Deane J) (‘\textit{Zecevic}'). This quote illustrates the psychological insight of Justice Deane and His Honour’s call for the jury to be directed in uncomplicated everyday language. An analysis of the psychological aspect of self-defence is beyond the scope of this thesis but see a brief discussion under the heading ‘The Psychology of Self-Defence’ in part one of the Appendix to this thesis.
necessary? And if she did more than was necessary to defend herself, does the need for some self-defence mitigate her excessive violence in any way?

Because juries have always insisted that self-defence does mitigate violence against an aggressor, legislatures and judges have been gradually forced to accommodate that democratic view of self-defence in law with acquittal, and much more recently, with a manslaughter conviction option in the alternative. But the legislative and judicial expressions of those options in New South Wales have always been convoluted. It is the purpose of the thesis to formulate and recommend a simple expression of the law of self-defence in New South Wales that lay jurors can understand and apply without much judicial explanation. The focus is on homicide cases, though the final formulation is intended to express the law of self-defence in other crimes where self-defence is raised in justification.

1.1 Research Question

Because the law related to self-defence in homicide cases in New South Wales became very contested during the 20th century for reasons that are explained within the thesis, the research questions that this thesis will answer are:

1. Is it possible to define self-defence within the existing *Crimes Act 1900 (NSW)* so simply that no reasonable jury could misunderstand it; and

2. If so, how should self-defence be defined?

Supporting questions that will assist in responding to those primary questions and which are answered in this thesis are:

3. Did English common law always recognise that self-defensive action by a person accused of homicide mitigated that action?

4. If not, how and when did self-defence come to be recognised as a defence that mitigated the severity of a finding of homicide against a person accused of homicide?

5. What part did the English jury play in the development of a law of self-defence in English common law?
6. What part did the High Court of Australia and the Privy Council in England play in the development of a law of self-defence in Australian common law?

7. How have the parliaments of the Australian states and territories responded to the uncertainties in Australian self-defence law?

8. Have legislative amendments in New South Wales since Zecevic improved clarity or have they compounded complexity?

9. Does a simple self-defence test matter?, and

10. If so, what are the requirements of a self-defence test so simple that a jury cannot misunderstand it?

11. How can such a simple test be formulated?

12. How should self-defence law in New South Wales be reformed?

1.2 Research methodology

To answer the research questions, this thesis takes a qualitative approach and uses ‘doctrinal’ research and ‘black-letter’ legal methodology. However, because this

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3 Terry Hutchinson offered an explanation as what doctrinal research in reforming the law might involve. She stated, ‘[t]he essential features of doctrinal scholarship involve ‘a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation’.


4 Terry Hutchinson and Nigel Duncan has offered one explanation of the term back letter, they stated:

The term ‘black letter’ refers to research about the law included in legislation and case law. The term originated from the name of the Gothic type which continued to be used for law texts. It is defined in Bryan A Gardner (ed), Blacks Law Dictionary (Westlaw International, 9th ed, 2009) as: ‘One or more legal principles that are old, fundamental, and well settled.’ In addition, the definition notes: ‘The term refers to the law printed in books set in Gothic type, which is very bold and black’.

thesis includes law reform recommendations, it may not be categorised as ‘pure’ doctrinal research. As Terry Hutchinson has emphasised:

Pure doctrinal research identifies and analyses the current law. Reform-oriented research recommends change. Most ‘good’ quality doctrinal research goes well beyond description, analysis, and critique, and invariably suggests ways the law could be amended.

Thus, no single research methodology is used to answer the research questions. Because this thesis uses a number of different methodologies, which sometimes overlap, I will now explain the methodological approach.

1.2.1 Methodology of legal history

I have used legal history as a lens to untangle problems rooted in the past and to examine how English criminal law was reformed in the past. Oliver Wendell Holmes Jr., is well known for teaching that a sound understanding of the legal history of any

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5 It is beyond the scope of this thesis to explore in detail all the different methodologies that can be used in legal research. It suffices not to forget what Justice Felix Frankfurter said. He said:

What is research? ... There is nothing technical about the meaning of research, and there is nothing new except the currency of the term. Maitland and Ames and Holmes did not talk about research nor did they deem themselves researchers. But eliminate their contributions from the history of modern jurisprudence, and you take away its greatest glories, the most powerful influences in the promotion of the scientific temper in law ... What is research? It is not a method, it is not an object, it is a behavior.


6 Hutchinson (n 3) 132 (emphasis in original).


8 Dirk Heirbaut stated:

There is no ‘methodological king’s road’ for research in the field of legal history ... The choices one makes depend of one’s personal interests and training, the relevant source material and so on.

field of law is an essential foundation before any reform is recommended. On one occasion he said, ‘[t]he history of what the law has been is necessary to the knowledge of what the law is.’\textsuperscript{9} More famously he observed:

It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was so laid down have vanished long since and the rule simply persists from blind imitation of the past.\textsuperscript{10}

Justice Kirby explained the significance of “the legal history of England” as follows:

In the High Court of Australia, we have had our own debates concerning the extent to which in understanding contemporary Australian legislation, it is useful to pay close attention to the legal history of England that preceded our home grown enactments.\textsuperscript{11}

Justice Kirby also observed that ‘[a] knowledge of legal history is basic to a full understanding of the system and a capacity to influence its development in a socially desirable way.’\textsuperscript{12} He then added:

It remains true … that a failure to know one’s history inevitably leads to a repetition of its errors … History is a vital ingredient for the legal context, whether the law in question is expressed in the Constitution, in statutory texts or in the decisions of the judges.\textsuperscript{13}

Justice Gummow also significantly observed, ‘unless one knows how the law came to be in its present state, how can one set about with any proper assurance deciding

\textsuperscript{9} Oliver W. Holmes, Jr., \textit{The Common Law} (London: MacMillan & Co., 1882) 37.

\textsuperscript{10} Oliver Wendell Holmes Jr., \textit{The Path of Law} (Bedford, Massachusetts, Applewood Books, 1897), 21.


\textsuperscript{13} Kirby, ‘Teaching Legal History in Australia’ (n 11) 17 (citations omitted). Hoeflich stated, ‘when one looks at the problems our legal system faces today, one sees clearly that many of these are issues that have arisen before or that have their roots in the past’. Hoeflich (n 12) 507.
what it ought to be?14 The High Court recognised in its decisions, “the impact and power of legal history” in deciding court cases. Justice Kirby explained:

If the reader doubts the power of legal history in the decisions of the High Court of Australia, he or she should open the pages of the Commonwealth Law Reports. There, in every branch of the law, will be found an exploration of the history of the applicable legislation and common law doctrine which went before the case in hand ... It is impossible to consider the development and extension of common law doctrine in any case without a full appreciation of what that doctrine is, why it exists, where it came from and how other jurisdictions have applied and developed it.15

Karl Llewellyn has argued, ‘[t]he argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.’16 In a similar vein, Paul Vinogradoff stated:

[W]e may use the effective method of going backward from the present as well as coming forward from the past. The first requisite to an intelligent study of legal history is a thorough knowledge of modern law. It is desirable to know the end before we start searching for the beginning.17

While I have used history as a lens for understanding where the current common law and statutes that deal with self-defence in homicide came from, I have also used doctrinal case methodology to advance the thesis project.


16 Karl N Llewellyn, ‘Some Realism About Realism--Responding to Dean Pound’ (1931) 44 Harv. L. Rev. 1222, 1236-7 (emphasis in original).

17 Paul Vinogradoff, ‘Meaning of Legal History’ (1922) 22 Colum. L. Rev. 693,700-701.
1.2.2 Methodology of case law

My primary objective in the thesis has been to identify those cases that played a role in the development and the interpretation of Australia’s unique common law of self-defence, and statutory self-defence. The study of those cases is essential ‘to uncover the fundamental rules and principles of law’. That study has recognised that the law of a country ‘sits within a culture. Law both drives and is influenced by the culture of the [relevant] country.’ Karl Llewellyn says that the primary methodological questions for all legal research are, ‘what difference does statute, or rule, or court-decision, make? … what does law do, to people, or for people? … what ought law to do to people, or for them?’ Justice Richard Posner has made the methodological point that case law is about real people and real problems and not about hypothetical scenarios or imagination and invention.

There is another reason why I focused upon the analysis of court opinion in real time. That is, ‘[t]he opinion [of the courts that decide cases] may even contain language that suggests the rule’s importance and the necessity for applying it in future cases’. In some cases there is language that suggests why the study of those cases in their

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20 Llewellyn (n 16) 1222-3 (emphasis in original). He later stated, "Law" without effect approaches zero in its meaning. To be ignorant of its effect is to be ignorant of its meaning": at 1249 (emphasis in original).

21 Justice Richard Posner has written the following powerful argument:

Although the writers we value have often put law into their writings, it does not follow that those writings are about law in any interesting way that a lawyer might be able to elucidate. If I want to know about the system of chancery in nineteenth-century England I do not go to Bleak House. If I want to learn about fee entails I do not go to Felix Holt. There are better places to learn about law than novels—except perhaps to learn about how laymen react to law and lawyers. Obviously this is not true in cultures where the only information about law is found in what we call literature, though contemporaries thought of it as history … But in a culture that has nonliterary records, those records generally provide more, and more accurate, information about the legal system than does literature.


22 Weaver (n 18) 553 (citations omitted).
historical context was ‘of considerable importance’ as Ellinger and Keith have emphasised:

The historical background of a case is of considerable importance as it can shed light on the true grounds of, and on the policy related to, the decision. Occasionally, that background may also suggest good reasons for distinguishing the case or for treating it as obsolete or as obscure.\textsuperscript{23}

But common law is no longer all there is to Australian law. While the common law still interacts with statute law and exerts influence on its development, when statutes are passed, they often trump the pre-existing common law doctrines and so the statutes merit their own separate methodological consideration. For the most part, the methodology that lawyers use to study statutes is called statutory interpretation.

\textbf{1.2.3 Methodology for studying statutes/legislation}

A necessary feature of doctrinal research is that it involves an analysis of all relevant legislation alongside case law ‘to reveal a[ll] … the law relevant to the matter under investigation’.\textsuperscript{24} I have therefore compared the common law of self-defence with the statutes that have followed, and how they have been interpreted by judges to enable the more detailed analysis that I then undertook of the New South Wales statutory self-defence provisions. I began with research that looked back to the development of the law in the 12\textsuperscript{th} century when English criminal law jury trial was forming. To enable modern readers to understand how the difficult line between murder, manslaughter, self-defence, limited guilt and no guilt has developed, and how the different degrees of homicide were developed, I have explained that the Crown enacted several statutes between the 14\textsuperscript{th} and the 16\textsuperscript{th} centuries. Those statutes were passed not only to maintain the king’s peace, but also to accommodate jury decisions intended to save the lives of people who would have been executed for homicide despite claims of self-defence. I researched the \textit{Statutes of the Realm} to identify and understand how those statutes came to be, and I also undertook a brief study of statutory self-defence provisions which have been passed in the various states and territories of Australia. I


\textsuperscript{24} Hutchinson (n 3) 130 (citations omitted).
did that research to identify the modern Australian tests for self-defence so that I could
analyse and assess the utility of the self-defence legislation that has been enacted in
New South Wales.

1.2.4 Methodology of historical background of statutory law

The study of the historical background of statutory law ‘is just as important in the
comprehension of statutory law as it is in the study of case law’.25 Ellinger and Keith
have explained:

        There are two reasons for the importance of the historical background of statutory law.
        First, very few pieces of legislation are original in the sense of being pure innovations
        of a skilled draftsman. In the majority of cases he consults and adapts earlier statutes
        or makes use of principles laid down or proposed in decided cases. On the Continent,
        the draftsmen may, even, resort to suggestions made in treatises of professors of law.
        Secondly, laws are not made in a vacuum. They are passed in order to meet some
        needs of society. While they may not always reflect the true wishes of the people, or
        even of the ruling group, they reflect, nevertheless, the historical and political spirit of
        the day.26

This study recognised some of the ‘very well know techniques’27 that reveal why
statutes evolved as they did. The relevant materials include committee reports,
marginal notes, explanatory notes to a Bill, and second reading speeches. The
importance of this methodology alongside other methodologies such as caselaw
methodology and academic or scholarly writing methodology, is to identify the reason
behind the enactment of a statute, to highlight if mistakes were made in that enactment
process, and to shed some light on aspects of the statutory law which may not have
appropriately responded to all the contested issues.28

25 Ellinger and Keith (n 23) 466.

26 Ibid 466 (citations omitted). Ellinger and Keith later added, ‘[w]e believe that the study of
statutory law from an historical point of view is a fruitful mode of research not only when applied
in the more traditional Common Law and commercial law fields but also in public law subjects’: at 467.

27 Ibid 468.

28 Ibid 469.
1.2.5 The use of academic and extrajudicial commentary

I used academic commentary and extrajudicial publications of judges, alongside the accounts of renowned Australian and English legal historians or scholars, to more objectively review and understand the significance of statutes, case law or principles of law. Philip Langbroek and his co-writers have explained the methodological contribution that such commentary makes to objective legal analysis. They stated:

Academic comments on case law are a point of reference … both explaining what a judgment does not explicitly say and commenting on the choices made by the courts, for example through comparing the judgment and its reasoning with earlier decisions in case law and scholarly debate.\(^{29}\)

Justice Gummow also acknowledged the contribution of academic commentary. He stated:

The High Court of Australia … has for many years (certainly since the appointment of Sir Owen Dixon in 1929) paid close regard to academic writings and has acknowledged its indebtedness in this regard … Academic writing tends to look beyond the parochial and now has an even more important role to play in assisting Australian courts.\(^{30}\)

I also note that Heydon J said a lot about the value of academic treatises in his dissenting judgment in *Australian Crime Commission v Stoddart* (‘*Stoddart*’).\(^{31}\) The plurality led by Kiefel J (as her Honour then was) in that case, was not so positive.\(^{32}\)

1.2.6 Methodology of Law Reform Commissions’ reports

This thesis used and referred to some law reform commissions’ reports (the commissions’ reports). Australian governments rely on their law reform bodies for law reform advice.\(^{33}\) Law reform commissions contribute to law reform because one of

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\(^{30}\) Gummow (n 14) 443 (citations omitted).


\(^{32}\) See *Stoddart* (n 31) (French CJ and Gummow J) 562- 571 [1]-[42], 620-637 [171]-[234] (Crennan, Kiefel, and Bell JJ).

\(^{33}\) Justice Kirby explained how and when the ”'golden age' of law reform in Australia’ began in Australia. He said:
their functions is to ‘undertake work that lays a foundation for new laws to be enacted’. Justice Kirby has emphasised the significance of the commissions’ reports. He stated:

It is beyond doubt that courts and academic institutions are increasingly turning to law reform reports as a significant, intensive and accurate source of legal authority, principle and policy. In this way, even if unimplemented by the Parliament, a law reform report can influence the development of the law by the courts, and also by officials and other agencies. In twenty years as an appellate judge, I have noticed a distinct change of attitude amongst the Australian judiciary concerning the citation and use of law

In Australia, systematic law reform began in the nineteenth century in a rather modest way … But it was the establishment of the Law Commissions, and especially the English Commission under Lord Scarman, that triggered the move for substantial institutional bodies in Australia, beginning with the New South Wales Law Reform Commission in 1966.


It is to be observed that the idea of governments’ reliance on law reform commissions to reform the law has existed since the sixth century. Alan Cameron produced the following quotes:

[In 528 at] Justinian’s instigation, John [the Cappadocian] set up a ten-man commission to sort through the entire corpus of Roman law. The Roman legal system was one of Rome’s greatest civilisational achievements, but by the sixth century, the code had grown into a gigantic hodgepodge of conflicting and out-of-date laws that hobbled the administration of justice, which in turn undermined the authority of the state. ‘… the law [we have found] to be so confused that it is extended to an infinite length and is not within the grasp of human capacity.’

The commission got to work, discarding contradictory and redundant laws, reassembling what was left into a more coherent form, and introducing new ones as needed to supersede the confusion.

The commission delivered its draft of the Codex of Justinian on 8 April 529, the first comprehensive and coherent body of Roman law in the empire’s history. It had been completed in just thirteen months, an astonishingly short period. Justinian crowed as he announced its publication: ‘Those things which seemed to many former emperors to require correction, but which none of them ventured to carry into effect, we have decided to accomplish at the present time, with the assistance of almighty God.’


reform reports … partly it is the result of a recognition of the high standard of excellence in such reports.\textsuperscript{35}

Law reform commissions contribute to law reform because one of their functions is to ‘undertake work that lays a foundation for new laws to be enacted’.\textsuperscript{36} For example, in 2013 after the New South Wales Law Reform Commission (NSWLRC) completed a comprehensive review of the \textit{Bail Act 1978} (NSW), the State of New South Wales ‘implemented many of the NSWLRC’s recommendations’\textsuperscript{37} when they reformed that Act. ‘Community participation not only provides “responses and feedback”, it also promotes “a sense of public “ownership” over the process of law reform.’\textsuperscript{38} However, occasionally, New South Wales legislatures have decided not to seek “community participation” and the “input” of the NSWLRC. One of those occasions was related to the \textit{Abortion Law Reform Act 2019} (NSW). Walsh and Legge explained,\textsuperscript{39} ‘the \textit{Reproductive Health Care Reform Bill 2017} (NSW) was introduced into the Legislative Assembly, but without the benefit of community consultation or input from its Law Reform Commission’.\textsuperscript{40} Justice Kirby described the drawbacks in not seeking community consultation in a democratic society. He stated:

\footnotesize{Kirby (n 33) ch 30, 13 (citations omitted). For High Court cases that referred to, or cited, law reform reports, see, eg, \textit{Peniamina v The Queen} (2020) 95 ALJR 85, 91 [14] (Bell, Gageler and Gordon JJ), 104 [99] (Keane and Edelman JJ dissenting); \textit{New South Wales v Robinson} (2019) 266 CLR 619, 643-4 [40]-[41] (Kiefel CJ, Keane and Nettie JJ dissenting), 666 [96] (Bell, Gageler, Gordon and Edelman JJ); \textit{IL v The Queen} (2017) 262 CLR 268, 293 [60] (Bell and Nettie JJ), 309 [96] (Gageler J dissenting), 320 [131], 329-330 [165]-[166] (Gordon J dissenting); \textit{IMM v The Queen} (2016) 257 CLR 300, 308 [25], 319 [72] (French CJ, Kiefel, Bell and Keane JJ), 326 [97] (Gageler J), 337-9 [141]-[143], 345 [146] (Nettle and Gordon JJ).

\footnotesize{Smith (n 34) 51.}


\footnotesize{Hutchinson (n 3) 136 (emphasis in original) (citations omitted).}


\footnotesize{Walsh and Legge (n 39) 326. The name change occurred because ‘[[o]ne of the amendments to the bill was to change the name of the Act to the \textit{Abortion Law Reform Act}:’ at 626 n 6. On the other hand, and contrary to the approach that the New South Wales Government has taken, two governments have requested some advice from their respective reforms’ commissions.}
Consultation with the public (through public hearings and other means) has been useful in law reform agencies not only for occasional feedback but also for raising expectations of reform outcomes. Access to social sciences and community consultation is not possible in the case of judicial reform. That fact is sometimes given as a reason why controversial reforms should not be undertaken in the courts … Law reform agencies can sometimes help the democratic system work more efficiently and promptly.\(^{41}\)

Justice Kirby’s service on a Law Reform Commission before his appointment as a High Court judge cannot be ignored. Justice Kirby had been appointed the first Chairman of the Australian Law Reform Commission (ALRC) when it was “created” on 1 January 1975.\(^ {42}\) Though he left the ALRC in 1984, he ‘watched’ its progress ‘[a]s a lawyer, appellate judge and citizen … and often used [the ALRC reports] in [his] judicial work’ since he left it.\(^ {43}\) Justice Kirby has explained why he was keen to get involved in law reform. It is instructive to reproduce what he said:

> For me, it was never a purely theoretical or analytical challenge. Law affected intimately the lives of people. To reform it, and thus to make it better, it was essential

\(^{41}\) Michael Kirby, ‘The Decline and Fall of Australia’s Law Reform Institutions – And the Prospects of Revival’ (2017) 91 A.L.J 841, 850 (emphasis in original) (citations omitted).

\(^{42}\) Kirby, ‘Are we there yet’ (n 33) ch 30, 1-2.

\(^{43}\) Ibid 2.
to consult the "usual suspects" - judges, legal practitioners, public officials and institutions. But it was also important to consult ordinary people. They would offer perspectives that would refine and strengthen our proposals. Moreover, the very process of consultation would build a momentum that would protect the ALRC against the risks of bureaucratic and political indifference when the reports were finally written and tabled in the Parliament … I was curious to hear from other people, living and working in Australia, about aspects of the law that they perceived as seriously unjust. If I could have such experiences, surely others could do so in those areas of the law that affected them.⁴⁴

1.2.7 Summary

This thesis answers two research questions: (1) Is it possible to define self-defence within the existing Crimes Act 1900 (NSW) so simply that no reasonable jury could misunderstand it; and (2) if so, how should self-defence be defined? The thesis also answers ten supporting questions which assist in responding to those primary questions. They are: (3) did English common law always recognise that self-defensive action by a person accused of homicide mitigated that action?; (4) if not, how and when did self-defence come to be recognised as a defence that mitigated the severity of a finding of homicide against a person accused of homicide?; (5) what part did the English jury play in the development of a law of self-defence in English common law?; (6) what part did the High Court of Australia and the Privy Council in England play in the development of a law of self-defence in Australian common law?; (7) how have the parliaments of the Australian states and territories responded to the uncertainties in Australian self-defence law?; (8) have legislative amendments in New South Wales since Zecevic improved clarity or have they compounded complexity?; (9) does a simple self-defence test matter?; (10) if so, what are the requirements of a self-defence test so simple that a jury cannot misunderstand?; (11) how can such a simple test be formulated?; and (12) how should self-defence law in New South Wales be reformed?

This methodology summary explains the approach that I have taken in the thesis to answer those questions. The primary methodological approach is qualitative and uses

⁴⁴ Ibid 5.
‘doctrinal’ research and ‘black-letter’ methodology. The primary materials used in that doctrinal and black letter research are case law and the legislation/statutes. However, the thesis begins with a detailed historical section to place the common law materials in context. After the analysis of the common law, I have reviewed law reform and academic commentary to identify the reasons for statutory amendments that flowed from a number of jurisprudential blockages in Australia in the 20th century. The research questions are thus not answered using a single research methodology; this thesis uses a number of different methodologies, which sometimes overlap.

I will now outline the structure that I have used in the thesis to answer the research questions outlined above.

1.3 Structure and contents

This thesis is divided into seven chapters. In chapter one, I begin with an outline for the purpose of this thesis. I explain that the purpose of this thesis is to formulate and recommend a simple expression of the law of self-defence in New South Wales that lay jurors can understand and apply without much judicial explanation. The idea of self-defence is simple. As Oliver Wendell Holmes has observed, ‘even a dog distinguishes between being stumbled over and being kicked’.

However, the legislative and judicial expressions of self-defence law in New South Wales have always been convoluted, confusing and challenging for a lay jury.

I then set out the research questions which this thesis will answer to achieve that purpose. They are: (1) is it possible to define self-defence within the existing Crimes Act 1900 (NSW) so simply that no reasonable jury could misunderstand it; and (2) if so, how should self-defence be defined? I also set out the supporting questions that will assist in responding to those primary questions and which are answered in this thesis. They are: (3) did English common law always recognise that self-defensive action by a person accused of homicide mitigated that action?; (4) if not, how and when did self-defence come to be recognised as a defence that mitigated the severity

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45 Hutchinson (n 3) above.

46 Hutchinson and Duncan (n 4) above.

47 Holmes, ‘The Common Law’ (n 9) 3.
of a finding of homicide against a person accused of homicide?; (5) what part did the English jury play in the development of a law of self-defence in English common law?; (6) what part did the High Court of Australia and the Privy Council in England play in the development of a law of self-defence in Australian common law?; (7) how have the parliaments of the Australian states and territories responded to the uncertainties in Australian self-defence law?; (8) have legislative amendments in New South Wales since Zecevic\(^48\) improved clarity or have they compounded complexity?; (9) does a simple’ self-defence test matter?, (10) if so, what are the requirements of a self-defence test so simple that a jury cannot misunderstand?; (11) how can such a simple test be formulated?; and (12) how should self-defence law in New South Wales be reformed?

I finally outline the methodology and the approach that I have undertaken to answer the above research questions. I explain that the research questions are not answered using a single research methodology because this thesis uses a number of different methodologies, which sometimes overlap. I also discuss why each methodology has been used in answering the research questions.

In chapter two, I answer questions three, four and five: (3) did English common law always recognise that self-defensive action by a person accused of homicide mitigated that action?; (4) if not, how and when did self-defence come to be recognised as a defence that mitigated the severity of a finding of homicide against a person accused of homicide?; and (5) what part did the English jury play in the development of a law of self-defence in English common law? I provide a brief history of the development of the law of self-defence from the 13\(^{th}\) century to the 19\(^{th}\) century, explaining first where the criminal law came from. That story is the story of the complicated interaction of new institutions in a very lawless time. My account is not comprehensive. My focus is on how the jury dealt with homicide cases when the jury accepted that there was an element of self-defence in the story. I place the jury in its larger historical context noting its probable Scandinavian origins through the inquisitorial functions it was assigned by William the Conqueror (died 1087), and the independent criminal trial decision making functions it was assigned after Pope Innocent III stopped clergy involvement in ordeal trials at the Fourth Lateran Council in 1215. I then explain how the different degrees

\(^{48}\) Zecevic (n 2).
of homicide were developed. That discussion explains how non-felonious homicide was established in two categories — justifiable homicide and excusable homicide. I note the enactment of several statutes by the Crown to press the need for convictions for homicide to maintain the king’s peace, but with assurances to juries that those they convicted would be fairly treated if those juries simply noted that the homicide concerned was a killing in self-defence. Those statutes are part of the story of how juries became independent triers of fact, how the role of public prosecutor was developed, and how juries decided self-defence cases from about the late 13th century to the 18th century. The history of self-defence in English criminal law is the story of how juries responded to the king’s statutes.

In chapter three, I answer the sixth question: What part did the High Court of Australia and the Privy Council in England play in the development of a law of self-defence in Australian common law? I explain the criminal self-defence law that New South Wales inherited, and how it developed during the 20th century. I have done that in two parts. In part one, I discuss the four cases that defined Australian common law on self-defence between 1958 and 1987 which recognised what came to be described as excessive self-defence as a partial defence to murder. Three were decided by the High Court of Australia and another by the Privy Council in England. Those cases are: R v Howe (HC), Palmer v The Queen (PC), Viro v The Queen (HC), and Zecevic v Director of Public Prosecutions (Vic) (HC). Absent statutory clarification, I explain the difficulty that the High Court had in formulating a self-defence test upon which all the judges on those superior courts could agree and which a jury could understand. In part two, I discuss the different strains of academic and extrajudicial opinion in commentary that followed the judicial consideration of self-defence in these four cases. I note the views that supported or criticised those judicial formulations to more objectively review and understand the significance of those four cases. I conclude chapter three by summarising where the common law of self-defence in Australia

49 (1958) 100 CLR 448 (‘Howe’).

50 [1971] 1 All ER 1077; AC 814 (‘Palmer’).

51 (1978) 141 CLR 88 (‘Viro’).

52 Zecevic (n 2).
stood before the legislature intervened to clarify and identify the role that those cases played in the development of Australia’s unique common law of self-defence.

In chapter four, I answer the seventh question: How have the parliaments of the Australian states and territories responded to the uncertainties in Australian self-defence law? I have done that in two parts. In part one, I discuss how the parliaments of the Australian states and territories have responded to the diverse High Court opinion, which has already been noted. I identify the seat of that judicial disagreement in questions about whether modern self-defence law should focus on overall intent or the proportionality of the self-defensive force that was used. I first explore the statutory self-defence provisions which have been passed in various Australian states and territories. I identify the various self-defences tests those legislatures devised and what judges said about those tests. In part two, I discuss the New South Wales statutory self-defence provisions in detail. I explain the context in which those provisions were enacted, and the alternatives considered before they were passed. I then discuss the self-defence provisions they settled on and what judges have said about them.

In chapter five, I answer the eighth question: Have legislative amendments in New South Wales since Zecevic improved clarity or have they compounded complexity? In part one, I analyse the effectiveness of the New South Wales legislative responses to the uncertainties in Australian self-defence law occasioned by the lack of High Court unanimity in this self-defence space where homicide is charged. I first recount how the history explains jury behaviour and question whether juries are still behaving in the same underlying way. I make some observations about how and why executive governments in the Westminster tradition still want a conviction for every homicide. I discuss how that “law and order” obsession results in the formulation of harsh legislation that does not accord with jury common sense when jurors hear self-defence stories during real trials. In part two, I analyse the statutory self-defence laws that were passed into law in New South Wales in 2002. I show how the current ss 418-421 of the Crimes Act 1900 (NSW) came into existence. I briefly recount the road from self-defence at common law to the current “codified” self-defence provisions. I show that legislative amendments in New South Wales post Zecevic have not improved clarity, and how, if anything, those amendments have compounded the complexity. I explain how complicated these sections are, and why juries do not understand them despite the best directions our Supreme Court judges can formulate. I discuss some of the
recurring issues that arise in self-defence cases under ss 418 and 421 and how they play out in practice. I discuss the complex interaction between s 418 and s 421 and I state why these sections need to be simplified.

In chapter six, I answer the ninth, tenth, eleventh and twelfth questions: (9) Does a simple self-defence test matter?; and (10) if so, what are the requirements of a self-defence test so simple that a jury cannot misunderstand?; (11) how can such a simple test be formulated?; (12) how should self-defence law in New South Wales be reformed? I have done that in three parts. I formulate a “simple” self-defence test to replace ss 418 and 421 of the *Crimes Act 1900* (NSW) in all self-defence trials, though this test is tailored for use in homicide cases. In part one, I explain why a “simple” test matters and I then discuss the requirements of a self-defence test that is simple enough that a jury can understand. In part two, I discuss the requirements of a simpler self-defence test. In part three, I propose a test that meets those requirements.53

In chapter seven, I conclude this thesis.

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53 Following consultation with my supervisor Dr Keith Thompson, he has advised me that in order to respect the spirit of the AGLC4 to reduce the size of the footnotes, I should include the internet citations or links for all electronic material including books, reports of the law reforms commissions reports, etc., in the bibliography, and refer the readers at the beginning of the thesis that I have done so. Please refer to the bibliography if becomes necessary to do so.
CHAPTER TWO

SELF-DEFENCE IN HISTORICAL CONTEXT

THE IDEA OF SELF-DEFENCE IN CRIMINAL LAW HISTORY

Introduction

The purpose of chapter two of this thesis is to provide a brief history of the development of the law of self-defence from the 13th century to the 19th century.

The history is large and extensive. The story is the story of the complicated interaction of new institutions in a very lawless time. In discussing a history so large and extensive, I note that it is not intended to identify precise details for each topic. This chapter will, however, enable modern readers to understand how the line between murder, manslaughter, self-defence, limited guilt, or no guilt has always been challenging.

I will explain this history in three parts. In the first part, I will explain where the criminal law came from. It may be difficult for modern readers to understand the fact that criminal law and the law of torts were not separated until about the early 14th century. Prior to this there was no distinction between wrongs committed between individuals and wrongs committed against the state, and more specifically “the peace” that the king was trying to establish as his contribution to the good of English society as a whole.

The king’s peace was a tool used by the king to control his subjects and to assert his authority so that he could maintain public order and settle blood-feuds. The idea of the king’s peace, keeping the king’s peace, and the system of criminal procedure by which the peace was enforced was the foundation of the entire system of criminal procedure and led to the growth of criminal procedure.
In part two, I will explain how we can trace this separation of criminal law and tort law in the records that were kept. Those records not only enable insight into that separation, but they show us how the new criminal law developed afterwards. Part of this discussion will involve an explanation of the evolution of the jury from, what was probably, its Scandinavian origins, through the inquisitorial functions it was assigned by William the Conqueror (died 1087), to the independent criminal trial decision making functions delegated to it after Pope Innocent III stopped clergy involvement in ordeal trials at the Fourth Lateran Council in 1215.

In part three I will explain how the different degrees of homicide were developed. Homicide was a fact of daily life in medieval England, but people understood that there was a difference between intentional and unintentional homicide. I will discuss how the distinction between homicide by those carrying out executions for the king and homicide by misadventure or self-defence, was developed. That discussion will explain, how the categories of justifiable homicide and excusable homicide were established as the primary categories of non-felonious homicide.

I will also discuss how the Crown enacted several statutes in order to maintain the king’s peace while in the meantime saving the lives of people who were convicted of killing in self-defence. Those statutes are part of the story of how juries became independent triers of fact, how the role of public prosecutor was developed, how juries decided self-defence cases from about late 13th century to about the 18th century, and how juries responded to the king’s statutes.
Part One: The origin on Anglo-Saxon criminal law

Until the Norman conquest there was no distinction between the law of crime and the law of tort.¹ The Anglo-Saxon legal system was originally a system of tribal justice.² The state was not considered to be the injured party. That was the family or kinship group.³ Wrongs between unrelated families were settled by feud between kinship groups.⁴ In an effort to control violence and establish obedience to the rule of law, early English rulers prohibited any form of self-defence. All intentional killings were capital crimes.⁵ Life for life punishments were easy enough for medieval people to understand from their Christian religious teaching which used the “eye for eye” mantra to explain punishments or restitution that fit the crime. However, from the beginning of the 9th century principles of self-defence were recognised. Under the laws of King Alfred, if a man saw his Lord attacked, a man could fight for his lord without being liable for blood feud, and was considered free.⁶ Feud was the common response in

¹ Holdsworth notably wrote:

We cannot use the term criminal law in a technical sense in the Anglo-Saxon period. A primitive system of law has no technical terms. It has rules more or less vague, and terms corresponding thereto, which will, if the law has a continuous history, become the technical rules, and give rise to the technical terms of later days. In this period we have not yet arrived at the distinction between the law of crime and the law of tort; far less have we arrived at the leading distinctions of the later criminal law, felony, treason, and misdemeanor.


Each tribe was in theory a group of kinsmen. The tribe performed the economic, political, religious, and familialistic functions performed by separate and distinct institutional structures in a modern society. The tribe was the land-owning unit, and the land was cultivated by a group of kinsmen who formed plough-teams and who cultivated the land in an open-field system. The tie which united these smaller pastoral communities was simply that of kindred.


³ Jeffery, ‘The Development of Crime in Early English Society’ (n 2) 654.

⁴ Ibid 655.

⁵ Holdsworth (n 1) vol 2, 51-4,100.

⁶ Frankowski (n 2) 397, 403.
homicide cases, but it did not stop the cycle of violence. People resorted to physical violence in order to defend their honour which resulted in violent blood feuds. The king marketed his brand of justice as a solution to lawlessness, and his requirement that the people see him as a source of justice dictated the principles of jurisprudence developed by his justices in eyre. Because the king’s justices visited regularly, judged fairly and because their judgements were enforced, the king’s law increased in popularity and came to be accepted as the law of the land.

The Saxon kings adapted the law to take people’s passion into account. But in the meantime, because they knew it was impossible to completely suppress human passion and to stop the cycle of violence, they adopted the principle of compensation for every personal injury, including taking away life. There were tariffs for compensation even if the act was accidental or was necessary for self-defence. The system of *wergild* or *wer, bot* and *wite* did not originate in English custom. When the King’s justices could not find a solution to stop the cycle of violence in existing English

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7 Holdsworth (n 1) vol 2, 43.
8 Jeffery has stated:

> During the tribal period the legal system was in the hands of the tribal group, and justice was based on the blood-feud. As tribalism gave way to feudalism, the feud was replaced by a system of compensations. Justice passed into the hands of landlords. There was no separation of lay and ecclesiastical courts until the time of William. State law and crime came into existence during the time of Henry II as a result of this separation of State and Church, and as a result of the emergence of a central authority in England which replaced the authority of the feudal lords. Henry replaced feudal justice with state justice by means of justices in eyre, the king’s peace, a system of royal courts, and a system of royal writs.

Jeffery, ‘The Development of Crime in Early English Society’ (n 2) 665.

The records of the English National Archives described what an “eyre” means as follows

Counties were grouped into circuits, with a group of justices assigned to each one; and the circuits, as well as the courts themselves, were known as eyres. In theory the eyre justices travelled these circuits at seven-year intervals, although the intervals were in practice often much more varied. The earliest surviving eyre roll dates from 1194, although evidence from the Pipe Rolls suggests that eyres were first held in the mid-1160s. Although general eyres were suspended in 1294, there were isolated eyres during the first half of the 14th century, and a failed attempt at a general revival in 1329-1330. Occasional eyres were summoned until 1374, but the last to produce any records was in Kent in 1348.

The National Archives.

9 Holdsworth (n 1) vol 2, 44-5.
10 Ibid vol 2, 51.
custom, they looked elsewhere. In this case they found their answer in the jurisprudence that the Saxon kings had brought with them from Germany and Denmark.\textsuperscript{11} The \textit{wergild} ‘was the price or value of the man killed and must be paid to his kinsmen’.\textsuperscript{12} The \textit{bot} ‘was the compensation required for injuries less than death’.\textsuperscript{13} The \textit{wite} ‘was the penalty or fine due to the king in his public capacity’.\textsuperscript{14} It is that system of \textit{bot} and \textit{wer} which was calculated to unpick the blood-feud that provided the groundwork of Anglo-Saxon criminal law.\textsuperscript{15}

During the reign of Henry II (1154-1189), the tribal-feudal system of law was replaced by a new system of writs and procedures, which marks the beginning of the English common law of crime.\textsuperscript{16} As a wrong was also regarded as a breach of the king’s peace,

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\textsuperscript{12} A Hampton L. Carson, ‘Sketch of The Early Development of English Criminal Law as Displayed in Anglo-Saxon Law’ (1916) 6 \textit{J. Crim. L. & Criminology} 648, 656. Holdsworth states:

\begin{quote}
We cannot understand either the amount of the wergild or the method of its payment unless we remember that it took the place of the feud, and that the feud was always in the background, to be resorted to if the money was not paid. ‘Buy off the spear or bear it,’ ran the English proverb.
\end{quote}

Holdsworth (n 1) vol 2, 45. See also Jeffery, ‘The Development of Crime in Early English Society’ (n 2) 655.

\textsuperscript{13} Jeffery ‘The Development of Crime in Early English Society’ (n 2) 655; Holdsworth (n 1) vol 2, 44. Carson has asserted that the \textit{bot} ‘might be due to the king if the injury affected him in his private capacity’. Carson (n 12) 656.

\textsuperscript{14} Carson (n 12) 656; Holdsworth (n 1) vol 2, 45; Jeffery ‘The Development of Crime in Early English Society’ (n 2) 655. Holdsworth states, ‘[i]n the \textit{wite} we can see the germ of the idea that wrong is not simply the affair of the injured individual an idea which is the condition precedent to the growth of a criminal law’. Holdsworth (n 1) vol 2, 47.

\textsuperscript{15} Holdsworth (n 1) vol 2, 46.

\textsuperscript{16} Jeffery, ‘The Development of Crime in Early English Society’ (n 2) 660, 662. Maitland had asserted that the term “common law” was used during or shortly after the reign of Edward I (1239-1307). Maitland, \textit{The Constitutional History of England} (n 11) 22. Maitland described this term as it encompassed the following general principles:
the wrongdoer not only had to compensate the injured person and his family but also the king, the lords and the community.\textsuperscript{17} The king’s peace was a tool used by the king to control his subjects and also to assert his authority so that he could maintain public order and settle blood-feuds.\textsuperscript{18} Because the new system worked and became popular, the number of offences against the king’s peace was increased, and this contributed to the growth of the idea of the king’s peace and hence the growth of criminal law.\textsuperscript{19} The king’s courts assumed jurisdiction over every allegation of breach of the king’s peace.\textsuperscript{20} By the time of Henry II, the king’s peace extended to all persons and all places in England.\textsuperscript{21} Keeping the king’s peace was the foundation of the entire system of criminal procedure and led to the growth of criminal procedure.\textsuperscript{22} Royal courts developed this judication and obtained full control over serious offences, and various

\begin{quote}

The word ‘common’ of course is not opposed to ‘uncommon’: rather it means ‘general’ and the contrast to common law is special law. Common law is in the first place unenacted law; thus it is distinguished from statutes and ordinances. In the second place, it is common to the whole land; thus it is distinguished from local customs. In the third place, it is the law of the temporal courts; thus it is distinguished from ecclesiastical law, the law of the Courts Christian, courts which throughout the Middle Ages take cognisance of many matters which we should consider temporal matters: Maitland, The Constitutional History of England (n 11) 22-3.

\textsuperscript{17} Holdsworth (n 1) vol 2, 47. In tracing the history of the king’s peace and its transformation see Frederic Pollock, ‘The King’s Peace’ (1885) 1 L. Q. Rev. 37. See also Jack K. Weber, ‘The King’s Peace: A Comparative Study’ (1989) 10 J. Legal Hist. 135. But what happened to an accused with pending criminal offences which occurred ‘during the time of the deceased monarch?’ Weber has written ‘[w]ith the death of a king in medieval England his peace came to an end’: Weber (n 17) 151. Weber has also written:

And the case law confirms the position of the writers. In Anon v. Howelle in 1316 it was found that because the offense was committed during the time of the deceased monarch, and nothing had been done against the peace of the ‘King who now is’ the defendant ‘was quit of prison’: Weber (n 17) 152.

\textsuperscript{18} Sir Frederic Pollock, Bart, English Law Before the Norman Conquest, in Select Essays In Anglo-American Legal History by Various Authors [1907] (Indianapolis: Liberty Fund, 2010) vol 1, 78.

\textsuperscript{19} Holdsworth (n 1) vol 2, 48. Those offences were ‘the offences which especially offended the moral or religious sense of a warlike community’.


\textsuperscript{21} Jeffery, ‘The Development of Crime in Early English Society’ (n 2) 662.

\end{quote}
torts, by offering the *quare* writ — that is — original writ.\(^{23}\) Local courts retained a large jurisdiction over minor offences. Around the middle of the 13\(^{th}\) century, trespass *contra pacem* was double in nature because certain violent offences could be initiated in either the king’s court or in the Court of Common Pleas.\(^{24}\) The king, therefore, established his control by appointing judges and following a rational process to convince his subjects that they should support his peace project. The writs that he offered were his process.

The separation between crime and tort became more visible at the beginning of the 14\(^{th}\) century. Plucknett explained how the categories of crime and tort gradually separated as follows:

> At the beginning of the fourteenth century the justices of the peace were becoming the principal jurisdiction for criminal matters, and in their sessions the indictable trespass is as conspicuous as the civil trespass was in the Common Pleas; consequently, there was no gap in criminal law forcing litigants to use civil remedies for lack of criminal ones. The contrast between indictment and original writ thus corresponded nearly enough with the distinction between crime and tort.\(^{25}\)


\(^{24}\) Ibid.

\(^{25}\) Ibid.
Part Two: The evolution of the jury trials

Historians neither agree when jury trials were first introduced into England, nor where they were first introduced. They have offered various theories. 26

Maitland had suggested ‘that the practice of summoning a body of neighbours to swear to royal which is the germ of trial by jury appears in England as soon as the Normans conquered England, and it can be clearly traced to the courts of the Frankish kings’. 27

Plucknett discussed more than one theory for the origin of the jury. He observed the ‘[s]upposed Anglo-Saxon origins’ when he explored and challenged the idea that the jury ‘is descended from the doomsmen who find the judgment and declare the law and

26 Hamar Foster has argued that:

there have been really two schools of thought: an older school that saw the jury as an essentially Anglo-Saxon institution rooted in the popular sovereignty of communal self-government, and a slightly later school that saw the jury as primarily a Norman innovation that was an important tool of the despotic and centralizing Angevin monarchy. This issue probably will never be settled, but recently some scholars have argued rather persuasively that the truth lies somewhere in between.


custom in the ancient communal courts’;\(^{28}\) and the idea that the origin of the jury lay in the earlier English use of compurgators or oath-helpers, a primitive version of character witnesses.\(^{29}\) But Plucknett found the idea of a combined English and Scandinavian origin more plausible. He said that the origin of the jury could be traced back to a ‘remarkable passage in the Laws of King Ethelred promulgated at Wantage, which probably dates from about the year 997 … the Wantage enactment’.\(^{30}\) He said that passage, might have been enacted when Scandinavian institutions prevailed in that portion of England that had been occupied by the Danes. But Plucknett was cautious about this conclusion because he said it is impossible ‘to establish continuity between the Law of Wantage and the jury as it existed after the Norman Conquest’.\(^{31}\) The impossibility arises because there is a two hundred year gap between the Wantage enactment and next appearance of the presenting jury. Until historians can fill that gap, it is inaccurate to say that we can find the origin of the jury in Ethelred’s law.\(^{32}\)

J. E. R. Stephens also discussed various theories, but he supported the theory which he considered had ‘the fewest difficulties’.\(^{33}\) He quoted Serjeant Stephen’s following

\(^{28}\) Plucknett, *A Concise History of the Common Law* (n 11) 157. Commenting upon that suggestion, Plucknett stated that:

This explanation, however, is by no means satisfactory, for the doomsmen did not find facts (for which there was other machinery available) but declared the law which applied to a state of facts which had already been established.

\(^{29}\) Ibid. Commenting upon that suggestion, Plucknett said:

this is open to the objection that the compurgators were summoned by a party and not by a public officer, and could not be compelled to act unless they cared to.

\(^{30}\) Ibid 157-158. That document states:

And that a gemot be held in every wapontake; and the xii senior thegns go out, and the reeve with them, and swear on the relic that is given them in hand, that they will accuse no innocent man, nor conceal any guilty one: at 157.

\(^{31}\) Ibid 157. Here Plucknett states:

The appearance of a principle or institution in one age, followed by the appearance of the same or a similar institution at a considerably later age, must not lead one to suppose that the later is derived from the earlier. Before this conclusion would be justified further evidence of continuity must be adduced: at 157-158.

\(^{32}\) Ibid 158.

\(^{33}\) Stephens (n 26) 151.
statement: ‘We owe the germ of this (as of so many of our institutions) to the Normans, and it was derived by them from the Scandinavian tribunals, where the judicial number of twelve was always held in great reverence’. J. E. R. Stephens also stated that the jury in criminal cases was unknown until it was established by William I. He said:

But, whatever may be the remote source of this institution, out of which trial by jury grew, two points are at any rate clear. (1) The system of inquest by sworn recognitors, even in its simplest form, makes its first appearance in England soon after the Norman Conquest. (2) This system was in England, from the first, worked in close combination with the previously existing procedure of the shire-moot; and, in its developed form of “trial by jury,” is distinctly an English institution.

Sir Patrick Devlin agreed with Stephens that the jury had a Norman origin. It was their idea that a man could be compelled by the king to take an oath. The Norman kings used this spiritual device to enforce their authority. They used it to obtain information from their English subjects by compulsion. Sir Patrick concluded his argument as follows:

[T]he jury originated as a body of men used in an inquisition or, in the English term, an inquest. The coroner or crownier, that is, the King’s officer, and the jury he summons and the inquest he conducts come closer to the original of the jury than any of the forms it later took.

All these scholars agree that the jury has Norman roots. The “jurors’ spiritual oath” was adapted to develop criminal law and procedure in England despite its original administrative use, including in the compilation of the Domesday Book. The original administrative use and the adaptations that followed, including adaptations to achieve justice in self-defence cases, will be illustrated below. But although Plucknett, Stephens and Devlin all emphasise the Norman influence in the development of the jury, it is not the whole story because we also know that accusation in criminal trials amongst the Anglo-Saxons were initially made according the law of Ethelred. Twelve

34 Ibid 151.
35 Ibid.
37 Ibid 6.
senior thanes of each hundred were required to act as public prosecutors with ‘the
duty of discovering and presenting the perpetrators of all crimes within their district.’

38 Apparently because this procedure worked and was popular, just prior to the Norman
invasion that duty was transferred to neighbours when a new trial procedure, the jury
of presentment, came into existence. 39 Because neighbours were likely to know what
happened in their community and also because they knew the character of each
member of their community, the presentment duty could be safely passed on to
them. 40 The Normans did not interfere with that arrangement after their invasion. 41
This practice, however, was open to abuse because rumours and gossip could found
suspicions of criminality in the neighbourhood. It also seems likely that the Norman
introduction of trial by battle soon after their arrival stifled neighbourhood
communication because this additional dispute resolution method was unilaterally
available in what today would be considered criminal cases and would-be accusers
avoided the risk of communications that might have enabled those trial by battle
confrontations. 42

Henry II recognised the need to reform the law because trial by battle was deterring
people from pointing out criminals out of fear or unwillingness to be known as accusers
after the introduction of trial by battle ‘which compelled them to support their charge

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40 Neighbours had knowledge of each other because ‘[a]t the level of the tribe, village, the
small group, at the level of the social unit each of whose members can have first-hand
knowledge of each other, human society … has been able to cohere’. Jeffery, ‘An Integrated
Theory of Crime and Criminal Behavior’ (n 2) 533 (citations omitted). Questions which were
asked of neighbours might have taken different forms such as ‘[w]hat are the customs of your district? … Name all the persons in your district whom you suspect
of murder, robbery or rape. Is Roger guilty of having murdered Ralph?’. Sir Frederick Pollock
and Frederic Maitland, The History of English Law before the time of Edward I [1898]

41 Jeffery has stated that because ‘William the Conqueror was to claim that he was the
guardian of the laws of Edward. The Saxon legal system was accepted in its entirety’. Jeffrey,
‘The Development of Crime in Early English Society’ (n 2) 659 (citations omitted).

42 Forsyth (n 38) 159.
by single combat’. In 1166 the Constitutions of Clarendon changed the pre-Norman jury arrangements and required that all violent offences to presented by twelve neighbours. It also required that everyone accused had to submit to the ordeal. Pollock and Maitland asserted that by the Constitutions of Clarendon the accusing jury became ‘prominent’. Maitland observed that those twelve jurors were ‘sworn accusers; their testimony is not conclusive; their oath does not lead to immediate condemnation; it leads to trial; it puts the accused on his trial; he must go to the ordeal … and their sworn accusation is an indictment’.

Ten years later in 1176 the Assize of Northampton recognised the need to avoid the criticism that flowed from contrived results under the original one jury solution. They added a second jury of twelve to the indictment process, which was also part of the presenting jury. This addition ensured ‘not only that both the sets of jurors mentioned in the first clause of the Assize of Clarendon must concur in their suspicion, but that

43 Ibid 161.

44 Plucknett said:

[I]n the Assize of Clarendon (1166) we find the establishment of a definite system of inquisitions as part of the machinery of criminal justice which have come down to our own day as “grand juries”

Chapter I

“First the aforesaid King Henry established by the counsel of all his barons for the maintenance of peace and justice, that inquiry shall be made in every county and in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of every vill, upon oath that they shall speak the truth, whether in their hundred or vill there be any man who is accused or believed to be a robber, murder, thief, or a receiver of robbers, murderers or thieves since the King's accession. And this the justices and sheriffs shall enquire before themselves …”

Plucknett, A Concise History of the Common Law (n 11) 161-2 (emphasis in original). Plucknett also said that ‘the Assize of Clarendon in 1166 … was made with the assent of all the prelates and barons of England, and is in form an expression of the King's will’: at 358.

See also Foster (n 26) 286-7. Green says that this means that that if the community wished to "absolve" a victim’s slayer, ‘it had to fail to present him in the first place’. Green, ‘Societal Concepts of Criminal Liability’ (n 26) 688.

45 Maitland (n 11) 128; W. G. Aitchison Robertson, ‘Trial by Ordeal’ (1926) 38 Jurid. Rev. 70, 74; Charles L. Wells, ‘Early Opposition to the Petty Jury in Criminal Cases’ (1914) 30 L. Q. Rev. 97, 98.

46 Pollock and Maitland (n 40) vol 1, 107.


every vill in the hundred concerned was expected to give its verdict’. 49 Maitland
described the situation as follows:

By the Assize of Clarendon in 1166 reissued with amendments at Northampton in 1176
Henry began a great reform of criminal procedure. Practically, we may say, he
introduced the germs of trial by jury: the old modes of trial, the ordeals and the judicial
combat, begin to yield before the oath of a body of witnesses. 50

After 1176, we know there there were two juries of twelve involved in the accusation
process. The first jury identified people thought to have committed crime from 1166
onwards and from 1215, and also decided on guilt or innocence. But it seems that a
second independent jury was introduced in 1176 to review the first jury’s accusation
to ensure that any manipulation in the pre-trial process was eliminated. 51

The ordeal was the oldest mode of trial in England. Nothing is older. 52 It was used to
determine the guilt or innocence of the accused. Because it was accepted by English
people in the 12th century that the result of the ordeal as administered by a priest
proved the guilt or innocence of the person accused, the result of ordeal trials was
final. It finally provided the guilt or innocence of the accused, 53 people believed that

49 Hurnard (n 26) 408.

50 Maitland, The Constitutional History of England (n 11) 13. Helmholz has asserted that
Stubbs also saw that the Assize of Clarendon (1166) and the Assize of Northampton (1176)
‘were early steps in that direction’. R. H. Helmholz, ‘Crime, Compurgation and the Courts of
the Medieval Church’ (1983) 1 Law & Hist. Rev. 1, 7.

51 See generally Hurnard (n 26); Robert H. Miller, ‘Six of One Is Not a Dozen of the Other: A
L. Rev. 621; Richard. H. Helmholz, ‘The Early History of the Grand Jury and the Canon Law’
(1983) 50 University of Chicago Law Review 613; Bates (n 48); Ralph V. Turner, ‘The Origins
of the Medieval English Jury: Frankish, English, or Scandinavian?’ (1968) 7 Journal of British
Studies 1.

52 See generally James B. Thayer, ‘Older Modes of Trial’ (1891-1892) 5 Harv. L. Rev. 45; John
White (n 26); Olson (n 26).

53 See generally Wells (n 45); Paul Hyams, ‘Trial by Ordeal: the Key to Proof in the Early
Common Law,’ in Morris Arnold et al., ed., On the Law and Customs of England: Essays in
Honor of Samuel E. Thorne (Chapel Hill, 1981); Roberts (n 52); White (n 26); Foster (n 26);
Concerning Judicial Discretion and the Law of Proof’(1989) 7 Law & Hist. Rev. 23; Thomas
Green, ‘Societal Concepts of Criminal Liability’ (n 26); Olson (n 26); Finbarr McAuley, ‘Canon
the answer given by the ordeal was final as it was dictated by the supernatural. It was called *iudicium Dei* – the judgment of God, and its value was it provided judgment of God. The adjudication of guilt was a matter of divine judgment. People believed that 'jurors might err where God would not'. The most routinely used ordeals to decide the guilt or innocence of the accused were hot iron, hot water, and cold water. These tests were always administered by the clergy. At the Fourth Lateran Council in 1215, Pope Innocent III forbade all clergy in the world from participating in religious ceremonies connected with ordeal trials. He prevented the clergy from performing

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54 Edmund M. Morgan, ‘Brief History of Special Verdicts and Special Interrogatories’ (1922-1923), 32 Yale L. J. 575, 575.

55 Ibid.

56 Foster (n 26) 291.

57 Hamer Foster described the various forms of ordeals as follows:

> There were four ordeals in Anglo-Saxon times, and Maitland briefly describes them as follows: The Ordeal of hot iron: the accused is required to carry a hot iron in his hand for nine steps, his hand is then sealed up and the seal broken on the third day, if the hand is festered then he is guilty, if not, innocent; the Ordeal of hot water: the accused is required to plunge his hand into hot water, if the Ordeal is simple, to the wrist, if threefold, then to the cubit; the Ordeal of cold water: the accused is thrown into water, if he sinks he is innocent, if he floats he is guilty; the Ordeal of the morsel: a piece of bread or cheese of an ounce in weight is given to the accused, having been solemnly adjured to stick in his throat if he is guilty.

Foster (n 26) 284-5 (citations omitted).

Charles Wells has suggested that trial by battle is ‘also a form of ordeal or appeal to the judgment of God, who, it was believed, would not allow the innocent to be defeated in the judicial combat or duel’: Wells (n 45) 97-8. He further suggested that:

> By the Assize of Clarendon, if not before, compurgation was superseded by the ordeal and was not allowed in Crown, i. e. criminal, cases. The duel would strictly apply only in cases where there was an individual accuser; consequently, when, as after the Assize of Clarendon (1166), the accusation was made by the Presentment Jury, the ordeal was the only form of trial left. By the Assize of Northampton (1176), accusation of murder or of felony by the Presentment Jury resulted in banishment at least, even if the accused was successful in the ordeal: Wells (n 45) 98.

See also Lesser (n 26) 79.

58 Lesser (n 26) 81.

59 Pope Innocent III had earlier nullified the Magna Carta charter which was signed by King John on 15 June 1215. The Pontiff has accepted King John’s complaint that he had affixed his seal under pressure from the barons. It is important to note, however, that the Magna Carta was focusing on addressing too many social problems in connection with the public order in general, one of which the operation of the justice system. It is further important to note that the Pontiff nullified it *only* because King John had signed it, and it was obtained, under
any religious ceremonies in connection with ordeals, removing ‘the ordeal from all religious sanctions, and for all intents and purposes abolished it from a regular means of trial’. That one international ecclesiastical decision unexpectedly abolished the principal means of determining the guilt or innocence of persons accused of crime in England. But because the English people had no experience with modern processes under which single non-ecclesiastical judges determine the guilt or innocence of persons accused of crime, they were not ready to accept the decisions of single lay judges as a reasonable means of determining the guilt or innocence of their neighbours. Judicial determination of criminal guilt or innocence likely did not even occur to them. But the king’s travelling justices were obliged to find a way to determine criminal guilt or innocence in the absence of the priests who had previously administered the religious ceremonies which had delivered those answers to their communities.

The prohibition of the ordeal in 1215 left the English system of criminal justice in disarray. The abolition of the ordeal forced the king’s advisors to find an alternative


The Roman Church’s opposition to the ordeal dated back to the days of Agobard, bishop of Lyons (840) but England took until 1215 to forbid its clergy from any participation in the ordeal. Plucknett, A Concise History of the Common Law (n 11) 167. It is beyond the scope of this thesis to elaborate or explore the reasons behind this development which many scholars and academic writers believe has reshaped the means of resolving legal disputes.

Plucknett, A Concise History of the Common Law (n 11) 167.

‘In its place the judicially centered inquisitorial system arose in Germany, Italy, France, and the lay-centered jury system in England.’ Olson (n 26) 111.

See generally Foster (n 26); Fraher (n 53).

Foster (n 26) 288.

When King John died on October 19, 1216, his nine year old son Henry III succeeded him, with William Marshal as his regent, giving the King’s regent and advisors another chance to revive the Magna Carta on November 1216 and find a replacement system for the ordeal as a mood of proof. Two examples may shed some light on the extent of William Marshal’s involvement in finding a replacement system for the ordeal as mode of proof: (1) his name ‘was the first layperson listed in the 1215 version of the charter’, Allen Shoenberger, ‘William Marshal Great Knight and Protector of Magna Carta: The Unknown Founder of the Rights of Englishmen and Americans’ (2016) 50 J. Marshall L. Rev. 1, 3 and (2) ‘reissuing the Magna Carta in 1216 (sic.) and again in 1217 (sic.) [were] under only his seal and the seal of the
way to decide the guilt or innocence of persons indicted by a presentment jury. Henry III’s government recognised the Fourth Lateran Council’s decree but took time to find and implement a new guilt adjudication process. There is evidence that despite the Fourth Lateran Council’s decree in 1215, presenting juries continued to rely on the ordeal as a method of final proof to determine the guilty of innocence of the accused, but it is not clear who administered those ordeals in the absence of the priests, or whether some priests continued to officiate in ordeal trials, contrary to the Pope’s direction in 1215.

In 1219, in order to save the English criminal justice system from falling into disrepute and enable people to have confidence in the justice system, a writ was issued by Henry III’s government to the justices in Eyre requesting that ‘the justices to be guided by suspicions, and were to reach their conclusions as to the reasonableness of that suspicion solely from their own discretion’. Plucknett says the 1219 writ was a temporary solution for the problem that the Fourth Lateran Council had created for English criminal justice. He also says the problem was solved ‘in a way typical of papal legate on behalf of Henry III’: at 7. It is beyond the scope of this thesis to elaborate or explore the extent of William Marshal’s involvement or influence on Henry III and the drafting of Magna Carta. As Richard Helmholz has argued under the heading of “Difficulties of proving influence”: ‘There is no direct evidence of the process by which the drafters arrived at the decisions they made’ (emphasis in original). Helmholz, ‘Magna Carta and the ius commune’ (n 59) 310 (emphasis in original). ‘The drafters left no notes’: Helmholz, ‘Magna Carta and the ius commune’ (n 59) 359.


67 Ibid. The writ stated:

The King to his beloved and faithful... Justices Itinerant... greeting: Because it was in doubt and not definitely settled before the beginning of your eyre, with what trial those are to be judged who are accused of robbery, murder, arson, and similar crimes, since the trial by fire and water (the ordeal) has been prohibited by the Roman Church, it has been provided by our Council that, at present, in this eyre of yours, it shall be done thus with those accused of excesses of this kind; to wit, that those who are accused of the aforesaid greater crimes, and of whom suspicion is held that they are guilty of that whereof they are accused, of whom also, in case they were permitted to abjure the realm, there would still be suspicion that afterwards they would do evil, they shall be kept in our prison and safeguarded, yet so that they do not incur danger of life or limb on our account. But those who are accused of medium crimes, and to whom would be assigned the ordeal by fire or water if it had not been prohibited, and of whom, if they should abjure the realm, there would be no suspicion of their doing evil afterwards, they may abjure our realm. But those who are accused of lesser crimes, and of whom there would be no suspicion of evil, let them find safe and sure pledges of fidelity and of keeping our peace, and then they may be released in our land.... We have left to your discretion the observance of this aforesaid order ... according to your own discretion and conscience: at 167-168.

See also Foster (n 26) 286-7.
English law – the justices were to make such experiments as they saw fit and gradually feel their way towards a solution’. It must be remembered that this happened at a time ‘when King’s justices had before them a very considerable number of jurors making presentments from vills and hundreds, from boroughs and the county itself’. It was therefore logical that rather than take the responsibility for ultimate justice upon themselves, the justices, and hence Henry III’s government, turned their attention to the recent second jury institution created after Clarendon and which was already ‘travers[ing] the decisions of the former [jury]’, and judging those persons accused by the neighbours. Once the second jury was institutionalised, it was a relatively small step for the justices to decide that the second jury should take the place of religious administration of the ordeal as the final judge of the accused’s guilt. Passing that responsibility to a community group also avoided judicial unpopularity. Thus, by the middle of the 13th century the English jury was practically established as the judge of criminal guilt, however unlikely that result might have appeared a century earlier.

The two stages of presentment from the middle of the 13th century can now be summarised. One jury established the facts, and the second jury not only confirmed those facts, but also determined the accused’s guilt or innocence. Larry Bates has argued:

The simplest procedure was to put a second question to the presenting jury. Since presumably the first panel was dismissed upon delivery of their indictment, this left the

68 Plucknett, A Concise History of the Common Law (n 11) 168.
69 Ibid 169.
71 Devlin (n 36) 10.
second panel of twelve to answer the second question—was the accused guilty or
innocent?73

Quoting Theodore Plucknett, Larry Bates further argued that ‘this was a logical
process ... the whole principal of jury trial was to get information useful to the Crown
from those people most likely to have it’.74

Robert Groot has argued that the presenting jury was chosen to replace the ordeal
and make the jury’s decision about accused’s guilt or innocence final because by 1215
jurors had developed an adjudicatory power by which they could issue opinions about
the guilt or innocence of the accused. The only additional necessary step left to
implement the new procedural system was to authorise juries to decide guilt or
innocence in trials officially on behalf of the king.75

When the priests administered the ordeal, justice was seen as a sacrament.76 The
presenting jury which thus replaced the ordeal, gave its judgment in place of divine
judgment, and thus made the final decision about accused’s guilt or innocence. Given
that function in place of the previous procedure, they naturally felt empowered to
develop the law as they saw fit — that is, according to their faith, social-culture,
conscience, common sense, and regardless of the directions of judges whose role had
not changed. Members of the jury understood that they were now responsible to
ensure divine mercy and justice was done, and because they knew they were now
called to do what God had directly done in ordeal trials, it was difficult for even the
king’s judges to interfere with jury decisions as a manifestation of the will of God.

When juries replaced the ordeal and began deciding criminal cases, including cases
that included self-defence facts, they exercised considerable discretion. In some self-
defence cases, as will be illustrated below, juries were not bound by law, either

73 Bates (n 48) 62. See generally Miller (n 51).
74 Bates (n 48) 62 (citations omitted). Larry Bates then said: ‘This practice continued well into
the fourteenth-century’ notwithstanding ‘in 1352 Parliament enacted a statute which permitted
the accused to challenge a member of the petit jury’: at 63. That twelve-member panel passing
a unanimous verdict was established by the time of Edward III in 1377 and remained
unchanged for ‘the next six hundred years’. Miller (n 51) 638-9.
75 Groot, ‘The Jury of Presentment Before 1215’ (n 26) 2.
76 Olson (n 26) 112-3.
because of the jury’s view that the self-defence acts involved were not unlawful, or because they considered the proposed punishment was too severe. 77 Other reasons for perverse decisions included juror fear of the defendants’ relatives or friends, or monetary gain or favour. Judges could not be sure of juries’ motives when they delivered life-saving verdicts. The judges understood, however, that juries were now responsible to ensure that divine justice was done. Individual jurors knew they had been called to declare the Will of God in the matters entrusted to them for decision.

Through its representatives on the jury, society put pressure on the king and judges to create rules consistent with their decisions rather than have the justice system come into disrepute because of repeated perverse verdicts. In a sense the king and judges were between a rock and a hard place. There was no going back to the ordeal because the priests were not available to administer it, and no one could take their place. Nor was society ready for adjudication of guilt by a single judge. The jury provided the only solution that was available. It avoided individual responsibility when its decisions were unpopular with any part of the community, but because it involved the community according to what we now know as the subsidiarity principle, it was immediately popular and the king could not take it away. That popularity and relative independence enabled juries representing society to exert pressure to change the law when it was perceived to be unjust. In time, juries could manipulate the evidence in the interests of the accused. They could decide that even though the accused had committed a capital offence, the killing involved was both unintended and necessary self-defence — which met the king’s exonerating criteria for a pardon.78 But if a jury worried that the king


might not grant a pardon for any reason, in the interests of community justice, they could also completely acquit the accused by finding there was no killing at all. If the jury considered the accused was guilty, their decision was final and capital punishment followed.\textsuperscript{79}

Jury influence thus exerted pressure for the law to recognise exceptions to the common law rule that culpable homicide always merited the death penalty. The notion of self-defence was one of those exceptions. Examples of cases where medieval juries supported defendants included cases where juries found that the defendant could not have avoided the death because the victim held the defendant so tightly that he could not escape,\textsuperscript{80} where the victim was faster than the defendant,\textsuperscript{81} or where the victim had repeatedly struck the defendant and the defendant struck the victim with only one blow.\textsuperscript{82} Other examples of jury findings supportive of defendants include cases where he was cornered and walls, or hedges and ditches left no avenue for the defendant’s escape.\textsuperscript{83} All of these findings or explanations by juries were intended ‘to save the life of the manslaughterer.’\textsuperscript{84}

Judges were fully aware that juries were manipulating evidence.\textsuperscript{85} ‘In almost every case in which self-defense was alleged, judges ‘pressed the jury on two questions:

\begin{itemize}
\item Beale (n 78) 569. Joseph Beale produced this case where the justices found that the killing in those circumstances was unnecessary:

\begin{quote}
Note that at the delivery of Newgate, before Knyvet [C. J.] and Lodelow [C. B.] it was found that a chaplain se defendendo slew a man, and the justices asked how. And [the jurors] said that the man who was killed pursued the chaplain with a stick and struck him, and he struck back, and so death was caused. And they said that the slayer, had he so willed, might have fled from his assailant. And therefore the justices adjudged him a felon, and said that he was bound to flee as far as he could with safety of life. And the chaplain was adjudged to the Ordinary: at 570 (emphasis in original) (citations omitted).
\end{quote}

\item Green, ‘The Jury and the English Law of Homicide’ (n 53) 428 n 57.
\item Ibid.
\item Ibid.
\item Ibid 429.
\item Green, ‘Societal Concepts of Criminal Liability’ (n 26) 683; Green, ‘The Jury and the English Law of Homicide’ (n 53) 430-1.
\item Green, ‘The Jury and the English Law of Homicide’ (n 53) 427, 433-4. Edmund Morgan described the process of judges “pressing” juries who rendered special verdicts (particularly
Had the defendant acted out of total desperation, and had he acted without malice? Every jury that decided to save a defendant otherwise guilty of a capital crime would emphasise the complete absence of alternative solutions and the unpremeditated nature of what had happened despite incredulity from the bench. Nor did judges punish the jury if it was revealed that the jury had manipulated the evidence. The method of rectification in those cases was “attaint”. Only another jury could find that the first jury had willfully falsified its verdict.

A legitimate question that flows from this analysis is why the judges could not discipline juries when they went rogue? Edmund Morgan has suggested that judges were not prepared to intrude upon jurors as the contest between judges and jurors was about evasion of responsibility and not about expanding the jurisdiction of the king’s justices. Part of the answer, however, also seems to lie in the jury’s popularity and their position as decider of fact in place of God. While the “god-like” role of the jury in deciding the guilt or innocence of persons accused of capital offences has received little attention in commentary, it is clear that it took a long time before the king or his

where the act alleged had actually occurred, but without criminality upon the part of the accused) to answer their questions as “interrogating” jurors. Morgan (n 54) 591.

86 Green, ‘The Jury and the English Law of Homicide’ (n 53) 434.

87 Ibid 429.

88 The history of jury attainder is unclear. Edmund Morgan described it as follows:

It seems that provision was made for punishing those who rendered a false verdict or false judgment before it was conceived that the verdict or judgment could be set aside. Thus, there was no attain of a grand assize and its finding was final, but the jurors were punishable for a false finding. The usual method of attainting a jury was by verdict of another jury of greater number whose members were of higher rank than the original jurors. This was not, however, the only means, for they might be attainted upon their own answers upon a later examination. Morgan (n 54) 576 n 3 (citations omitted).


89 Morgan (n 54) 586.
judges developed the confidence and the power to control or reform the juries which they had unchained.

**Part Three: The development of different degrees of homicide**

Before 1215 when the jury succeeded to the fact deciding role, homicide was punishable by death regardless of how it came about. Because crimes in breach of the king’s peace were also sins in the eyes of the Church, there were always questions about whether the king’s judges should take jurisdiction or whether these matters should be referred to the church. While the king’s justices trumped the local laws of manorial Lords relatively quickly, the authority of the Church and the jurisdiction it claimed was not so easily eclipsed. The Church had developed more nuanced ways of dealing with degrees of sin. The king may not always have been willing to cede jurisdiction, but when Church intervention would yield a more just result, he and his subjects did not always object. The Church represented God and the king could not always win the argument that his will was more important, especially if his judgments did not seem more just on the facts.\(^9\) One of the reasons the Pope outlawed priestly involvement in secular courts after 1215 must have been to emphasise church jurisdiction in matters of sin. It may be that the Pope fully expected all these difficult cases to be referred to ecclesiastical courts in the absence of an alternative. That interpretation of events says that the advent of the jury as the decider of guilt or innocence in the absence of the ordeal, was a happy coincidence that completely changed the trim of English criminal procedure for all time. What it ultimately did was reduce ecclesiastical jurisdiction which is highly ironical in light of the issues at stake at the time.

In order to compete with the Church’s more developed jurisprudence in sin, the king’s law had to develop nuances, otherwise the people were apt to think that these cases should go to the Church because the Church was more competent to deal with them.

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\(^9\) The demise of the ordeal in 1215 following the Fourth Lateran Council is an illustrative example on the subject matter of the King’s relationship with the Church. It is beyond the scope of this thesis to explore or elaborate on the politics of the King’s relationship with the Church. See generally: McAuley (n 53); Olson (n 26); Helmholz “Magna Carta and the ius commune” (n 59); Foster (n 26); Shoenberger (n 59); Bates (n 48); Miller (n 51).
Homicide was a fact of daily life in medieval England, but people understood that there was a difference between intentional and unintentional homicide and the accused’s mental state was recognised as the determinative factor in his or her culpability. The distinction between homicide in execution of the law, as for example, by the king’s executioner, and homicide by misadventure or self-defence was understood but was not clearly defined. A man was not guilty of homicide if he was the king’s executioner doing his job as executioner. And in the minds of a jury, accidental and self-defence killings were never as culpable as what we now call premeditated murder. But the lack of these distinctions when the king was considering a pardon frustrated juries charged with making final judgments. They therefore found ways to deliver results they considered just, despite the king’s inflexible rules. Persons who caused death were liable to conviction for homicide regardless of whether the cause of death was intentional or accidental. Perverse jury verdicts pressed the kings’ judges to recommend and recognise categories of homicide.

91 Green, ‘The Jury and the English Law of Homicide’ (n 53) 416.

92 Beale (n 78) 567-8. Beale has stated:

It had become the practice of the Clerks in Chancery to issue a writ (similar to the writ de odio et atia) to inquire whether a homicide for which a man was under arrest had been committed “by misfortune, or in his own defence, or in any other manner without felony” ; but by the Statute of Gloucester this was forbidden, and it was provided that a verdict should be found before the justices in eyre or gaol-delivery, and then “by the report of the justices to the king the king shall take him to his grace, if it please him: at 568 (emphasis in original) (citations omitted).

Sir James Stephen has stated that the Statute of Gloucester 6 Edw. I, c. 9. has provided:

The king commands that no writ shall be granted out of the chancery of the death of a man to inquire whether a man killed another by misadventure or in self-defence, or in other manner by felony, but if such a person is in prison and before the justices in eyre or justices of gaol delivery, puts himself on the country for good or evil, and if it is found by the country that he did it in self-defence or by misadventure then, on the record of the justices, the king shall pardon him if he will.


In the 13th century justifiable homicide and excusable homicide were established as the primary categories of non-felonious homicide. The two main categories ‘took their form during the reign of Henry II and his immediate successor’. The distinction between justifiable homicide and excusable homicide was important because it enabled the king’s justice to provide a solution that was seen as a fair and just alternative to the way the Church would handle homicides if it took jurisdiction. The distinction between murder and manslaughter has attracted the attention of many historians, authors, and scholars.

Green identified a distinction between justifiable homicide and excusable homicide. He wrote: ‘Justifiable homicide included executions pursuant to a royal order and the ancient practices of slaying thieves caught escaping with the goods and outlaws who resisted capture. Slayers deemed justified were acquitted by the royal courts’. Green considered excusable homicide to be divided into two categories — accidental homicide, which was identified when the accused had no intention to kill or seriously

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94 Green, ‘The Jury and the English Law of Homicide’ (n 53) 419. Green stated:

The category of justifiable homicide included executions pursuant to a royal order and the ancient practices of slaying thieves caught escaping with the goods and outlaws who resisted capture. Slayers deemed justified were acquitted by the royal courts (citations omitted).

95 Ibid. Green stated:

There is some, but slight, evidence that as early as the reign of Henry I, slaying in self-defense did not lead to payment of the wergild. Nevertheless, the defendant had to make “honorable amends”: at 419 n 20 (emphasis in original) (citations omitted).


97 Green, ‘The Jury and the English Law of Homicide’ (n 53) 419.
injury the victim, and homicide in self-defence when the accused committed homicide in self-defence to save his own life.  

Sir Owen Dixon has also written about the evolution of the law of homicide. He stated:

The middle of the thirteenth century provides enough beginning for the development of the law of homicide ... Homicide is the chief felony ... The distinction between murder and manslaughter is unknown. The very word 'murdrum' does not, in its legal use, signify the crime.  

Sir Owen Dixon summarised the law as it existed in the 14th century in the following terms:

[T]he distinction between murder and manslaughter has not yet emerged. All homicide is criminal unless it is justifiable as something akin to the execution of justice. Every killing is a felony involving loss of life or member, unless it is excusable, per infortunium or se defendendo. These must be especially found, and when especially found they do not entitle the prisoner to an acquittal but only to a pardon and a pardon does not give a relief from forfeiture of goods. Homicide can never be excusable on the grounds of self-defence or misadventure if committed of malice aforethought, and a general pardon will not avail if malice aforethought is found by inquest.

Sir Owen Dixon saw the developments occurring later than Green does, but they were the same developments. However, the evidence which Green has found forty years after Dixon discussed these developments, does suggest that the distinctions on which they both agreed occurred earlier than Dixon believed. That is because we can see evidence of those distinctions in the Constitutions of Clarendon in 1166 during the reign of Henry II and confirmation in the Statute of Gloucester in 1278 much earlier than Dixon thought.

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98 Ibid 419-20.
99 Dixon (n 93).
100 Ibid 64 (emphasis in original).
101 Ibid 65-6 (emphasis in original). Coldiron has asserted that '[t]he practice of forfeiture of goods in the case of excusable homicide was not abolished until the statute of 9 Geo. IV C.31, sec. 10, in 1828, although it had fallen into disuse before that time'. Coldiron (n 93) 532.
In 1267, ten years earlier than Statute of Gloucester, the Statute of Marlbridge,102 abolished the "murdrum"103 fine 'if the death was occasioned by misadventure'.104 Before the Statute of Marlbridge if a person killed another in misadventure, he paid a fine but was not guilty of a capital offence.105 But in 1278 there was still no guarantee


[MURTHE] from henceforth shall not be [judged] before our Justices, where it is found Misfortune only: But it shall take place in such as are slain by Felony, and not otherwise.

Statutes of the Realm. Volume 1, 25 (emphasis in original).

103 Hessel E. Yntema has asserted that "murdrum" had Danish or Scandinavian origin and it was a murder fine designed 'to bring a few of the more serious offences under royal control'. Yntema (n 93) 155.

104 Coldiron (n 93) 539. Coldiron, however, noted that:

A misinterpretation of this statute by Coke and others led to a mistaken belief that prior to this time one who killed by misadventure or in self-defense, was hung. But this mistake has now been rectified and it is now settled that this statute merely abolished the "murdrum" fine in cases of misadventure and self-defense: at 531 n 25 (emphasis in original) (citations omitted).

105 Maitland ‘The Early History of Malice Afore Thought’ (n 102) 407. Maitland has also argued that:

Mr Justice Stephen shows very clearly that the Statute of Marlbridge does not countenance the doctrine put forward in the Year Book of 1348, and repeated with exaggerations by Coke, namely, that before this statute a man was hanged if he slew another in self-defence. The statute merely abolished the practice of fining the hundred when a foreigner perished accidentally: at 407 (citations omitted).

Sir James Stephen has written the following account:

It is further to be observed that there was no need to refer in this act to the cases of homicide under a necessity which might have been avoided. In a case where this happened the person who caused the death must of course be known, and when the person by whom the death was caused was known, no "murdrum" was due from the township. The only cases in which the act could apply would be cases in which some stranger who could not be identified as an Englishman was found dead under circumstances which led to the inference that his death was accidental, e.g. if he were found drowned with no marks of violence. The statute therefore throws little light on the subject, though its words, when rightly understood, seem to imply that killing "per infortunium" was in those days so far from being felony that the two were contrasted with each other.

Stephen (n 92) vol 3, ch 26, 36. Sir James Stephen has also argued that the reason the Statute of Marlbridge has been invoked in self-defence cases was because of a "mistake" in constructing it, and 'this mistake had the practical result of the Statute of attaching forfeiture of goods to a verdict of se defendendo': Stephen (n 92) vol 3, ch 26, 42 (emphasis in original). See also Parker (n 11) 75 n 174. Parker has asserted:
that the king would grant a pardon after a finding of killing by misadventure or in self-defence, though royal pardons in cases of premeditated murder were granted rarely if at all.\textsuperscript{106} Plucknett has noted:

In the thirteenth century misadventure and self-defence were still recognised, not so much as defences to a charge of homicide as circumstances entitling one to a pardon; but if these defences were not involved, there was but one other case, and that was homicide. Whatever might be urged in mitigation of this offence could only be urged before the king as part of an appeal for pardon; it could not be considered by a court of law.\textsuperscript{107}

The king wanted that distinction between killing by misadventure or in self defence to be clarified for the jury and so directed the enactment of the Statute of Gloucester in 1278.\textsuperscript{108} The Statute of Gloucester made it necessary for the jury to find misadventure or self-defence if a person accused of a killing was to have any hope of obtaining a pardon. The mistake being that “murder” was not construed as it should have been as murdrum—a fine on the township, but as the more modern development of murder as the most heinous form of homicide. Forfeiture was not finally abolished until accomplished by the statute. 9 Geo. IV, c. 31, s. 10.: Parker (n 11) 75 n 174.

\begin{footnotes}
\item[107] Plucknett A Concise History of the Common Law (n 11) 474.
\item[108] 6 Edw. 1, c. 9. James Fitzjames Stephen has written the Statute text is as follows:

\begin{quote}
The king commands that no writ shall be granted out of the chancery of the death of a man to inquire whether a man killed another by misadventure or in self-defence, or in other manner by felony, but if such a person is in prison and before the justices in eyre or justices of gaol delivery, puts himself on the country for good or evil; in case it be found by the country, that he did it in self-defence or by misadventure then, on the record of the justices, the king shall pardon him if he will.
\end{quote}

Stephen (n 92) vol 3, ch 26, 36-7. See also Dixon (n 93) 65.

But see Statutes of the Realm volume 1, page 49 where the statute reads:

\begin{quote}
THE King commandeth, That no Writ shall be granted out of the Chancery for the Death of a Man to No Writ enquire whether a Man did kill another by Misfortune, or in his own Defence, or in other Manner [without Felony:] but he shall be put in Prison until the coming of the justices in Eyre, or justices assigned to the Gaol-delivery, and shall put himself upon the Country before them for Good and Evil; In case it be found by the Country, that he did it in his Defence, or by Misfortune, then by [the Report of the Justices to the King, the King shall take him to his Grace, if it please him (emphasis in original).]
\end{quote}

The person’s goods, however, still had to be forfeited and this remained the case for excusable homicides until 1828 when it was abolished by the statute of 9 Geo. IV C.31, sec. 10. William 532. Coldiron (n 93) 532. See generally Dixon (n 93).
pardon. Sir James Stephen has explained why the *Statute of Gloucester* was enacted in the following words:

This act by its opening words abolished the writ *de odio et atia*, which was issued, ... in order that a jury might say whether a person accused of homicide was accused duly or maliciously in order that in the latter case he might be bailed. It would seem from this statute that the commonest cases of accusations "de odio et atia" were cases of misadventure or self-defence. The survivors of the deceased in such cases were likely to accuse of wilful homicide those whose negligence or violence had caused their relation's death; and the statute provides that these cases are no longer to be bailable, and that when the trial comes on, the jury, if they think that the case was one of self-defence or misadventure, are neither to convict nor acquit, but to find specially to that effect, upon which the king, if he pleases, may, upon the record or report of the justices, pardon the party.\(^\text{109}\)

However, as yet there was no statutory recognition of the idea of “malice aforethought”. Even though any formal written pardon granted by the king would use that language when affirming that this was not a wilful or premeditated murder, the language of the *Statute of Gloucester* did not use the term “malice aforethought” as a legal term to distinguish homicide resulting from misadventure or self-defence from other homicides, nor was the term “malice aforethought” defined.\(^\text{110}\) Juries still did not trust the king to pardon in all misadventure and self-defence cases so they continued

\(^{109}\) Stephen (n 92) vol 3, ch 26, 37 (emphasis in original). Nelson E. Johnson has written that:

At this time, to secure a pardon in the case of homicide *se defendendo*, it was necessary, according to the criminal procedure, that the jury should find that the accused killed in self-defense, in the following words: "In self-defense and not by felony or malice aforethought." This is the first time that this term “malice aforethought” is used, as far as the writer has been able to discover. These words were required by the statute 6 Edw. I., c. 9, known as the Statute of Gloucester. It happened that this statute abolished the writ *de odio et atia*, and it seems highly probable that the "malice aforethought," the absence of which the jury had to find specially, is the equivalent of the *odiam et atia*, as set forth in that writ. It is thought that this is the origin of the “malice aforethought” which is so necessary an element of murder to-day.


The words “malice aforethought” are not included in the translation of the *Statute of Gloucester*. See Dixon (n 93) 65; Stephen (n 92) vol 3, ch 26, 37.

\(^{110}\) Coldiron (n 93) 531. It is the language of the pardon that used the words “malice aforethought": at 531.
to find such defendants “not guilty” to more completely protect them from the possibility of capital punishment.

Perkins has offered yet another interpretation of the development of the law of homicide.111 For Perkins criminal homicide was divided into the categories of murder and manslaughter ‘several centuries ago’112 but he did not specify when this division in the law occurred. However, homicide was murder unless it was excused or justified, in which event it was manslaughter and both classes were common law creations.113 Perkins has further argued that ‘self-defense cases offer a nice distinction between the proper use of the words "justifiable" and "excusable" as applied to homicides’.114 With respect, the coincidence of Perkin’s classes with modern homicide categories seems a little too convenient and the timing of the distinction between murder and manslaughter is uncertain.

While Green and Dixon disagree about the timing of the distinction, they are ad idem on what happened, and their distinction does not conveniently coincide with modern sensibilities. Green’s idea and research is the more convincing because it is more recent, includes a number of cases which demonstrate his conclusions and it also benefits from an understanding of the role of the Statute of Gloucester.115 And while Green does not fully explain why the king’s justices did not upset jury verdicts and

111 See generally Perkins ‘Re-examination of Malice Aforethought’ (n 93); Perkins, ‘The Law of Homicide’ (n 93).


113 Ibid.

114 Ibid. Perkins also argued that:

If the distinction between justifiable and excusable homicide is to be retained in modern law, the difference should certainly be grounded upon other than purely historical reasons. One who kills another in self-defense, under circumstances in which he was privileged by law to make use of deadly force to save his own life, should be said to have committed justifiable homicide (in spite of the fact that it was originally excusable only) because what is authorized by law is in every proper sense, justified. But one who kills another by accident may, under certain circumstances, be excused, but cannot properly be said to be justified.

Perkins ‘Re-examination of Malice Aforethought’ (n 93) 541 n 39.

115 See generally Green, Verdict According to Conscience (n 77); Green, ‘The Jury and the English Law of Homicide’ (n 53).
rarely called for consideration by a second jury, he does show unequivocally that the king's justices would not interfere with jury findings of fact.\textsuperscript{116}

In 1293, King Edward I (reigned 1272 – 1307) created further justified homicide categories when he justified park rangers who killed poachers and exempted them from capital punishment in the same way that he had already justified the act of the executioner who was not culpable for the life he took with his axe or at the gallows.\textsuperscript{117} Sir James Stephen has written that this statute 'throws some light on the subject ...
This act supplies a case of homicide which was regarded as absolutely justifiable. The forester or park-keeper was not to be "punished or disturbed " if he acted within the powers given by the act'.\textsuperscript{118} After discussing these exemptions for park rangers and executioners, referring to the Statute of Marlbridge in 1267, the Statute of Gloucester in 1278 and statute 21 Edw. 1, st. 2 in 1293, Stephen has further written:

The result of these authorities seems to be in the end of the thirteenth and the beginning of the fourteenth centuries, [that] juries were bound in cases of trials for homicide, where the defence was misadventure or self-defence, to find specially that such was the case, upon which the king was bound to grant his pardon.\textsuperscript{119}

\textsuperscript{116} See generally Green, *Verdict According to Conscience* (n 77); Green, 'The Jury and the English Law of Homicide' (n 53); Green, 'Societal Concepts of Criminal Liability' (n 26).

\textsuperscript{117} The Statute of 21 Edw. 1, st. 2. See *Statutes of the Realm*, Volume 2, 112. This Act provides that the 'foresters, parkers, or warreners, if they find trespassers who will not yield themselves "after hue and cry made to stand unto the peace, but do continue their malice"'. Stephen (n 92) vol 3, ch 26, 37-8.

\textsuperscript{118} Stephen (n 92) vol 3, ch 26, 37-8 (emphasis in original). Stephen stated:

In 1310 an entry appears upon the Parliament Roll of 3 Edw. 2, in answer to a petition complaining of the ease with which pardons were granted to homicides and other offenders, …
This seems to show that in such cases pardons were granted as of course: at 38.

\textsuperscript{119} Ibid 38. In support to his analysis, Sir James Stephen has provided the following story:

S. being indicted for the death of N. and pleading not guilty, the jury found that S. and N. quarreled on their way to the public-house, and in the course of the quarrel N. struck S. with an ash stick on the head so that he fell, and S. got up and ran away as far as he could, and N. followed S. with the stick in his hand to kill him if he could, and drove him to a wall situated between two houses which he could in no wise pass; and when S. saw that N. wanted to kill him with the stick, and that he could not avoid death unless he defended himself, he took a certain 1 poleaxe and struck N. with it on the head, of which N. immediately died, and the said S. immediately after fled as far as he could. Wherefore the jurors said that S. killed N. in self-defence, and not by felony or of malice aforethought, and that he could not otherwise escape from death. Therefore S. is remitted to prison to wait for the mercy of the king in the custody of the sheriff: at 38-9 (citations omitted).
This exception for royal officials appears to have to have led juries to reason — “if the King can give this exemption, why can he not broaden it to other cases where the killing was justified?” The cases cited in Thomas Green’s research prove that juries were pushing back against the king’s limited exceptions in cases that did not involve his park rangers’ and, in effect, said that additional exceptions were needed in other cases where killing was justified.\(^{120}\) Green’s research includes examples of cases during the 13\(^{th}\) century where medieval juries supported the defendant’s case by finding a great variety of justifications. Those include circumstances where the defendant could not have avoided the death because the defendant escaped after the victim attacked the defendant; circumstances where though the defendant had escaped and fallen in a ditch, the victim had followed, caught up and tried to attack him; \(^{121}\) and the previously noted circumstances where the victim was faster than the defendant and there was thus no alternative to the killing; \(^{122}\) and a case where the

\(^{120}\) See generally Green, *Verdict According to Conscience* (n 77); Green, ‘The Jury and the English Law of Homicide’ (n 53); Green, ‘Societal Concepts of Criminal Liability’ (n \(^{26}\)).

\(^{121}\) C 260/6, no. 28 (1292). In this case the jurors stated that:

Gilbert, son of William de Cherneleye, struck Robert de Caterhale upon the head with his bow so that the bow broke; and Gilbert struck him again with the remaining part of his bow. Robert, fleeing, sought to cross a ditch in which a hedge grew and in saving himself grasped a branch from the hedge which broke off so that he fell with the stick into the ditch. Gilbert soon arrived, assailing Robert with his fractured bow. Robert, considering this, struck back at Gilbert with the broken branch hitting him in the head so that he died. The jurors were asked whether Gilbert had a sword or a knife and, if so, whether he had drawn either. When they replied that Gilbert was so armed, but had drawn neither weapon, the court, obviously doubtful as to the lethal nature of the broken bow, asked the jurors once again whether Robert could have escaped without slaying Gilbert. The jury reiterated their opinion that he could not have done so. This failed to satisfy the court, however, and only after a second jury had been impaneled and had supported the verdict of the original jury was the defendant awarded a special verdict. The enrollment indicates in a later hand that Gilbert was pardoned.


\(^{122}\) C 260/6, no: 16 (1292). In this case the petty jury stated that:

Alan de la More killed John Tyrel in self-defense after a great chase. The two had argued until John ran home to fetch a sword. “Alan, seeing John approaching, and desiring to evade John's malicious intent, kept himself underneath the horse his father, Robert, was riding. Robert did all in his power to prevent John from striking Alan, but John chased Alan into a certain corner . . . , where, as a last resort, Alan retaliated with a mortal blow. The court asked whether Alan could have fled before John returned from his house armed. The jury replied that the defendant could not have fled because John was faster than he.

Green, ‘The Jury and the English Law of Homicide’ (n 53) 429 n 59

Green also has asked to “compare” this case with ‘C 260/23, no. 23 (1332), where the jurors testified that the defendant fled as fast as he could ("velociori curru quo potuit"), but his
victim held the defendant tightly so that he could not escape and had no alternative but to kill. Thirteenth century juries thus did not consider that the new statute helped them much at all. Indeed, this statute seems to have confirmed juries in their determination to protect persons accused of homicide in self-defence cases with supportive stories to ensure an acquittal, as anything less would have consigned the accused to an uncertain fate.

The case of John Pentyn and his wife Clemencia in 1332 is illustrative. The trial jury made up a story different from that which was recorded from the inquest’s jury’s decision. The inquest jury’s story was that John struck the victim in the head when the victim and others came to his wife’s aide after they had heard her crying for help. They said that the wife had cried for help when she saw that her husband had locked himself in the solar trying to hang himself. The trial jury’s story was different. They found that after John and his wife had an argument, she had left the house. When she came back and found herself locked out, she screamed. When the victim heard her screaming, he went to her house, entered the solar and tried to kill her husband. When her husband could not escape, he struck the victim with an iron rod in self-defence.

Green has summarised another remarkable example of markedly different jury stories from the same facts somewhere between 1325 and 1326. The inquest jury found that John le Marche and Agnes de Wycoumbe were arguing outside John’s house past  }

123 C 260/7, no. 46A (1293). In this case, the jury told the court that:

Gregory le Waleis threw Thomas de Gloucester "to the ground, lay upon him, and drew his knife desiring to kill him. Thomas, perceiving this, and fearing likewise his own death, drew his knife and struck Gregory as the latter lay upon Thomas' stomach." The justices then asked the jury whether in fact Thomas might have escaped without killing Gregory, to which the jury responded, "No, because Gregory lay upon Thomas' stomach and held him tightly and firmly to the ground." ... Their reply satisfied the court, and the defendant was remanded to prison to await his pardon.

Green, 'The Jury and the English Law of Homicide' (n 53) 428-9 n 59.

124 The solar was a private room in a medieval house (or castle) to provide some privacy for the head of the house.

125 London Coroners' Rolls, Roll B, 42, pp. 65-6 - C 260/32, no. 15 (1322). Green, 'Societal Concepts of Criminal Liability' (n 26) 678 n 35; Green, Verdict According to Conscience (n 77) 40-1 n 41.
local curfew when Agnes took a stick from John’s hand and started to hit John on the back and sides. When witnesses Geoffrey de Caxtone and Andrew de Wynton saw what was happening, they came with staves to defend Agnes and struck John on the head and body and John died a few days later from his injuries. The trial jury’s story, however, was that John had met Andrew some distance from where he died and struck him on the head with a staff. Andrew initially fled to save himself until he was up against a wall and was forced to retaliate. 126

Green notes that in 1339 that juries were still determined to protect and assist people accused of crimes causing death where they had a credible self-defence story. In that year, Green refers to an inquest jury’s story of that year in which Simon and Robert were arguing in the street. Simon struck Robert, wounding him on the upper lip. A spectator named John then seized a "dorbarre" and struck Simon on the hands, side and head, killing him.127 The trial jury changed the story perhaps to make it more believable finding that John had acted in self-defence to save himself from imminent death. According to the trial jury, Simon and Robert were arguing over some pennies which Simon owed to Robert. When Simon attempted to strike Robert with a staff, Robert held it firmly with his hands. Simon drew a knife and stabbed Robert in the mouth. John witnessed all of this from his shop and then approached both the fighting men. But when Simon saw John coming, he left Robert and chased John with the knife. That chase ended with Simon holding John against a wall attempting to kill him. To prevent his imminent death and because he could not escape, John struck Simon on the head with the dorbarre he held in his hands and killed Simon. 128

126 London Coroners' Rolls, Roll E, no. 35, pp. 162—63 (1325) and C 260/37, no. 7 (1326). Green, Verdict According to Conscience (n 77) 40; Green, 'Societal Concepts of Criminal Liability' (n 26) 677-8. Green noted that '[a] trial enrollment is extant only in the case of Andrew': Green, Verdict According to Conscience (n 77) 40; Green, 'Societal Concepts of Criminal Liability' (n 26) 677-8. This is because 'according to the coroner's roll, Andrew and a certain Robert le Raykere, who had "aided and abetted" the felony, were immediately captured; Agnes and Geoffrey fled': Green, Verdict According to Conscience (n 77) 40 n 37; Green, 'Societal Concepts of Criminal Liability' (n 26) 677-8 n 32.

127 C 260/50, no. 60 (1339). John, son of Robert de Uptone, was tried in 1339 for the death of Simon Chaucer. Green, 'The Jury and the English Law of Homicide' (n 53) 435 n 80; Green, 'Societal Concepts of Criminal Liability' (n 26) 681.

128 Green, 'The Jury and the English Law of Homicide' (n 53) 435 n 80; Green, 'Societal Concepts of Criminal Liability' (n 26) 681.
In 1340, King Edward III (reigned 1327-1377) passed a statute to abolish the rule known as Englishry under which the local hundred had to pay a severe fine if a foreigner was found dead within their geography and no one had been held responsible. The rule had protected the Danish occupiers under Cnut and had been adopted by the Normans in favour of the French after their invasion in 1066. This statute effectively eliminated the distinction between voluntary homicide in general and murder. This adjustment in the law relating to murder was followed by a further adjustment in 1348 when a further statute was passed to prevent the execution of people who were convicted of killing in self-defence, though their goods were still forfeit to the Crown in consequence of the killing.

129 14 Edw. III, st. 1. c. 4. The statute provides:

ITEM, Because many Mischiefs have happened in divers Counties of England, which had no Knowledge of Presentment of Engleschrie, whereby the Commons of the Counties were often amerced before the Justices in Eyre, to the great Mischief of the People ; It is assented, That from henceforth no Justice Errant shall put in any Article, (') Opposition, Presentment of Engleschrie against the Commons of the Counties, nor against any of them; but that Engleschrie and Presentment of the same, be wholly out and void forever, so that no Person by this Cause may be from henceforth impeached.

Statutes of the Realm. Volume 1, 282.

130 The effect of a presentment of Englishry was to free the hundred from the fine which was to be paid if the presumption that the person slain was a Frenchman was not removed. The fine was called murdrum as well as the offence. Stephen (n 92) vol 3, ch 26, 31, 40. See also Coldiron (n 93) 529.

131 The difference between homicide and murder was that in cases of murder a presentment of Englishry was required, in the absence of which the person found killed was presumed to be a Frenchman (Norman), and the township was fined. See generally Stephen (n 92) vol 3, ch 26; Plucknett, A Concise History of the Common Law (n 11) ch 1; Coldiron (n 93); Yntema (n 93). Coldiron stated:

With the passage of this Act the technical difference between voluntary homicide and "murder" was abolished. But "murdrum" continued in the law, not to indicate a technical fine, but to distinguish secret slayings by ambush, by waylaying, and by other foul means, from other types of felonious homicides. Thus, one more step in the break between murder and manslaughter was complete: Coldiron (n 93) 532 (citations omitted).

132 21 Edw. III. Sir James Stephen produced the following note from ‘the Year-book, 21 Edw. 3, p. 17B. (A.D. 1348)’

Note-That a man was convicted of having killed another in self-defence, and, notwithstanding, his chattels were forfeited, though his life is safe. The reason is, that at common law a man was hanged in this case as much as if he had done it feloniously, and, although by the statute (Marbridge, 52 Hen. 3, c. 25) the king has spared his life, his goods remain under the common law.
Despite these statutory reforms in homicide cases, Green records that juries maintained their determination to protect persons accused of homicide in self-defence cases with supportive stories, perhaps to avoid the forfeiture of their goods that still followed any killing in the absence of an acquittal. Thus in 1348, when Thomas and Richard had an argument and William came to aid his brother Thomas, the inquest jury found that William had no choice but to draw a knife and stab Richard in the back. The trial jury added that William had no other option in defending himself in the melee that followed, though in their version of the story, Richard was fatally stabbed in the stomach.\textsuperscript{133}

In 1356 even coroner’s juries were lenient. For example, in one case, Walter and Thomas were began arguing in a cart, Thomas jumped out of the cart and the ntried to stab Walter with an iron fork. Walter’s successful self-defence was that he had parried Thomas’ thrust with the fork and stabbed Thomas’ left arm with a knife, the blow being unfortunately fatal.\textsuperscript{134} The continued jury practice of leniency appears to

\textsuperscript{133} Stephen (n 92) vol 3, ch 26, 41. However, this “[n]ote” was described by Sir James Stephen as “remarkable passage” because ‘in the course of the eighty-one years, between the Statute of Marlbridge (1267) and 21 Edw. III (1348), the old law had been completely forgotten’: at 40-1. Sir James Stephen has also argued that the Statute of Marlbridge has been invoked in self-defence cases because of a “mistake” in understanding its meaning. He explained the mistake as follows:

The words "Murdrum de cetero non adjudicetur coram justiciariis ubi infortunium tantummodo adjudicetur” must have been construed, "Killing by misadventure shall not be held before the justices to be murder,” in ignorance of the fact that “murder” meant the fine on the township. The recital of the statute of 1340 abolishing Englishry shows how natural the mistake was: at 42 (emphasis in original).

He further explained that ‘this mistake had the practical result of the Statute of attaching forfeiture of goods to a verdict of “se defendendo”’: at 42 (emphasis in original). The Statutes of the Realm do not contain the text of this statute.

\textsuperscript{134} The coroner’s role: 9 J.I. 3. 134, m.41/4 (1348). Thomas and Richard were having an argument. William came to the aid of his brother, Thomas. William drew a knife and stabbed Richard in the back. The Cambridge trial jury told the Court that no only had William stabbed Richard as he had no other options, but the jury also found that Richard died of a wound to his stomach. Green, ‘Societal Concepts of Criminal Liability for Homicide in Medieval England’ (n 26) 682.

\textsuperscript{134} JUST 2/18, m.45d/5 (1356). Green, ‘The Jury and the English Law of Homicide’ (n 53) 431 n 67; Green, ‘Societal Concepts of Criminal Liability’ (n 26) 677; Green, Verdict According to Conscience (n 77) 39. The trial record ‘has not been located’. ‘Societal Concepts of Criminal Liability’ (n 26) 677 (n 26); Green, Verdict According to Conscience (n 77) 39 n 31.
have been the reason for King Edward III’s additional statute in 1357 to specifically to deal with

Manslayers and Manslaughters, Robbers and slaughters, Robberies, Trespasses and Trespassers.\textsuperscript{135}

It specifically stated that pardons should not be granted except in Parliament or Council and felonies must be specified in Pardons.\textsuperscript{136} But that new statute did not make clear how manslayers and manslaughters were to be distinguished from one another.\textsuperscript{137} What does seem likely is that the kingsmen (his knights in Parliament) were trying to impose the king’s will upon the lesser men who had been summoned for jury service in the country, and who continued to assist defendants with acquittals in homicide cases when there was any hint of self-defence. Even if juries knew about the new statute, at least one jury appears to have ignored it and continued to exercise their lenient practice again one year later in 1358, when they told the court that the defendant had stabbed the victim with a knife because he thought he wanted to kill him.\textsuperscript{138}

In 1361 juries continued to be content to support the defendant’s case and leave the law alone. When James and John were fighting, Alice, James’ wife, tried to save James and in so doing killed John. The trial jury told the court that Alice had killed John when she was defending both herself and her husband.\textsuperscript{139} Another incident


\textsuperscript{137} It is possible but not certain that that distinction was made upon whether killing was or without malice aforethought – that is - a person who killed his victim with malice aforethought was a manslayer, and a person who killed his victim without malice aforethought was a manslaughterer.

\textsuperscript{138} J.I. 2. 18, m.47d/4 (1358). Hugh and John were both chaplains. Hugh took John with his hands and “threw him feloniously” at his feet wanting to kill him. John thought Hugh wanted to kill him, so John drew a knife and stabbed Hugh in the chest. Green, ‘Societal Concepts of Criminal Liability’ (n 26) 677; Green, Verdict According to Conscience (n 77) 39. The trial enrollment (C 47, Cambridge, 6/87) is incomplete but the complete parts ‘indicate a classic form of self-defense’. Green, ‘Societal Concepts of Criminal Liability’ (n 26) 677 n 27; Green, Verdict According to Conscience (n 77) 39 n 32, n 33.

\textsuperscript{139} C. 9260/792 no. 15. (1361). Green, ‘Societal Concepts of Criminal Liability’ (n 26) 681. In the ‘coroner’s indictment copied in gaol delivery roll … there was no mention [that Alice killed John] in self-defence’: at 681-2.
recorded by Green occurred in 1363. The defendant, Robert, was fearful that the victim, William, would kill him when he tried to draw a knife, and so struck William on the head with a hatchet, killing him.\footnote{JUST 2/102, m.9/2 (1363). Green, ‘The Jury and the English Law of Homicide’ (n 53) 432 n 67; Green, ‘Societal Concepts of Criminal Liability’ (n 26) 676 n 23, n 24.} Robert was pardoned for self-defence in 1367.\footnote{Green was unable to locate the trial record, but citing the ‘Calendar of the Patent Rolls, 1232-1422 (London, 1906), May 6, 1367, p. 395’, he stated that Robert was pardoned for self-defense. Green, ‘Societal Concepts of Criminal Liability’ (n 26) 676 n 24. See also Green, ‘The Jury and the English Law of Homicide’ (n 53) 431 n 67.}

In 1365, jurors had to provide an elaborate story to the coroner to save a defendant from an uncertain fate. Ruskin started a fight with William de Assheby but got in trouble and his servant Sydenfen rushed to his aid. The jury told the coroner that William de Assheby was acting in self-defense when he fatally stabbed Sydenfe.\footnote{J.I. 2. 53, m.3d/4 (1365). Green, Verdict According to Conscience (n 77) 39-40; Green, ‘Societal Concepts of Criminal Liability’ (n 26) 677 n 29. Green also stated ‘[w]hen Assheby came to trial he already had a pardon’: Green, Verdict According to Conscience (n 77) 40 n 35 (citations omitted).} A case for self-defence was also maintained by a jury in 1380 when there was little evidence that the victim had produced a weapon with which to injure the defendant.\footnote{J.I. 2. 58, m.4/2 (1380). In this case, after the victim threw the defendant to the ground, the defendant killed him. But there was no evidence that the victim used or attempted to use any weapon. Nevertheless, the jury decided that the defendant killed the victim in self-defence. Green, ‘Societal Concepts of Criminal Liability’ (n 26) 677 n 27; Green, Verdict According to Conscience (n 77) 39 n 33.}

In Green’s account, jury steadfastness continued to 1389 when the Commons intervened to suggest by petition that the king’s exceptions were not wide enough. Their petition suggested that pardons should not be granted in cases of intentional and premeditated killings, and the king responded with another statute.\footnote{13 Rich. II, s.2 C.1. It provided:

Our lord the king…hearing the grievous complaint of his said Commons…of the outrageous mischiefs and damages which have happened to his said realm, for that treasons, murders [murdr], and rapes of women be commonly done and committed, and the more because charters of pardon have been easily granted in such cases…the king…hath granted, that no charter of pardon from henceforth shall be allowed before any justice for murder, or for the death of a man slain by await, assault or malice prepensed [murdro mort de homme occys per agayt assaut ou malice prepense] …unless the same…be specified in the same charter.} This time
the "malice aforethought" words from the king’s formal pardon documents were used in statute for the first time,\textsuperscript{145} and distinguished between killing with malice aforethought and other forms of homicide.\textsuperscript{146} Plucknett has explained the distinction and context as follows:

[I]n 1390 the Commons secured a statute which recognised certain pardons as issuing from the Chancery as a matter of course (no doubt cases of self-defence or misadventure); with these the statute contrasts pardons for ‘murders done in await, assault, or malice prepense’. In such cases pardons were subject to almost impossible conditions. The pardoning power in other cases was not touched, and so the Crown retained its normal powers and procedure for pardoning homicide, except cases of what we may call wilful murder.\textsuperscript{147}

The language of the new statute confirmed that the king remained determined to enforce his principle that all killings should result in a conviction and that he alone had the authority to grant a pardon. He was unhappy with the fact that juries continued to acquit persons accused of homicide in self-defence cases, so the Commons proposed he reform the law to re-assure juries that pardons would only be denied in cases of premeditation. Indeed, it appears that the Commons suggested that the king delegate the pardon right to his Chancellor, who would then apply standard rules. But the stand-off continued.

Thus, from their inception as an institution in what became English criminal law, trial juries were prepared to act to provide justice even though it was fundamentally at odds with the letter of the king’s law as understood both by the king and his justices. Juries understood that they were neither to convict nor acquit but to make special findings

\footnotesize{McBain (n 106) 55 (emphasis in original). See also Parker (n 11) 73. See the full text of the statute at the Statutes of the Realm, Volume 2, 68-9.}

\textsuperscript{145} Stephen (n 92) vol 3, ch 26, 43, referring to the statute of 13 Rich. II, s.2 C.1. William Coldiron has argued that this development even if it is correct, it is not important. Coldiron (n 93) 532.

\textsuperscript{146} Dixon (n 93) 65. Sir Owen Dixon has suggested that:

This statute upon a petition by the Commons against the practice of pardoning felony in advance. It enacted that no charter of pardon should be allowed by justices if it was found that homicide was by ambush, assault or premeditated malice unless the pardon specifically extended to such a case: at 65.

\textsuperscript{147} Plucknett, A Concise History of the Common Law (n 11) 474-5.
that the accused had acted in self-defence in appropriate cases. They persisted in
their protection of those who had killed in self-defence throughout the thirteenth and
fourteenth centuries with “no alternative but to kill’ findings. They simply did not trust
that the king would pardon these defendants, and they also protected many
defendants from having their property and goods forfeited in the process. The jury
used its unreviewable power, part of which was a consequence of community social
attitudes. One aspect of that attitude was that from about the late Anglo-Saxon times
to about the end of middle ages a difference was perceived between what we call
manslaughter and premeditated murder.\footnote{148} Medieval communities also perceived a
difference between types of homicide.\footnote{149} The community also had a deep
understanding of chivalry and honour; a noble and dignified person did not run away
when confronted. We may misunderstand the chivalry/honour system as a species of
pride. But to get inside the minds of 13th and 14th century juries we must understand it
more intimately than that. It may help to remember that George Washington’s Treasury
Secretary Alexander Hamilton died in a duel with Aaron Burr, a later Vice President,
over a trivial matter of honour. If this idea of chivalry or honour was alive enough for
educated men of the 19th century to fight to the death, it is easier to understand why
the nobles and knights and other free men who made up juries in England in the 14th
century should have been more empathetic than the king who simply wanted to
establish law and order through his realm. No one ever challenged the king to a duel.

The foregoing self-defence cases also suggest that self-defence principles such as
intention, imminence, necessity, proportionality and reasonableness, which remain
relevant in self-defence cases, were taken into account by judges and juries after
1200. The juries used their independence from judicial control to make criminal legal
practice conform to common sense. Judges did not have the social power to force the
juries to conform to the rule that issues of self-defence should be indicated and left to
the king. Thus although judges protested from time to time, lest the king thought them
lame, jury popularity and the common sense results they produced, obliged the judges
to go along with them.

\footnote{148}{Green, ‘Societal Concepts of Criminal Liability’ (n 26) 669.}
\footnote{149}{Ibid 682-3.}
We come now to the next step when, by enacting four statutes in 1496, 1512, 1531, and 1547, a “definite break” between murder and manslaughter took place. Those statutes also incrementally excluded the benefit of clergy in cases in which homicides had been committed with "malice aforethought." ‘It was upon these statutes that the distinction between murder and manslaughter rested.’ These statutes however ‘did not provide a new crime’. All they did was make homicide a capital offence when it was committed ‘with a particular kind of mens rea’ – that is – when the intention to do the fatal act was made in advance of the

150 12 Hen. VII, c. 7 (1496). Statutes of the Realm. Volume 2, 639. The expressions used were "wilful prepensed murders," "prepensedly murder". Stephen (n 92) vol 3, ch 26, 44; Pekins ‘Re-examination of Malice Aforethought’ (n 93) 543-4 n 61.

151 4 Hen. VIII, c. 2 (1512). Statutes of the Realm. Volume 3, page 49. The expression used was “murder upon malice prepensed”. Stephen (n 92) vol 3, ch 26, 44; ‘Re-examination of Malice Aforethought’ (n 93) 543-4 n 61.


154 Dixon (n 93) 66. See also Stephen (n 92) vol 3, ch 26, 44.

155 The benefit of clergy was abolished in 1827 by 7 and 8 Geo. IV., c. 28, Stephen (n 22) vol 1, 471. See also Arthur Lyon Cross, ‘The English Criminal Law and Benefit of Clergy during the Eighteenth and Early Nineteenth Century’ (Apr., 1917) 22 The American Historical Review 544, 564-5. It is beyond the scope of this thesis to discuss the benefit of clergy in detail. A comprehensive analysis of the “benefit of clergy” can be found in J. Bellamy, Criminal Law and Society in Late Medieval and Tudor England (Palgrave Macmillan, 1st ed, 1984) 115-164. See also William Blackstone, Commentaries on the Laws of England (1765-1769) (Lonang Institute, 2010) bk 4, ch 28; Pollock and Maitland (n 40) vol 1, 259-264; Maitland The Constitutional History of England (n 11) 229-230; William Holdsworth, A History of English Law (Methuen & Co, Ltd., 1923) vol 3, 293-302. See generally Jeffery (n 2); Arthur Lyon Cross, ‘The English Criminal Law and Benefit of Clergy during the Eighteenth and Early Nineteenth Century’ (Apr., 1917) 22 (No 3) The American Historical Review 444. Green, ‘The Jury and the English Law of Homicide’ (n 53); J Earl Miller, A History of Benefit of Clergy in England: With Special Reference to the Period between 1066 and 1377 (Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in History, Graduate School of the University of Illinois, 1917).

156 Dixon (n 93) 66. See also Stephen (n 92) vol 3, ch 26, 44.

157 Dixon (n 93) 66.

158 Ibid.
offence that was committed.\textsuperscript{159} James Stephen described the law at that stage as follows:

We have thus arrived at the point at which homicide was finally divided into two main branches, namely, murder which is unlawful killing with malice aforethought, and homicide in general, which is unlawful killing without malice aforethought, the one offence being within, the other without, benefit of clergy.\textsuperscript{160}

Sir James Stephen did not elaborate further in the above quote, but it can be inferred from the text of the above statutes that what he meant was that a person who could prove that he was a member of the clergy who was accused of unlawful killing with malice aforethought could not claim the benefit of clergy and so have his case heard in an ecclesiastical court. However, a manslaughter charge could still be heard in an ecclesiastical court if the accused could prove that he was a member of the clergy. In practice though, it was unlikely that these cases would ever have come before an ecclesiastical court because it was unlikely that manslaughter was ever the primary charge even after this distinction was recognised in statute. Even now in homicide cases, manslaughter is always treated as a secondary fallback charge if the murder charge is not proven. And if murder was charged as already explained, the matter would not be referred to an ecclesiastical court.

\textsuperscript{159} In 1603 stabbing between the Scotch and the English became frequent causing King James to enact the Stabbing Statute which took away the benefit of clergy from some kinds of manslaughter - “rage drunkenesse hidden displeasure, or other passion of minde”, but maintained the benefit for acts committed in self-defence or misadventure. See 1 Jac. I, C.8. Statutes of the Realm: Volume 4, 1026. Coldiron has suggested that:

It is generally agreed that this statute was an attempt to make a crime of murder, with malice prepensed, out of circumstances which might only justify a conviction of “chance medley”. This was an important distinction at this time because murder with malice prepensed had been ousted of the benefit of clergy by the above-mentioned statutes and thus a conviction for that crime meant death. But “chance medley” or other homicides were clergyable and called only for a branding on the brawn of the thumb and imprisonment for the maximum of one year.

Coldiron (n 93) 534 (citations omitted).

\textsuperscript{160} Stephen (n 92) vol 3, ch 26, 45.
Green says ‘[t]here are no gaol delivery or criminal assize rolls for most of the fifteenth century or the first half of the sixteenth century’. Green also says that Salisbury’s case in 1553 is the ‘earliest reported [jury] verdict of manslaughter’. In this case, John Vane Salisbury had joined a fight which was already underway. Why he joined the fight is unclear, but he wound up being one of the four defendants indicted for murdering Ellis. The Court directed:

[If the jury found Salisbury “did not have malice aforethought [“malice prepense”], but suddenly [“sodeynement”] took part with those who had malice aforethought, this would be manslaughter in him and not murder, because he did not have malice aforethought.

The jury convicted the other three of murder but convicted Salisbury of manslaughter because he had not participated with malice aforethought. Upon the jury’s verdict

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161 Green, *Verdict According to Conscience* (n 77) 121 n 62. Green further says ‘[i]n the late sixteenth century, there were still cases ending in verdicts of self-defense and, apparently, an order that the defendant obtain a pardon’: at 123 n 72.

162 Green, ‘The Jury and the English Law of Homicide’ (n 53) 485. Citing Kaye (n 96), Green also says that Kaye also believed that the first time that a court distinguished murder from manslaughter is in Salisbury’s case: at 485 n 258 (citations omitted). But Graham McBaine stated that there was a case in 1348 where it was held ‘that the killing of a third party peacemaker who intervened in a brawl was manslaughter.’ McBain (n 106) 52.


164 Green, ‘The Jury and the English Law of Homicide’ (n 53) 484 (citations omitted). John Reeves stated what occurred in the following terms:

> The jury upon the trial put this question, with relation to one of several that were indicted for murder, Whether if the defendant was in company with them who of malice prepense killed the deceased, and when he saw them combating together, took part with them suddenly, without any malice prepense, and struck the deceased, together with the others, he was guilty of murder or manslaughter? to which the court answered, if he had no malice prepense, but *suddenly* took part with those who had, it was manslaughter, and not murder.


165 Green, ‘The Jury and the English Law of Homicide’ (n 53) 484. Edmund Morgan asserts that the jury in this case returned special findings because notwithstanding that Salisbury had committed the act, there was no criminality committed on his part. Morgan (n 54) 581. John
the judges debated among themselves how to sentence Salisbury and whether he might have killed Ellis in self-defence, and so they came face to face with the same dilemma that juries had been facing for the previous 250 years. Green has asserted that the decision in Salisbury’s case “reveals” both the judicial application of the statutory manslaughter distinction and “the fact” that the distinction was unnecessary because the accused was unable to plead clergy ‘for whatever reason’. The judicial application of the statutes governing murder excluded clergy from the manslaughter offence and ‘accessories, therefore, lost access to the benefit of clergy as well as principal offenders’. Therefore, if someone was accused of murder with malice aforethought they could not claim benefit of clergy and it was left to the jury to redeem persons they considered falsely or unfairly accused. The gradual removal of benefit of

 Reeves however had written that ‘[w]hat was finally done in this case does not appear’. Reeves (n 164) vol 5, ch 32, 134.

166 John Reeves gave this interesting account upon the jury verdict:

Upon this, it was privately debated upon the bench, whether he should be entirely acquitted by this verdict, inasmuch as he was arraigned of murder, and was acquitted thereof; or whether he should have judgment to be hanged for the manslaughter; or, thirdly, whether this verdict should serve for an indictment of manslaughter, or what else should be done: and it was clearly the opinion of the whole court, that they might give judgment against him to be hanged for the manslaughter. In support of this, they said, that the jury might give a verdict at large, and find the whole matter; as if one was arraigned of the death of a man, and he pleaded not guilty, the jury might find that he killed him in his own defence.

Reeves (n 164) vol 5, ch 32, 134.

Green says that Salisbury in the end ‘was reprieved because of the Court’s doubt as to the effect of a variance between the verdict and the indictment’. Green, ‘The Jury and the English Law of Homicide’ (n 53) 484. Reeves, however, says ‘[w]hat was finally done in this case does not appear’. Reeves (n 165) vol 5, ch 32, 134.

167 Green, ‘The Jury and the English Law of Homicide’ (n 53) 484. But Green does not further elaborate on this point except when he was referring to some inconsistency between the indictment and the verdict, he stated:

I believe we may fairly infer that, had Salisbury been literate, the point would have been moot. At the worst, the verdict of manslaughter would have forced him to plead his clergy and be branded before going free.

Green, ‘The Jury and the English Law of Homicide’ (n 53) 484.

168 Dixon (n 93) 66.
clergy in cases of serious crime can be seen in legislation during the reign of Queen Mary who briefly restored Catholicism as the established religion of England.\textsuperscript{169}

Thus we see that all the English monarchs from the fourteenth to the 16\textsuperscript{th} century saw perverse juries as an impediment to their obligation to punish homicidal killers and to generally enforce the law in pursuit of peace in society. To the extent that juries prevented that, they were obstacles to the peaceful development of society. But because they could not be visibly coerced, monarch after monarch passed clarifying statutes confirming that all homicides required a conviction and that it was for the monarch to decide on any appropriate remission of penalty including pardon as an act of discretionary clemency.\textsuperscript{170} But none of those statutes convinced the jury that royal pardon could be relied on in a single case and juries continued to acquit manslaughterers on almost any pretext they chose if they felt a whiff of justification. Absent incontrovertible proof of jury corruption, all jurors safely sheltered behind their corporate shield.

It is also significant to observe that in the text of all of the statutes those monarchs passed, the word “homicidis” or “homicides”, only bear one meaning, manslaughter or manslayer.\textsuperscript{171} “Murdres” or “murdris” always meant what we would call premeditated

\textsuperscript{169} See, eg, 4&5 Phil & Mar. c.4, sect.1. Statutes of the Realm: Volume 4, page 322.


murder.\textsuperscript{172} This drafting distinction was not a historical accident.\textsuperscript{173} It was the result of pedantic accuracy by careful draftsmen.\textsuperscript{174} Both the parliamentarians and the kings’ advisors wanted juries to know that there was a difference between intentional murder and manslaughter without premeditation so that those juries could, and should, rely and allow the king to do his divine duty to judge and pardon his people when required. But jury popularity and acquittal practice stymied the legal drafters for more than three centuries.

Though the detailed reasons for jury acquittals are not always clear, the unmistakable common thread is that juries for centuries were concerned that the king would not pardon persons accused of murder where the jury said the death occurred in self-defence and was not murder. The statutes passed by successive kings about distinctions between the various types of homicide should thus be seen both as an


McBain has noted:

The English word ‘homicide’ derives from the latin - from \textit{homo} and \textit{caedes}, the killing of a man. In earlier times, homicide was synonymous with the English [sic] word ‘manslaughter’ and both were used in contra-distinction to murder (premeditated killing) to cover any other type of killing of one man by another - such as accidental, negligent or reckless killing, as well as killing in self-defence or subsequent to provocation.

\textsuperscript{173} Michael Prestwish noted ‘[t]he question of who was responsible for the statutes is not an easy one. The drafting of statutes was a technical business, and the range and complexity of many suggest that it is a mistake to look for a single author’. Michael Prestwich, \textit{Edward I} (Yale University Press, 1997) ch 10, 269. At some point in time, judges were involved in drafting those statutes and no doubt later they left their marks on other subsequent drafters. Prestwich has given the following account as how judges were involved in drafting statutes:

Argument in court in 1311 about the interpretation of the first clause of the statute of Westminster II of 1285 led Chief justice Bereford to set out what he believed ‘he that made the statute intended’. Earlier, in discussions about a different clause of the same statute, Chief Justice Hengham had expostulated, “Do not gloss the statute: we know it better than you, for we made it”: at 270.

\textsuperscript{174} Theodore Plucknett, \textit{Statutes and their Interpretation in the First Half of the Fourteenth Century} (Cambridge at the University Press, 1922) 111.
affirmation of jury pressure on English monarchs and their parliaments, and as a succession of attempt to appease those juries with more palatable conviction choices.

By the 15th century it was well established that trial juries did not need to be, and indeed should not be, self-informing. But by this time even inquest juries were becoming independent as professional prosecutors began to perform the old functions of the accusing jury. Langbein has argued that it is not clear why jury independence continued to develop and led to the emergence of prosecution during the middle of the 16th century. However, it is difficult to avoid the conclusion that professional prosecution was intended to remove the need for self-informing juries and to insist that all juries be genuinely independent, without previous personal knowledge of the facts so that proper convictions might be recorded without contrivance of any kind.

By 1554, management of the trial had thus become the responsibility of the prosecution and the bench. Because attempts to control the jury and have them

175 Langbein has written:

The breakdown of the medieval system, the transformation of active medieval juries into passive courtroom triers, is not well understood either in its timing or its causes. Probably in the later fifteenth century, but certainly by the sixteenth, it had become expectable that jurors would be ignorant of the crimes that they tried.


176 Langbein states:

The public prosecutor in Anglo-American criminal procedure performs two primary functions. One is investigatorial—evidence gathering—and this has no firm border with the higher levels of the policing function. The other is the forensic prosecutorial role—presenting the evidence to the trier (incident to which has developed the power to decide whether to prosecute).


177 Green states that was because:

The Marian bail and committal statutes of 1554 and 1555 required justices of the peace to formulate depositions based on pretrial witness testimony, and these depositions were available to the court. They allowed the bench to play an active role in questioning witnesses and the defendant. Responsibility for management of the trial was divided between prosecution and bench; the prosecutor produced witnesses and their prepared depositions, while the judge put questions to all parties and controlled the structure of, and time allocation for, courtroom debate.

Green, ‘The Jury and the English Law of Homicide’ (n 53) 489-90 (citations omitted).
to do their duty without embellishment had utterly failed, more serious reform was essential. The structure of the jury trial was itself therefore changed. The self-informing jury was broken down by design so that juries could only be independent triers of fact. The jury itself was still too popular to be abolished in favour of judge alone trials. But its independence had been turned on its head. Anything that might suggest jury partiality was scrupulously made illegal and jury independence became jury impartiality. The jury room itself was still inviolable, but individual misbehaviour could be punished as a departure from the new independence standard. The aggrieved person no longer provided information to the jury outside the court and the jury was no longer self-informed. But aggrieved persons sometimes did not survive to prosecute or decline to prosecute. Because the Crown was not prepared to ignore these abuses of the English criminal justice system, the Crown seized control of the trial by making prosecution an official state function. It is not insignificant that these were Marian reforms. This was the short period when Catholics reasserted themselves but were regularly found murdered without trace of the assassins.

To ensure her supporters were protected by law, Queen Mary passed two new statutes, the Marian bail statute and the Marian committal statute. Justices of the peace became public prosecutors for felony and forerunners of modern prosecutors and that system began to be formalised under Queen Mary. Justices of the peace

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179 Ibid.


181 2 & 3 Phil. & Mar. c. 10 (1555). See statute text in the Statutes of the Realm Volume 4 page 286.

182 Langbein, ‘The Origins of Public Prosecution at Common Law’ (n 176) 318. Langbein states:

The JPs originated in the fourteenth century as law enforcers, "keepers of the peace," foremost among whose duties was the arrest of vagabonds and rioters. By mid-century the "keepers" were " justices": sitting collectively in their quarterly sessions they comprised a law court for criminal matters. In the fifteenth century the JPs' criminal trial jurisdiction was very extensive. Felons were routinely indicted, convicted and executed at sessions of the peace. By the mid-sixteenth century, however, it was rare for the JPs to try felons. The assize system had been revitalized, and felony cases were generally being held for trial before the royal judges on their periodic circuit: at 318-9.
were chosen because ‘well before the Marian statutes the justices of the peace were
the officers to whom aggrieved citizens would make complaint of serious crime’.\(^{183}\) But
though the intent was clearly to isolate jury opinion and prejudice, Green asserts that
it was still several centuries before jurors could be excluded because they knew
something of the facts personally.\(^{184}\) Indeed, it is doubtful that Queen Mary considered
it possible that she could abolish jury prejudice. Her more modest agenda was to
appoint public officials whom she could control and who would insist that even
unpopular prosecutions should proceed.

These Marian Statutes did not completely abolish private citizens’ prosecutions. They
only made justices of the peace back-up prosecutors in case there were no private
accuser or in case the evidence was insufficient to prosecute. The new statutes
enabled Queen Mary’s officials to force her justices of the peace to ‘investigate, bind
witnesses, and appear at assizes to orchestrate prosecution’.\(^ {185}\) At the trial justices of
the peace would not only testify about their investigations, but they would also cross-
examine the accused before the jury.\(^ {186}\) Green made several arguments in relation to
the two Marian Statutes. He argued that the two Marian Statutes assured the public
that:

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\text{[T]here would be an official version of the case available to judge and jury and that witnesses would be bound over to give evidence against the accused. The interest in evidence meant that the jury was no longer to be self-informing; the presentation of evidence prompted judicial commentary together with the charge to the jury.}^{187}\]

\(^{183}\) Langbein, ‘The Origins of Public Prosecution at Common Law’ (n 176) 319.

\(^{184}\) Green, *Verdict According to Conscience* (n 77) 18.

\(^{185}\) Langbein, ‘The Origins of Public Prosecution at Common Law’ (n 176) 319.

\(^{186}\) Ibid.

While 16th century juries after the Marian Statutes were passed were not yet excluded from trial if they possessed personal knowledge, Green explains that the development of the role of public prosecutor reduced jury discretion.\textsuperscript{188} The function of the jury became determinative, not informative. The establishment of an official prosecution created a balance of power between the jury and the judge because the jury was no longer in control of the production of evidence or procedure.\textsuperscript{189} And because the jury lost those controls, it could no longer conceal or alter the evidence.\textsuperscript{190} All the facts were discussed in the presence of the judge in open court and he was in a better position to oversee the verdict and whether it was consistent with the evidence.\textsuperscript{191} The Marian Statutes indirectly enabled the future possibility that juries could be punished for perverse verdicts if their findings were inconsistent with the facts, because they could not find those facts from their own knowledge behind closed doors.

But jury punishment for perversity still lay in the future. Sixteenth century juries could still rely on private evidence they knew or heard on their own and because of the success of their predecessors, likely continued to manipulate that evidence in the interests of the accused behind closed doors.\textsuperscript{192} There is no 16th century evidence to show that they were prevented from doing so.\textsuperscript{193} The jury considered the evidence presented in court but continued to rely on what its members knew independently. The jury also maintained the power to give a final verdict.\textsuperscript{194}

\textsuperscript{188} Palmer (n 187) 789.

\textsuperscript{189} Ibid.

\textsuperscript{190} Ibid.

\textsuperscript{191} Green, ‘The Jury and the English Law of Homicide’ (n 53) 490.

\textsuperscript{192} Green does not specifically state in that context that the jury were unable to manipulate evidence in self-defence cases. Green, ‘The Jury and the English Law of Homicide’ (n 53) 490-1.

\textsuperscript{193} Green stated that the jury “informed itself or confirmed its earlier impressions” and this practice did not change throughout the sixteenth, seventeenth, and eighteenth-century. Green, Verdict According to Conscience (n 77) 18.

\textsuperscript{194} Green, ‘The Jury and the English Law of Homicide’ (n 53) 490.
Langbein suggests that the ‘transformation of the active medieval juries into passive courtroom triers is among the greatest mysteries of English legal history’. The discussion above confirms that there is no mystery surrounding how jury perversity was gradually controlled by judges after the Marian Statutes established justices of the peace as crown prosecutors when there was no private information about serious crime.

After the independence of the jury settled in the 16th century, there were no further changes. That is, our jury today is really the same as the independent 16th century jury. England began its experiment with jury involvement in judicial matters in the 12th century. The institution developed and endured because it was popular, involved local people and was perceived to deliver a form of justice that was acceptable to the community. The institutional jury was a key component of the tension that existed between the definitions of murder and manslaughter, and what entitled a person accused of crime to an acquittal. Jury involvement ensured that community opinion dictated trial outcomes, and it also denied the king complete control over punishment for homicide. It forced the king and the parliament to accept that genuine self-defence availed killers from guilt and capital punishment.

Conclusion to chapter two

We have seen that the story of self-defence in English law is the story of the complicated interaction of new institutions in a very lawless time. Criminal law and the law of torts were not separated until about the early 14th century. Before that there was no distinction between wrongs between individuals and wrongs committed against the state, and more specifically “the peace” that the king was trying to establish as his contribution to the good of English society as a whole. The king’s wish to establish peace was the foundation of the entire system of criminal procedure and led to its growth.

We have seen also that the use of the jury in what became criminal trials, was the result of the Pope’s proclamation at the Fourth Lateran Council in 1215, that priests

could no longer be involved in the king’s ordeal trials. Though the Pope probably intended to secure ecclesiastical jurisdiction and control over matters of sin by this proclamation, the dexterous experimental development of the jury as a fact deciding institution by the king and his judges not only created a popular institution, but an institution that was popularly perceived as a protector of citizen’s rights and liberty.

To regain control over the fate of persons convicted of homicides, successive English kings passed a variety of statutes. Each of those statutes was designed to convince juries to let the king decide who should escape capital punishment for homicide by royal pardon. But because juries did not trust the king to pardon in self-defence cases, they manipulated the evidence in various ways to protect popular people accused of homicide if the jury considered they had acted in self-defence, and not by felony or malice aforethought. By acquitting people accused of homicide or finding that they had acted in undeniable self-defence, juries ensured that accused persons would escape punishment altogether or be granted royal pardons.

The line between murder, manslaughter, self-defence, limited guilt or no guilt has thus always been challenging. Different degrees of homicide developed in large part because of jury perversity. A distinction between homicide in execution of the law and homicide by misadventure or self-defence was developed, and the categories of justifiable homicide and excusable homicide were established as the primary categories of non-felonious homicide.

Jury perversity and modern impartial fact finding and independence, only came about after the development of the role of public prosecutor. Though juries did not have to have personal knowledge of the facts of a case from the 13th century, they were not excluded from the trial if they did have personal knowledge until perhaps the 18th century. Juries were popular because they were believed to protect the common man against excessive executive action. They continued to find ways to protect people accused of homicide in self-defence cases, even when statutory lines had been clearly drawn between murder, homicide, and theoretically dictated when an accused person was entitled to an acquittal.
CHAPTER THREE

THE DEVELOPMENT OF THE DOCTRINE OF SELF-DEFENCE IN AUSTRALIA AT COMMON LAW

THE HIGH COURT OF AUSTRALIA AND SELF-DEFENCE: AN OVERVIEW

Introduction

The purpose of chapter three of this thesis is to explain the criminal self-defence law that New South Wales inherited and how it developed during the 20th century. I will explain that development in two parts.

In part one I discuss the four cases which defined Australian common law on self-defence between 1958 and 1987 and which recognised a partial defence to murder which was generally, but not always accurately, described as excessive self-defence. Three were decided by the High Court of Australia and one by the Privy Council in England. Those cases are: R v Howe (HC) (‘Howe’),1 Palmer v The Queen (PC) (‘Palmer’),2 Viro v The Queen (HC) (‘Viro’),3 and Zecevic v Director of Public Prosecutions (Vic) (HC) (‘Zecevic’).4 I will explain how these cases show the difficulty that the High Court had in formulating a self-defence test upon which all those judges could agree and which a jury could understand.5

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1 (1958) 100 CLR 448 (‘Howe’).
2 [1971] 1 All ER 1077; AC 814 (‘Palmer’).
3 (1978) 141 CLR 88 (‘Viro’).
4 (1987) 162 CLR 645 (‘Zecevic’).
5 Lord Scarman stated:

Juries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion, but are expected to exercise practical common sense.
In part two, I discuss the different strains of academic opinion in the commentary that grew out of consideration of self-defence in these four cases.

I conclude this chapter by summarising where the common law of self-defence in Australia stood before legislatures began intervening to clarify the defence.

**Part One: The High Court of Australia and Self-Defence Cases**

The self-defence law complications that now exist and which are unresolved are not the result of jury pushback. While the existence of self-defence is a result of jury pushback during the 14th -16th centuries, juries became subject to judges thereafter and did not further contribute to the development of the common law of self-defence in England. That was also true in Australia, but it does not mean the Australian common law of self-defence was settled. In fact for three decades, between 1958 and 1987, the High Court and Privy Council wrestled with the question whether excessive self-defence entitled a defendant to a complete acquittal, or whether the conviction should be reduced from murder to manslaughter. The heart of the judicial conflict was whether modern self-defence law should focus on overall intent or the proportionality of the self-defence force that was used. Some judges were focused on whether the accused's overall intent was determinative – and if there was no intent to kill but just to self-defend, they considered that an acquittal was appropriate. Other judges were of the opinion that if the accused used more force than what was necessary, he or she could not get an acquittal but instead be found guilty of manslaughter.

The issues here are not the same issues that had subliminally concerned juries in England between the 14th and 16th centuries. Certainly their above ground concern was with whether the king would pardon or not. But the reason that juries did not want self-defenders executed was because they were not as culpable as pre-meditated murderers. However the amount of force they used appears to have been relevant to jury assessment of their culpability.

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*R v Hancock [1986] AC 455; 1 All ER 641, 651 (Lord Scarman).*
There are not many reported cases dealing with self-defence during the 18th century in England. Between *Bushell's Case* in 1670 ("Bushell's Case") and the late 18th century the English criminal jury trial and the law of self-defence underwent little significant change.7 There are no relevant reported cases on self-defence of any court sitting in *banc*, at least since *R v Mawgrade* (1707) Keil. 119; 84 E. R. 11078 and so there is not much to say about that period. By the 19th century, the law recognised different degrees of homicide because juries had succeeded in changing the law so that manslaughter was recognised as a separate homicide category. Factors or circumstances such as imminence, an attack, the apprehension of an attack or serious violence, the reasonableness of that apprehension, and the necessity of using excessive force in self-defence, remained matters of concern for both judges and juries when deciding a self-defence case. Judges were giving directions about those differences.9 Juries seemed to understand what the judges told them, but they did not

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6 (1670) Vaughan 135; 124 ER 1006 ("Bushell's Case"). Weinberg-Brodt has summarised the case as follows:

This case involved a habeas corpus petition on behalf of jurors jailed for acquitting William Penn and William Mead on charges of seditious libel. The acquittals were in defiance of the trial judge's instructions and, in the trial judge's opinion, against plentiful and manifest evidence to the contrary. The trial judge, forced to enter the acquittal, fined and jailed the jury for contempt. The jury was released by Chief Justice Vaughan, who held that juries could never be punished for their verdicts but sidestepped the question of whether juries have any concomitant "right" to nullify. In fact, he implied that no such right exists, but that the de facto power to nullify without fear of punishment is justified only because nullification is not provable. Chief Justice Vaughan argued that, since criminal juries have the right to deliver general verdicts, a judge cannot require a jury to give "official" findings of fact. Thus a judge never can "know" what facts a jury found and therefore never can prove that a jury has nullified. It is always possible that the jury just interpreted the facts incorrectly, as is its prerogative in criminal cases.


8 *R v Lawson and Forsythe* [1986] VR 515, 560 (Ormiston J) ("Lawson and Forsythe"). A case which Ormiston J has suggested was resolved on provocation.

9 See, eg, *R v Scully* (1824) 1 Car. & P. 319; 171 ER 1213 ("Scully"); *R v Dakin* (1828) 1 Lew. 166; 168 ER 999; *R v Smith* (1837) 8 Car. & P. 160; 173 ER 441; *R v Bull* (1839) 9 Car. & P. 22; 173 ER 723; *R v Odgers* (1843) 2 M. & Rob. 479 ("Odgers"); 174 ER 355; *R v Hewlett* (1858) 1 F. & F. 91; 175 ER 640; *R v Quin* (1863) 3 F. & F. 818; 176 ER 374; *R v Alexander Barnsley Konck* [1877] 14 Cox C. C. 1. Some of these cases were also considered in *Howe* (n 1) when some of the justices of the High Court were reviewing some of the older authorities which preceded *Howe*. But these cases were considered not to be authoritative. See *Howe* (n 1).
always follow what they were told. Juries did not know the facts before the trial, they heard the facts for the first time in open court and the judge explained the law to them. Juries started following judicial directions because of this procedural change, but they were not subservient. They still ignored strong judicial direction and still found accused persons not guilty even when the judge thought that the defendant was technically guilty. In a way, this was a new and different version of jury independence. Before the 18th century, juries appear to have been scared that they would be personally

10 Two cases show that despite the strong implication from the judge that the jury could not find the accused not guilty because of use of unreasonable force, the jury ignored the judge and found the accused not guilty anyway.

Scully’s Case

The first case occurred in 1824. John Scully went to the police and made a confession that he had “unfortunately” shot a man walking into his master’s garden. Scully was indicted for manslaughter. At the end of the trial, the judge directed the jury that a person watching his master’s garden was not justified “at all” in shooting “at” or “injuring in any way” persons who come to their premises “even at night” and “even and if he saw them going into his master's hen-roost.” He further directed the jury that Scully ought first to have considered if he could apprehend the victim, and Scully ought to have fired only if he was threatened and his life was in “actual danger.” If the victim was only a trespasser, Scully would be guilty of manslaughter. Despite these directions, the jury acquitted Scully even though he confessed that he did not attempt to apprehend the victim, he was not threatened, and his life was not in danger. Scully (n 9).

The facts of Scully were almost identical to the very well-known case of R v McKay [1957] VR 560 (‘McKay’) (Lowe, Dean JJ, and Smith J dissenting). The High Court in Howe (n 1) adapted the reasoning of McKay. The outcome of Scully however was remarkably different from the outcome in McKay.

Odgers Case

The second case occurred in 1843. Both Odgers and the victim were at a bar when Odgers challenged the victim to a fight. This was prevented by other people at the bar. Sometime after, the victim and one of his friends challenged Odgers to fight, but they were again prevented from fighting. Odgers left the bar, but the victim followed him and again challenged him to a fight. Odgers asked the victim to stand back and retreated a few steps. The victim refused and a fight ensued during which Odgers struck the victim across the shoulder-blade with the scythe causing a severe injury. Odgers was indicted for maliciously cutting and wounding with intent to do grievous bodily harm. Cresswell J in summing up for the jury, explained that the law had changed. The word maliciously did not mean with premeditated malice as in murder anymore. It means manslaughter, not murder, under the new law if there was an intention to commit the mischief unlawfully and without lawful excuse. For a successful self-defence plea in a case of homicide committed with a deadly weapon, Odgers must have retreated as far as possible and only used his weapon to avoid “his own destruction.” Cresswell J told the jury that he found it impossible that the Odgers was forced to use the scythe. His offence amounted to manslaughter unless the jury really believed that Odgers had not intended to do grievous bodily harm. The jury found Odgers not guilty. Odgers (n 9).
punished if they admitted that they had found someone not guilty to save him from execution. By the 19th century juries knew that they were safe from personal punishment, but they also knew that they could still save someone from the scaffold by a finding of “not guilty” even when a such a finding was unreasonable.

There was a hiatus in the development of the law of self-defence between 1700 and 1958 because there are no reported cases for a court sitting en banc during this period. But that all changed in the twentieth century in Australia. Self-defence could involve both reasonable and unreasonable force. In Howe the High Court found that a person who had used more force than was necessary to repel an unlawful attack and killed his attacker was guilty of manslaughter, not murder. If the force used to repel the attack was reasonable, then he would have been entitled to an acquittal. The High

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11 Jury attainer for making a false verdict was always a possibility. The history of jury attainer, however, is unclear. Edmund Morgan described it as follows:

It seems that provision was made for punishing those who rendered a false verdict or false judgment before it was conceived that the verdict or judgment could be set aside. Thus, there was no attaint of a grand assize and its finding was final, but the jurors were punishable for a false finding. The usual method of attainting a jury was by verdict of another jury of greater number whose members were of higher rank than the original jurors. This was not, however, the only means, for they might be attainted upon their own answers upon a later examination.

Edmund M. Morgan, 'Brief History of Special Verdicts and Special Interrogatories' (1922-1923) 32 Yale L.J. 575, 576 n 3 (citations omitted). Thomas Green stated, 'the closest the bench came to application of the dreaded process of attaint was the impaneling of a second jury to test the first jury's special verdict of self-defense, and there is no evidence to suggest that the first jury would have been punished had its verdict been repudiated'. Green (n 7) 19. For the history of attainder see generally Thayer, A Preliminary Treatise on Evidence at the Common Law (Boston: Little, Brown and Company, 1898); James B. Thayer, 'The Jury and its Development' (Pt 3) (1891-1892) 5 Harv. L. Rev. 357; John Zane, 'The Attaint. I' (1916) 15 Michigan Law Review 1; John Zane, 'The Attaint. II' (1916) 15 Michigan Law Review 127.

12 Weinberg-Brodt (n 6) 829-30. See also Green (n 7) ch 6. The possibility of attainder lapsed when '[t]he absolute power of English juries to find an accused not guilty without fear of punishment was established in 1670 in Bushell's Case'. Weinberg-Brodt (n 6) 829 (citations omitted).

13 See Scully (n 10); Odgers (n 10).

14 Howe (n 1).

15 The High Court in Howe (n 1) adopted the reasoning of the Victorian Supreme Court of Criminal Appeal in McKay (n 10). McKay's case stood as an authority against the proposition that it is lawful to kill a fleeing thief solely on the basis of necessity, and for the proposition that proportionality in using defensive force is a further added condition in deciding such self-defence cases. See generally Norval Morris, 'The Slain Chicken Thief [sic]- Some Aspects of Justifiable and Excusable Homicide' (1958) 2 Sydney L. Rev. 414; Norval Morris, 'A New
Court also held that the old common law rule which denied any reduction of penalty when an accused had failed to retreat would no longer apply in Australia. Instead, failure to retreat was a factor which would be considered when the judge directed the jury how to assess whether the defendant's conduct was reasonable or unreasonable.16

The Privy Council in *Palmer*17 rejected the High Court’s doctrine of excessive self-defence in *Howe* and left the jury with no option for a verdict of manslaughter in a murder trial when they considered the defendant had used excessive force. In cases of excessive force, the Privy Council held that the defence of self-defence either entirely failed and resulted in a murder conviction, or it succeeded and resulted in an acquittal.18 The Privy Council said that self-defence was a simple and straightforward conception, and the idea of excessive self-defence had unduly complicated the reasoning process required of a jury. Common sense dictated that disproportionality should not allow any intermediate result. A murder defendant who had used force to defend himself or herself was either guilty of murder or was entitled to an acquittal.

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16 The Court however split 3 to 2 in deciding what formula should be applied as to what constituted necessity for the accused to plead self-defence, and what tests were to be applied in determining that the force used by the accused was excessive and hence whether he was entitled to a verdict of manslaughter. Dixon CJ, McTiernan and Fullagar JJ formed the majority on both points. Taylor and Menzies JJ formed the minority. See *Howe* (n 1).

17 *Palmer* (n 2).

18 See *Palmer* (n 2).
The High Court in *Viro*\(^{19}\) disagreed with the Privy Council’s analysis in *Palmer* and reinstated the doctrine of excessive self-defence that it had set out in *Howe*. The moral culpability of a person accused of murder who had used unnecessary force to repel an unlawful attack was less than the moral culpability ordinarily associated with murder. To reinforce their reasoning, the High Court formulated six propositions which they said would enable trial judges to instruct juries how to decide whether the jury could acquit the accused or convict the accused of the lesser offence of manslaughter when self-defence was plead in a murder case.\(^{20}\) The High Court’s propositions also required the jury to assess whether the accused, rather than a reasonable person, reasonably believed that there was a threat to her life before there could be either an acquittal or a manslaughter verdict.

But the High Court in *Zecevic*\(^{21}\) preferred the Privy Council’s reasoning in *Palmer* and disapproved its own earlier decisions in *Howe* and *Viro*. That is, the High Court in *Zecevic* held that only if the jury was satisfied beyond reasonable doubt that the defendant reasonably believed that it was necessary to do what he did in defending himself, could the jury acquit the defendant.\(^{22}\) If the defendant had used unreasonable force, then the only possible verdict was murder.

I now proceed to discuss *Howe, Palmer, Viro* and *Zecevic* in more detail.

### 3.1 The Howe Case

The High Court’s decision in *Howe*\(^{23}\) was the first of many that considered and adjusted self-defence law in Australia. It is famous because it is the first case where a plea of self-defence in a murder case could result in a verdict other than guilty or not guilty. Howe was charged with the murder of Millard and tried in the Supreme Court of South Australia. Howe alleged that Millard subjected him to a violent sodomitical

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\(^{19}\) *Viro* (n 3).

\(^{20}\) See ibid.

\(^{21}\) *Zecevic* (n 4).

\(^{22}\) See ibid.

\(^{23}\) *Howe* (n 1).
attack, and that he had killed Millard in self-defence. The Crown alleged that Howe shot Millard to rob him of money, and this was a case of murder to rob. Howe argued both provocation and self-defence. The judge rejected provocation and only put self-defence to the jury. In directing the jury, Ross J said:

[T]hat where a person charged with the murder of an assailant relies on self-defence, he cannot succeed, and has no defence at all, if the jury are satisfied that the killing took place either (1) when the accused has not retreated as far as possible having regard to the attack; or (2) if he has used more force than is necessary for mere defence, the result in both cases being that the person who kills is guilty of murder.

Howe was convicted of murder and appealed to the Full Court of South Australia. The two principal questions on appeal were:

(1) Whether it is an essential condition of the plea as a matter of law that Howe in the face of a violent and felonious assault, or the threat of such an assault, should have retreated as far as it was reasonably open for him safely to do before meeting Millard’s attack with force.

(2) If death ensues because Howe has resorted to an unnecessary measure of force in resisting an attack or threatened attack, a degree of force out of reasonable proportion to the danger, does that leave Howe guilty of murder or is his crime manslaughter?

The argument that Howe was not bound to retreat was based on the view that ‘a person subjected to a violent felonious attack was not bound to retreat’. The Full Court denied that this was a rule of law and said that a failure to retreat is an element to be considered in assessing the reasonableness of the defendant's conduct. The Full Court referred to the judgment of Smith J in McKay's case and ruled that only

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26 Ibid.

27 R v Howe (1958) SASR 95.

28 Howe (n 1) 456 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464).

“necessary self-defence” … ma[d]e…a homicide “justifiable”.30 The Full Court then concluded that "when the defence of self-defence against a violent, felonious attack is raised today, the jury should not be directed to consider only whether the accused was subjected to a violent and felonious attack."31 The jury must also be directed to consider whether he was subjected to such an attack and whether in all the circumstances, he was acting reasonably in not retreating and engaging Millard directly. The question was whether he had done all that he could to avoid killing Millard.32

The Full Court further analysed Lowe J’s judgment in *McKay's Case*33 and concluded:

> We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believed to be necessary in the circumstances, is guilty of manslaughter and not of murder.34

The Full Court of South Australia had considered two questions. They were:

1. Was more force used than a reasonable man would consider necessary?
2. If so, did the accused nevertheless honestly believe that such excessive force was necessary?

and both questions would have to be answered in the affirmative to justify a verdict of manslaughter.35

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32 Ibid 571 (Ormiston J).
35 *Palmer* (n 2) 829 (Lord Morris for Lord Donovan and Lord Avonside).
The Full Court expressed the question in this way:

[Had] a man actually defending himself from the real or apprehended violence of the deceased … used more force than was justified by the occasion and [had] death … ensued from this use of excessive force.\(^{36}\)

The Full Court allowed Howe’s appeal, overturned Howe’s conviction of murder and ordered a new trial. The Crown obtained special leave to appeal to the High Court.\(^{37}\) The High Court ‘treated the appeal as raising an abstract point of law’.\(^{38}\) The essential question was ‘as to the consequence of the use of excessive force in self-defence?’\(^{39}\) And the assumption made for the purpose of answering this question was that:

[A] man actually defending himself from the real or apprehended violence of the deceased has used more force than was justified by the occasion and that death has ensued from this use of excessive force.\(^{40}\)

Dixon CJ said that there was no satisfactory judicial decision to answer this question; the High Court was required to break new ground. Dixon CJ said:

There is no clear and definite judicial decision providing an answer to this question but it seems reasonable in principle to regard such a homicide as reduced to manslaughter, and that view has the support of not a few judicial statements to be found in the reports.\(^{41}\)

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\(^{36}\) *Howe* (n 1) 460 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464).

\(^{37}\) Ibid 455 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464).

\(^{38}\) *Palmer* (n 2) 828 (Lord Morris for Lord Donovan and Lord Avonside).

\(^{39}\) *Viro* (n 3) 96 (Barwick CJ dissenting). See also *Howe* (n 1) 460-1 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464), 465 (Taylor J), 469 (Menzies J).

\(^{40}\) *Howe* (n 1) 460 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464).

\(^{41}\) *Howe* (n 1) 461 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464). It is important to note what Barwick CJ said in *Viro* when he was commenting about the above quote of Dixon CJ. He said ‘[t]he Court reviewed a number of judicial pronouncements, which, it is proper to say, were not the outcome of any specific argument in which basic principle was examined’. *Viro* (n 3) 97 (Barwick CJ dissenting).
After reviewing a number of cases, Dixon CJ agreed with the Full Court of South Australia stating:

From the foregoing authorities it appears that in substance the Supreme Court took a correct view of the consequences of the failure of a plea of self-defence to a charge of murder when it fails only because the deceased's death was occasioned by an excessive use of force, that is to say by force going beyond what was necessary in the circumstances or might reasonably be regarded in the circumstances as necessary.

All the judges agreed that if it was necessary for the accused to defend himself but he had used excessive force resulting in the death of the attacker, he was guilty of manslaughter, not murder. But the unanimity ended there. The Court was split 3:2 on how to decide whether the force actually used was excessive.

Writing for the majority Dixon CJ said that if the accused ‘feared for his life or the safety of his person from injury, violation or indecent or insulting usage’, then ‘he was entitled to use force in order to “repel force or apprehended force”’. If the force he

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Howe (n 1) 461-3 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464).


44 Ibid 462 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464). Dixon CJ also agreed in substance with Lowe's J sixth proposition in McKay's Case, which was as follows:

If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter: at 462 (citations omitted).


46 Howe (n 1) 460-1 (Dixon CJ, McTiernan J agreeing at 464, Fullagar J agreeing at 464).

47 Ibid.
used was reasonable and proportionate, he was entitled to an acquittal. But if the force used was excessive or disproportionate, he was entitled to a verdict of manslaughter, not murder.\(^{48}\) The minority could not agree and formulated two further tests.

Taylor J said that Lowe’s J sixth proposition in *McKay’s case*\(^{49}\) was wrong because ‘it was not … limited to cases where it appears that the accused entertained an honest belief that the force used, though excessive on any reasonable view, was necessary’.\(^{50}\) Taylor J further said that unless the jury was satisfied beyond reasonable doubt that what the accused had done was not primarily for the purpose of defending himself against an attacker,\(^{51}\) the jury should return a verdict of manslaughter.\(^{52}\) He said:

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\(^{48}\) Ibid 462 (Dixon J, McTiernan J agreeing at 464, Fullagar J agreeing at 464).

\(^{49}\) Which was formulated as follows:

if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter - not murder.

*McKay* (n 10) 563. Howe’s counsel relied on the sixth proposition before the Full Court and the High Court as an authority for the proposition:

not only that a verdict of manslaughter is permissible in the circumstances hypothetically stated but that a verdict of murder is not open in any case where, on such an occasion, the killing results from the use of force beyond that reasonably necessary in the circumstances.

*Howe* (n 1) 467 (Taylor J dissenting).

\(^{50}\) *Howe* (n 1) 466-7 (Taylor J dissenting).

\(^{51}\) Ibid 466 (Taylor J). Taylor J had also some doubts about the South Australia Full Court Supreme Court ruling. He said:

It may be thought with some justification that a direction founded upon this view of the law would tender a somewhat artificial or unreal issue of fact for the consideration of a jury. Indeed it may be thought only remotely possible that a jury, having satisfied itself beyond reasonable doubt that an accused person had used more force in self-defence than he could reasonably have thought necessary, would, thereafter, be prepared to entertain the view that the degree of force used was no greater than the accused, in fact, honestly believed to be necessary. In this situation it is not surprising that the principle which the Full Court thought to be "implicit in the early cases", has not, as their Honours observed, attracted the attention of textbook writers and commentators or been the subject of consideration by any appellate court in England. Nor, indeed, was counsel for the prisoner able to cite any English cases or any textbook in which the enunciated proposition had been stated to form part of the English common law relating to homicide: at 466 (emphasis in original).

\(^{51}\) Ibid.

\(^{52}\) During his judgment Taylor J reviewed several authorities. These are: *McKay’s case* (n 10); *Woolmington v Director of Public Prosecutions* (1935) A.C. 462; *Mancini v Director of Public
I prefer to state the test as being whether the respondent used more force than on reasonable grounds he could have believed to be necessary and not whether he used more force than on reasonable grounds he actually believed to be necessary.\textsuperscript{53}

Menzies J expressed the question to be answered in this way:

Whether upon a trial for murder where self-defence is an issue the jury should be directed that it is manslaughter and not murder if an accused person in defending himself from a violent and felonious attack killed his attacker by the use of force which notwithstanding his honest belief that it was necessary for his self-protection was force in excess of that which on reasonable grounds he could have believed was necessary for that purpose.\textsuperscript{54}

Menzies J said that he expressed the question in this way because in the circumstances of Howe's case 'it would be a very unusual case in which a jury would come to such findings …'\textsuperscript{55} Menzies J confined his views to self-defence cases 'against serious violence, but not necessarily felonious violence',\textsuperscript{56} and formulated his test as follows:

\begin{quote}
I have reached the conclusion that the law is that it is manslaughter and not murder if the accused would have been entitled to acquittal on the ground of self-defence except for the fact that in honestly defending himself he used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant. It is to
\end{quote}

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\textsuperscript{53} Howe (n 1) 469 (Taylor J dissenting). See also \textit{Palmer} (n 2) 829 (Lord Morris for Lord Donovan and Lord Avonside).
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\textsuperscript{54} Howe (n 1) 469 (Menzies J).
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\textsuperscript{55} Ibid 469 (Menzies J).
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\textsuperscript{56} Menzies J went on to say:
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\begin{quote}
A man who is attacked may use such force as on reasonable grounds he believes is necessary to prevent or resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional. In deciding in a particular case, whether it was reasonably necessary to have used as much force as was in fact used, regard must be had to all the circumstances including the possibility of retreating without danger or yielding anything that a man is entitled to protect. If the force used was disproportionate to the seriousness of the attack and the danger of the person attacked, then force beyond what was reasonably necessary will have been used and some crime will have been committed. This statement leaves open the exact consequences of using what is conveniently enough described as excessive force to meet such an attack and to that difficult question I now turn.
\end{quote}

\begin{flushright}
\textit{Howe} (n 1) 471 (Menzies J).
\end{flushright}
be observed that this statement of the law would always leave open the question whether the person who killed was defending himself when he did so.\(^57\)

In *Howe* the High Court thus briefly established a common law doctrine of excessive self-defence manslaughter in Australia.\(^58\) But it only survived until 1971 when the Judicial Committee of the Privy Council in England\(^59\) revisited the new doctrine in *Palmer*.\(^60\)

### 3.2 The Palmer Case

Sigismund Palmer “Palmer” was indicted in Jamaica for murdering Cecil Henry on 14 May 1968. The Crown’s case was that Palmer had stolen a quantity of illegal drugs and when escaping with the drugs, had fatally shot one of his pursuers. Palmer denied that he had fired a shot.\(^61\) The jurors accepted the Crown’s version of events and Palmer was sentenced to death.\(^62\) Palmer’s application for leave to appeal to the Jamaican Court of Appeal was refused but he was granted special leave to appeal to the Privy Council. Lord Morris delivered the judgment of the Court. He said:


\(^60\) *Palmer* (n 2).

\(^61\) Ibid 820-2 (Lord Morris for Lord Donovan and Lord Avonside).

\(^62\) Ibid 823-4 (Lord Morris for Lord Donovan and Lord Avonside).
[T]he only question that [was] raised for determination [was] whether in cases where on a charge of murder an issue of self-defence is left to the jury it will in all cases be obligatory to direct the jury that if they found that the accused while intending to defend himself had used more force than was necessary in the circumstances they should return a verdict of manslaughter.63

Their Lordships examined both the majority and minority views in Howe64 and refused to follow any of the reasoning, though they supported Taylor J’s criticisms of the majority.65 Their Lordships emphasised the need for a commonsense approach with the jury as arbiter. They said:

In their Lordships’ view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide … If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.66

63 Ibid 820 (Lord Morris for Lord Donovan and Lord Avonside).

64 Howe (n 1). Lord Morris also discussed McKay’s case (n 10), and in particular Lowe J’s sixth proposition which was “quoted with approval” in Howe’s case. He said:

[t]he sixth [proposition] was in these terms …

If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter—not murder.

Palmer (n 2) 830-1 (Lord Morris for Lord Donovan and Lord Avonside).

65 Their Lordships quoted Taylor J’s “summary” of the minority’s views in Howe’s case at 467 as to why the majority test in McKay’s case was erroneous. Palmer (n 2) 831 (Lord Morris for Lord Donovan and Lord Avonside).

66 Palmer (n 2) 831-2 (Lord Morris for Lord Donovan and Lord Avonside).
For a brief period after 1971, Australian State courts were conflicted as to whether they should follow *Palmer* or “a conflicting decision” of the High Court of Australia because Australian appeals to the Privy Council were not finally abolished until 1986. The decision of the Privy Council in *Palmer* has unsurprisingly attracted the attention of many academics, authors and scholars. It remained the common law in Australia

67 Mason CJ described the situation as follows:

In *Viro* the Court was called on to make a choice between the *Howe* and *Palmer* versions of self-defence. What *Howe* had decided settled the common law of self-defence in Australia until the Privy Council in *Palmer* rejected *Howe*. Thereafter until *Viro*, trial judges directed juries in accordance with *Palmer*. In so doing trial judges complied with the rule that State courts, at least in non-federal matters, were bound to follow a decision of the Privy Council in preference to a conflicting decision of this Court. That rule, which was a by-product of the existence of the appeal from the High Court to the Privy Council, ceased to have any application once the appeal from this Court was abolished by the Privy Council (*Appeals from the High Court*) Act 1975 (Cth). The point is that, despite *Howe*, *Palmer* was accepted as authoritative before *Viro*.

Zecevic (n 4) 650 (Mason CJ) (emphasis in original).


governing self-defence cases until the High Court’s decision in Viro,⁷⁰ which was the third time the High Court had altered the doctrine of excessive self-defence and where they formulated the six point text referred to in the introduction to this chapter.

### 3.3 The Viro Case

On 22 January 1975 Frederick Viro (‘Viro’), Sebastian Greco (‘Greco’) and a few others agreed to rob John Rellis (‘Rellis’). According to the Crown, Rellis was lured into the middle of the back seat of Viro’s car where Viro would supply him with heroin. But Viro did not have any drugs and had no intention of supplying Rellis with any drugs. During the car journey Viro attacked Rellis from the front passenger seat with a jack handle. During the attack, Rellis produced a flick knife. The driver stopped the car and during the ensuing three-way fight between Viro and Greco on one hand, and Rellis on the other, Viro produced a steak knife which he had in the glove box and stabbed Rellis repeatedly.⁷¹ Rellis was thrown out of the car and later died of his wounds. The intended robbery never took place as the sum of $1250.00 which Viro and Greco intended to steal was later found on Rellis’ body.⁷²

Viro and Greco both pleaded not guilty to the charge of murder. The Crown argued that Viro intended to kill Rellis or to inflict grievous bodily harm upon him. Alternatively, Viro’s acts which caused Rellis’ death were done in an attempt to commit a crime punishable with penal servitude for life.⁷³ Viro argued that he never intended to harm Rellis. Viro said he stabbed Rellis because he was personally affected by heroin and

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⁷⁰ See Viro (n 3).

⁷¹ The steak knife, which was exhibited, had a serrated blade, about 10 1/2 cm in length. The flick knife that Viro said had been used by Rellis had a blade 9 1/2 cm in length but it was a heavier blade than that of the steak knife. Viro (n 3) 104 (Gibbs J).

⁷² Viro (n 3) 103-4 (Gibbs J).

⁷³ Ibid 106 (Gibbs J). There was no robbery and no money was taken from Rellis. The Crown case was that the relevant crime was assault with intent to rob with offensive weapons and wounding. The intention which the Crown had to prove on this aspect of the case was an intent to rob Rellis. The evidence that Viro intended to rob Rellis was strong. Viro never suggested that the use of the drugs meant that he had not formed an intent to rob Rellis: at 107-8 (Gibbs J).
was trying to get Rellis’ money to buy heroin for himself. Viro also said that he had stabbed Rellis because he was afraid for his life because Rellis was a big man.\textsuperscript{74}

The trial judge directed the jury that they must find that Viro and Greco intended to kill Rellis, or to do him grievous bodily harm, before they could convict.\textsuperscript{75} However the trial judge did not tell the jury that the fact that Viro had used heroin might be relevant to the question whether Viro had formed the necessary intention to kill or do grievous bodily harm.\textsuperscript{76} Viro’s counsel specifically asked the trial judge to give that direction, but the trial judge declined to do so.\textsuperscript{77} The trial judge was also asked by Viro’s counsel to direct the jury that if Viro had used excessive self-defence, the jury could come to a verdict of manslaughter. The trial judge thought that he had given such a direction,\textsuperscript{78}

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\textsuperscript{74} Ibid 105 (Gibbs J).

\textsuperscript{75} Ibid 108 (Gibbs J).

\textsuperscript{76} The trial judge said to the jury:

\begin{quote}
Gentlemen, in relation to each of the accused who said they were heroin addicts or on drugs, the fact that a person is a drug addict is an irrelevant situation so far as the commission of this crime is concerned. It is no excuse or no defence and it only comes into the matter, as I understand, because it is suggested on their behalf that if you are on drugs you are not able to think clearly, not able to remember things and things of that nature. That is the only way it comes into this case as I understand it.

Their records of interview are put before you as documents of truth which you can rely on and the learned Crown Prosecutor suggests that an examination of those will show in each case they were clear in their evidence, able to think and they gave detailed explanations and there was no impairment or infringement of their faculty to remember or express themselves and to understand.
\end{quote}

Ibid (108) (Gibbs J).

\textsuperscript{77} Ibid (109) (Gibbs J).

\textsuperscript{78} Jacobs J reproduced the transcript of this exchange:

\begin{quote}
“MR. LLOYD-JONES: Would your Honour direct the jury that if the accused Viro used excessive self-defence then manslaughter is available.

HIS HONOUR: No, I will not put that. Excessive self-defence?

MR. LLOYD-JONES: Yes.

HIS HONOUR: I have put it higher. I have put it that unless they are satisfied they should find him not guilty of murder but guilty of manslaughter.”
\end{quote}

\textit{Viro} (n 3) 150 (Jacobs J).
but on self-defence, the trial judge had directed the jury according to *Palmer* and a manslaughter verdict in accordance with *Howe* was not set out as an option.\(^\text{79}\)

Viro and Greco were both convicted of murder and sentenced to life imprisonment. Both appealed to the Court of Criminal Appeal of New South Wales, and their appeals against their conviction were dismissed.\(^\text{80}\) Viro obtained special leave to appeal to the High Court. Viro has argued that the trial judge failed to direct the jury that in deciding whether Viro had formed the intention necessary to constitute murder they should take into account the fact that he had used drugs, and that they were entitled to return a verdict of manslaughter if they believed Viro had acted in self-defence but had used excessive force in defending himself.\(^\text{81}\)

In considering whether manslaughter was an appropriate verdict in an excessive self-defence case, the High Court had to choose between the reasoning in its own decision in *Howe* and the Privy Council’s contrary view in *Palmer*.\(^\text{82}\) While there was a preliminary constitutional question as to whether the Court was free to disregard the

\(^{79}\) The trial judge said to the jury:

> It is the law that any person who is attacked with violence may defend himself. If in the course of defending himself against an attack, the man who is his aggressor is killed, then it will be a question for you to determine whether or not what he did was done primarily for that purpose of defending himself against the aggressor and you would have to be satisfied beyond a reasonable doubt that this was not so before you could return a verdict of murder.

Ibid 148-9 (Jacobs J).

\(^{80}\) The Full Court of the New South Wales Court of Criminal Appeal approved of the trial judge’s direction which was as follows:

> No question of self-defence can arise in this case unless you take the view that on the facts the man who was killed was attacking these two men, that he was the aggressor, because the thing explains itself. It is only if you are attacked that you are entitled to defend yourself. If you are the attacker you cannot complain if your victim has the temerity to defend himself and if he beats you in a fight it is just too bad. So you see it never arises unless there is material upon which you can say at the point of time this man was stabbed, Rellis was the aggressor. He was attacking him. They had ceased all attack on him and that is the way it is put.

Kovacs (n 45) 64.

\(^{81}\) *Viro* (n 3) 106 (Gibbs J). Argument on the first ground was heard by Gibbs, Stephen, Mason, Jacobs, and Murphy JJ, and on the second ground by the full court: Barwick CJ, Gibbs, Stephen, Mason, Jacobs, Murphy, and Aickin JJ. *Viro* (n 3) 92 (Barwick CJ dissenting).

\(^{82}\) *Zecevic* (n 4) 650 (Mason CJ).
Privy Council’s decision in *Palmer* and follow its own decision in *Howe*, it also had the opportunity to decide which reasoning was the more persuasive. That is, if excessive self-defence was proven, should it result in manslaughter according to *Howe* or an acquittal according to *Palmer*?

Barwick CJ and Gibbs J preferred the Privy Council’s reasoning in *Palmer*. In homicide cases, self-defence must be objectively judged and there was no middle ground. The defence of self-defence either entirely fails and results in a murder conviction or it succeeds and results in an acquittal.

Stephen, Mason and Aickin JJ preferred the High Court’s earlier reasoning in *Howe*. While they agreed that an objective reasonableness element was engaged when self-defence was argued in homicide cases, when self-defence had been proven but the force used was excessive, the jury could be directed to convict the accused of the lesser offence of manslaughter rather than to exonerate with an acquittal.

Jacobs and Murphy JJ agreed with Barwick CJ and Gibbs J that there must either be a murder conviction or an acquittal when self-defence was argued in such cases. But contrary to the opinion of Barwick CJ and Gibbs J, they said that the accused’s self-defence arguments should be considered in a subjective way. Jacobs J said the accused should be acquitted if he or she believed that it was necessary to use the force in the way he or she did, and that belief was not irrational. Murphy J said that all that mattered was that the accused believed that he was defending himself. If that was true, he was entitled to an acquittal. The rationality of his belief was irrelevant. 83

Stephen, Aickin, and Mason JJ, said that manslaughter was the right verdict. They relied on *Howe*.84 The law had been stated correctly in *Howe*, and they expressly

83 Ibid 651 (Mason CJ). See also Fairall (n 58) 34.

84 The rationale is that:

[T]he moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated with murder.

*Viro* (n 3) 139 (Stephen J). See also *Zecevic* (n 4) 660 (Wilson, Dawson and Toohey JJ).
rejected *Palmer*. In an effort to clarify, they set out the task of the jury in death or grievous bodily harm cases as follows:

1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.  
   (b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.\(^{85}\)

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\(^{85}\) *Viro* (n 3) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).
Though they did not concur with Mason J’s judgment, because trial courts need “practical guidance”, Gibbs J, Jacobs J, and Murphy J accepted Justice Mason’s six propositions. Thus in Viro, six of the judges ruled that Australian juries should be instructed to follow the law as it had been set out in Howe.

Ordinarily it would not be necessary to further consider the individual opinions of the High Court justices in Viro since six of them had agreed on the outcome and the directions that should be given to Australian juries in such cases in the future. But the apparent consensus lasted only nine years. Further analysis of the reasoning of the different judges in Viro reveals why the apparent consensus did not hold.

Jacobs and Murphy JJ favoured a subjective approach to the accused’s response in defending himself. Jacob J’s view was that he would have accepted that Howe was correct, but for his view that there was no objective element in self-defence. He said:

I think it best to state what I understand to be the applicable principle. In my opinion the question for the jury is whether the accused although he had the intention to kill or to do grievous bodily harm acted as he did with the purpose of defending himself and in the belief that the infliction of death or the grievous bodily harm inflicted by him was necessary in order to defend himself. If the facts of the case leave open the view that there were no rational grounds for the belief which the accused had, then, and only then, should the jury be told that the belief of the accused must be a rational one. Then … it would be desirable to make it clear that the belief must be one which a rational man might or could have held, not necessarily the belief which the jury as reasonable persons think that they would have held.

86 It is for this reason, the majority in Zecevic said that it was “open to question” whether Viro is an authority for the use of excessive force in self-defence. Zecevic (n 3) 660 (Wilson, Dawson and Toohey JJ).

87 Viro (n 3) 128 (Gibbs J).

88 Ibid 158 (Jacobs J).

89 Ibid 171 (Murphy J).

90 See Viro (n 3).

91 Ibid 153-4 (Jacobs J).

92 Ibid 157-8 (Jacobs J).
Murphy J said that there had been rapid social change in Australia and in that context, ‘the creative role of appellate courts naturally expands to adapt decisional law to the new social environment’. That context dictated that if the accused believed, and there were reasonable grounds for that belief, that he was defending himself it would be sufficient to lead to a complete acquittal. He said:

The problem arises from the maintenance of the objective test (that there were reasonable grounds for believing what was done was necessary for self-defence) in addition to the subjective test (that he believed he was defending himself). In order to avoid confusion, I use the expressions “subjective test” and “objective test” as ordinarily used in the literature, although from the trial court’s point of view, these descriptions would be more accurate if they were transposed. In my opinion, the objective test should be abandoned … The argument that the objective test should be retained in order to preserve the social fabric is not convincing to me. It is a curious jurisprudence which requires acquittal of murder because, as a result of intoxication by drugs or alcohol, the requisite intent (to kill or inflict grievous bodily harm) is absent, but does not require acquittal when the accused, with that intent, killed because he honestly believed that he was defending himself (although he did more than was reasonably necessary).

Murphy J also said that excessive force, proportionality and failure to retreat are all factual matters for the jury to consider. He added that this area of the criminal law

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93 Ibid 166 (Murphy J).

94 Ibid 168.

95 Ibid (emphasis in original).

96 Murphy J said that:

The test of proportionality has been applied as if a proportionate response between the apprehended harm and the action of the accused were essential to the defence. This is not an ingredient. Proportionality between the apprehended harm and force used to repel it merely bears on whether he was defending himself. That an accused took no less action than he was certain would avoid his own death or grievous bodily harm would not, in my view, point against his believing he was defending himself. But that is a factual general observation. Whether an accused retreated, or declared off his own attack are also for the jury on the issue. They are not conditions of the defence. Self-defence is not strictly a defence. Perhaps what is done in self-defence should be regarded simply as an act (or omission) which is not malicious within the meaning of s. 18 (2) (b).

Ibid 170 (Murphy J).
was further complicated by a ‘general tendency to elevate factual arguments into legal tests which are often not only erroneous but also complicate the criminal law and confuse trials’. Murphy J observed that self-defenders act instinctively and it was unrealistic to impose objective rationality upon anyone faced with some pressure. He suggested jury directions in the following terms:

I favour the instructions on this aspect of self-defence being confined to a direction that the onus is on the prosecution to prove (beyond reasonable doubt) that the accused did not act in his own defence, and that considerations such as excessive force, proportionality and failure to retreat, are not conclusive but may be taken into account when deciding that issue. This applies also to questions of whether an accused believed he was defending himself or that what he was doing was necessary to avoid the apprehended harm, or whether he had any belief at all.

Relying on *Palmer*, Barwick CJ and Gibbs J said that a person was not guilty of any crime, if, in defending himself or herself, the accused used force that was not greater than what the accused believed was reasonably necessary and was not out of all proportion to the injury that he or she was intending to prevent. In those circumstances

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97 Ibid.

98 Ibid.

99 Ibid.

100 When their Lordships stated:

In their Lordships’ view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter.

*Palmer* (n 2) 831-2 (Lord Morris for Lord Donovan and Lord Avonside).

101 *Viro* (n 3) 101-2 (Barwick CJ dissenting), 127-8 (Gibbs J).
circumstances, a person accused of murder or inflicting grievous bodily harm was entitled to an acquittal. For Barwick CJ the accused’s intent was fundamental in formulating the correct test for homicide in self-defence cases. Barwick CJ was of the view that there is no middle ground – ‘either the requisite intent to kill or to do grievous bodily harm is present, or it is absent’.  

The law stated in Viro survived until it was reconsidered by the High Court in Zecevic.

### 3.4 The Zecevic Case

Fadil Zecevic and his family immigrated from Albania to Australia and they were living in a block of units which they had built. Two units were available for rent and one of them was rented by the victim, Harold Peter Triebel ("Harry") and his girlfriend. Harry’s repeated failures to close the security gates to the courtyard around which the units were erected and his failure to place his car in the garage provided to him, worsened the relationship between him and the Zecevic family. On 16 July 1983, Zecevic fatally shot Harry after an argument when Harry had again left the gates open and left his car

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102 Barwick CJ explained himself as follows:

Upon the failure of self-defence as an excuse of a homicide committed with intent to kill or to do grievous bodily harm, the presence of that intent leaves no room, in my opinion, for a finding of manslaughter. In this connexion, I must say that I can see no justification for concluding that an intent to kill or to do grievous bodily harm does not amount to malice aforethought in a case where self-defence is for any reason not accepted by the jury as excusing the homicide: that is to say, I can see no validity in the proposition that, if self-defence is not accepted because of the disproportionate nature of the force used in a case where the intent to kill or to do grievous bodily harm is present, malice aforethought is not itself present. Either the requisite intent to kill or to do grievous bodily harm is present, or it is absent. There is, in my opinion, no middle ground constructed upon the failure for any reason of self-defence as an excuse of the homicide. As I have indicated, the absence of the requisite intent will open the door to a conviction for manslaughter, if in the result the killing was not excusable. But the failure of the excuse based on self-defence for the killing with the requisite intent cannot, in my opinion, reduce the consequence of such a killing from murder to manslaughter. Non-acceptance of the excuse of self-defence necessarily, in my opinion, involves the conclusion that the accused when killing with intent was not defending himself but, on the contrary, was an aggressor with the deceased his victim. I can see no basis for regarding the resultant homicide done with intent as being merely unlawful and not murderous.

Viro (n 3) 96 (Barwick CJ dissenting).

103 Zecevic (n 4).
outside the garage. Zecevic was charged with murder. Zecevic raised the issue of self-defence, but Gray J would not put self-defence to the jury. Relying on the first of the six propositions in Viro, Gray J concluded:

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Zecevic said that he was going home after he had bought some bread and milk at a shop and returned home when the following exchange with Harry took place:

I asked him why he didn't close the doors and why he didn't put his car in the garage. He got very angry with me and say, 'What's it to you, I do what I like, I pay rent.' I say, 'Why do you think spend so much money on the doors?' and he said, 'It's none of your business, I do what I like, I pay $115 rent.' He won't close the doors and he went to his unit. I went to my unit and opened the door and I put the bread and milk on the steps. Then I went and knocked on his door. I was upset with him because he won't shut the gates. When I knocked on his door, the glass broke. He come to the door and looked very angry. His colour had changed and he was white. I asked him why he did not close the doors and why he did not put his car in the garage, and he say, 'Wait a second,' and went back inside. I stood back from his door and he come with his hands behind in his back and stabbed me. He stabbed me in the chest on the left side, but I did not see the knife. I thought - I didn't know how bad I was stabbed. I was angry and very much scared. I ran inside to my unit. He say, 'I blow your head off.' I believed he had a knife, and I thought he might have a shotgun in the car. I ran up to my bedroom. I was very angry and very frightened. I was not sure what I was doing at that stage. I got the gun and shells and went downstairs and loaded the gun. I could see Harry and I was very scared and upset. He was near his car, and I thought Harry was going to do something more to me, and he was going to, he was going to kill me. I had been stabbed already, and I thought he might have had a gun or something in the car. After that I don't remember exactly what happened. I was lost. I remember I see him there and I shot. He was facing me when I start to shoot. I don't remember how many times, I don't remember how many time I shoot. At that time I was very frightened and angry and I wasn't myself at all. I knew I didn't want to kill him. I wanted to protect myself because I thought he was going to kill me: at 655 (Wilson, Dawson and Toohey JJ) (emphasis in original).

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1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

   (b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.
[T]hat the only inference open upon the evidence was that the appellant did not reasonably believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.\textsuperscript{107}

Zecevic was convicted of murder and his appeal was dismissed by the Full Court of the Supreme Court of Victoria.\textsuperscript{108} Zecevic was granted special leave to appeal to the High Court so that the common law of self-defence could be reconsidered.\textsuperscript{109} Mason CJ acknowledged that the six tests he had set out in \textit{Viro} were unduly complex and included three separate elements of reasonableness.\textsuperscript{110} He agreed that the joint

\begin{itemize}
\item[5.] If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?
\item[6.] If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.
\end{itemize}

\textit{Viro} (n 3) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

\textsuperscript{107} \textit{Zecevic} (n 4) 656 (Wilson, Dawson and Toohey JJ).

\textsuperscript{108} \textit{R v Zecevic} [1986] VR 797.

\textsuperscript{109} \textit{Zecevic} (n 4) 654 (Wilson, Dawson and Toohey JJ).

\textsuperscript{110} Ibid 653 (Mason CJ). Deane J described the three stages of reasonableness as follows:

The first stage is in the requirement that the perception of the accused that there existed an occasion of self-defence must have been reasonable in the sense "not (of) what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself". If the accused's perception of an occasion of self-defence was unreasonable in the context of his actual circumstances, the effect of the formulation is that the defence fails completely. "(N)o question of self-defence arises". The second stage at which the element of reasonableness arises under the \textit{Viro} formulation is that the force used must have been "reasonably proportionate to the danger which (the accused) believed he faced". The "danger" for the purposes of this test of reasonableness is not the actual danger but the danger which the accused believed existed. If there was no such reasonable proportionality but the elements of the defence are otherwise not disproved, the defence necessarily fails as a defence to manslaughter. Whether, in such a case, it also fails as a defence to murder depends upon the third test of reasonableness, namely, whether the accused believed that "the force which he used was reasonably proportionate to the danger". The element of reasonableness at this third stage is different from that involved in the other two tests. It alone is completely subjective in the sense that it requires no more than a subjective belief that reasonable proportionality existed where in fact it did not.

Ibid 672 (Deane J dissenting) (emphasis in original).
judgement of Wilson, Dawson and Toohey JJ was simpler and should be followed. Mason CJ, and Wilson, Dawson and Toohey JJ overruled the High Court’s earlier decisions in Howe and Viro and approved the High Court’s earlier reasoning in Palmer. In doing so, they abolished the doctrine of excessive self-defence which had allowed a manslaughter conviction rather than an acquittal in some self-defence cases, blending the three separate elements of reasonableness in Viro and incorporating them into a single question –

[Did] the accused believe…upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Wilson, Dawson and Toohey JJ emphasised that it was for the jury alone to decide what to make of the evidence and to answer this question. They said that in many cases the trial judge should assist the jury by telling them:

[I]n determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part.

Wilson, Dawson and Toohey JJ, rejected Zecevic’s submission that there ‘should be no objective element in the defence of self-defence’, and concluded that an honest and reasonable belief test is the correct test. In support of that conclusion, they said

111 Ibid 654 (Mason CJ).
112 Arenson, ‘Expanding the Defences to Murder’ (n 69) 131. See also Fairall (n 58) 31.
113 Zecevic (n 4) 661 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).
114 Ibid 662 (Wilson, Dawson and Toohey JJ).
115 Weinberg, ‘Moral blameworthiness — The ‘objective test’ dilemma’ (n 15) 194.
116 Stanley Yeo, ‘The Element of Belief in Self-Defence’ (1989-1990) 12 Sydney L. Rev. 132, 139. Yeo asserted that was “the result of the following two stage process of reasoning: –
that “neither the history of the law relating to that defence, nor its exculpatory character, supported that submission”,117 and they noted that ‘the modern law of self-defence had its origin in rules that distinguished between justifiable and excusable homicide’.118

Brennan J accepted Wilson, Dawson and Toohey JJ’s test but would have expressed it differently as follows:

1. Whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did; and

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a subjective test is applied. On the other hand, a mental state belonging to a defence warrants an objective test.

(2) In respect of offences of violence (such as assault and murder), an accused's belief (mistakenly perhaps) as to the existence of a threat occasion justifying his use of violence by way of self-defence is a defence element. It follows from (1) above that such a belief needs to be based on reasonable grounds”: at 139 (citations omitted).

117 Zecevic (n 4) 648 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 652).

118 It is instructive to reproduce in detail what Wilson, Dawson and Toohey JJ said:

[T]he modern law of self-defence has its origin in rules which distinguished between justifiable and excusable homicide. The importance of the distinction lay largely in the different consequences of successful pleas of justification and excuse and now is a matter of history. Justifiable homicide carried with it commendation rather than blame and accordingly entitled the accused to total acquitted, entailing no forfeiture and requiring no pardon. It extended to killing done in the execution of justice, which came to include both the apprehension of felons and the prevention of felonies and thus those cases of self-defence which were in response to a felonious attack by the deceased. Excusable homicide, on the other hand, was not entirely without blame and merely excused rather than acquitted, requiring, at first, a pardon and involving, for a somewhat longer period, forfeiture. It was concerned, not with the execution of justice, but with a necessary and reasonable response to a threat to life and limb. Any practical distinction between justifiable homicide and excusable homicide disappeared with the abolition of forfeiture by statute in 1828 and today it is no part of the law in Australia to differentiate between the two ... But the history of the matter serves to explain why the requirement of reasonableness, which was a requirement of excusable homicide, has remained part of the law of self-defence. Moreover, it establishes why that requirement ought not be regarded as a definitional element of the offence in question but as going rather to exculpation. True it is that in result a successful plea of self-defence resembles justification rather than excuse because it entitles the accused to a full acquitted, but in scope and in practice nowadays the plea has a greater connection with excusable homicide, being in most cases related to the preservation of life and limb rather than the execution of justice.

Ibid 657-8 (‘Wilson, Dawson and Toohey JJ) (citations omitted). See also Weinberg ‘Moral blameworthiness — The 'objective test' dilemma’ (n 15) 193-4; Yeo ‘The Element of Belief in Self-Defence’ (n 116) 140.
2. Was the force or threatened force against which the accused reasonably believed it was necessary to defend himself such that a person in the victim's position was not lawfully entitled to apply it?\(^{119}\)

Deane and Gaudron JJ both wanted to retain the *Howe* and *Viro* test and preserve the verdict of manslaughter in excessive self-defence cases, but their reasoning differed. Deane J thought it was essential to ensure that jurors could understand the issues of fact to determine, and he said trial and appellate judges should avoid treating factual arguments as legal principles.\(^{120}\) Deane J accepted *Viro*'s complex principles but was of the view that it had to be ‘framed not in terms of legal technicality but in terms of factual justification’.\(^{121}\) Deane J was also of the view that there was a “basic and conceptual anomaly” in *Viro*’s six propositions. He said:

Regardless of whether one see the basis of the decision in *Viro* that excessive self-defence reduces homicide from murder to manslaughter as lying in ordinary standards of moral culpability or in modern notions of the content of malice aforethought in the crime of murder, it is anomalous that the offence should not also be reduced to manslaughter in a case where the element of objective reasonableness in the accused’s belief that he was acting in self-defence is absent because the accused's genuine perception of an occasion of self-defence was unreasonable.\(^{122}\)

Deane J noted that the majority of the Court in *Viro* did not address this issue. Deane J did, and concluded that:

\[
\text{[T]he proper verdict in a case of homicide where self-defence fails as a complete defence by reason only of the fact that the accused's genuine belief that he was acting in reasonable self-defence was not reasonably held is manslaughter regardless of whether the absence of the element of reasonableness is caused by the unreasonableness of the perception of an occasion of self-defence or the unreasonableness of the belief that the force used was not excessive. If that view be}
\]

\(^{119}\) Zecevic (n 4) 670 (Brennan J).

\(^{120}\) Ibid 670 (Deane J dissenting).

\(^{121}\) Ibid 682 (Deane J dissenting). See also Weinberg ‘Moral blameworthiness — The ‘objective test’ dilemma’ (n 15) 194.

\(^{122}\) Zecevic (n 4) 681-2 (Deane J dissenting).
accepted, as I think it should be, much of the difficulty of the Viro formulation disappears in that there is no longer any need to distinguish between the first and second stage requirements of reasonableness.\textsuperscript{123}

Gaudron J said that when self-defence is an issue, it is neither necessary nor desirable to instruct the juries with a precise formula on the distinction between murder and manslaughter.\textsuperscript{124} She said that despite “Van Den Hoek v. The Queen” absence of malice aforethought still has a role to play in homicide self-defence cases as a point of distinction between murder and voluntary manslaughter.\textsuperscript{125} Gaudron J was also of the view that the law of self-defence was that the accused should be found guilty of manslaughter rather than acquittal\textsuperscript{126} “if he or she believed on reasonable grounds that it was necessary to resort to force in self-defence, and otherwise believed, although unreasonably, that his or her acts were necessary in self-defence’, she continued:

So stated, the issue remains throughout as one of self-defence; the issue of disproportionate force is but an aspect of the surrounding circumstances by reference to which the jury will determine whether the accused, in fact, had any relevant belief, and if so, whether the belief was reasonable.\textsuperscript{127}

\textsuperscript{123} Ibid 681 (Deane J dissenting).

\textsuperscript{124} On the condition that:

[M]atters of onus and standard of proof are properly explained it is sufficient that a jury be instructed in the context of the relevant facts, that a person, although not entitled to the full benefit of self-defence, is guilty of manslaughter and not murder, if he or she believed on reasonable grounds, that it was necessary to resort to force in self-defence, and otherwise believed, although unreasonably, that his or her actions were necessary in self-defence.

\textsuperscript{125} Ibid 687-8 (Gaudron J dissenting).

\textsuperscript{126} Deane and Gaudron JJ were only the two judges who allowed manslaughter rather than acquittal. The five other judges, Mason CJ, Wilson, Brennan, Deane, Dawson JJ ruled that there must be a complete acquittal. See Zecevic (n 4).

\textsuperscript{127} Zecevic (n 4) 687 (Gaudron J dissenting).
The High Court allowed the appeal, set aside Zecevic’s conviction and sentence and ordered a new trial. Zecevic has not been superseded.

Part Two: Academic commentary on the Zecevic settlement

Howe, Palmer, Viro and Zecevic have attracted considerable academic commentary. Most of this commentary has been directed to whether there should be a half-way house or a middle-ground verdict in proven self-defence homicide cases. Some commentators liked the half-way house or middle ground approach; others liked the all-or-nothing approach and rejected the half-way house or middle-ground approach for various reasons. In the following section, I discuss the various reasoning of those commentators, sparked initially by the decision in the Howe case and “settled” in Zecevic.

3.5 Commentary following Howe

The recognition of the excessive self-defence doctrine in Howe was welcomed as a new and major development in the area of homicide. Howe’s explicit ruling that a verdict of manslaughter could be appropriate in a proven self-defence case where the charge had been murder brought reason to the law after a long period of “obscurity” and could be stated ‘with [a] reasonable degree of certainty’. Courts had previously been required to sentence convicted murderers to death or to life imprisonment. The Howe recognition of excessive self-defence gave courts an opportunity to avoid a murder verdict, and save someone who had committed homicide with mitigating

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128 See Howe (n 1).
129 See Palmer (n 2).
130 See Viro (n 3).
131 See Zecevic (n 4).
132 See Howe (n 1).
133 Morris ‘A New Qualified Defence to Murder’ (n 15) 23.
circumstances from the death penalty or life imprisonment.\textsuperscript{136} The idea of excessive self-defence also enabled juries that did not wish to acquit those who had committed a homicide but who had raised dubious self-defence arguments, to convict of manslaughter.\textsuperscript{137} The possibility of a manslaughter verdict was a commonsense response to a modern iteration of the ancient jury’s concern about excessive penalties when the law did not recognise mitigating circumstances.

The ruling in \textit{Howe} that failure to retreat was no longer an essential element of a self-defence plea in a homicide case where the charge was murder,\textsuperscript{138} was also a welcome development.\textsuperscript{139} However, a failure to retreat could still be taken into account when deciding whether there should be an acquittal or a conviction for either murder or manslaughter.\textsuperscript{140} Even though a failure to retreat still entangled the old chance medley rule in murder cases,\textsuperscript{141} it was no longer the single deciding factor in whether a claim

\textsuperscript{136} Somarajah, ‘Excessive Self Defence under the Australian Criminal Codes’ (n 69) 156.

\textsuperscript{137} Morris, ‘A New Qualified Defence to Murder’ (n 15) 50-2. See also Leader-Elliott, ‘Norval Morris and the ‘New Manslaughter’” (n 135) 81.

\textsuperscript{138} \textit{Howe} (n 1) 462-3 (Dixon CJ, McTiernan agreeing at 464, Fullagar agreeing at 464), 469 (Taylor J), 471 (Menzies J).

\textsuperscript{139} Snelling (n 134) 136. See also Morris, ‘A New Qualified Defence to Murder’ (n 15) 32-3.

\textsuperscript{140} \textit{Howe} (n 1) 462-3 (Dixon CJ, McTiernan agreeing at 464, Fullagar agreeing at 464).

\textsuperscript{141} Morris has argued that:

\begin{quote}
one who had voluntarily engaged in a sudden affray could withdraw and, having indicated his intention to quit the affray by retreating "to the wall", would be excused the murder if he then killed an assailant.
\end{quote}

Morris, ‘A New Qualified Defence to Murder’ (n 15) 32 (emphasis in original). George Crabb described chance medley as a term used ‘when the killing of a man was \textit{se defendendo}, in self-defence, in a medley, that is, scuffle, affray, or sudden quarrel’. George Crabb, \textit{A history of English law, or, An attempt to trace the rise, progress, and successive changes of the common law: from the earliest period to the present time} (London: Baldwin and Cradock, 1829) ch 20, 293 (emphasis in original). Bernard Brown has argued that ‘Chance medley … may be regarded as the direct progenitor of provocation’. Bernard J. Brown, ‘The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law’ (1963) 7 \textit{Am. J. Legal Hist.} 310, 310. Bernard Brown has reproduced the following quote of what Lord Goddard CJ said in \textit{R v Semini} [1949] 1 All E.R. 233; 1 KB 405, 407-408

\begin{quote}
Where . . . the killing was the outcome of a quarrel or fight, it was excusable, though not justifiable, if the killer had not begun but had taken part in the fight, or if having begun it, he endeavoured to decline any further struggle and retreated, but, being closely pressed, killed his antagonist to avoid himself being killed or maimed: Brown (n 141) 311.
\end{quote}
of self-defence should succeed.\textsuperscript{142} The mitigation idea of excessive self-defence in \textit{Howe} was seen to be ‘based on principles of justice and reasonableness’.\textsuperscript{143} It was also logical as a matter of deterrence because it did not equate those who killed with deadly force with those who killed believing that it was necessary to do what they did.\textsuperscript{144}

The \textit{Howe} reasoning even allowed a manslaughter verdict where the accused ‘had made an unreasonable mistake as to the degree of retaliatory force required by the occasion’.\textsuperscript{145} The mitigation idea in \textit{Howe} also allowed the court to simultaneously control the limits of permissible violence, satisfy the jury’s common sense of justice by enabling it to return an intermediate verdict of manslaughter,\textsuperscript{146} and provide justice to the person accused of homicide. There were also arguments that the reasoning in \textit{Howe} gave both the jury and sentencing judge the flexibility to ‘ensure that the charge and punishment accurately reflect[ed] the accused's moral culpability’.\textsuperscript{147}

Other commentators thought that the logic behind the doctrine of excessive self-defence that was legitimised in \textit{Howe} was ‘seriously defective’.\textsuperscript{148} A “fundamental shortcoming” was that the purpose of the qualified defence was unclear.\textsuperscript{149} It was suggested that ‘the true object of excessive defence was not to mitigate the severity of the law, but “to restrict … an admitted right of self-defence”’.\textsuperscript{150} Excessive self-

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Bernard Brown has argued that killing in such circumstances was “picturesquely” termed “chance medley” which was initially called “chaud melee” but became corrupted into “chance medley” or “chaunce medley”.

\textsuperscript{142} Morris ‘A New Qualified Defence to Murder’ (n 15) 32-3.

\textsuperscript{143} Sornarajah, ‘Excessive Self Defence under the Australian Criminal Codes’ (n 69) 172.

\textsuperscript{144} Arenson, ‘Expanding the Defences to Murder’ (n 69) 132.

\textsuperscript{145} Fairall (n 58) 37-8 (citations omitted).

\textsuperscript{146} Sornarajah, ‘Excessive Self Defence under the Australian Criminal Codes’ (n 69) 162.

\textsuperscript{147} Yeo, ‘The Demise of Excessive Self-Defense in Australia’ (n 15) 356 (citations omitted).

\textsuperscript{148} Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 736.

\textsuperscript{149} Ibid 728.

\textsuperscript{150} Leader-Elliott, ‘Norval Morris and the ‘New Manslaughter’’ (n 135) 81 (emphasis in original) (citations omitted).
defence required the jury to ‘go through a complicated and difficult process’.\(^\text{151}\) Excessive self-defence was ‘incoherent in principle and difficult, if not impossible, to explain to juries’.\(^\text{152}\) The jury’s task of defining the proper scope of the excessive self-defence allowed in \textit{Howe} was a difficult one.\(^\text{153}\) It was difficult because the new halfway house defence required the jury to delimit the circumstances\(^\text{154}\) in which the qualified self-defence rule applied.\(^\text{155}\) It was predicted that this test would be subject to further modification,\(^\text{156}\) and that was a problem because the limits of this qualified defence would be determined by the facts of each case rather than by the law.\(^\text{157}\)

Some commentator did not accept that a mere insult\(^\text{158}\) could justify the intentional killing of another.\(^\text{159}\) Nor was the co-option of the reasonable man test into the law of

\(^{151}\) Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 732. See also Kovacs (n 45) 69.

\(^{152}\) Leader-Elliott, ‘Norval Morris and the ‘New Manslaughter’” (n 135) 84.

\(^{153}\) Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 727.

\(^{154}\) Quoting Hawkins, Morris has argued that the operative principle in delimiting those circumstances was:

“There must be no malice coloured under pretence of necessity: for wherever a person who kills another acts in truth upon malice and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder”, and

To give meaning to this principle of ”malice coloured under pretence of necessity”, of a mere pretext of self-defence cloaking a pre-existing intent to kill, it is necessary to distinguish between motive and intent.

Morris, ‘A New Qualified Defence to Murder’ (n 15) 42.

\(^{155}\) Ibid 42-3.

\(^{156}\) Snelling (n 134) 138.

\(^{157}\) Morris, ‘A New Qualified Defence to Murder’ (n 15) 42-3.

\(^{158}\) The judgment of Dixon CJ in the High Court, which attracted majority support was that the accused was entitled to use deadly force to defend himself or herself against:

an attack of a violent and felonious nature, or at least of an unlawful nature ... made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage.

\textit{Howe} (n 1) 461 (Dixon J).

\(^{159}\) Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 733.
murder welcomed, because it would make excessive self-defence difficult to define.\textsuperscript{160} If the accused had acted unreasonably as when a response to threatened harm was disproportionate, the accused could not succeed in a plea of self-defence.\textsuperscript{161} Other commentators did not accept that an accused could not rely on excessive self-defence unless the situation warranted some degree of violence,\textsuperscript{162} and the accused had inflicted on the victim, at least, a grievous bodily harm.\textsuperscript{163}

The idea of excessive self-defence made it difficult for the jury to identify whether the accused had lost self-control or had some hidden malicious motive such as revenge when more violence was used than a reasonable man would have considered necessary.\textsuperscript{164} The idea of excessive self-defence in \textit{Howe} was also said to be ‘fashioned by men’,\textsuperscript{165} for men who kill men, and it failed to take into account the circumstances of women who kill men in self-defence as a response to domestic violence within a family.\textsuperscript{166} The distinctions in the idea of excessive self-defence in \textit{Howe} were not nuanced enough to answer the question whether a person subject to domestic violence including threats of injury, violation and indecency, could justify a resort to deadly force.\textsuperscript{167}

Other commentators argued that the new idea of excessive self-defence in \textit{Howe} had “little merit”. Mitigating circumstances could already be raised to reduce penalty during a sentencing hearing, they argued that sentencing practice made murder and

\textsuperscript{160} Ibid 733-4.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid 735-6.
\textsuperscript{163} Ibid 734.
\textsuperscript{164} Ibid 735-6. See also Sornarajah, ‘Excessive Self Defence under the Australian Criminal Codes’ (n 69) 160.
\textsuperscript{165} Leader-Elliott, ‘Norval Morris and the ‘New Manslaughter’” (n 135) 80.
\textsuperscript{166} Ibid 76.
\textsuperscript{167} Ibid 84.
manslaughter verdicts “equally variable”. Others disagreed and said there was no comparison between sentences for murder and manslaughter in any Australian common law jurisdiction.

3.6 Commentary following Palmer

The return to the Privy Council requirement of an ‘all-or-nothing’ result in the Palmer case re-energised commentators. The commentary was complicated by the continuing argument whether Australian common law should be decided in England. But the core ideological battleground remained whether there was room for the middle ground verdict of manslaughter when the charge was murder and the defence responded with self-defence arguments. Should self-defence either entirely fail and result in a murder conviction, or should the defence succeed and result in a complete acquittal even though the force used in the self-defence was out of all proportion to the threats or violence that had been used against the accused? Some commentators liked the reasoning in Palmer because the test it required was

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169 Leader-Elliott, ‘Norval Morris and the ‘New Manslaughter’” (n 135) 87.

170 The test according to Palmer was as follows:

In their Lordships’ view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide … If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.

Palmer (n 2) 831-2 (Lord Morris for Lord Donovan and Lord Avonside).

171 Kovacs (n 45) 55.

172 Palmer (n 2) 832 (Lord Morris for Lord Donovan and Lord Avonside).
straight forward and easy for a jury to understand and comprehend. The Palmer test was also said to be based ‘upon common sense notions of fairness and justice’. Common sense would not permit any action in self-defence which was disproportionate to the ‘necessities of the situation’. The defence of self-defence left no room for an intermediate plea of excessive self-defence, nor was there a need for it. The commentators who did not like the reasoning in Palmer said that its ‘all-or-nothing’ approach was not ‘based on principles of justice and reasonableness’ and could not deliver justice to the accused at the same time as it controlled the limits of permissible violence. The only way those two social goals could be achieved simultaneously was if juries were allowed to return manslaughter verdicts in murder cases where self-defence was pleaded as per Howe. The decision in Palmer was also said to be ambiguous because it did not allow the jury to identify when the force used by the accused in killing his victim was excessive. The Palmer reasoning

Their Lordships said that the plea of self-defence:

[I]s a straightforward conception ... it requires no set of words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide.

Ibid 831 (Lord Morris for Lord Donovan and Lord Avonside).


Fairall (n 58) 30.

Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 729 quoting, their Lordships in Palmer when they said ‘[i]f there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation’: Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 729 n 16.

Elliott, ‘Excessive Self-Defence in Commonwealth Law’ (n 69) 728.

Palmer (n 2) 832 (Lord Morris for Lord Donovan and Lord Avonside).

Somarajah, ‘Excessive Self Defence under the Australian Criminal Codes’ (n 69) 172.

Ibid 169.

Kovacs (n 45) 56, 59.

Ibid 56. Kovacs asked: would that lead to a murder conviction or an acquittal?: at 56.
elided two different views of acceptable self-defence in Australian society and that created unacceptable uncertainty. It was further argued that the reasoning in Palmer risked causing injustice because it allowed juries to acquit the accused even if the force used in self-defence was excessive.

3.7 Commentary following Viro

The Viro decision was not popular with judges or other commentators because of the complexity of the six-part test that it set out. Nor did it resolve the underlying tension

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184 Kovacs called one interpretation the traditionalist approach and required that necessity and proportionality are not “discrete” ingredients for a self-defence plea. She argued that this approach retained the idea that if the accused failed to establish that the force used was proportionate, that would mean that accused failed to establish a “sine qua non of the defence” and his or her defence would entirely fail resulting in a murder conviction. Kovacs called the other interpretation or approach, the “second interpretation”. She argued that this interpretation rejected the idea that necessity and proportionality are discrete ingredients which must be established for a plea of self-defence to succeed. She then concluded that that distinction was “hardly an academic one”: Kovacs (n 45) 56-7.

185 Ibid 60.

186 The formulation of Viro’s test was as follows:

(1)(a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression “reasonably believed” is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

(2) If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

(3) If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

(4) If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

(5) If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?
between those who argued that binary verdicts were sufficient in homicide cases with a self-defence element, and those who argued that the failure to recognize that self-defence could be reasonable or unreasonable, was leading to unjust verdicts and punishments.

Extra-judicially, judges did not hide their dissatisfaction with the excessive self-defence doctrine as it was expressed in *Viro*. Weinberg J said that *Viro* ‘turned out to be a disaster for the administration of criminal justice’.187 Gleeson CJ said it was ‘an example of an attempt at individualised justice that went too far’ because the ‘elaborate interplay between the subjective and objective factors … was difficult to explain to juries’.188 Sir Darryl Dawson added that *Viro*’s six separate propositions189 were ‘quite beyond a jury’s comprehension’.190 He continued that they would remain ‘hopelessly abstruse’ no matter how a trial judge might “adapted” them when instructing the jury.191 Justice Weinberg said that they were ‘complex, unnecessary’192 and ‘almost incomprehensible’ for a jury to understand.193 This was because they contained ‘a number of negatives and double negatives’,194 and were designed to take account ‘not only of the various factual possibilities that might exist, but also of the problems that

(6) If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

*Viro* (n 3) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).


189 *Viro* (n 3) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

190 D Dawson, ‘Recent Common Law Developments in Criminal Law’ (n 69) 5, 7.

191 Ibid 8.

192 Weinberg, ‘Moral blameworthiness — The ‘objective test’ dilemma’ (n 15) 194.


194 Ibid.
arise having regard to the need to bear in mind considerations of onus of proof’. Nor could they be reformulated in a way that might assist the jury. Reducing them in writing to be handed to the jury did not help either. Trial judges ‘continued to encounter difficulties’ in explaining them to the jury. That ‘task has vexed courts … jury directions were often “replete with length, turgidity, complexity, and double, even multiple negatives”’. Academic commentators agreed that the six Viro rules lacked coherence and consistency, and that Mason J’s six points to be included in jury instructions which was intended to assist juries in applying the excessive self-defence doctrine, was probably more of a hindrance than a help. Viro’s excessive self-defence doctrine did not acknowledge any moral difference between different self-defence cases, but it led inexorably to confusion. That was because it required the jury to assess the accused’s honesty rather than his reasonableness. And yet it provided the accused with a complete defence if threat perceptions were reasonable, but not otherwise. This was also described as a ‘basic and complicating conceptual anomaly’.

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196 Weinberg, ‘Moral blameworthiness — The ‘objective test’ dilemma’ (n 15) 194.
198 Tilmouth (n 69) 34.
200 Viro (n 3) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).
201 Fairall (n 58) 29.
202 Ibid 33.
203 Ibid 38.
204 Ibid 38 emphasising what Deane J said at 680 in Zecevic (n 4).
3.8 Commentary following *Zecevic*

Stanley Yeo welcomed the High Court’s decision in *Zecevic* because it recognised the significant role that subjective fear played in self-defence cases. But Yeo was not completely satisfied because a test rephrased in terms of the accused’s reasonable belief would have assured more subjectivity than a reasonable person test, and would have allowed the jury to take into account additional factors of a ‘personal nature’ that were not encompassed by pure proportionality. Yeo did not think it necessary to resurrect the excessive self-defence doctrine.

Paul Fairall agreed that it was not necessary to resurrect the excessive self-defence doctrine even though the six *Viro* rules were flawed, complex, incoherent and inconsistent. The excessive self-defence doctrine was not the only option for reform but it could be further refined. As Deane J had pointed out in his dissenting judgment, it was not necessary to reverse the *Howe* and *Viro* decisions. The self-defence rules could be improved by separately considering the accused’s response to the threat experienced and in the response chosen. There was no clear majority as to whether self-defence could only succeed if the accused used lawful force. Only

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205 Yeo, ‘Self-Defence: From *Viro* to *Zecevic*’ (n 174) 262.

206 The test for the jury to apply was as follows:

[Did] the accused believe...upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

207 Yeo, ‘Self-Defence: From *Viro* to *Zecevic*’ (n 174) 265.


209 *Viro* (n 3) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

210 Fairall (n 58) 29-30.

211 Ibid 28.

212 *Zecevic* (n 4) 679 (Deane J dissenting).

213 Fairall (n 58) 45-6.
Brennan and Deane JJ wanted to retain the old idea that ignorance of the law excuses no one (*ignorantia juris neminem excusat*) and automatically defeated a plea of self-defence.\(^{214}\) They said it did not matter that the accused was mistaken about the lawfulness of the aggressor’s behaviour.\(^{215}\) The majority’s approach however,\(^{216}\) eliminated the need to distinguish between lawful and unlawful self-defence conduct.\(^{217}\) The accused could be convicted of murder even if he honestly believed that he was acting reasonably in self-defence.\(^{218}\) The jury only needed to be instructed that they must work out whether the accused’s belief that he was acting in self-defence was honest and reasonable.\(^{219}\)

There was no longer any rule which required the jury to consider the manslaughter option in cases of excessive self-defence because the majority ruled that ‘there is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone’.\(^{220}\) However, none of the commentators explained how the jury might find a different verdict if they did not like the two options available and there were no instructions from the judge suggesting what they should do in that case. Fairall had suggested that there is nothing to bar the accused, or his or her defence counsel, that it is within their constitutional right to find a middle-ground verdict of manslaughter.

\(^{214}\) *Zecevic* (n 4) 669-70 (Brennan J), 682 (Deane J dissenting).

\(^{215}\) Fairall (n 58) 43.

\(^{216}\) *Zecevic* (n 4) 663 (Wilson, Dawson and Toohey JJ).

\(^{217}\) Fairall (n 58) 44.

\(^{218}\) Ibid 47.

\(^{219}\) Mason CJ said:

> In the result I now consider that we should accept that the joint judgment of Wilson, Dawson and Toohey JJ. correctly states the law of self-defence. The law on this topic in Australia will then conform to the law in the United Kingdom as expounded in *Palmer and The Queen v. McInnes* and in other jurisdictions. The risk that an accused person may be convicted of murder when he lacks reasonable grounds for his belief that the degree of force used was necessary for his self-defence will be alleviated by several factors. It is for the Crown to establish that there was an absence of reasonable grounds for the accused’s belief. A jury will be slow to make such a finding if the Crown has failed to satisfy them that the accused did not honestly believe that the force used was necessary. And the jury will not return a verdict of murder unless it is satisfied that there was an intention to kill or to do grievous bodily harm.

*Zecevic* (n 4) 654 (Mason CJ) (citations omitted).

\(^{220}\) *Zecevic* (n 4) 662 (Wilson, Dawson and Toohey JJ). See also Fairall (n 58) 47.
‘even though the formal elements of murder (as redefined in Zecevic) are established’.221

Arenson said that none of the four justifications which were offered222 in support of abolishing the excessive self-defence doctrine, allowing a half-way house and manslaughter verdict were convincing.223 He added that the excessive force

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221 Fairall (n 58) (n 92) 47.

222 The four justifications were that the Zecevic test: would enable juries to understand and apply; would restore consistency to the law of self-defence; there would be no risk for injustice for the accused; and would “express” “the common law in terms” consistent with those expressed in ‘Palmer (adopted in England in McInnes) and which are generally consonant with the law in the code States’. Zecevic (n 4) 664-5 (Wilson, Dawson and Toohey JJ).

223 Arenson, ‘Expanding the Defences to Murder’ (n 69) 132. Arenson has argued that:

Firstly, the view that both judges and juries would be able to understand and apply the Zecevic test is “unsupported by empirical evidence”: at 132.

Secondly, while the majority view that ‘doctrinal consistency would be best served by abolishing the dichotomy that existed between murder and all other offences regarding the law of self-defence’ is “appealing on its face”, this justification ‘ignores the very policy considerations’ which created the excessive self-defence’s doctrine. These are:

[C]riminal sanctions do little, if anything, to deter those who act with a genuine belief that their conduct is legally and morally correct … and those who kill under circumstances amounting to ‘excessive self-defence’ are not in pari delicto with those who kill maliciously and with full awareness that the use of deadly force is unwarranted: at 133 (emphasis in original) (citations omitted).

Moreover:

Though it is certainly true that the dichotomy between murder and other defences regarding the law of self-defence is at odds with doctrinal consistency the courts have never decreed, nor do considerations of logic or fairness suggest, that the need for doctrinal consistency in the law is so paramount that it should never be subordinated to countervailing interests such as those underlying the doctrine of ‘excessive self-defence’: at 133 (emphasis in original).

Thirdly, the majority conclusion that “the risk of such an injustice” for an accused in the abolition of the excessive self-defence’s doctrine “is remote”, was not acceptable, because ‘if one accepts that it is better to allow a thousand guilty persons to walk free than to convict one innocent person, then is it not equally true that an injustice to one represents an injustice to all?’: at 133-4 (emphasis in original) (citations omitted).

Fourthly, the majority view that abolishing the doctrine of excessive self-defence ‘would bring the Australian common law doctrine into harmony with that of England and the various code jurisdictions throughout Australia’: at 135 (citations omitted); it is inconsistent with ‘the fact that the High Court has not hesitated to break with precedents in England and other jurisdictions when there has been a perceived necessity for doing so’: at 135.
manslaughter rule had been known and applied for centuries, and had been ‘consistently affirmed and reaffirmed by the High Court of Australia and appellate courts in other jurisdictions’. Ignoring this conventional wisdom failed to recognise the malice aforethought that had always been required to convict anyone of murder. Arenson believed that juries had enough ‘common sense and intellect to understand and correctly apply [judicial] directions’ differentiating between murder and manslaughter to any set of facts that raised these matters for decision.

Eric Colvin argued that it was odd to assess a self-defence situation using a reasonableness standard when a person had to make a quick decision under stress. That implied that a person accused of a serious crime would be criminally responsible for not giving enough thought to the existence or nature of an attack, or the options for dealing with it. In particular, Colvin observed that courts, including the High Court in Zecevic, had repeatedly stressed that in self-defence cases, juries should be reminded that they should approach the ‘task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection’.

Eric Colvin also

See also Yeo ‘The Demise of Excessive Self-Defense in Australia’ (n 15) 355-6.

Arenson, ‘The Demise of Equality Before the Law’ (n 69) 8.

Ibid 9. Arenson has argued that according to Zecevic:

an accused’s genuine belief that it was necessary to resort to the use of deadly force in self-defence was deemed to negate the malice aforethought element of murder under the excessive force manslaughter doctrine: at 4 n 8.

Malice aforethought was defined in the following terms:

[T]he presence or absence of malice aforethought does not depend on whether the accused acted with actual malice or prior design … suffice it to say for present purposes that malice aforethought is nothing more than a term of art that is used to depict the overall conduct of one who kills under any of the circumstances amounting to murder at common law. Conversely, if the accused’s conduct does not amount to any form of murder at common law, s/he has not acted with malice aforethought (citations omitted).


Ibid 209. See also Zecevic (n 4) 662-3 (Wilson, Dawson and Toohey JJ); Palmer (n 2) 832 (Lord Morris for Lord Donovan and Lord Avonside).
argued that the *Zecevic* test\(^{229}\) might be made more helpful if it were asked ‘whether the assessment of the situation was one that an ordinary person could have made, rather than by asking whether there were reasonable grounds for it’.\(^{230}\)

### 3.9 Summary

Even though the majority of the High Court in *Zecevic* had said that it was conforming the law of self-defence in Australia to that of England, some commentators have argued that there is still a difference in approach. English trial judges following *Palmer* instructed juries in subjective terms – did this accused honestly believe he was acting in self-defence? Following *Zecevic* trial judges in Australia were required to instruct juries to decide guilt in self-defence cases by asking whether the accused’s belief was honest and reasonable which was almost completely objective.

Stanley Yeo questioned the majority’s belief in *Zecevic* that their ruling would conform the Australian common law of self-defence to the English law as laid down in *Palmer*\(^{231}\) and *McInnes*\(^{232}\) on three grounds.\(^{233}\) In contrast to *Zecevic*’s ruling that the accused’s belief has to be reasonable, in England courts permitted the defence to succeed if an accused honestly although unreasonably believed that he was being or was about to be attacked; English law frames the element of use of force in self-defence in terms of what a reasonable person would regard as proportionate force. Yeo argued that English law framed self-defence in terms of what a reasonable person would regard as proportionate force, and English courts had not clarified whether the exercise of reasonably proportionate force was to be construed as a rule of law or merely as an

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\(^{229}\) The *Zecevic* test for the jury to apply was as follows:

> [Did] the accused believe...upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

*Zecevic* (n 4) 662 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).

\(^{230}\) Colvin (n 227) 209.

\(^{231}\) *Palmer* (n 2) (Lord Morris for Lord Donovan and Lord Avonside).

\(^{232}\) *R v McInnes* [1971] 1 WLR 1600; [1971] 3 ALL ER 295.

\(^{233}\) Yeo ‘The Demise of Excessive Self-Defense in Australia’ (n 15) 363.
evidentiary matter. Yeo also criticized the majority in Zecevic because they had ignored the Australian view that the half-way house and manslaughter verdict option allowed in both Howe and Viro accorded with public sentiment in this country. He suggested that the majority in Zecevic had been over-zealous in their rejection of the excessive self-defence doctrine because the six propositions in Viro had created problems for trial judges when trying to provide juries with clear instructions. Abolishing the excessive self-defence doctrine completely was an over-reaction because trial juries did not appear to have had problems in making occasional manslaughter decisions after Howe before the complicating Viro propositions had been introduced.

Justice Mark Weinberg had also criticised the discussion of the origin of modern law self-defence in the joint judgment of Wilson, Dawson and Toohey JJ. He wrote:

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234 Ibid 363-5.
235 Zecevic (n 4).
236 Howe (n 1).
237 Viro (n 3).
238 Yeo, ‘The Demise of Excessive Self-Defense in Australia’ (n 15) 353.
239 Ibid 355.
240 Weinberg, ‘Moral blameworthiness — The ‘objective test’ dilemma’ (n 15) 195. It is instructive to reproduce in detail what the majority said in Zecevic. They said

[T]he modern law of self-defence has its origin in rules which distinguished between justifiable and excusable homicide. The importance of the distinction lay largely in the different consequences of successful pleas of justification and excuse and now is a matter of history. Justifiable homicide carried with it commendation rather than blame and accordingly entitled the accused to total acquittal, entailing no forfeiture and requiring no pardon. It extended to killing done in the execution of justice, which came to include both the apprehension of felons and the prevention of felonies and thus those cases of self-defence which were in response to a felonious attack by the deceased. Excusable homicide, on the other hand, was not entirely without blame and merely excused rather than acquitted, requiring, at first, a pardon and involving, for a somewhat longer period, forfeiture. It was concerned, not with the execution of justice, but with a necessary and reasonable response to a threat to life and limb. Any practical distinction between justifiable homicide and excusable homicide disappeared with the abolition of forfeiture by statute in 1828 and today it is no part of the law in Australia to differentiate between the two … But the history of the matter serves to explain why the requirement of reasonableness, which was a requirement of excusable homicide, has remained part of the law of self-defence. Moreover, it establishes why that requirement ought not be regarded as a definitional element of the offence in question but as going rather to exculpation. True it is that in result a successful plea of self-defence resembles justification rather than excuse because it entitles the accused to a full acquittal, but in scope and in practice nowadays the plea has a
With great respect, their Honours’ conclusion that self-defence as we now know it was essentially exculpatory in its origin may be an overstatement. There are passages in Hale that support that conclusion, but Stephen takes a somewhat different approach. The view taken by the court gives insufficient weight to the breadth of the term ‘felonious attack’ at common law, which rendered self-defence justifiable, and not merely excusable.\(^{241}\)

Gleeson J (as his Honour then was) said that the High Court decisions *Howe*, *Viro* and *Zecevic*, were an “experiment” with criminal law and justice.\(^{242}\) The High Court rejected *Palmer* and in *Howe* and *Viro*, attempted to conform the law of self-defence in Australia to popular sentiment. Gleeson J also observed that juries did not appear to have had problems in choosing occasional manslaughter verdicts after *Howe* allowed them to do so.\(^{243}\) He observed that the idea of excessive self-defence had enabled juries to convict persons accused of homicide of manslaughter when they considered their self defence arguments were dubious.\(^{244}\)

The High Court appears to have been discouraged in their efforts to modernise the law of self-defence in Australia before 1986 because they were still subject to the English common law precedent. But the complexity and impracticality of their six propositions in the *Viro* case did not assist their modernisation efforts. Because those modernisation efforts were inconsistent and did not garner universal support, state legislatures have stepped in and that has made the law more complex as I will explain in chapter four.

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\(^{241}\) Greater connection with excusable homicide, being in most cases related to the preservation of life and limb rather than the execution of justice.

*Zecevic* (n 4) 657-8 (Wilson, Dawson and Toohey JJ) (citations omitted). See also Yeo, ‘The Element of Belief in Self-Defence’ (n 116) 140, where Yeo has argued that this discussion failed to explain ‘why the law of homicide required an objective element of reasonableness before a killing could be excused’.

\(^{242}\) Weinberg, ‘Moral blameworthiness — The ‘objective test’ dilemma’ (n 15) 195 (citations omitted).

\(^{243}\) Gleeson, ‘Clarity or Fairness: Which Is More Important’ (n 195) 309.

\(^{244}\) Yeo, ‘The Demise of Excessive Self-Defense in Australia’ (n 15) 355.

\(^{244}\) Morris, ‘A New Qualified Defence to Murder’ (n 15) 51-2 n 3. See also Leader-Elliott, ‘Norval Morris and the ‘New Manslaughter’’ (n 134) 81.
Conclusion to chapter three

Even though the decisions in Howe, Palmer, Viro and Zecevic did not succeed in creating a simple and predictable modern law of self-defence in Australia, they have identified the competing arguments as to what a good modern law of self-defence should look like. The residual questions revolve around the question whether self-defence should be objectively or subjectively assessed. Does the speed and violence involved in homicides mean that objective tests are inappropriate in this criminal law space? Is it fair to apply civil law negligence standards in the criminal law arena where there is no or inadequate time for an accused person to work out a reasoned response to instant threats? But if arguments that objective standards ask too much of any reasonable man or woman under threat of death or grievous violence, is it appropriate to abandon objective standards completely and have a jury reduce a resulting penalty because that jury does not consider it fair to expect any better conduct from this accused in light of all the surrounding circumstances?

The underlying questions were about whether modern self-defence law should focus on overall intent or the proportionality of the force that was used. A secondary conflict concerned whether proven intent should result in an acquittal or a manslaughter conviction in a self-defence case. Some judges focused on whether the accused’s intent was determinative. If there was no intent to kill but just to self-defend, then an acquittal was appropriate. Other judges believed that if the accused used more force than what was necessary, then an acquittal was inappropriate and a manslaughter verdict was then appropriate.

These questions and the subsequent academic and extra judicial criticism provide a frame for chapter four. Since the High Court had been unable to answer these questions in a convincing or authoritative way, was it time for Australian state and territorial legislatures to step in and make the law both consistent and coherent again? In that discussion, I will suggest that these legislatures could respond in two (or three) different ways:

1. They could deny the possibility of acquittal altogether since there had been a homicide. In a sense this concern is the same concern that motivated pre-16th century juries to prevent homicide cases going to the king for pardon when they were worried that he might not exercise the clemency that they thought was
appropriate in some self-defence cases. Arguably governments and their law enforcement agencies, like all the kings of England between the 12th and the 16th centuries, are reluctant to condone any homicide at all.

2. Alternatively, they could recognise enduring community sentiment that says there are three possible results when a homicide case has involved a self-defence element:
   a. The accused could be exonerated and acquitted;
   b. The accused’s penalty could be reduced to manslaughter because of the judge or jury’s assessment of the self-defence context; or
   c. The judge or jury could decide that the alleged self-defence context did not mitigate the homicide at all, and that the accused should be convicted of a cold-blooded and premeditated murder.

In chapter four I discuss how the Australian state and territorial legislatures have responded to the uncertainties in Australian self-defence law occasioned by the lack of any unanimous High Court decision in this self-defence homicide space. I analyse the effectiveness of these legislative responses in chapter four before I discuss options for further reform in New South Wales in chapter six. Because I do not have space in the confines of this thesis to recommend changes to the relevant law of all the states and territories, my reform suggestions in chapter six suggest wise reforms in New South Wales recognising that if those reforms are effective, they will be influential in all other Australian jurisdictions.
CHAPTER FOUR

STATUTORY SELF-DEFENCE IN THE AUSTRALIAN JURISDICTIONS:
AN OVERVIEW

Introduction

The purpose of chapter four of this thesis is to discuss how the parliaments of the Australian states and territories have responded to the uncertainties in Australian self-defence law. Once again, that uncertainty has been caused by continuing diversity in High Court opinion in this self-defence homicide space, and by disagreement as to whether modern self-defence law should focus on overall intent or the proportionality of the self-defence force that was used.¹

In Part One I briefly discuss the statutory self-defence provisions that have been passed in the various states and territories, including the various tests as to what constitutes self-defence that those legislatures have devised and what judges have said about those tests.

In Part Two I discuss the New South Wales statutory self-defence provisions in detail. I explain the context in which these provisions were passed and the alternatives that were considered before they were passed. I then discuss the self-defence provisions which were settled on, and what judges have said about them.

¹ The focus of this thesis is only directed to the self-defence of person as distinct from defence of property, and defence of other.
My conclusion will be a summary. I will defer making suggestions as to why and how the New South Wales self-defence provisions should be reformulated until chapters five and six.

Part One: Brief overview of statutory self-defence law in the Australian jurisdictions

When it became clear that the disagreement between the High Court and the Privy Council had become intractable, the individual Australian parliaments began taking a variety of legislative steps to clarify the law of self-defence. Because all those steps were different, there could be no standard formula for jury instructions in deciding a self-defence case. And while the Victorian legislature even acknowledged that self-defence legislation was confusing in the text of their statute, trial judges ‘continued to encounter difficulties’ in explaining those provisions to the jury.

The statutory self-defence formulas varied. Some were subjective, some were objective or were a combination of both. If the statutory formula required that the accused’s criminal responsibility should be determined subjectively, then the jury had to decide whether the accused, with this state of mind and personal characteristics or circumstances was justified in the self-defence steps that were taken. If the statutory formula required that the accused’s criminal responsibility be determined objectively, then the jury had to decide whether a reasonable person placed in the same circumstances at the time would have been justified in this self-defensive conduct. If

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2 In Victoria the Parliament ‘[has] recognize[d] that…in recent decades, the law of jury directions in criminal trial has become increasingly complex; and…has made it increasingly difficult for jurors to understand and apply jury directions’. Subsections 5 (1)(b) and (c) of the Jury Directions Act 2015 (Vic).


the statutory formula included both subjective and objective proof elements, the jury had to decide whether the accused believed his self-defensive conduct was necessary, and whether his or her conduct or response, in the circumstances as he or she perceived them, was reasonable.

Most of these new self-defence provisions post-date the Zecevic decision in the High Court. The test in that case required that the accused subjectively believed the actions taken were both necessary and objectively reasonable.\(^5\) Though most of the legislation included the idea of necessity, the wording of the test of reasonableness varied. New South Wales,\(^6\) the Australian Capital Territory,\(^7\) and the Northern Territory\(^8\) adopted\(^9\) the self-defence provision of the Commonwealth Criminal Code.\(^10\)

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\(^5\) The Zecevic test was as follows:

[Did] the accused believe … upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

Zecevic v Director of Public Prosecutions (Vic) (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666) (‘Zecevic’).

\(^6\) Sections 418-422 of the Crimes Act 1900 (NSW). Miriam Gani was of the view that the judiciary of New South Wales has accepted those self-defence provisions ‘as a codification of the law of self-defence’ (citations omitted). Miriam Gani, ‘Codifying the criminal law: Implications for interpretation’ (2005) 29 Crim. L. J. 264, 277.

\(^7\) Section 42 of the Criminal Code 2002 (ACT). It is not my intention to analyse s 42 of the Criminal Code 2002 (ACT) and s 10.4 of the Criminal Code 1995 (Cth) because both sections are similar to s 418 of the Crimes Act 1900 (NSW).

\(^8\) Section 43BD of the Criminal Code Act 1983 (NT).

\(^9\) In Egitmen v Western Australia Mitchell JA said:

The Commonwealth, New South Wales and Australian Capital Territory provisions were based on those recommended by a 1992 report of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General for the Model Criminal Code.


\(^10\) See s 10.4 of the Criminal Code 1995 (Cth) in the legislation schedule in part three of the appendix. In Egitmen Mitchell JA said that the proper construction of s 10.4 should be as follows:

[S]ection 10.4 (2)(a)] is entirely subjective. The question is whether the accused subjectively believes the conduct is necessary to defend a person irrespective of the reasonableness of that belief. [Section 10.4(2)(b)] has a subjective and an objective component. The objective
Under section one of that provision, the accused’s criminal responsibility was nullified if the accused was shown to have carried out the conduct constituting the offence, in self-defence.

But s 2 complicated that consideration. It divided that consideration into two limbs. Under the first, the accused must subjectively believe that the defensive conduct was necessary. But the second alternative limb mixed objective and subjective elements. It requires that the accused’s response to the circumstances be objectively reasonable, but it does not require that the accused’s perception of the surrounding circumstances be objectively reasonable.¹¹ If the accused misread the circumstances, that had to be taken into account.

Because the prosecution retains the overriding obligation to prove the accused guilty of the crime of murder beyond reasonable doubt, the prosecution must persuade the jury that the accused’s self-defence arguments were not convincing under either limb of this provision. That is, the prosecution must satisfy the jury that this accused did not believe his self-defence conduct was necessary (limb one); or that the accused's self-defensive conduct was not reasonable in light of what he believed about the circumstances (limb 2).¹²

³ component is that the accused's conduct is “a reasonable response in the circumstances”. However, the reasonableness of the response is to be assessed by reference to the circumstances as the accused subjectively perceives them, irrespective of the reasonableness of that perception.

Egitmen (n 9) 244 [251] ((Mitchell JA, Mazza JA agreeing at 221 [121]).

See Commonwealth Attorney-General’s Department in association with the Australian Institute of Judicial Administration, The Commonwealth Criminal Code A Guide for Practitioners (Prepared by Ian Leader-Elliott, 2002) 229-231 (‘The Guide’). The Guide relevantly suggests that chapter three, of which s 10.4 is part, imposes ‘no limit of this kind on the range of offences for which self defence might provide an excuse or justification’: The Guide (n 10) 229. The Guide further suggests that under s 10.4 the accused is judged on his or her own perceptions of the threat and ‘an unreasonable mistake can provide the basis for a complete defence’: The Guide (n 10) 229. Moreover, self defence is available to the accused ‘even in circumstances where the accused responded to an unreasonable apprehension of harm’: The Guide (n 10) 230-1.

¹¹ Moore v The Queen [2016] NSWCCA 185, [27] (Basten JA, RA Hulme J agreeing at [94]) (‘Moore’).

¹² R v Katarzynski [2002] NSWSC 613, [23] (Howie J) (‘Katarzynski’).
The legislatures in South Australia, Tasmania, Victoria and Western Australia have all made different changes since *Zecevic*. But there have been no changes in the Queensland self-defence provisions, since Sir Samuel Griffith drafted the *Criminal Code* in 1889.

I will now briefly discuss the statutory self-defence provisions that have been passed in the various states and territories.

### 4.1 South Australia

The self-defence provisions in South Australia have been described as ‘notorious for the difficulty they cause in directing juries’. The test has two limbs. Under the first limb, s 15(1)(a) requires an assessment of the accused’s subjective belief as to what was necessary and reasonable. The jury is required to assess the accused’s genuine belief about the threat or perceived threat, but there is no requirement of reasonableness. At this stage the jury is not required to examine whether a

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14 Section 46 of the *Criminal Code Act 1924* (Tas).

15 Sections 322G-322N of the *Crimes Act 1958* (Vic).

16 Sections 247-248 of the *Criminal Code 1913* (WA).

17 Sections 271-272 of the *Criminal Code 1899* (Qld). Sir Samuel Griffith described ss 271 and 271 as both correctly stating the common law in Queensland. In Sir Samuel Griffith’s letter to Queensland’s Attorney General accompanying the Draft Code in 1897, he ‘stated that in this part of his draft Code the sections corresponded to the common law unless otherwise indicated. There is no contrary indication concerning ss. 278, 279 in the draft which correspond to ss. 271, 272 of the Code as enacted in 1901’. S. O’Regan, ‘Self-Defence in the Griffith Code’ (1979) 3 *Criminal Law Journal* 336, 337 n 3.

18 *R v Dunn* [2012] SASCFC 40, [43] (Gray J, Anderson J agreeing at [53], Stanley J agreeing at [54]) (‘*Dunn*’).

19 See s 15 of the *Criminal Law Consolidation Act 1935* (SA) in the legislation schedule in part three of the appendix.

20 *R v McCarthy* (2015) 124 SASR 190, 208 [59] (Gray J dissenting) (‘*McCarthy*’).

reasonable person would hold that belief. 22 The jury is however, required ‘to determine whether it is a reasonable possibility that the accused held that belief’. 23

After the jury has already considered the accused’s belief under first limb, 24 its next task is to consider whether the accused has responded reasonably to the perceived threat (subs 15(1)(b)). This requires the jury to make an objective assessment of the response of the accused with regard to the threat which the accused subjectively and genuinely believed to have existed, 25 and requires in accordance with ‘the law at least since Viro v The Queen, that the force used must not be disproportionate to the necessities of the occasion’. 26 This subsection, however, “departs” from the decision in Zecevic because it requires an objective assessment of the reasonableness of the accused’s response. 27 In Zecevic ‘it was the accused’s belief based upon the circumstances as the accused perceived them to be, which ha[d] to be reasonable

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22 Dunn (n 18) [44] (Gray J, Anderson J agreeing at [53], Stanley J agreeing at [54]).

23 Ibid. See also McCarthy (n 20) 208 [59]-[60] (Gray J dissenting) (citations omitted). In McCarthy Gray and Peek JJ quoted what Vanstone J said in R v Fragomeli [2008] SASC 96 at [28]

the fact is that s 15(1)(a) does import, in a limited way, the concept of proportionality. Plainly the accused’s genuine belief must extend to the necessity to employ force and to the degree of force he uses: (McCarthy (n 20) 209 [64]) (Gray J dissenting), 292 [350] n 219 (Peek J).

Peek J was of the opinion that:

s 15(1)(a) does not specifically require a positive belief that the conduct was proportionate to the threat … However, in considering whether the defendant actually did hold a belief that the conduct was necessary and reasonable for a defensive purpose pursuant to s 15(1)(a), one does consider all of the facts; if the defendant’s conduct is completely disproportionate to any threat he could have apprehended, that apparent disproportionality may (not must) tend to indicate that the defendant did not in fact actually consider that his conduct was necessary and reasonable for a defensive purpose: (McCarthy (n 20) 292 [350] (Peek J, Kourakis CJ agreeing at 197 [1])).

24 Dunn (n 18) [44] (Gray J, Anderson J agreeing at [53], Stanley J agreeing at [54]).

25 Ibid.

26 Ibid.

27 Ibid.
and not the belief of the reasonable man. Subsection 15(1)(b) is said to require the jurors to place themselves in the position of the accused at the time the self-defence was required, and then to objectively assess the reasonable proportionality of the accused’s conduct. However it is questionable that the word “genuine” in the subsection assists the jury’s assessment of the accused’s belief since what is required is an assessment of the accused’s state of mind and ‘[a] belief cannot be held without being genuine.’ A direction for the jury under the second limb is also said to require a direction with respect to the phrase “reasonably proportionate.” This South Australian code is also the example of a statutory self-defence law in Australia that requires the accused’s self-defence to be proportional “to the threat.”

4.2 Tasmania

In Tasmania the self-defence provisions do not contain reference to a necessity requirement. That is, there is no requirement that the accused believed that his or her

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28 *Katarzynski* (n 12) [6] (Howie J) (citations omitted). The Zecevic test was expressed in the following terms:

[Did] the accused believe…upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

*Zecevic* (n 5) 661 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).

29 *Dunn* (n 18) [29], [43] (Gray J, Anderson J agreeing at [53], Stanley J agreeing at [54]).

30 *Edwards* (n 21) [152] (Gray J).

31 *Dunn* (n 18) [29] (Gray J, Anderson J agreeing at [53], Stanley J agreeing at [54]). Section 15B of the *Criminal Law Consolidation Act 1935* (SA) provides:

15B Reasonable proportionality

A requirement under this Division that the defendant's conduct be (objectively) reasonably proportionate to the threat that the defendant genuinely believed to exist does not imply that the force used by the defendant cannot exceed the force used against him or her.

32 Section 15(1)(b) of the *Criminal Law Consolidation Act 1935* (SA) provides

(b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.
response to the circumstances was necessary. However, in *R v Walsh* (‘Walsh’), Slicer J said that the first limb required the jury to consider whether the accused ‘genuinely and honestly believed that force was necessary’. The Tasmanian test also has two limbs. The first limb is purely subjective and requires the jury to assess whether the accused believed he needed to use defensive force at the time of the incident. The jury is required to place itself in the position of the accused at the time and ‘ascertain his belief as to the element of danger’. The accused ‘may be mistaken but the test is genuineness of [his] belief not [his]reasonableness’. This requirement may be satisfied even if the accused was mistaken about the need for self-defence.

The second limb involves the use of a mixed objective/subjective test. It requires the jury to assess whether the force used by the accused was reasonable in the circumstances as the accused believed them to be. The accused’s belief of the

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33 Section 46 of the *Criminal Code Act 1924* (TAS) provides:

A person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.

34 (1991) 60 A Crim R 419 (Slicer J) (‘Walsh’).

35 *Walsh* (n 34) 423 (Slicer J).


37 *Walsh* (n 34) 423 (Slicer J).

38 Ibid.

39 Ibid. Slicer J also said that this approach ‘is consistent with the approach’ taken by English Court of Appeal in *R v Gladstone Williams* when their Lordships said:

The reasonableness or unreasonableness of the defendant’s belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, the unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant … if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts: at 423 (Slicer J) citing, *R v Gladstone Williams* (1984) 78 Cr App R 276, 282.

Slicer J then said the above principle ‘was affirmed by by the Privy Council in *Beckford*’ when in that case their lordships “add[ed]” ‘no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances': at 423 (Slicer J) citing, *Beckford* [1988] AC 130, 145; (1987) 85 Cr App R 378, 386. See also *Review of the Law Relating to Self-defence* (n 36) 6-7.

40 *Walsh* (n 34) 423-4 (Slicer J). See also *Review of the Law Relating to Self-defence* (n 36) 6-7.
circumstances is to be determined on a subjective basis. But whether the force used by the accused was reasonable in those circumstances is determined on an objective basis. In other words, assuming the jury has already found that the belief of the accused was genuinely held, the jury would be required to assess whether a reasonable person would consider the force actually used by the accused was reasonable to the circumstances as he or she believed them to be.

In *R v Walsh* (‘*Walsh*’), Slicer J said this process ‘would be difficult’ for the jury. He further said that if the jury found that the belief of the accused was genuinely held, they would then have to consider other matters: the surrounding circumstances at the time, place, time of the day, relative sizes of the accused and the victim; and the personal characteristics and attributes of the accused, such as whether the accused:

[W]as a war veteran who had been badly injured, or who had been severely injured following an attack by a group of youths … a person with the experiences of the accused would be more susceptible to fear of consequences and be more likely to perceive a necessity for immediate and drastic action.

He also said that evidence of ‘the effect of prior traumatic experiences on susceptibility or sensitivity to a perceived threat’ was relevant evidence to be considered by the jury.

The Tasmanian self-defence provision does not just apply in cases of homicide. It also applies in other cases of violent crime including assault, wounding and causing grievous bodily harm. When a self-defence plea succeeds in Tasmania, it is a

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41 *Walsh* (n 34) 423-4 (Slicer J). See also *Review of the Law Relating to Self-defence* (n 36) 6-7.

42 Ibid.

43 *Walsh* (n 34) (Slicer J).

44 Ibid 424 (Slicer J).


46 *Walsh* (n 34) 424 (Slicer J). See also *Review of the Law Relating to Self-defence* (n 36) 8.

complete defence, and the accused in entitled to an acquittal. That is, there is no half-way house possibility of a manslaughter conviction where the accused is charged with a homicide. Either the accused was justified in using the force, or she was not.

### 4.3 Victoria

In Victoria, the self-defence provisions distinguish between cases of general violence and cases of family violence. There are separate definitions for “family violence”, “family member’ and what “evidence of family violence” is to be taken into account when a case involves family violence.

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48 Ibid 6, 11, 30, 50.

49 Duggan v The Queen [2001] TASSC 5, [32] (Crawford J, Slicer J agreeing at [80], Evans J agreeing at [81]), (‘Duggan’).

50 Ibid [32]. In Wright v Tasmania (‘Wright’) Blow J said:

> In determining whether the amount of force used in self-defence was reasonable or excessive, a jury must take into account the fact that a person defending himself or herself may be in a stressful situation with little or no time to think.

Wright v Tasmania [2005] TASSC 113, [16] (Blow J, Tennent J agreeing at [33]) (citations omitted).

He further said:

> A person who believes he or she is about to be attacked does not necessarily have to wait for the assailant to strike the first blow or fire the first shot. Circumstances may justify the use of pre-emptive force in self-defence: Wright at [17] (Blow J) (citations omitted).

51 See s 322K of the Crimes Act 1958 (Vic) in the legislation schedule in part three of the appendix. It is beyond the scope of this thesis to discuss or analyse domestic or family violence and the associated self-defence questions about “domestic-captives” or “dominated defendants”. But see the brief discussion of this phenomenon in part two of the Appendix under the heading ‘Self-Defence in Domestic Violence Cases’.

52 See s 322M of the Crimes Act 1958 (Vic) in the legislation schedule in part three of the appendix.

53 See s 322J of the Crimes Act 1958 (Vic). It is also relevant to note that if a request is made by the accused, or his counsel, to the trial judge under s 58 (Request for direction on family violence) of the Jury Directions Act 2015 (Vic), or if the accused is unrepresented and the judge considers it in the interests of justice to do so, the judge must direct the jury in accordance to s 59 of the Jury Directions Act 2015. See s 59 in the legislation schedule in part three of the appendix. The judge may also direct the jury according to s 60 of the Jury Directions Act 2015 (Vic). See s 60 in the legislation schedule in part three of the appendix.
The test in cases of general violence is governed by s 318K(2). The test has two limbs. Under the first, the accused must subjectively believe that the defensive conduct was necessary (subs 318K(a)). The second limb mixes objective and subjective elements. It requires that the accused’s response to the circumstances be objectively reasonable, but it does not require that the accused’s perception of the surrounding circumstances be objectively reasonable (subs 318K(b)). If the accused misreads the circumstances, that has to be taken into account.

The test in cases of family violence is governed by s 322M. The two limbs of the test in s 318K are maintained, except that s 322M modifies the factors to be considered by making them less stringent in assessing the belief of the accused in circumstances where family violence is in issue. Section 322M justifies the subjective belief of the person in the necessity of self-defence and the objective reasonableness of the defensive conduct even if “the person is responding to a harm that is not immediate” (subs 322M(b)) and the ‘the response involves the use of force in excess of the force involved in the harm or threatened harm’ (subs 322M(b)). Circumstances of family violence can thus affect both limbs of the test for self-defence. The two questions for the jury to answer in cases involving family violence then are: is there a reasonable possibility that the accused believed that his or her conduct was necessary to defend himself or herself?; and is there a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them? The jury should find the accused not guilty unless the jury’s answer is “No” to one of those questions.

It is not for the accused to establish that he or she held the relevant belief and that his or her conduct was a reasonable response in the perceived circumstances. The onus

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54 The Victorian test in s 318K(2) adopts the same test of s 418(2) of the Crimes Act 1900 (NSW).


56 Ibid [51]-[52].

57 Victorian Criminal Charge Book (n 55) [26]-[27] citing, Katarzynski (n 12) [22] (Howie J).

58 Victorian Criminal Charge Book (n 55) [28].
is on the prosecution to disprove, beyond reasonable doubt, the accused’s defence. But the accused has the evidential onus of establishing the self-defence argument on the balance of probabilities.\textsuperscript{59} This is consistent with general common law principles as set out in the decisions in \textit{Viro}\textsuperscript{60} and \textit{Zecevic}\textsuperscript{61}

\subsection*{4.4 Western Australia}

Like Victoria, the Western Australian self-defence provision does not just relate to homicide as it provides that the accused’s “harmful act” would be “lawful” if it was done in self-defence.\textsuperscript{62} It does that by requiring the court to separately consider the “harmful acts” of both the accused and the victim every time the issue of self-defence arises in a criminal trial. Moreover, the self-defence provision ‘contemplate[s] a person acting in respect of a harmful act which is not imminent’.\textsuperscript{63}

Section 284 (4) has been described as complex and ambiguous and has been said to “create an irreconcilable contradiction. Its objective assessments overlap and are impossible to apply without either ignoring some of [its] terms or contorting the meaning of others”.\textsuperscript{64} The provision has also been criticised because it does not take into account the gender inequality that has been addressed in the Victorian provision.\textsuperscript{65}

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\textsuperscript{59} See s 322I of the \textit{Crimes Act 1958} (Vic) in the legislation schedule in part three of the appendix.

\textsuperscript{60} \textit{Viro v The Queen} (1978) 141 CLR 88 (‘\textit{Viro}’).

\textsuperscript{61} \textit{Zecevic} (n 5).

\textsuperscript{62} See s 248 of the \textit{Criminal Code 1913} (WA) in the legislation schedule in part three of the appendix.

\textsuperscript{63} \textit{Goodwyn v Western Australia} (2013) 45 \textit{WAR} 328, 350 [164] (Mazza JA) (‘\textit{Goodwyn}’).

\textsuperscript{64} Stella Tarrant, ‘Self-defence in the Western Australian Criminal Code: Two Proposals for Reform’ (Research Paper, University of Western Australia-Faculty of Law, 2015-2016), 11-2.

In *Egitmen v Western Australia* (*Egitmen*)66 Buss P explained why it is so hard to explain the requirements of s 248(4) to a jury.67 He said:

> [S]ection 248(4) enumerates four elements. First, the accused [must] (subjectively) believe… the harmful act is necessary to defend the accused or another person from a harmful act, including a harmful act that is not imminent (s 248(4)(a)). Secondly, the accused's harmful act [must be] a reasonable (objective) response by the accused in the circumstances as the accused (subjectively) believes them to be (s 248(4)(b)). Thirdly, there [must be] reasonable (objective) grounds for the accused's (subjective) belief that the harmful act is necessary to defend the accused or another person from a harmful act, including a harmful act that is not imminent (s 248(4)(a) read with s 248(4)(c)). Fourthly, there [must be] reasonable (objective) grounds for the accused's (subjective) belief as to the circumstances (s 248(4)(b) read with s 248(4)(c)).68

This summary reiterates what Martin CJ said in *Goodwyn v Western Australia* (*Goodwyn*)69 when he explained that it was not practically possible to ask the jury to divide the accused’s intention in the manner the legislature seemed to intend as per the requirements of s 248(4). He said:

> However, in the way in which s 248(4) has been structured, it is impossible to segregate the existence of objectively reasonable grounds for a subjective belief that the act of the accused was a necessary response to the apprehended threat from the existence of objectively reasonable grounds for the apprehended threat. Put another way, the way that the section has been structured, it is logically impossible to conceive of a circumstance in which a subjective belief that the act of the accused was a necessary response to an apprehended threat could be based on objectively reasonable grounds unless there were objectively reasonable grounds for the apprehension of a threat which justified the response of the accused.70

66 *Egitmen* (n 9).

67 Ibid 214-5 [64]-[75] (Buss P, Mazza JA agreeing at 221 [121]). See also *Goodwyn* (n 63) 341-2 [84]-[95] (Buss JA), 350-1 [166]-[174] (Mazza JA); *Raux v Western Australia* (2012) 210 A Crim R 562, 585 [136]-[141] (Buss JA, McLure P agreeing at 568 [26], Pullin JA agreeing at 568 [27]) (*Raux*).

68 *Egitmen* (n 9) 215 [76] (Buss P, Mazza JA agreeing at 221 [121]).

69 *Goodwyn* (n 63).

70 *Goodwyn* (n 63) 331-2 [3] (Martin CJ).
The accused's belief in subs 248(4)(a) is a singular belief – that is – both the accused's 'belief as to the apprehended threat, and a belief as to whether a particular act is necessary to defend against that threat', are neither discrete nor divisible. While the jury may think that there are many factors that informed both the accused's decision and their own analysis, they have to roll all those considerations into the one decision they are called to make – “Was this self-defence or was it not?” It was just such intertwined complexity that saw English juries before the 16th century either qualify their verdicts or even choose supposedly aberrant decisions.

Section 248(3) complicates matters further by introducing the notions of partial self-defence and excessive self-defence which will be remembered from the Howe Case. The result is that in proven homicide self-defence cases the jury is expected to return a verdict of manslaughter if the accused's response was unreasonable in the circumstances as he or she believed them to be. Thus, even if the use of force by one person is lawful, if the force used was more than justified by law under the circumstances, the jury is required to find that such excessive force was unlawful. But there is even more complexity. If the accused made a mistake of fact about the lawfulness of an attack that was honest and reasonable, s 24 provides that he or she can rely upon self-defence, and the s 24 option is not excluded as a defence under s 248(5).

In all these scenarios, the burden of disproving the accused's self-defence argument remains with the prosecution. In all cases, the prosecution must exclude the possibility

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72 Ibid.

73 Section 260 of the *Criminal Code 1913* (WA) provides:

260 Excessive force is unlawful

In any case in which the use of force by one person to another is lawful, the use of more force than is justified by law under the circumstances is unlawful.

74 See s 24 of the *Criminal Code 1913* (WA) in the legislation schedule in part three of the appendix.

75 *William-Jones v Miller* 269 A Crim R 320, 332-3 (Smith AJ).
of self-defence beyond reasonable doubt. In practice that means that the prosecution must show that the accused was not acting in self-defence if ‘it established one or more of the following matters beyond reasonable doubt:

- that the accused did not subjectively believe that the harmful act was necessary to defend herself;
- there were no objectively reasonable grounds for the accused to believe that the harmful act was necessary to defend herself;
- the accused’s harmful act was not an objectively reasonable response in the circumstances that she subjectively believed to exist; or
- there were no objectively reasonable grounds for the accused’s subjective belief as to the circumstances.

Proof beyond reasonable doubt of any one of those matters would mean that the prosecution had negated the defence of self-defence. On the contrary, however, in self-defence cases, the accused must succeed if he or she raises a reasonable doubt about the prosecution’s allegations.

### 4.5 Queensland

In Queensland, the self-defence provisions in ss 271 and 272 of the *Criminal Code 1899* distinguish between provoked and unprovoked assault, and in order ‘to be

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76 *Egitmen* (n 9) 215 [76] (Buss P, Mazza JA agreeing at 221 [121]), 239 [228] (Mitchell JA).

77 *Gallagher v Western Australia* [2016] WASCA 54, [20] (Buss and Mazza JJA, Mitchell J) (‘*Gallagher*’). See also Goodwyn (n 69) 342 [95]-[96] (Buss JA); *Egitmen* (n 9) 239-240 [227]-[228] (Mitchell JA, Mazza JA agreeing at 221 [121]).

78 *Gallagher v Western Australia* [2016] WASCA 54, [20] (Buss and Mazza JJA, Mitchell J) (‘*Gallagher*’). See also Goodwyn (n 69) 342 [95]-[96] (Buss JA); *Egitmen* (n 9) 239-240 [227]-[228] (Mitchell JA, Mazza JA agreeing at 221 [121]).

79 Goodwyn (n 69) 342 [96] (Buss JA); *Egitmen* (n 9) 239-240 [227]-[228] (Mitchell JA, Mazza JA agreeing at 221 [121]).

80 See s 271 of the *Criminal Code 1899* (Qld) in the legislation schedule in part three of the appendix. See also *Graham v The Queen* (2016) 90 ALJR 820, 823-4 [9]-[11] (French CJ, Kiefel and Bell JJ, Gordon J agreeing at 832 [57]) (‘*Graham High Court Appeal*’).

81 See s 272 of the *Criminal Code 1899* (Qld) in the legislation schedule in part three of the appendix. See also *Graham High Court Appeal* (n 80) 823-4 [9]-[11] (French CJ, Kiefel and Bell JJ, Gordon J agreeing at 832 [57]).
understood [these] must be considered together’. 82 There are four elements of unprovoked assault that the jury must consider under s 271(1). They were set out by the Queensland Court of Appeal in *R v Sharpley* (‘Sharpley’). 83 In that case Chesterman JA, with whom White JA and Daubney J agreed, said that the defence must prove:

(a) The accused must have been unlawfully assaulted; (b) [h]e did not provoke the assault on him; (c) [t]he force used to resist the assault is reasonably necessary to make an effective defence to the assault; and (d) [t]he force used was not intended to cause death or grievous bodily harm and was not in its nature likely to cause death or grievous bodily harm. 84

Unless the prosecution disproves, beyond reasonable doubt, “at least” one of the above four elements, the accused’s self-defence plea would succeed. 85

In *Zecevic*, 86 Brennan J defined the word “unlawful” as it forms part of the first element of s 271. He said:

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82 *R v Muratovic* [1967] Qd R 15, 25 (Hart J) (‘Muratovic’). In *R v Wilmot*, Jerrard JA was of the view that the construction of self-defence provisions in the *Criminal Code 1899* (Qld) is the same as per *Zecevic*’s common law test. He said that in *Zecevic* “the common law position approved by the majority” was as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal …

If the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence.


83 [2011] QCA 124 (‘Sharpley’).

84 Ibid [34] (Chesterman JA, White JA agreeing at [58], Daubney J agreeing at [59]) (‘Sharpley’).

85 Ibid [35].

86 Zecevic (n 5)
[Unlawful] is used in the self-defence provisions to describe the character of the force against which a person may defend himself, not to describe force applied by a victim who is criminally responsible for applying it: see the Criminal Code (Q.) ss.246,271; (W.A.) ss.223,248 … and is to be understood “to describe force which is not authorized, justified or excused by law whatever be the state of mind of the person who applies it.67

In *R v Graham* (*'Graham Appeal'*68 Morison JA, Atkinson and Applegarth JJ in the Queensland Court of Appeal agreed with the trial judge’s directions to the jury69 when he described the meaning of the word “provoke” forming part of the second element of s 271(1):

> “Provocation” means any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.90

They also agreed with the trial judge’s directions to the jury91 when he told the jury that the word ‘assault’ in the third element:

> [D]oes not have to involve actual physical assault: a movement or a gesture may constitute an assault, but more than that: ... *a threat to apply force of any kind ... under such circumstances that the person has, actually or apparently, a present ability to affect the person’s purpose ...*’ can constitute an assault.92

In *R v Allwood* (*'Allwood'*93 McPherson JA said that the words “unlawful” and “unprovoked” in s 271(1) are to be understood to mean that an accused would have

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67 Ibid 668 (Brennan J).
68 [2015] QCA 137 (*'Graham Appeal'*).
69 *Graham Appeal* (n 88) [41] (Atkinson J, Morrison JA agreeing at [1], Applegarth J agreeing at [79]).
90 Ibid [30].
91 Ibid.
92 Ibid (emphasis in original).
93 [1997] QCA 257 (*'Allwood'*).
an “excuse” to defend himself or herself against ‘unlawful and unprovoked assault … [to] an attack or a threatened attack’. 94

There are also four elements that the jury must consider under s 271(2). They were set out by the Queensland Court of Appeal in *R v Graham* (‘*Graham Appeal’*). 95 There Morison JA, Atkinson and Applegarth JJ agreed with the trial judge 96 when he told the jury ‘there is no burden on the [accused] to satisfy you that he was acting in self-defence’, 97 self-defence is excluded ‘if the prosecution satisfies you beyond reasonable doubt that:

[1] That the accused was unlawfully assaulted; or [2, that] the accused had not provoked the assault on him; or [3, that] that the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm; or [4, that] the accused believed on reasonable grounds that he could not otherwise preserve himself or herself from death or grievous bodily harm. 98

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94 *Ibid* 7 (McPherson JA).

95 *Graham Appeal* (n 88).

96 *Ibid* [41] (Atkinson J, Morrison JA agreeing at [1], Applegarth J agreeing at [79]).

97 *Ibid* [30].

98 *Ibid*. See also *Muratovic* (n 82). In *Muratovic* Hart J said:

To enable a person charged with a wilful murder or murder to raise a defence on a literal meaning of s 271 there must be evidence of the following constituents: That he was unlawfully assaulted; that he had not provoked the assault on him; that the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm; that he believed on reasonable grounds that he could not preserve himself or herself from death or grievous bodily harm otherwise by using force; that the force used by him was necessary for his or her defence: *Muratovic* (n 82) 26 (Hart J).

In *R v Wilmot* Jerrard JA said:

In *Marwey v The Queen* (1977) 138 CLR 630 the High Court unanimously approved the construction Gibbs J had placed on s 271(2). Barwick CJ wrote that what that second paragraph called for was the actual belief by the defendant on reasonable grounds of the necessity of the fatal act for his own preservation (at 637). His Honour held the section made the belief of the defendant the definitive circumstance, which belief must be based on reasonable grounds. He held that in contrast, in s 271(1) the determination of the extent of the permissible force was directly committed to the jury as an objective fact. Stephen J considered s 271(2) raised two questions: whether there was a belief on the part of the defendant that the force he used was necessary, a subjective belief; and whether there existed reasonable grounds for that belief (an objective question, exclusively concerned with the jury’s view whether there were reasonable grounds for the defendant’s belief.

*Wilmot* (n 82) 25 [34] (Jerrard JA, Muir J agreeing at 31 [59]). See also *Marwey v The Queen* (1977) 18 ALR 77, 86 (Stephen J) (‘*Marwey’*); *Sharpley* (n 83) [34] (Chesterman JA, White JA
In *R v Muratovic (‘Muratovic’)* 99 Gibbs J said that the word “otherwise” in s 271 (2) is to be understood to mean ‘otherwise than by using the force which he in fact used’. 100 In *R v Allwood (‘Allwood’)101* McPherson JA described the complexity of s 271. She said:

Section 271 is one of a group of sections of the Criminal Code on which it is difficult to instruct a jury in terms that are at once simple, accurate and readily comprehensible. Merely to read the provisions out is seldom of much help to them. It takes close study for even a trained lawyer to understand how those provisions operate in particular circumstances.102

The elements that the jury must consider under s 272 were set out by the Queensland Court of Appeal in *R v Graham (‘Graham’).*103 There Morison JA, Atkinson and Applegarth JJ agreed with the trial judge104 when he told the jury that ‘there is no burden on the [accused] to satisfy you that he was acting in self-defence’,105 self-defence is excluded ‘if the prosecution satisfies you beyond reasonable doubt that:

1. The assault by [the victim] was not of such violence as to cause reasonable apprehension of death or grievous bodily harm; or
2. The assault did not induce [the accused] to believe, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm to use the force he used in self-defence; or
3. The force used by [the accused] was more than was reasonably necessary to save her from death or grievous bodily harm; or

agreeing at [58], Daubney J agreeing at [59]); *Graham Appeal* (n 88) [30] (Atkinson J, Morrison JA agreeing at [1], Applegarth J agreeing at [79]).

99 *Muratovic* (n 82).

100 Ibid 18-9 (Gibbs J). See also *Marwey* (n 98) 636-7 (Barwick CJ), 639-640 (Stephen J); *Wilmot* (n 82) 24-5 [32-]34 (Jerrard JA, Muir J agreeing at 31 [59]).

101 *Allwood* (n 93).

102 Ibid 7 (McPherson JA).

103 *Graham Appeal* (n 88).

104 Ibid [41] (Atkinson J, Morrison JA agreeing at [1], Applegarth J agreeing at [79]).

105 Ibid [30].
4. The [accused] first began the initial assault with intent to kill or to do grievous bodily harm to [the victim]; or
5. The [accused] endeavoured to kill or do grievous bodily harm to [the victim] before the necessity of so preserving herself arose; or that
6. In either case, unless, before such a necessity for self-defence arose, the [accused] declined further conflict, and quitted it, or retreated from it as far as practicable.'\(^\text{106}\)

If the prosecution excludes any one of those matters, beyond reasonable doubt, the accused's plea of self-defence would fail.\(^\text{107}\)

### 4.6 Northern Territory

In the Northern Territory, there are two self-defence provisions with two different tests.\(^\text{108}\) Section 29 mimics the common law test in Zecevic,\(^\text{109}\) and s 43BD does not. In *Burkhart v Bradley* (‘*Burkhart*')\(^\text{110}\) all the Northern Territory Supreme Court Justices noted the difference.\(^\text{111}\) Section 43BD, like s 418 of the *Crimes Act 1900* (NSW),

\(^{106}\) Ibid [30]. See also *Muratovic* (n 82) 26-7 (Hart J).

\(^{107}\) *Graham Appeal* (n 88) [30] (Atkinson J, Morrison JA agreeing at [1], Applegarth J agreeing at [79]).

\(^{108}\) See s 43BD of the *Criminal Code Act 1983* (NT) in the legislation schedule in part three of the appendix. Section 29 of the *Criminal Code Act 1983* (NT) is also relevant. See s 29 in the legislation schedule in part three of the appendix.

\(^{109}\) *Burkhart v Bradley* 33 NTLR 79, 84 [23] (Southwood, Kelly, and Barr JJ) (‘*Burkhart*'). The Zecevic test was expressed in the following terms:

[Did] the accused believe...upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.


\(^{110}\) *Burkhart* (n 109).

\(^{111}\) Ibid. Southwood, Kelly, and Barr JJ said:

The main difference in the two provisions is the requirement in s 29(2)(b) that, "the conduct is a reasonable response in the circumstances as the person reasonably perceives them" rather than "as the person perceives them" (in s 43BD): at 84 [22] (emphasis in original).
“mirrors” s 10.4 of Commonwealth Criminal Code. Both the NSW provision and s 43BD(2) have two limbs. In Woods v The Queen (‘Woods’) Riley CJ, Kelly and Barr JJ described the requirements of the two limbs in s 43BD(2) as follows:

The Criminal Code requires not only that an accused believes that conduct in self-defence is necessary to defend himself or herself or another person, but that such conduct in self-defence must be “a reasonable response in the circumstances as he or she perceives them.”

Section 29(b), however, requires that the accused’s perception, and his or her response, must be reasonable. In Burkhart v Bradley (‘Burkhart’), referring to s 29(b) the Court said: ‘The Crown can disprove self-defence by negating either the first

They further said:

[W]e note that it seems anomalous to have two different tests for defensive conduct in the Criminal Code, one in s 43BD applying to Schedule 1 offences, and one in s 29 applying to all other offences. Moreover, Schedule 1 offences include serious offences against the person including murder. The effect of that is that a person may be found not guilty of murder because the killing amounted to defensive conduct (on the application of s 43BD) if (given the requisite belief) the killing was a reasonable response in the circumstances as the accused person perceived them (with no requirement for that perception to be reasonable); whereas a person charged with assault (as Mr Burkhart was) will only be found not guilty on the basis that the conduct was defensive (again given the requisite belief) if the assault was a reasonable response in the circumstances as the accused person reasonably perceived them – ie that perception must be reasonable (on the application of s 29). We respectfully suggest that it would be appropriate for the legislature to address this anomaly: at 85 [27] (emphasis in original).

This “anomaly” has not been addressed by the Northern Territory’s legislature since 2013.

112 Ibid 84 [21]. This section was inserted into the Criminal Code Act 1983 (NT) on 20 December 2006: at 84 [21] n 8.

See The Guide (n 10). The Guide relevantly suggests that chapter three, of which s 10.4 is part, imposes ‘no limit of this kind on the range of offences for which self defence might provide an excuse or justification’: The Guide (n 10) 229. The Guide further suggests that under s 10.4 the accused is judged on his or her own perceptions of the threat and ‘an unreasonable mistake can provide the basis for a complete defence: The Guide (n 10) 229. Moreover, self defence is available to the accused ‘even in circumstances where the accused responded to an unreasonable apprehension of harm’: The Guide (n 10) 230-1.

113 [2012] NTCCA 8 (Riley CJ, Kelly and Barr JJ) (‘Woods’).

114 Ibid [6].

115 Burkhart (n 109) 84 [22] (Southwood, Kelly, and Barr JJ).

116 Burkhart (n 109).
or the second requirement of the defence of self-defence. It is not necessary for the Crown to negative both requirements'. With respect, the same principles should be applied to s 43BD(2). It should also be presumed that the Crown is required to exclude any one of those matters, beyond reasonable doubt.

I now discuss in part two, the nature of statutory self-defence in New South Wales. It will now be clear that the self-defence statutes that the state and territory legislatures have passed in response to the Palmer and Zecevic decisions by the High Court are inconsistent and confused. Because the Australian Constitution does not require the standardisation of any aspect of state and territory criminal law, it is well beyond the scope of this thesis to suggest that all of these provisions might be clarified in any single legislative reform effort. But since the combined reform efforts of the Commonwealth and New South Wales have succeeded in promoting a Uniform Evidence Act since 1995, I return to the more modest goal of recommending appropriate reforms in New South Wales as reform in that State will be influential elsewhere in Australia.

**Part Two: Self-Defence in New South Wales**

4.7 The backdrop for enacting self-defence provisions in the _Crimes Act 1900_(NSW)

In 1987, the search for consistent expression of the principles of criminal justice led to the establishment of a committee under the chairmanship of Sir Harry Gibbs to overhaul the Commonwealth criminal law (hereafter the “Gibbs Committee”). The

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117 Ibid 84 [24] (Southwood, Kelly, and Barr JJ).

118 Uniform Evidence Act 1995 (Cth).


Gibbs Committee issued several reports,121 but its proposals were viewed as controversial and were subject to ‘well-reasoned criticism’.122 The Gibbs Committee recommended codification of the general principles of criminal responsibility in its first interim report.123 However, it is not clear whether the Gibbs Committee intended that the entire criminal law of the Commonwealth should be codified.124 Perhaps the Gibbs Committee had in mind that it would have been unconstitutional to codify the entire criminal law of the Commonwealth since the Australian Constitution does not confer the power to make comprehensive criminal laws on the Commonwealth. ‘According to the constitutional arrangement in Australia … the general criminal law is a matter for the States and Territories rather than a matter for the Commonwealth’.125


121 Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (n 119) 153 n 8. Those reports were:


124 Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (n 119) 154. Goode summarised the situation at the time as follows:

The three themes that seem to have emerged at this point were:

1. consistency, if not uniformity, across Australian criminal jurisdictions;
2. the overall benefits of codification; and
3. the consensus on these objectives by both Code and common law jurisdictions.

125 Ibid 152. But the constitutional problem was not the only problem. There was another “substantive” problem. Sections 79 and 80 of the Judiciary Act 1903 (Cth) allow the court which exercising Commonwealth jurisdiction, by default, to “pick up” and apply the law of the relevant state or territory of the place in which the court is sitting if there is no criminal law provision enacted by the Commonwealth Parliament to deal with the prosecution of a Commonwealth offence. The source of this “substantive” problem was that “the states and...
Committee also proposed that Australia follow recent developments in England and abandon the traditional requirement that a mistake be reasonable if it was to afford an exculpatory defence such as self-defence.126

In 1990 the codification of Commonwealth criminal law and the recommendations of the Gibbs Committee were considered by the Third International Law Congress which was held in Hobart. 'The general impression left by the Congress not only support for the codification of Commonwealth criminal law but, far more importantly, a strong questioning of the extent of the diversity between the criminal laws of the States and Territories'.127 The Congress further observed that there were very few Commonwealth criminal cases and all homicides were charged under state or territory laws.

The Gibbs Committee drafted a Bill for a federal criminal code but it was not introduced to Parliament.128 However, the Gibbs Committee Reports did lead the Standing Committee of Attorneys-General of Australian states and territories (the “Standing

territories” had not ‘maintained [a] modicum of consistency, if not uniformity, in the criminal law or the law of criminal procedure and evidence’: at 152-3.

126 Colvin, ‘Unity and Diversity in Australian Criminal Law’ (n 120) 85.

127 Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (n 119) 154 (citations omitted). Goode also quoted other criticisms such as what the then Attorney-General of Queensland said in his paper to the Third International Law Congress in September 1990:

Why should a person’s criminal responsibility, the punishment which a certain offence carries or even, indeed, whether certain conduct amounts to an offence vary simply by the crossing of State boundaries? In a country as homogenous as Australia, this amounts to at worst lunacy or at best illogicality: at 154 (citations omitted).

Furthermore, citing the Editorial in the Criminal Law Journal, Mathew Goode reproduced the following quote:

the often disparate State and Territory criminal laws on the same subject-matter created injustice and inequality before the law; that the time was ripe for the criminal laws of the various States and Territories to be uniformly expressed and applied; and that the Review Committee’s report was a viable starting point towards achieving this uniformity: at 154 n 12 (citations omitted).


Committee”) to consider developing a uniform criminal code for Australia. The Standing Committee established the further Model Criminal Code Officers Committee (the “Model Code Committee”) and, in 1992, the Model Code Committee made final recommendations to the Standing Committee. Those recommendations formed the basis of the Criminal Code Bill 1994 (Cth), which was passed by the Commonwealth Parliament in March 1995.

The Australian constitutional settlement in 1901 was focused on the separation of power between the Commonwealth and the states. Federation was primarily focused on the reduction of trade barriers and the cost of collective defence of the former colonies. Because the Australian constitutional framers did not contemplate a nation with an integrated and consistent criminal law, they did not design constitutional machinery to enable the creation of such law or indeed, a similarly integrated Australian Corporations or Family Law. While a comprehensive Corporations Law was successfully engineered after a false start, and Family Law has been standardised in all Australian states except Western Australia, efforts to integrate Australian criminal and evidence law have been less successful for a variety of political and logistical reasons. Evidence law is closer to national integration than criminal law but fissures in the national fabric of evidence law continue. The creation of consistent

129 Goode, ‘Codification of the Australian Criminal Law’ (n 120) 6-8.

130 Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (n 119) 155.


national criminal laws has proven to be more elusive. While there are now only three states that have declined to adopt the Uniform Evidence Act 1995 (Cth), the Gibbs Committee's draft national criminal code did not get off the ground. In that context, the modest goal of this thesis is to propose adjustments to New South Wales criminal law in self-defence space which might persuade other states that their laws can also be simplified and in a manner which will improve the trial judge explanations of self-defence laws to juries. But since even the Gibbs' Committee draft model provisions which were adopted in New South Wales have not proven logically simple and easy to explain to juries, I discuss how those provisions might be further improved.

The New South Wales self-defence provisions were drafted based on recommendations made by the Model Code Committee for the Model Criminal Code, and took effect on 22 February 2002. The explanatory notes for the Self-defence Amendment Bill in 2001 were brief. They stated that the object of that bill was to codify self-defence law in New South Wales in order to 'accord with the Model Criminal Code'. The explanatory notes also stated that:

The codification effected by the Bill seeks to simplify the law by enabling defendants to rely on self-defence if they believed their conduct was necessary (even if they were wrong), so long as the response was objectively proportionate to the situation (as they perceived it).

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134 Queensland, South Australia and Western Australia.

135 Egitmen (n 9) 244 [249] [(Mitchell JA, Mazza JA ageing at 221 [121])]. See also Colvin, 'Abusive Relationships and Violent Responses' (n 9) 347. See s 10.4 of the Criminal Code 1995 (Cth) in the legislation schedule in part three of the appendix.

136 The statutory provisions dealing with self-defence were inserted into the Crimes Act 1900 (NSW) by the Crimes Amendment (Self-defence) Act 2001 (NSW) and took effect on 22 February 2002. Moore (n 11) [26] (Basten JA, RA Hulme J agreeing at [122]).

137 The long title of the Crimes Amendment (Self-Defence) Act 2001 (NSW) provides:

An Act to amend the Crimes Act 1900 to codify the law with respect to self-defence; and to repeal the Home Invasion (Occupants Protection) Act 1998 and the Workplace (Occupants Protection) Act 2001.

138 In particular s 10.4 of Commonwealth in the Criminal Code Act 1995. See Explanatory Notes for Crimes Amendment (Self-defence) Bill 2001 ('Explanatory Notes').

139 Explanatory Notes (n 138) (emphasis in original).
The explanatory notes were explicit that the *Crimes Amendment (Self-defence) Bill 2001* has not been drafted to accord with the *Model Criminal Code*. Despite idealistic striving for the implementation of a standardised Model Criminal Code, and perhaps because the New South Wales legislature knew that its new law would stand alone, it decided to reintroduce the manslaughter half-way house option in homicide cases which had caused common law friction between the Privy Council and the High Court of Australia before appeals to the Privy Council were completely abolished in 1986. It stated:

(a) The Bill (and the Code) excludes self-defence in those circumstances if the accused uses force that inflicts really serious injury, and

(b) The Bill (but not the Code) reduces murder to manslaughter in the case of excessive self-defence, that is, where the defendant believed it was necessary for personal defence, but where the accused uses force that inflicts death and that is not a reasonable response in the circumstances.\(^{140}\)

The explanatory notes further stated:

The Bill confirms (in accordance with the existing law and other provisions of the Code that if the issue of self-defence is raised, the prosecution must prove, beyond reasonable doubt, that the defendant did not act in self-defence.\(^{141}\)

The New South Wales legislature recognised that for centuries, juries wanted a manslaughter option in homicide cases despite executive pressure to force them to convict of murder when acquittal was the only other option in homicide cases.

### 4.8 Self-defence provisions: *Crimes Act 1900* (NSW)

Against that backdrop, and since 2002 in New South Wales,\(^{142}\) statutory self-defence provisions have replaced the common law test of self-defence as stated in *Zecevic*.\(^{143}\)

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\(^{140}\) Ibid (emphasis in original).

\(^{141}\) Ibid.

\(^{142}\) The statutory provisions dealing with self-defence were inserted into the *Crimes Act 1900* (NSW) by the *Crimes Amendment (Self-defence) Act 2001* (NSW) and took effect on 22 February 2002. *Moore* (n 11) [26] (Basten JA, RA Hulme J agreeing at [94]).

\(^{143}\) The *Zecevic* test was as follows:
The relevant provisions introduced into the *Crimes Act 1900* (NSW) are ss 418,144 419145 and 421.146

Section 418 (1) nullifies the accused’s criminal responsibility for an offence if the person carried out the conduct constituting the offence in self-defence. Section 418(2) sets out the circumstances where self-defence is available. It provides that the conduct of an accused is conduct done in self-defence if: (a) the accused believes that the conduct is necessary to defend himself or herself; and (b) the conduct was a reasonable response in the circumstances as he or she perceived them. The questions for the jury to answer under s 418 are not the same as they were at common law under *Zecevic*.147

[Did] the accused believe…upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

*Zecevic* (n 5) 661 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).

144 See s 418 of the *Crimes Act 1900* (NSW) in the legislation schedule in part three of the appendix. See also *Moore* (n 11) [26] (Basten JA, RA Hulme J agreeing at [94]). It is not my intention to fully analyse s 418 in chapter four. See chapter five.

145 See s 419 of the *Crimes Act 1900* (NSW) in the legislation schedule in part three of the appendix. See also *Moore* (n 11) [26] (Basten JA, RA Hulme J agreeing at [94]). It is beyond the scope of this thesis to analyse s 419.

146 See s 421 of the *Crimes Act 1900* (NSW) in the legislation schedule in part three of the appendix. See also *Moore* (n 11) [26] (Basten JA, RA Hulme J agreeing at [94]). It is not my intention to fully analyse s 421 in chapter four. See chapter five.

147 Katarzynski (n 12) [22] (Howie J) (“Katarzynski”). See also: *R v Burgess; R v Saunders* (2005) 152 A Crim R 100 105 [10]-[12] (Adams J, Halsop J agreeing at 117 [51], Newman JA agreeing at 117 [52]).

This is because, Howie J said, according to *Zecevic* ‘it was the accused’s belief based upon the circumstances as the accused perceived them to be, which has to be reasonable and not the belief of the reasonable man’. *Katarzynski* (n 12) [6] (Howie J).

The *Zecevic* test was in the following terms:

[Did] the accused believe…upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

*Zecevic* (n 5) 661 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).
The operation of this section was explained by Howie J in *R v Katarzynski* (‘*Katarzynski*’).

He said:

[I]s there [sic] a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them?\(^{149}\)

It is doubtful that Howie J’s explanation of the operation of s 418 accurately reflects the new provision. The phrase “is there is a reasonable possibility” is not included in s 418(2). The addition of this phrase made the test more complicated than it already is. It added an objective component to the first limb of subs 418(2), which is otherwise purely subjective, and added an objective component to the second limb of subs 418(2), which already mixes objective and subjective elements. Nevertheless, Howie J’s formula became the recognised test for the statutory self-defence test.\(^{150}\)

In *Oblach v The Queen*\(^{151}\) Spigelman CJ said:

The distinction [Howie J] drew between the two aspects of the test under s 418 turns on the absence of the word “reasonable” before “believes” in the introductory words of s 418(2) and the presence of that word before the word “response” in the last part of that subsection.\(^{152}\)

Neither the “codified” self-defence test in s 418, nor the “codified” onus of proof section in s 419, contains the phrase “reasonable possibility”.\(^{153}\) Nevertheless, Howie J used

\(^{148}\) *Katarzynski* (n 12) [22] (Howie J).

\(^{149}\) Ibid.

\(^{150}\) The phrase “reasonable possibility” had been challenged on the basis that it undermined the “beyond reasonable doubt” standard of proof. But citing *Crawford v the Queen* [2008] NSWCCA 166 at [22]; *R v Jacobs* [2009] NSWSC 235 at [9]; *B v R* [2015] NSWCCA 103 at [77], R A. Hulme J said that he was ‘unaware of any case in which anything that was said in *R v Katarzynski* had [sic] been called into question’, including when *R v Katarzynski* itself went on appeal. *Moore* (n 11) [122]-[124] (R A Hulme J).

\(^{151}\) (2005) 65 NSWLR 75 (‘*Oblach’*).

\(^{152}\) Ibid 84 [52] (Spigelman CJ, Sully J agreeing at 89 [83], Hulme J agreeing at 91 [95]).

\(^{153}\) But see s 322(1)(1) in the *Criminal Code 1958* (Vic), the onus of proof section, where the phrase “reasonable possibility” is incorporated in this section.
that phrase in formulating the test under s 418(2). Barwick CJ explained how the onus of proof should be approached in homicide self-defence cases in Viro.\textsuperscript{154} He said:

Although it is common enough to speak of the “defence” of self-defence, since Woolmington v. Director of Public Prosecutions, where the proven facts give rise to the reasonable possibility that the fatal act was done in self-defence and the accused raises the question (see Director of Public Prosecutions v. Walker), the onus rests upon the Crown to negative that possibility, i.e. to remove any reasonable doubt that the fatal act was not done in self-defence.\textsuperscript{155}

In Moore v The Queen (‘Moore’)\textsuperscript{156} Basten JA noted the “significance” of this statement. He said:

What is significant is that the statement of principle as to the burden of proof equated negativing “the reasonable possibility that the fatal act was done in self-defence” with removal of “any reasonable doubt that the fatal act was not done in self-defence”.\textsuperscript{157}

By incorporating the common law onus of proof from Viro and Zecevic into the New South Wales self-defence law in homicide cases (ss 418 & 419), the two questions for the jury become:

1. is there a reasonable possibility that the accused believed that his or her conduct was necessary to defend himself or herself? and,
2. if there is, is there a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or he perceived them?\textsuperscript{158}

Section 418 of the Crimes Act 1900 (NSW) provides:

418 Self-defence —when available

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

\textsuperscript{154} Viro (n 58).

\textsuperscript{155} Ibid 95 (Barwick CJ dissenting) (citations omitted). See also Zecevic (n 5) 657 (Wilson, Dawson and Toohey JJ).

\textsuperscript{156} Moore (n 11).

\textsuperscript{157} Ibid [43] (Basten JA, RA Hulme J agreeing at [94]) (emphasis in original).

\textsuperscript{158} Katarzynski (n 12) [22] (Howie J).
(2) A person carries out conduct in self defence if and only if the person believes the conduct is necessary:

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

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

Section 418(2) separates the subjective belief of the accused from the question of the reasonableness of his or her conduct. The test in s 418(2) has two limbs. The first limb is "completely" subjective. That is, once the jury understands all the personal characteristics of the accused at the time he or she carried out the conduct, the jury must consider only what the accused believed. The accused need not have had reasonable grounds for his or her belief for the self-defence actions concerned to come within the protection of the overall provision. Moreover, the statutory provisions do not require the jury to consider what a reasonable or ordinary person would have believed in the circumstances and it does not matter if the accused’s belief was mistaken, as long as it was genuinely held.

The second limb is another mixed objective/subjective test, but it separates the subjective element from the objective element. The question whether a response was

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159 Katarzynski (n 12) [23] (Howie J). See also Moore (n 11) [47] (Basten JA, RA Hulme J agreeing at [122]).

160 Katarzynski (n 12) [23] (Howie J).

161 Ibid [22] (Howie J); Oblach (n 151) 84 [51] (Spigelman CJ, Sully J agreeing at 89 [83], Hulme J agreeing at 91 [95]; Moore (n 11) [27] (Basten JA, RA Hulme agreeing at [94]); Sivaraja v The Queen; Sivathas v The Queen [2017] NSWCCA 236, [122] (Meagher JA; R A Hulme and Beech-Jones JJ) (‘Sivaraja and Sivathas’).

162 Katarzynski (n 12) [24] (Howie J).
reasonable requires an “entirely” objective assessment of the proportionality of the accused’s response to the circumstances which the accused subjectively believed that he or she was facing.\textsuperscript{163} In other words, it requires that the accused’s response be reasonable in the circumstances as he or she perceived them to be, but does not require that the accused’s perception of the circumstances be reasonable.\textsuperscript{164}

In \textit{R v Katarzynski} (‘Katarzynski’)\textsuperscript{165} Howie J explained the test as follows:

The issue as to the reasonableness of the accused’s response is objective in so far as the jury is not concerned with what the accused believed was necessary to respond to the circumstances as he or she perceived them to be. The current provision is not concerned with whether the accused’s belief as to what was the necessary response was a reasonable one or whether he or she had reasonable grounds for that belief. This is where the current provisions are in contrast to the position at common law: the accused need not have reasonable grounds for his or her belief that it was necessary to act in the way he or she did in order to defend himself or herself. It is sufficient if the accused genuinely holds that belief.\textsuperscript{166}

The jury is required to assess whether the accused’s response was reasonable, not what the response of the ordinary or reasonable person would be.\textsuperscript{167} That is why Howie J identified relevant factors to be considered by the jury when assessing the reasonableness of the accused’s response. Those factors include, depending upon the circumstances of each case, “some of” the personal attributes of the accused such as gender, age, state of health; and “some of” the surrounding physical circumstances.\textsuperscript{168}

\textsuperscript{163} \textit{Oblach} (n 151) 84 [51] (Spigelman CJ, Sully J agreeing at 89 [83], Hulme J agreeing at 91 [95]).

\textsuperscript{164} \textit{Moore} (n 11) [27] (Basten JA, RA Hulme J agreeing at [94]).

\textsuperscript{165} \textit{Katarzynski} (n 12) (Howie J).

\textsuperscript{166} Ibid [24] (Howie J).

\textsuperscript{167} Ibid [25] (Howie J).

\textsuperscript{168} Ibid.
The idea of excessive self-defence is contained in s 421. It will be remembered that excessive self-defence had been confirmed by Howe,169 disapproved by Palmer,170 reinstated by Viro,171 and disapproved again by Zecevic.172 It has been labelled manslaughter by excessive self-defence and it is now recognised as a form of voluntary manslaughter.173 Once again, that idea is that in a case of proven self-defence, a verdict of manslaughter should be available if the jury concluded that the self-defensive force used was excessive.174 It will also be remembered that in such cases, the accused does not deny any element of the offence but relies on self-defence to deny at least part of the responsibility or liability for committing that offence.175

The “emphasis” in s 421 on the response of an accused person “in the circumstances as he or she perceives them” (subs 421(1)(b)) requires the jury to undertake ‘an evaluation of the degree to which the response exceeds that which would be a

169 R v Howe (1958) 100 CLR 448 (‘Howe’).

170 Palmer v The Queen [1971] 1 All ER 1077; AC 814 (‘Palmer’).

171 Viro (n 58).

172 Zecevic (n 5).


174 Section 421 Crimes Act 1900 (NSW). See Moore (n 11) [29] (Basten JA, RA Hulme J agreeing at [94]). Basten J went on to say:

The administration of justice would be much improved if the following proposition from Palmer v The Queen accurately described the legal principles at stake:

In their Lordships’ view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances: Moore (n 11) at [30] (citations omitted).

175 The Guide (n 10) 337.
reasonable response if those circumstances existed'. That analysis is ‘inherently both complex and evaluative’ especially in a family violence case.

Section 421 does not approach the idea of excessive self-defence in the same way as the High Court did in Viro and Zecevic. But perhaps that is not surprising since the High Court was not involved in a statutory drafting exercise when it decided those cases. The New South Wales drafters have chosen to include excessive self defence in their statutory treatment – whereas others have either not done so (despite jury pressure for centuries) or have treated it differently. In chapter five and in chapter six I discuss how community expectations of self-defence in homicide has been treated by the law and I suggest how they should be treated by the law.

The “onus of proof” in all cases of self-defence in New South Wales is set out in s 419. In criminal cases, the “ultimate onus of proof” never leaves the prosecution. The defence succeeds if it raises a reasonable doubt. That remains true in cases where statutes recognise defences like provocation, intoxication and self-defence which complicate jury cases at common law. Section 419 recognises this enduring proof principle in modern self-defence cases in New South Wales. Under s 419, the prosecution may prove its case beyond reasonable doubt by showing either that:

(a) the accused did not believe at the time of the act that it was necessary to do what he or she did in order to defend himself or herself; or

(b) the accused’s act was not a reasonable response in the circumstances as he or she perceived them (emphasis in original).

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177 Silva v The Queen [2016] NSWCCA 284, [93] (McCallum J).

178 Viro (n 58).

179 Zecevic (n 5).

The statutory self-defence formulas which have been developed in New South Wales in ss 418 and 421 of the *Crimes Act 1900* remain difficult to understand and apply and need to be simplified. They have not resolved the difficulties which were highlighted between 1958 and 1987 in the decisions of Howe, Palmer, Viro and Zecevic discussed in chapter three.

The danger of creating complex formulas is that trial judges find them difficult to explain and juries also find them difficult to understand, accept and apply. As shown in chapter two, English history in criminal jury cases suggests that juries did not trust the king to grant pardons in self-defence cases. To avoid the risk that the king would not grant a pardon, juries manipulated the evidence to protect persons accused of homicide from the death penalty, if the jury considered the accused had acted in self-defence. Australian criminal law history has not been immune from difficulty in homicide cases where self-defence is claimed. As is shown in chapter 5, history and research in the United States and in Australia suggests that complex self-defence formulas may result in perverse verdicts and unjust decisions.

**Conclusion to chapter four**

For the last 60 years, judges in Australia have struggled to explain self-defence in murder cases in a way that helps juries to make their decisions. The development of the idea of self-defence in the common law between 1950 and 1990 presents as judicial innovation responding to jury questions about the fairness of convicting someone when there was an element of self-defence involved in the facts, or when the self-defence pled was more than was necessary to deal with the violence that drew out the self-defensive conduct. In that sense, jury questions in the 20th and 21st centuries present as a modern reiteration of jury concerns that the king would not pardon people who were legitimately defending themselves from violence before evidence became public and subject to judicial control after the 17th century.

For better or worse, juries have added a democratic community element to the law of self-defence since the beginning. In early times, juries used their unreviewable

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181 See generally Ian Barker QC, *Sorely tried*:
power to prevent the king executing people they thought were innocent or less responsible than those who had committed premeditated murder. When the king's law did not differentiate, juries did. The idea of excessive self-defence presents as a modern jury response to a law that is not nuanced enough. Because appellate courts in Australia and England have been reluctant to interfere with jury verdicts, and because it is no part of the judicial function under a Westminster system of government to create precise legislative tests, neither the High Court of Australia nor the Privy Council in England have been able to adjust homicide self-defence law in a manner that has respected and accommodated enduring jury concern. At a most basic level, appellate courts simply apply existing law. When the Palmer and Zecevic cases focused this jury discontent with binary acquit or convict, black and white results in self-defence law, it was appropriate that legislatures step in since they have the power to make precise amendments to the criminal law in ways that appellate courts cannot. But the Commonwealth legislature does not have the constitutional power to make criminal laws that are binding in every state and territory. In chapter five, I therefore assess the utility, wisdom and practicality of the state legislative responses which I set out in chapter four. That analysis will provide a foundation for further reform recommendations that I will make in chapter six.

Democracy and trial by jury in New South Wales (Series: Francis Forbes Lectures - 2002) on the history of trial by jury in NSW and on the question of whether we should keep the jury or not. It is beyond the scope of this thesis to answer this question.
CHAPTER FIVE

ANALYSIS OF THE NEW SOUTH WALES SELF-DEFENCE PROVISIONS

Introduction

This chapter analyses the effectiveness of the New South Wales legislative responses to the uncertainties in Australian self-defence law occasioned by the lack of any unanimous High Court decision in this self-defence homicide space.

While the “facts” of self-defence cases may differ, there are recurring areas of concern which are incompatible with the New South Wales legislative responses and justify the reformulation of a simple test to assist juries in deciding self-defence cases. As Lord Scarman said, ‘[j]uries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion, but are expected to exercise practical common sense.’¹ For Justice Oliver Wendell Homes it is the lawyers’ training, not juries, which ‘is a training in logic’.² In Zecevic, Deane J said:

The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of the school child who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.³

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¹ *R v Hancock* [1986] AC 455; 1 All E.R. 641, 651 (Lord Scarman) (‘Hancock’).


³ *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 675 (Deane J) (‘Zecevic’).
This chapter has two parts. In Part One I recount how the history explains jury behaviour and whether juries are still behaving in the same underlying way. I make some observations about how the “law and order” mandate to politicians has directed the formulation of harsh legislation that does not accord with jury instinct, and why judge’s directions should be kept to a minimum.

In Part Two I analyse the statutory self-defence provisions in New South Wales. I show why we have the current law, ss 418-421 of the Crimes Act 1900 (NSW). I briefly recount the road from self-defence at common law to the current “codified” self-defence provisions. I show that legislative amendments in New South Wales post Zecevic have not improved clarity. If anything, those amendments have compounded the complexity. I explain how complicated these sections are and why the sections do not respond to or accommodate the jury common sense instinct. I discuss some of the recurring issues which arise in self-defence cases in connection with ss 418 and 421 and how they operate in practice. I state why these sections need to be simplified. I discuss the complex interaction between s 418 and s 421.

My conclusion summarises and leads into my recommendation in chapter six.

Part One: The jury and the politicians: A brief overview

The jury has been entrusted with the adjudication of criminal guilt in the most serious cases since the late 12th century. For many generations the king tried to make juries make decisions that went against their conscience, but they pushed back. They continued to push back when the English Parliament allied with the king to pass many laws that told them how to decide these serious cases. Their push back may be analogous to the more well-known struggle for judicial independence. Both judge and jury need to be able to make their decisions without the intervention or meddling of other forces. Jury push back in historical times was hailed as courageous and saw the jury celebrated as the greatest bulwark of liberty. But even when the judges unexpectedly gained the ability to control juries as the result of legislation during the

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4 The scope of this thesis is directed to the defence of the person as distinct from defence of others and property.
reign of Bloody Mary, the public still retained their confidence in the jury as a
democratic institution. While jury push back is not as obvious today as it was before
the 17th century, common sense jury decisions and the occasional aberrant verdict still
exert pressure on the courts and modern parliaments to bring the law into line with jury
common sense. The jury verdicts in the cases of Katharine Abdallah and Manisha
Patel are cases in point. I now briefly discuss those two cases.

5.1 The case(s) of Katherine Abdallah

Katherine Abdallah “Katherine” and her cousin Suzie Sarkis (“Suzie”) had been living
together at a townhouse owned by Katherine. They had a physical fight after Suzie
smashed a vase on the floor. During the fight, Katherine struck Suzie on the forehead
with a four pack of V-drink and she ‘took two large knives from a knife block’ in the
kitchen and stabbed her. There was also evidence of earlier hostility after Katherine
discovered that while unlicensed, Suzie had taken her Mercedes for a drive. On that
occaision, after the police told Katherine what happened, Katherine had responded to
the police: ‘She’s going to be in serious trouble when I get her. You guys will probably
be called back’.

Katherine was charged with murdering Suzie under s (18)(1)(a) of the Crimes Act 1900
(NSW). Katherine pleaded self-defence. The jury returned a verdict of not guilty of

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5 R v Abdallah [2015] NSWSC 531 (‘Abdallah First Sentencing Hearing’); Abdallah v The
Queen [2016] NSWCCA 275 (‘Abdallah Appeal’); R v Katherine Abdallah (No 6) [2018]
NSWSC 729 (‘Abdallah Second Sentencing Hearing’).

6 Patel v The Queen [2017] NSWCCA 121 (‘Patel First Appeal’); R v Patel (No 3) [2018]
NSWSC 952 (‘Patel Sentencing Hearing’); Patel v The Queen [2019] NSWCCA 170 (‘Patel
Second Appeal’).

7 Abdallah Appeal (n 5) [1]-[14] (Hoeben CJ at CL dissenting).

8 Ibid [13].

9 Ibid.

10 Abdallah Second Sentencing Hearing (n 5) [17] (Lonergan J). Section 18 of the Crimes Act
1900 (NSW) provides:

18 Murder and manslaughter defined
(1)
(a) Murder shall be taken to have been committed where the act of the accused, or thing by
him or her omitted to be done, causing the death charged, was done or omitted with reckless
murder but guilty of manslaughter. Katherine was sentenced to imprisonment for 11 years. In his jury directions, the judge “was not satisfied” that Katherine intended to kill Suzie when she murdered her, but he “was satisfied” that she “intended to cause her really serious injuries (grievous bodily harm) when she stabbed her”. He accepted that Katherine believed that her self-defence conduct was necessary, but he found that the stabbing which had caused Suzie’s death was an “unreasonable response” to the circumstances as Katherine perceived them.

Katherine appealed to the New South Wales Court of Criminal Appeal against her conviction and sentence on the basis that the judge had given the jury incorrect self-defence directions. Button J with whom Campbell J agreed, allowed the appeal against conviction, quashed the conviction for manslaughter, and ordered a new trial on a count of manslaughter. Katherine’s second trial was for manslaughter pursuant to s 18(1)(b) of the Crimes Act 1900 (NSW). The second trial judge described the

indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

11 Abdallah First Sentencing Hearing (n 5) [44] (Adamson J); Abdallah Appeal (n 5) [2] (Hoeben CJ at CL dissenting dissenting).

12 Abdallah First Sentencing Hearing (no 5) [66] (Adamson J).

13 Ibid [38], [40], [55] (Adamson J). But see Abdallah Appeal where Hoeben CJ said:

The applicant was sentenced on the basis that she possessed the requisite intent for murder, believed that her conduct was necessary but that the act causing death was an unreasonable response to the perceived circumstances (i.e. excessive self-defence).

Abdallah Appeal (n 5) [4] (Hoeben CJ at CL dissenting).

14 Abdallah Appeal (n 5).

15 Ibid [119] (Button J, Campbell J agreeing at [86]).

16 Abdallah Second Sentencing Hearing (n 5) [17] (Lonergan J). See s 18 of the Crimes Act 1900 (NSW) (n 10) above.
offence charged under this subsection as a punishable homicide that did not amount to murder.\textsuperscript{17} Katherine pleaded self-defence. The jury rejected that defence\textsuperscript{18} and convicted her of manslaughter.\textsuperscript{19} Katherine was sentenced to 9 years imprisonment with a non-parole period of 6 years and 9 months.\textsuperscript{20}

5.2 The case(s) of Manisha Patel

Manisha Patel (“Patel”) met Niraj Dave (“Niraj”) through a website used by Indian nationals seeking prospective marriage partners. They formed an intimate relationship but they both agreed not to get married. Two years later Niraj’s parents arranged for him to meet Purvi Joshi (“Purvi”) in India as a prospective wife. Niraj travelled to India to meet her. Patel travelled with Niraj to India on the same flights but they had no contact with each other once in India.\textsuperscript{21} On their return journey, Niraj and Patel slept together at a stopover hotel, Patel got pregnant and terminated the pregnancy. Some months later Purvi arrived from India to live with Niraj. Patel went to Niraj’s flat, attacked Purvi and she died.\textsuperscript{22}

Patel was charged with murdering Purvi and Patel pleaded self-defence. After trial by jury Patel was convicted of murder. She appealed her conviction on the basis that the judge had given the jury an incorrect self-defence direction.\textsuperscript{23} Patel’s appeal was

\textsuperscript{17} Abdallah Second Sentencing Hearing (n 5) [17] (Lonergan J).

\textsuperscript{18} Ibid [18]-[19] (Lonergan J).

\textsuperscript{19} Ibid [1] (Lonergan J). Katherine was sentenced to a total term of imprisonment of 9 years with a non-parole period of 6 years and 9 months: at [77] (Lonergan J).

\textsuperscript{20} Ibid [77] (Lonergan J).

\textsuperscript{21} Patel First Appeal (n 6) [1]-[6] (Bathurst CJ, Hoeben CJ at CL and McCallum J). It is to be noted that the facts as were stated by the Criminal Court of Appeal in Patel First Appeal were brief. However, the facts as described by sentencing judge of the Supreme Court were detailed and occupied about 36 paragraphs. See Patel Sentencing Hearing (n 6) [13]-[49] (Lonergan). The facts summarised here were taken from both of these cases.

\textsuperscript{22} Patel First Appeal (n 6) [1]-[6] (Bathurst CJ, Hoeben CJ at CL and McCallum J).

\textsuperscript{23} Ibid [1]; Patel Sentencing Hearing (n 6) [2] (Lonergan).
allowed, and a new murder trial ordered. The new (second) jury returned a verdict of not guilty of murder but guilty of manslaughter based on excessive self-defence.

On some views Abdallah and Patel present as cases of premeditated murder. Nevertheless, the two juries in Abdallah and the second jury in Patel, would not accept that they had to find these women guilty of murder. Three of the four juries that considered these cases would not convict either defendant of premeditated murder. Both cases present as examples of modern juries using existing tools (self-defence findings in this case) to qualify the likely punishment following premeditated homicide convictions. In both cases we can infer that the juries thought a murder conviction would result in too harsh a punishment. Both juries improvised and used the excessive self-defence provisions in the statute as a way to reduce the penalty that would apply if the accused had been convicted of premeditated murder.

As explained in chapter two, perverse jury verdicts were a factor in the introduction of manslaughter as an option in homicide cases. It was also arguably perverse jury verdicts that saw the High Court develop the idea of excessive self-defence at common law. Those judges recognised ongoing jury concern about all-or-nothing results in murder cases where there were mitigating circumstances, but it would not be right to acquit. The Privy Council did not agree, but the High Court persisted. The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General attempted to settle the disagreement between the Privy Council and the

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24 Patel was tried again for the murder of Purvi but she did not give evidence at her second trial. The transcript of her evidence from the earlier trial was tendered and read aloud to the jury. Patel Second Appeal (n 6) [10] (Harrison J, Simpson AJA agreeing at [1], N Adamson J agreeing at [63]); Patel Sentencing Hearing (n 6) [5] (Lonergan).

25 Patel Sentencing Hearing (n 6) [3] (Lonergan); Patel Second Appeal (n 6) [2] (Harrison J, Simpson AJA agreeing at [1], N Adamson J agreeing at [63]). Patel was sentenced to imprisonment for 9 years and 4 months with a non-parole period of 7 years. Patel Sentencing Hearing (n 6) [118] (Lonergan); Patel Second Appeal (n 6) [2] (Harrison J). Patel sought leave to appeal the severity of her sentence. Leave to appeal was granted but her appeal was dismissed. See Patel Second Appeal (n 6).

26 Patel was convicted of murder after her first jury trial. The Court of Appeal ordered a new trial after she appealed her conviction on the basis that the judge had given the jury an incorrect self-defence direction. Patel First Appeal (n 6) [1] (Bathurst CJ, Hoeben CJ at CL and McCallum J); Patel Sentencing Hearing (n 6) [2] (Lonergan).

High Court with s 10.4 of the *Criminal Code*. Their proposals were rejected by the New South Wales legislature. The New South Wales legislature saw the wisdom of what the High Court had been trying to achieve with decisions in the occasional murder cases involving self-defence claims that reached them. The New South Wales legislature therefore crafted a new self-defence statute that allowed manslaughter convictions when the jury decided the self-defence action taken was excessive but where the intention to commit premeditated murder could not be proven to the satisfaction of the jury. But the formulas they wrote into their statute were too complicated for judges to explain to juries. In part 2, I will explain why those formulas have proven difficult and even unworkable.

Like kings before them, modern ministers of justice seem to want murder convictions for every dead body in an age when courts are required by media representations of public opinion to sentence murderers to the most serious penalties available in law. Our democratic history has given the jury the task of weighing the evidence and judging the facts, and to make these decisions according to their own best judgment. Nevertheless, the political desire for murder convictions has directed the formulation of complex legislation that does not always accord with the jury’s common-sense approach to choosing a verdict, and indirectly, a sentence that fits the crime. There is a peculiar disconnect between media representations of public opinion that call for murder convictions for every homicide and the decisions made by juries as the actual representatives of the public who decide these cases. The executive’s concern seems to be that a jury verdict less than murder will not go down well in the media and may harm re-election chances. History also suggests that judicial disquiet with the disconnect between jury decisions and the law, also leads to legislative reform. An example is that the appellate judges in the *Abdallah* case appear to have found it hard to accept that the jury chose not to convict Katherine Abdallah of murder when the trial judge seemed to think that should have been the result according to the law and facts.

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As we saw in chapter two, in historical times, the reason juries found mitigating
defences was to avoid the risk that a judge might sentence the accused to execution
or life imprisonment when those sentences did not accord with jury common-sense.
While the risk of capital punishment has gone, the Abdallah and Patel cases suggest
that modern juries in New South Wales are using contemporary self-defence
provisions to mitigate what they perceive to be the harshness of the modern
sentencing regimes which have been provided by politicians. This chapter argues that
the current amendments to New South Wales self-defence law are too complex and
are resulting in retrials that could be avoided if the law was simplified. If we are to
persist with criminal jury trials we need to trust juries with the task of determining
whether the accused has committed murder or manslaughter or is entitled to an
acquittal. It is submitted that part of the reason why the existing legislation is so
complicated is because it is too prescriptive. As in historical times, it suggests that the
legislature is trying to tell the jury what its verdict should be, which does not accord
with the principle that all those vested with criminal decision-making power in our
system of criminal justice should exercise that power independently. 29

The law should be simple enough so that the jury cannot misunderstand it,30 and can
make an independent decision. In Kable v Director of Public Prosecutions (NSW)
(‘Kable’) 31 the High Court resisted the idea that the legislature should be able to direct
judges what their verdicts should be in criminal cases. 32 For McHugh J ‘[c]ourts
29 The question of whether we should abolish criminal jury trials is beyond the scope of this
thesis.

30 The question of how we should do that will be the subject of the recommendations made in
chapter six.

31 (1996) 189 CLR 51 (‘Kable High Court Appeal’). Kable High Court Appeal was ‘widely and
rightly seen as a pivotal event in the emergence of the public interest strategy of pursuing
constitutional validity to statutes which are alleged to effect over-criminalisation in one way or
another’. Luke McNamara and Julia Quilter, ‘High Court Constitutional Challenges to Criminal
and Quilter has argued that the result of Kable High Court Appeal has led to a number of
further challenges to the validity of statutes because they interfered with judicial
independence. See McNamara and Quilter: 1047-1082.

32 It suffices to summarise some aspects of this case.

In 1989 Gregory Wayne Kable (‘Kable”) murdered his wife by stabbing her to death in the
house where she lived with the two young children of the marriage. Mr Kable was charged
with murder but the Crown chose to accept a plea to manslaughter based on diminished
exercising federal jurisdiction must be perceived to be free from legislative or executive interference.\textsuperscript{33} He was also of the view that the Legislation at issue in that case made the New South Wales Supreme Court:

\begin{quote}
responsibility. \textit{Kable v Director of Public Prosecutions} (1995) 36 NSWLR 374, 380 (Mahoney JA, Clarke JA agreeing at 395 E, Sheller JA agreeing at 395 G, 396 A) (‘\textit{Kable Appeal}’).
\end{quote}

On 2 December 1994, the New South Wales Parliament passed the \textit{Community Protection Act 1994} (NSW) ("\textit{the Act}") which conferred jurisdiction upon the Supreme Court of New South Wales to make an order for the preventive detention of the appellant after his sentence for manslaughter ended. The legislature enacted this “extraordinary” legislation only for the detention of Kable, ‘requiring the [New South Wales] Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law [wa]s alleged and where there ha[d] been no determination of guilt’. \textit{Kable High Court Appeal} (n 31) 98 (Toohey J).

Section (3)(a) of \textit{the Act} permitted ‘the preventive detention ... of Gregory Wayne Kable’ upon application by the Director of Public Prosecutions under s (5)(1)(a) of \textit{the Act}, provided the Supreme Court of New South Wales was satisfied, on the balance of probabilities (s 15), that Kable was likely to commit a ‘serious act of violence’ (s (5)(1)(a)) and that he posed a continuing threat to the community (s (5)(1)(b)). For a brief summary of the "central provisions" of the \textit{Community Protection Act 1994} (NSW) see \textit{Kable High Court Appeal} (n 31) 119-121 (McHugh J).

On 23 February 1995, Levine J of the Supreme Court of New South Wales ordered that Mr Kable “be detained” in custody for the maximum period of six months (s 5(2)). No criminal trial took place before Levine J. Levine J made the order under s 9 of the \textit{Act}. (\textit{Kable Appeal} above 377 (Mahoney JA, Clarke JA agreeing at 395 E, Sheller JA agreeing at 395 G, 396 A)). Kable appealed unsuccessfully to the New South Wales Court of Appeal. See \textit{Kable Appeal}.

Kable was then granted special leave to appeal to the High Court. The question before the High Court ‘was whether the \textit{Community Protection Act 1994} (NSW) was a valid law of the Parliament of New South Wales’. \textit{Kable High Court Appeal} (n 31) 108 (McHugh J).

Toohey, Gaudron, McHugh and Gummow JJ, upheld Kable’s appeal, and held that the \textit{Community Protection Act 1994} (NSW) was invalid. Brennan CJ and Dawson J dissented. See \textit{Kable High Court Appeal} (n 31).

Notwithstanding the High Court judgment in 1996 finding the \textit{Community Protection Act 1994} (NSW) (‘\textit{the Act}’) invalid, the \textit{Act} was repealed on 8 July 2015 by Sch 6 to the \textit{Statute Law (Miscellaneous Provisions) Act 2015} (NSW) No 15.

It is beyond the scope of this thesis to analyse the constitutional validity of a legislature enacting a statute that only applies to one person. It suffices to note McHugh J’s observation that the purpose of enacting this legislation ‘[was] to detain the appellant not for what he has done but for what the executive government of the State and its Parliament fear that he might do’. \textit{Kable High Court Appeal} (n 31) 120 (McHugh J).

\textsuperscript{33} \textit{Kable High Court Appeal} (n 31) 116 (McHugh J).
The instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person.  

Justice Gaudron said:

The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. Particularly is that so in relation to criminal proceedings which involve the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences.

These principles were reiterated by Justice Gummow when he cited with approval a dissenting judgement in a US case. The relevant part of that judgment reads:

Most critically, public confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. ... The need to preserve judicial integrity is more than just a matter of judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably [sic] and efficiently. Litigants and our citizenry in general must also be satisfied.

Kable is authority for the proposition that:

Since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially

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34 Ibid 122 (McHugh J). See also Fardon v Attorney-General (Qld) (2004) 223 CLR 575, 596 (McHugh J) (‘Fardon’).

35 Kable High Court Appeal (n 31) 107 (Gaudron J).

36 The US case was ‘Hobson v Hansen (1967) 265 F Supp 902 at 923, 931, per J S Wright J, dissenting.’ Kable High Court Appeal (n 31) 132 n 260 (Gummow J). That decision ‘was later referred to favourably by the Court of Appeals for the Eleventh Circuit in In re Application of the President’s Commission on Organized Crime and by Kozinski J in giving the judgment of the Court of Appeals for the Ninth Circuit in Gubiensio-Ortiz v Kanahele’: at 132 (Gummow J) (citations omitted).

37 Kable High Court Appeal (n 31) 132-3 (Gummow J).
impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.\textsuperscript{38}

In \textit{Wainohu v New South Wales}, French CJ and Kiefel J explained what the term "institutional integrity" means. They said:

The term "institutional integrity", applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court’s independence and its impartiality.\textsuperscript{39}

As the High Court said, independence is removed when the power to make independent decisions is removed or diluted.

Looking back to the year 1700, we find that preserving the judicial integrity and maintaining the independence of the courts is not a new principle. The purpose of the \textit{Act of Settlement} in 1700 was to “preserve judicial integrity” by preventing the executive from leaning on judges.\textsuperscript{40} It is submitted that the jury are as entitled to their unfettered “adjudicative independence” as judges. If they are to decide criminal cases, they need to judge by themselves and without being told what to do in so much detail that their discretion is taken away from them. Lawyers and judges should understand this. It is what all the argument about judicial independence under our \textit{Constitution}\textsuperscript{41} is all about. Though the law of evidence has been called the law of jury control, the

\begin{footnotesize}
\begin{enumerate}
\item See the English Statute of 12 & 13 Will 3 c. 2. § 2. known as the \textit{Act of Settlement 1700}. \textit{Statutes of the Realm}: Volume 7, 636,7. It is beyond the scope of this thesis to trace the history of the \textit{Act of Settlement 1700} and the various efforts to protect judges from executive direction. But concerning the developing perception of the need to protect the judiciary from executive direction, see generally Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence' (2001) 1 Oxford \textit{U Commw. L. J.} 253; Douglas E Edlin, 'The Constitutional Logic of the Common Law' (2020) 53 \textit{Vand. J. Transnat’l L.} 79.
\item \textit{Commonwealth of Australia Constitution Act 1900}.
\end{enumerate}
\end{footnotesize}
proponents of that view did not suggest that legislative control of juries should extend to directing their verdicts.\textsuperscript{42}

The foregoing discussion takes us to the question of what exactly jury independence means.

5.3 The essence of jury independence

The argument here is that independence in criminal decision making belongs to juries as much as to judges.\textsuperscript{43} That is, because the idea of jury independence is a fundamental aspect of a jury trial. What should the jury be independent from? If we are to persist with criminal jury trial as an institution in our criminal justice system, juries are as entitled to complete autonomy in deciding the guilt or innocence of the accused as a judge in a judge-alone trial.\textsuperscript{44} The job of the jury is to judge. Let us


\textsuperscript{44} Section 133 of Criminal Procedure Act 1986 (NSW) provides:

133 Verdict of single Judge

(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.
simplify the law and let juries judge instead of fettering their decision-making with complicated legal formulas that they find difficult to understand.

Ian Barker has stated that democracy in New South Wales emerged as ‘a battle for [the] right to be tried by a “petty” jury’.45 Sir Barwick says ‘“[d]emocracy”, a frequently misused, describes a system of government under which a community manages and controls the whole of its affairs without exception.’46 The jury system is arguably an essential feature of a real democracy.47 The people of Australia as represented by juries in our system of criminal justice, are ‘the true source of sovereignty’.48 The common sense of lay jurors is the embodiment of community standards and ‘ensures that certain standards applied in the courts reflect community standards’.49 Juries thus ‘ensure … the right of an accused person to a fair trial’.50 Contrary to Sir James Stephens, Evatt J argued that the jury is ‘just as capable of performing judicial and political functions as those who from their infancy have had the advantages of leisure, education, and wealth’.51

If democracy is enhanced by independent decision making in criminal trials, then jury independence should be as important as “judicial independence” in a criminal trial decided by a judge alone. But what does “judicial independence” mean?

5.4 A brief history and justification for judicial independence in Australia

The Doctrine of Judicial Independence can be traced back to the Act of Settlement 1700 (UK). In Wilson v Minister for Aboriginal & Torres Strait Islander Affairs (‘Hindmarsh Island Bridge case’) the majority said ‘[t]he inherited tradition of judicial


46 Barwick (n 43) 21 (emphasis in original).


49 Barker (n 45) 12.


51 Evatt (n 47) 67.
independence is rooted in and manifested by the *Act of Settlement* 1700*.\(^{52}\) In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (*Trade Practices Tribunal*),\(^{53}\) Windeyer J said that:

> it is well-recognized dogma for us that the judicial power is to be exercised separately from the exercise of the other two powers, *and by different people*. This is a necessity of our written constitutional law as well as a compelling part of our inheritance of the British tradition of the independence of the judges.\(^{54}\)

The source of judicial independence in Australia is Chapter III of the *Australian Constitution*.\(^{55}\) However, in Australia ‘there is no single ideal model of judicial independence’.\(^{56}\) It suffices to say, however, that the idea behind judicial independence in Australia is that the members of the judiciary should have ‘completely separate authority and function from all other participants in the justice system’.\(^{57}\) As Dixon CJ said, the “core” purpose of judicial independence is that:

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\(^{52}\) Wilson *v Minister for Aboriginal & Torres Strait Islander Affairs* (*Hindmarsh Island Bridge Case*) (1996) 189 CLR 1, 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) citing, the English Statute of ‘12 & 13 Will 3 c 2’.

\(^{53}\) (1970) 123 CLR 361.

\(^{54}\) *Trade Practices Tribunal* (n 53) 12 (Windeyer J) (emphasis in original). Cited with the Majority approval in (*Hindmarsh Island Bridge Case*) (n 52) 12.

\(^{55}\) Nevertheless, in *Forge v Australian Securities and Investments Commission* (*Forge*) Gleeson CJ said:

> If Ch III of the Constitution were said to establish the Australian standard for judicial independence then two embarrassing considerations would arise: first, the standard altered in 1977; secondly, the State Supreme Courts and other State courts upon which federal jurisdiction has been conferred did not comply with the standard at the time of Federation, and have never done so since.


\(^{56}\) Ibid 65 [36] (Gleeson CJ). It is beyond the scope of this thesis to discuss or analyse the Doctrine of Judicial Independence under the *Australian Constitution* and the different arrangements that bear upon judicial independence. See generally *Forge* (n 55).

No outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.58

In the same vein, the majority in the Hindmarsh Bridge case cited with approval the following passage from Mistretta v United States:59

The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.60

Looking back at the year 1700 we find that the “judicial independence” “rooted and manifested” in the Act of Settlement 1700 was intended to ensure ‘the further Limitation of the Crown and [to] better secur[e] the Rights and Liberties of the Subject’.61 The High Court cases discussed above also show that the aim of judicial independence is to ensure that judges make their own decisions without any interference from outsiders, governmental or otherwise. It can be inferred that the foundational aim of judicial “independence” continues to be the ’guarantee’ and ‘protection of the individual liberty of the citizen’.62 The question that follows is: do we not expect this same virtue from the juries we appoint to decide our criminal cases?

The judicial independence to which we aspire is set out in the Criminal Procedure Act 1986 (NSW). Section 133 states that the judge has “complete” autonomy in deciding the guilt or innocence of the accused.63 The judge is said to be the only ‘independent

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60 Hindmarsh Island Bridge case (n 52) 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).


62 Hindmarsh Island Bridge case (n 52) 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

63 Section 133 of Criminal Procedure Act 1986 (NSW) provides:
arbiter\textsuperscript{64} in a judge-alone criminal trial. While jury independence is not similarly stated expressly, there is an implied common law expectation (symbolically restated in the \textit{Australian Constitution}) that our juries must be similarly independent arbiter and are expected to exercise complete autonomy when they decide the guilt or innocence of the accused. If that is so, then our criminal law needs to be expressed plainly and without overbearing legislative guidance so that juries can democratically and independently adjudicate guilt or innocence in criminal trials. Excessive legislative direction arguably compromises jury independence in the same way in which it has been held to compromise judicial independence when directed at judges.\textsuperscript{65}

If judges, politicians, and lawyers disagree what a law means and how it should be applied, it is unreasonable to expect lay jurors to understand and apply it. For the reasons identified above, it is also arguable that unnecessarily complex criminal law compromises jury independence. Nor is it appropriate that judicial explanations of what criminal law means should be so intrusive that they reach into the jury room and tell the jury what to decide. In the context of this thesis, the concept of self-defence is simple enough that lay people can understand it. It is submitted that the legislative task is to express that concept simply enough that any judge can explain it with ease but leave the factual decision making to the jury.

\begin{quote}
\textit{133 Verdict of single Judge}

(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.
\end{quote}


\textsuperscript{65} See \textit{Kable High Court Appeal} (n 31). The exposition of this principle and its application in jury cases is beyond the scope of this thesis.
5.5 The importance of simple judicial instructions

The need for lay jurors to understand judicial explanations of the law is well explained by two American empirical studies jointly undertaken by Steel and Thornburg. Their studies “tested” the extent to which jurors understand judges’ instructions in criminal and civil cases. They also surveyed people who actually served as jurors and reached a verdict. These two studies showed the impact of jury confusion on jury verdicts and how overly complex instructions confuse and interfere with jury independence. The Steele and Thornburg studies also noted that jury ‘verdict[s] based on misunderstood instructions will stand’. They observed that jury comprehension of judges’ instructions is inadequate and that improvements to jury instructions would improve jury comprehension of those instructions. They recommended that if juror comprehension of the instructions was “an important factor” on appeal, judges should “make the effort” to write “comprehensible” instructions. They also recommended that judges be permitted ‘to comment on the evidence and to inform the jury on the effect of its answers’, and that ‘juror comprehension would be improved if each juror were given a written copy of the judge’s instructions to take into the jury room’.

Those findings confirm that judges need to provide juries with instructions that simply and accurately explain the law. Legislatures need to make sure that criminal laws are simple enough that judges can explain them in terms that any jury can understand. In 2018 in a “Banco Court Lecture”, High Court Justice Virginia Bell said that complex law makes it difficult for trial judges to explain that law to juries. She said that ‘the

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67 Ibid 78.

68 Ibid.

69 Ibid 83.

70 Ibid 108.

71 Ibid 109.

72 Ibid.

73 Virginia Bell AC (Justice of the High Court of Australia), Jury Directions: the Struggle for Simplicity and Clarity (Banco Court Lecture Supreme Court of Queensland, 20 September 2018) 1.
directions of law that judges were required to give the jury had become excessively long and complex. She also observed that the complexity of the criminal law ‘reflect[ed] a tendency on the part of appellate judges to over-intellectualise the criminal law … the intended audience had become the appellate court and not the jury’.

The difficulties that jurors face in self-defence trials in England is also applicable in Australia. The English research demonstrated that out of 797 jurors, only one third were able to fully understand the law of self-defence. When jurors misunderstand judicial explanations of homicide law and self-defence, there is a risk of serious consequences and the miscarriage of justice. Those consequences were demonstrated in *Sellars v. United States* (*Sellars*). Instead of acquiting the defendant in that case, the jury found him guilty of manslaughter because they mistakenly understood that even if the defendant had acted in self-defence, he still had to be convicted of manslaughter. The problem was compounded by the fact that

74 Ibid.

75 Ibid. In support of that proposition, Justice Bell referred to the references which were given separately, between about 2009 and 2012, to “the Law Reform Commissions of Victoria ("VLRC"), Queensland ("QLRC"), and New South Wales ("NSWLRC")", requiring each commission “to report on the directions given to juries in criminal trials.” The three commissions produced three reports. These are:


77 To illustrate the difficulties that jurors face in self-defence trials in England, citing Professor Cheryl Thomas’ research in 2010, Lord Justice Moses, quoted the results for a film used by Professor Thomas in her research to see how potential jurors would respond in a trial for a charge of an assault occasioning actual bodily harm. The accused pleaded self-defence. The judge “posed” to the jury the following two questions (which were similar to the test in s 418 of the *Crimes Act 1900* (NSW)): “did the defendant believe it was necessary to defend himself”? and, “did he use reasonable force?” Out of 797 jurors “only 31% accurately identified both questions, 48% one and 20% neither” (ibid).

78 401 A.2d 974, 980-82 (D.C. Ct. App. 1979) (Reilly CJ, Harris Associate judge, and Mack AJ dissenting) (‘Sellars’).

the trial court and the Court of Appeal refused to change the verdict even when ‘[j]urors later told the court that they had misunderstood the self defense instruction’. The majority of the Court of Appeal found no error after examining why the trial judge refused to change the verdict.

‘[A] systematic study’ of ‘successful criminal appeals across Australia’ between 5 June 2005 and 31 December 2012 undertaken by Judge Sydney Tilmouth QC of the South Australian District Court is also relevant to this consideration. Judge Tilmouth’s aim was to identify where judges had made errors when directing juries in criminal cases. He found ‘that judge induced error…[was] more common than expected’. Though judicial directions about self-defence in homicide cases ‘ha[d] long been recognised as confusing and complex for juries’, he concluded that ‘matters have not become any clearer by a succession of legislative interventions, which if anything [those legislative changes] have only served to compound the complexities involved’.

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80 Ibid 101-2. See also Sellars (n 78).

81 The Court of Appeal explained what happened. The Court of Appeal said:

The trial judge received a note from the jury foreman. It alleged that the jurors had agreed that appellant acted in self-defense, but that the verdict did not convey that agreement. The trial judge held a hearing in chambers, questioning each juror individually in the presence of the prosecutor, appellant, and defense counsel about the verdict. Three jurors reaffirmed the verdict as rendered. The foreman virtually admitted that he had changed his mind about appellant's guilt after the jury was discharged. The remaining jurors said they had believed appellant acted in self-defense and had intended the manslaughter verdict to reflect that conclusion. They apparently had misunderstood one portion of the court's charge, which read as follows:

If you find that the Government has failed to prove beyond a reasonable doubt that this defendant did not act in self-defense, in connection with the actions he took against both Epluribus Thomas and Clyde Thomas, you must find the defendant not guilty.

'The court denied relief and imposed sentence. This appeal followed.'

See Sellars (n 78).


83 Ibid 18.

84 Ibid 34.

85 Ibid, citing
That confusion should not surprise experienced criminal lawyers and judges because it has been embedded in English criminal law for a long time. But that difficulty is no reason why the New South Wales legislature cannot simplify how self-defence law is expressed in the *Crimes Act 1900* (NSW).

Historically, as has been shown in chapter two, as members of the community juries were required to decide the guilt or innocence of the accused in criminal matters according to their conscience. When kings were disappointed by jury verdicts, they enacted statutes in an effort to regulate and even direct the verdicts juries should return. Juries resisted. Modern experience suggests that juries remain inclined to resist the law when it is said to require decisions which contradict conscience. The *Abdallah* and *Patel* cases are examples. Such pressure is exerted incrementally. The fact that jury decisions do not always accord with the alleged expression of community expectations in modern media should not surprise us. Juries hear the nuances of cases and are charged with making decisions according to their conscience in individual cases rather than in view of more generalised social justice. Conscience and social justice do not always sell media copy, especially when some of the nuanced facts that influenced the jury are not reported. I will now discuss how previous efforts to amend self-defence law in New South Wales has complicated the law and made it difficult for lay juries to apply.

As explained in chapters three and four, that complication is the product of diverse judicial opinion about how self-defence law should operate. In chapter three, it was observed that the dissenting judges in *Viro* and the majority in *Zecevic* warned against complex laws that juries could not understand. In chapter four, in *Moore v The Queen*

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86 For example: Constitutions of Clarendon (1164-1176); *Statute of Marlbridge* (1267), 52 Hen. III, c. 25; *Statute of Gloucester* (1278), 6 Edw. I, c. 9; *Liberty of Subject Act* (1354), 28 Edw. III, ch 3; *Observance of Due Process of Law Act* (1386), 42 Edw. III, ch 3; The four statutes: 12 Hen. VII, C. 7 (1496), 4 Hen. VIII, C. 2 (1512), 23 Hen. VIII, C. 1, sec.1-4 (1531), and 1 Edw VI, C.12, sec. 10 (1547); *Marian bail statute* (1554-5), 1&2 Phil. & Mar. c. 13; *Marian committal statute* (1555), 2&3 Phil. & Mar. c 10; *Statute of Stabbing* (1663-4), 1 Jac. I c. 8.
Justice Basten expressed his view that the ‘administration of justice would be much improved’ if *Palmer* were understood to have ‘accurately described the legal principles at stake’. And, as is discussed below, in *Hamzy v The Queen* in the Court of Appeal, Justice Simpson confirmed the writer’s view that s 421 ‘presents difficulties, of construction’. It will also be shown in this chapter, that even though the legislative intention in enacting s 421 was to restore ‘the common law position as previously stated by the High Court in *Viro*’ despite the provisions of the *Model Criminal Code*, neither s 421 nor s 418 approach excessive self-defence in the same way as the High Court did in *Viro*. Nor can lay jurors understand or practically apply the tests set out in ss 418 and 421 when self-defence is raised in answer to a homicide charge under s 18 of the *Crimes Act 1900* (NSW).

Many High Court judges have recognised the importance of clarity and certainty in criminal law. In *Mraz v The Queen* (‘*Mraz’*), Fullagar J said that ‘every accused person is entitled to a trial in which the relevant law is correctly explained to the jury’. In *Taikato v The Queen*, the majority said that ‘[t]he operation of the criminal law should be as certain as possible.* Gleeson CJ observed that ‘in the area of criminal justice … certainty is of particular importance’. The US empirical studies by Steel

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87 *Palmer v The Queen* [1971] 1 All ER 1077; AC 814 (‘*Palmer’*).

88 *Moore v The Queen* ([2016] NSWCCA 185, [30] (Basten JA, RA Hulme J agreeing at [94]) (‘*Moore’*).

89 *Hamzy v The Queen* [2018] NSWCCA 53, [183] (Simpson JA dissenting) (‘*Hamzy’*).

90 Chrissa Loukas, citing, the second reading speech of the New South Wales Attorney General [Hansard 28.11.2001 at page 19093]. Chrissa Loukas, ‘Crimes Amendment (Self Defence) Act 2001’ (Published paper, 28 February 2002). But the way to understand a subject ‘is not to read something else, but to get to the bottom of the subject itself’. Holmes (n 2) 476.

91 *Viro v The Queen* (1978) 141 CLR 88 (‘*Viro’*).

92 (1955) 93 CLR 493 (‘*Mraz’*).

93 Ibid 514 (Fullagar J).

94 (1996) 186 CLR 454 (‘*Taikato’*).

95 Ibid 466 (Brennan CJ, Toohey, McHugh and Gummow JJ).

96 Anthony Murray Gleeson (Chief Justice of the Supreme Court of New South Wales as he then was) ‘Clarity or Fairness: Which Is More Important’ (1990) 12 *Sydney L. Rev.* 305, 309.
and Thornburg\(^{97}\) and Judge Sydney Tilmouth's Australian research\(^{98}\) discussed above provide insight that is relevant in Australia. The point is to simplify the law so that judges can simply explain it to juries so that all the jurors understand it. The decisions in the \textit{Abdallah} and \textit{Patel} cases discussed above also suggest that the four juries in these cases did not clearly understand the self-defence provisions in the existing NSW statute.

This brings us to an analysis of the statutory self-defence provisions in New South Wales and an explanation why those formulas have proven difficult and even unworkable.

\textbf{Part Two: Analysis of self-defence provisions in New South Wales}

\textbf{5.6 The road from common law self-defence to the current “codified” self-defence provisions}

The complicated self-defence law that is now expressed in the NSW statutory formulas has not resolved the difficulties which were highlighted between 1958 and 1987 in \textit{R v Howe} (‘Howe’),\(^ {99}\) \textit{Palmer v The Queen} (‘Palmer’),\(^ {100}\) \textit{Viro v The Queen} (‘Viro’),\(^ {101}\) and \textit{Zecevic v Director of Public Prosecutions (Vic)} (‘Zecevic’).\(^ {102}\) While the existence of self-defence in the English criminal law inherited by Australia is at least partly the result of jury pushback during the 14\(^{th}\)-16\(^{th}\) centuries, juries have not been able to influence the shape of the criminal law since they became subject to judicial oversight during and after the reign of Queen Mary in Tudor England. Nor have they been able to make direct contributions to the development of the common law of self-defence in either

\(^{97}\) See Steele and Thornburg (n 66).

\(^{98}\) See Tilmouth (n 82).

\(^{99}\) \textit{R v Howe} (1958) 100 CLR 448 (‘Howe’).

\(^{100}\) \textit{Palmer} (n 87).

\(^{101}\) \textit{Viro} (n 91).

\(^{102}\) \textit{Zecevic} (n 3).
England or Australia since. But that does not mean the Australian common law of self-defence was settled. Between 1958 and 1987 jury verdicts in homicide self-defence cases were out of step with legislative expectations and forced the High Court and Privy Council to wrestle with the question whether excessive self-defence entitled a defendant to a complete acquittal or whether the conviction should be reduced from murder to manslaughter.

The heart of the judicial conflict was whether modern self-defence law should focus on overall intent or the proportionality of the self-defensive force that was used. Some judges were focused on whether the accused’s overall intent was determinative, and if there was no intent to kill but just to self-defend, they considered that an acquittal was appropriate. Other judges were of the opinion that if the accused used more force than was necessary, he or she should not be acquitted but should be found guilty of manslaughter. As before the 16th century, it seems that the unexpected nature of some jury verdicts raised these questions for judicial and then legislative review.

In Howe the High Court found that a person who had used more force than necessary to repel an unlawful attack and killed his attacker was guilty of manslaughter not murder. If the force used to repel the attack was reasonable, then he would have been entitled to an acquittal. In Howe the High Court thus briefly established at

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103 Howe (n 99).

104 The High Court in Howe (n 99) adopted the reasoning of the Victorian Supreme Court of Criminal Appeal in R v McKay [1957] VR 560 (‘McKay’). McKay’s case stood as an authority against the proposition that it is lawful to kill a fleeing thief solely on the basis of necessity, and for the proposition that proportionality in using defensive force is a further added condition in deciding such self-defence cases. See generally Norval Morris, ‘The Slain Chicken Thief [sic]-Some Aspects of Justifiable and Excusable Homicide’ (1958) 2 Sydney L. Rev. 414; Norval Morris, ‘A New Qualified Defence to Murder’ (1960) 1 Adel. L. Rev. 23; David Lanham, ‘Killing the Fleeing Offender’ (1977) 1 Crim. L. J. 16. It also had an influence on Viro’s Case as it led to the formulation of the test in Viro. Viro (n 3), 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180). Some writers argued that the doctrine of excessive self-defence was first raised in McKay’s case. Stanley Yeo stated that McKay’s case “purports” to be the first Australian case to recognise the doctrine of excessive self-defence. (Stanley Yeo, ‘The Demise of Excessive Self-defence in Australia’ (1988) 37 Int’l & Comp. L.Q 348, 348 n 1). Referring to McKay’s case, Justice Weinberg said that the doctrine of excessive self-defence ‘seems to have been first raised in Australia in the celebrated case of the chicken farmer who shot the fleeing thief’ (Justice Mark Weinberg, ‘Moral blameworthiness — The ‘objective test’ dilemma’ (2003) 24 Australian Bar Review 173, 191). But excessive self-defence had been discussed earlier in R v Griffin (1872) 10 SCR (NSW) 91 (Cheeke J); R v Morrison (1899) 10
common law that a manslaughter conviction was appropriate rather than an acquittal when the accused has used more force than was necessary to defend himself — since called excessive self-defence. But the common law doctrine of excessive self-defence was revisited and struck down by the Privy Council in *Palmer v The Queen* (‘*Palmer*’) in 1971 after only 13 years.¹⁰⁵

Palmer had killed Henry, and the jury convicted him of murder. Palmer appealed to the Privy Council arguing that the judge should have directed the jury about an alternative verdict of manslaughter in light of the self-defence issues involved in the case and the decision taken by the High Court of Australia in *Howe*. The Privy Council rejected Palmer’s appeal and said that there was no option for a verdict of manslaughter when a defendant had used excessive force in self-defence. The defence either succeeded in its entirety or it failed.¹⁰⁶ That Privy Council decision left the jury with no manslaughter conviction option in a murder trial when the jury considered that the defendant had used excessive force. The Privy Council said that self-defence was a simple and straightforward conception, and the idea of excessive self-defence had unduly complicated the jury’s reasoning.¹⁰⁷ The Privy Council decision, however, was out of step with the idea that had surfaced in Australia, which held that a manslaughter halfway house was appropriate in self-defence cases when excessive force had resulted in a homicide. The decision in *Palmer* remained the common law in Australia governing self-defence cases until the High Court’s decision in *Viro v The Queen* (‘*Viro*’).¹⁰⁸

The *Viro* case was the third time that the High Court considered itself obliged to grapple with the doctrine of excessive self-defence. The High Court in *Viro* disagreed with the Privy Council’s analysis in *Palmer* and reinstated the doctrine of excessive self-defence that it had set out in *Howe*. The moral culpability of a person accused of

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¹⁰⁵ *Palmer* (n 87) (Lord Morris of Birth-y-Gest for Lord Donovan and Lord Avonside).

¹⁰⁶ See ibid.

¹⁰⁷ *Palmer* (n 87) 831-2 (Lord Morris of Birth-y-Gest for Lord Donovan and Lord Avonside).

¹⁰⁸ *Viro* (n 91)
murder who had used more force than necessary to repel an unlawful attack was less than the moral culpability ordinarily associated with murder. To reinforce its reasoning, the High Court formulated six propositions which it were said would enable trial judges to instruct juries how to decide whether the jury should acquit the accused or convict of the lesser offence of manslaughter when self-defence was plead in a murder case. The judgments of Mason, Stephen and Aikin JJ also required judges to instruct juries to assess whether the accused rather than a reasonable person, believed that there was a threat to her life before there could be either an acquittal or a manslaughter verdict.

109 Ibid 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180). The six propositions were in the following terms:

1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

110 The first proposition was as follows:

1 (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.
The self-defence doctrine stated in *Viro* came under pressure because *Viro*’s six propositions were too complicated for trial judges to explain simply to juries.\(^{111}\) So the High Court revisited the issue in *Zecevic v Director of Public Prosecutions (Vic)* (‘*Zecevic*’).\(^{112}\) That new panel of the High Court thought, as the Privy Council had said in *Palmer*, that their predecessors had gone too far in creating the half-way house and so they retreated to murder or acquittal as binary alternatives in homicide cases involving claims of self-defence. The High Court panel in *Zecevic* preferred the Privy Council’s reasoning in *Palmer* and disapproved its own earlier decisions in *Howe* and *Viro*. In *Zecevic*, the High Court held that the jury could only acquit if it was satisfied beyond reasonable doubt that the defendant reasonably believed that it was necessary to do what he did in defending himself. If the defendant had used unreasonable force, then the only possible verdict was murder.\(^{113}\) But the doctrinal agreement between the Privy Council in *Palmer* and High Court in *Zecevic* still did not resolve the underlying doctrinal issues because the legislature was alert to the underlying perception of injustice that arose in homicide cases where self-defence was argued and the manslaughter half-way house was not available.

Gleeson CJ said that the High Court decisions in *Howe*, *Viro* and *Zecevic*, were an “experiment” with criminal law and justice.\(^{114}\) For Gleeson CJ, ‘[f]ine distinctions and nice elaborations are the stuff of which revenue law is made, but they are generally alien to criminal law.’\(^{115}\) The inference from his expression of concern is that the legislature should simplify the law since the High Court would not be able to do so. High Court efforts to clarify law would always be limited by the facts of the cases which they were asked to decide. Underlying the majority view in *Zecevic* was a concern

\(^{111}\) *Zecevic* (n 3) 653 (Mason CJ) citing, ‘*Reg. v. McManus* (1985) 2 N.S.W.L.R. 448, at pp.461-462; and *Reg. v. Lawson and Forsythe* [1986] V.R. 515, at p. 547-549 (Mason CJ citations)’. See also *Zecevic* (n 3) 661 (Wilson, Dawson and Toohey JJ); Tilmouth (n 82) 34.

\(^{112}\) *Zecevic* (n 3).

\(^{113}\) See Ibid.

\(^{114}\) Gleeson (n 96) 309.

\(^{115}\) Ibid.
about simplicity.\textsuperscript{116} However, ‘[d]espite the elegance and simplicity of \textit{Zecevic}'s statement of the law’,\textsuperscript{117} it removed the possibility of a manslaughter conviction in cases of excessive self-defence.

In light of the history, the removal of the manslaughter option in excessive self-defence cases did not sit well with the New South Wales legislature and they decided not only to “codify” self-defence, but to restore excessive self-defence as a partial defence in murder cases. They tried to reintroduce the High Court’s manslaughter halfway house, but it is submitted that the formula they provided in the amended statute is too complicated. The difficulty that formula presents is demonstrated in the \textit{Abdallah} and \textit{Patel} decisions already discussed. The question is how the statutory formula might be further simplified. Revising statutory formulas is not the job of the courts and especially not in Australia. Courts do their best with the formulas the legislature provides, but the code provided by the legislature in this case did not simplify the issues involved.

The New South Wales self-defence provisions were drafted to:

\[ G \text{enerally accord ... with the codification of that defence contained in the Model Criminal Code recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.}\textsuperscript{118}

Those provisions took effect on 22 February 2002\textsuperscript{119} but they are not simple. The explanatory notes for the \textit{Self-defence Amendment Bill} in 2001 were brief. They stated

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\textsuperscript{116} The majority in \textit{Zecevic} stated the test as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

\textit{Zecevic} (n 3) 662 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).

\textsuperscript{117} Bell (n 73) 15.


\textsuperscript{119} The statutory provisions dealing with self-defence were inserted into the \textit{Crimes Act 1900} (NSW) by the \textit{Crimes Amendment (Self-defence) Act 2001} (NSW) and took effect on 22 February 2002. \textit{Moore} (n 88) [26] (Basten JA, RA Hulme J agreeing at [122]).
that the object of the bill was to codify self-defence law in New South Wales.\textsuperscript{120} The explanatory notes also stated that:

The codification effected by the Bill seeks to simplify the law by enabling defendants to rely on self-defence if they believed their conduct was necessary (even if they were wrong), so long as the response was objectively proportionate to the situation (as they perceived it).\textsuperscript{121}

The New South Wales legislature introduced the manslaughter half-way house option in self-defence homicide cases knowing that it had caused friction between the Privy Council and the High Court of Australia before appeals to the Privy Council had been abolished in 1986.\textsuperscript{122} Even though, the legislature was committed to the implementation of a standardised \textit{Model Criminal Code}, it still decided to reintroduce the manslaughter half-way house option in self-defence homicide cases.\textsuperscript{123} Bell J described that decision as follows:

\textsuperscript{120} The long title of the \textit{Crimes Amendment (Self-Defence) Act 2001 (NSW)} provides:

\begin{quote}
An Act to amend the \textit{Crimes Act 1900} to codify the law with respect to self-defence; and to repeal the \textit{Home Invasion (Occupants Protection) Act 1998} and \textit{the Workplace (Occupants Protection) Act 2001}.
\end{quote}

\textsuperscript{121} Explanatory Notes (n 28) (emphasis in original).


\textsuperscript{123} The explanatory notes stated:

\begin{quote}
(a) The Bill (and the Code) excludes self-defence in those circumstances if the accused uses force that inflicts really serious injury, and

(b) The Bill (but not the Code) reduces murder to manslaughter in the case of excessive self-defence, that is, where the defendant believed it was necessary for personal defence, but where the accused uses force that inflicts death and that is not a reasonable response in the circumstances.
\end{quote}

Explanatory Notes (n 28) (emphasis in original).
Simplicity in the statement of the law has given way to the legislature’s judgment that the law should provide for the lesser culpability of the accused whose acts done in self-defence are disproportionate. It is a judgment that accords with Howe.\textsuperscript{124}

The statutory self-defence provisions approved by the New South Wales legislature and effective since 2002 are set out in ss 418-423 of the \textit{Crimes Act 1900 (NSW)}.\textsuperscript{125}

Sections 418, 419 and 421 provide:

\textbf{418 Self-defence —when available}

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

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

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

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

\textsuperscript{124} Bell (n 73) 16.

\textsuperscript{125} The scope of this thesis is directed to ss 418 and 421.
419 Self-defence—onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.  

421 Self-defence—excessive force that inflicts death

(1) This section applies if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

In this thesis, I have focused on homicide cases. Section 421 is not the only section that deals specifically with homicide. Section 418 is also about self-defence and is engaged in homicide cases as it provides a complete defence to various offences including murder. In homicide cases under s 18 of the Crimes Act (NSW), the jury is required to consider the terms of both ss 418 and 421 when self-defence is raised. For reasons that are not entirely clear, when the legislature drafted their new serious crime self-defence regime, they chose to differentiate between homicides and other serious crimes. What the jurors are asked to do under ss 418 and 421 is not simple.

Section 418 provides a complete defence and is applicable to various offences other than (but including) murder. Section 421 is also applicable to “the use of force that involves the infliction of death” (s 421(1)(a)). However, under ss 418 and 421, the jury is required to ascertain the “response” of the accused twice, and each time they are expected to ascertain that response by applying a different test. I explain.

Section 418 provides:

418 Self-defence —when available

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

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

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

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

Under s 418 (2)(a) the jury is required to consider whether the conduct of the accused was a reasonable response in the circumstances as he or she perceives them. In assessing whether the accused’s response was reasonable, the jury is assessing the response of the accused, not the response of an ordinary or reasonable person. Section 418 thus mixes objective and subjective tests with the result that it is difficult even for lawyers to work out whether they are assessing what the accused believed and did in response, or what a reasonable person would have believed and done in response.

When the jury turns to consider s 421, they are required to apply a different test. Section 421 provides:

129 R v Katarzynski [2002] NSWSC 613, [25] (Howie J) (‘Katarzynski’). In Moore (n 88) RA Hulme J said that he was ‘unaware of any case in which anything that was said in R v Katarzynski had (sic) been called into question’: (Moore) [124]).
421 Self-defence — excessive force that inflicts death

419 This section applies if:

(d) the person uses force that involves the infliction of death, and

(e) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(3) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

As can be seen, the jurors under are no longer assessing the “reasonableness” of the response; they are assessing its “unreasonableness”. Moreover, when assessing whether the accused’s response was unreasonable, the jury is assessing the response of a reasonable person, not the response of the accused.130

The legislature has not explained these complications in their explanatory notes.131 The differences between ss 418 and 421 also raise the question why the self-defence test is different when the charge is homicide and not some lesser crime. Moreover, when the difference between these subjective and objective assessments is explained, the jury is apt to think it is being assigned to do something other than what comes naturally in applying their conscience to the facts presented. If we believe that juries can judge whether an accused person is guilty of murder or manslaughter, or is entitled to an acquittal based upon all the factors raised in evidence at the trial


131 Explanatory Notes (n 28).
(including making deductions about the accused’s intent), then arguably, we need say no more than that.

Because the tests in ss 418 and 421 are different, they are difficult for jurors to understand regardless how they were explained.\(^\text{132}\) And though the tests in ss 418 and 421 appear to be simpler than the High Court’s six propositions in \textit{Viro}, they are no easier to explain to jurors as the decisions in \textit{Abdallah} and \textit{Patel} show. Simplicity is important to ‘help a jury reach a conclusion of guilt or innocence’.\(^\text{133}\) The statutory formula needs to be revisited and simplified.

In Australia, drafting statutes is the province of the legislature. The separate judicial task of the courts, including the High Court is to interpret the formulas provided by the legislature in statute. Courts do their best with the formulas that the legislature provides. As the High Court judges in \textit{Howe} and \textit{Viro} showed, the constraints of judicial decision making on a case by case basis do not naturally allow judges to develop generally applicable formulas. That difference between the judicial and legislative functions is clearer in Australia where judicial activism is frowned upon since close observance of the doctrine of parliamentary sovereignty save in cases of constitutional interpretation, dictates that the legislature should take the leading role in law reform. That role should be utilised to formulate a simple self-defence test using every day language that any lay jury can understand.

I now explain why those formulas have proven difficult and even unworkable.

\(^{132}\) See, eg, above nn 82-85 and accompanying text. The provisions in its current form are also incompatible with the principles of due process, procedural fairness, and natural justice; and might be unconstitutional as well. It is beyond the scope of this thesis to discuss the subject matter of the constitutionality or unconstitutionality of unclear or vague criminal law provisions and the accused’s right to due process of law. For the discussion of the question of whether the \textit{Australian Constitution} provides a due process protection to criminal litigants see Chief Justice Robert S. French, Procedural Fairness – Indispensable to Justice? Sir Anthony Mason Lecture, The University of Melbourne Law School Law Students’ Society, 7 October 2010); Anthony Gray, \textit{Criminal Due Process and Chapter III of the Australian Constitution} (Federation Press, 2016); Amsterdam G. A, ‘Note: The Void-For-Vagueness Doctrine in the Supreme Court: A Means to an End’ (1960) 109 \textit{University of Pennsylvania Law Review} 67; Andrew E Goldsmith, ‘The Void-for-Vagueness Doctrine in the Supreme Court, Revisited’ (2003) 30 \textit{Am. J. Crim. L.} 279.

5.7 Analysis of s 418

Section 418 defines self-defence in the *Crimes Act 1900* (NSW) and it ‘provides a complete defence to various offences other than (but including) murder’. It lets the jury weigh anything presented as evidence and anything else they think appropriate to factor into their decision as to whether the accused is guilty of the crime charged or not. Under subsection one of that provision (s 418(1)), the accused’s criminal responsibility is nullified if she is shown to have carried out the conduct constituting the offence, in self-defence. But s 418 (2)(a) complicates that consideration. It divides that consideration into two limbs:

(2)(a)(i) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary (limb one); and

(2)(a)(ii) the conduct is a reasonable response in the circumstances as he or she perceives them (limb two).

The two limbs in s 418(2) separate the subjective belief of the accused from the issue of the reasonableness of her conduct. Under the first limb, the accused must subjectively believe that the defensive conduct was necessary. But the second limb mixes objective and subjective elements. It requires that the accused’s response to the circumstances be objectively reasonable, but it does not require that the accused’s perception of the surrounding circumstances be objectively reasonable. If the accused misreads the circumstances, that has to be taken into account.

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134 *Smith* (n 127) [18] (Simpson JA, Leeming JA agreeing at [1], Hamill J agreeing at [75]). See also above (n 127).

135 Section 418(1) provides:

A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

Section 418(1) is premised on whether “a person” is “not criminally responsible” notwithstanding the form of the verdict the jury is asked to return is: “guilty” or “not guilty”, not “criminally responsible” or “not criminally responsible”.

136 *Katarzynski* (n 129) [23] (Howie J). See also *Moore* (n 88) [47] (Basten JA, RA Hulme J agreeing at [94]).

137 *Moore* (n 88) [27] (Basten JA, RA Hulme J agreeing at [94]).
Because the prosecution retains the overriding obligation to prove the accused guilty of the crime of murder beyond reasonable doubt (s 419), the prosecution must convince the jury that the accused’s self-defence arguments are not convincing under either limb of s 418 (2). That is, the prosecution must satisfy the jury that this accused did not believe his self-defence conduct was necessary (the first limb); or that the accused’s self-defensive conduct was not reasonable in light of what he believed about the circumstances (the second limb).  

When the different tests embedded in the two subsections of s 418(2) are broken down like this in a legal explanation by a judge, they are likely to confuse a jury and make the jurors think that they cannot decide the case in accordance with their ordinary lay English view of the self-defence.

I now analyse in more detail the two limbs of the test, s 418(2)(a)(i) and s 418(2)(a)(ii).

5.7.1 First Limb: s 418(2)(a)(i): The element of belief, intention and the guilty mind or mens rea under s 418(2)(a)(i)

The first limb is “completely” subjective. That is, it requires the jury to place itself in the shoes of the accused, and then consider only what the accused believed. This subsection does not require the accused to have reasonable grounds for his belief. Nor does this limb require the jury to consider what a reasonable or ordinary person would have believed in the circumstances, and it does not matter if the accused’s belief was mistaken, as long as it was genuinely held. The belief of the accused is not

138 Katarzynski (n 129) [23] (Howie J).

139 Ibid.

140 Ibid [22] (Howie J); Oblach (n 151) 84 [51] (Spigelman CJ, Sully J agreeing at 89 [83], Hulme J agreeing at 91 [95]; Moore (n 11) [27] (Basten JA, RA Hulme agreeing at [94]); Sivaraja v The Queen; Sivathas v The Queen [2017] NSWCCA 236, [122] (Meagher JA; R A Hulme and Beech-Jones JJ) (‘Sivaraja and Sivathas’).

141 Katarzynski (n 129) [24] (Howie J). However, it is questionable that the word “genuine” in Howie J’s test assists the jury’s assessment of the accused’s belief since what is required is an assessment of the accused’s state of mind and ‘[a] belief cannot be held without being genuine’. R v Dunn [2012] SASCFC 40, [29], [43] (Gray J) (‘Dunn’).

Kai Ambos argued that this form of “subjectification” “eliminates a difference that ontologically cannot be eliminated, namely the difference between reality and imagination” because ‘the conflict between aggressor and defender does not take place in the real word but only in the mind of the defender, who mistakenly believes that he is attacked, his reaction is necessary’. K. Ambos, Other Grounds for Excluding Criminal Responsibility: in Cassese A Gaeta P &
only the triggering condition for his or her intention but also the prerequisite for
determining the necessity of his or her self-defensive conduct. The subjective belief of
the accused would also provide the jury with an answer to the question whether the
accused intended to defend herself or was using the occasion to attack the victim. More specifically, if the intention of the accused was to defend herself, then she will also not have believed that she was committing murder because her self-defensive actions would eliminate the intention required to commit that crime. Or, as Barwick CJ put it in *Viro*, ‘if the act is to be accounted as done in self-defence, defence must be [the accused’s] intention’.143

Because these issues lie at the heart of proof in all criminal law cases, they have received a great deal of judicial and scholarly comment all of which is relevant to this analysis of the proof of intent in New South Wales when self-defence is claimed by criminal defendants under ss 418, 419 or 421. I now discuss the interrelation of criminal intent and self-defensive intent in homicide cases in New South Wales.

5.7.1.1 Proof of intent as an essential element in any crime

Since the common law and the statutory formulas in ss 418, 419 and 422 will normally
leave judging intent to the jury, they should not be complicated. In particular, the jury
should understand as just explained that an intent to defend oneself is inconsistent
with an intention to commit murder. Or as Lord Chief Justice Russell said in 1899, ‘[n]o
crime can be committed unless there is a *mens rea*’144 — *actus reus not facit reum nisi mens sit rea*. Criminal intent has been defined many times.145 Given that common

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142 *Viro* (n 91) 99 (Barwick CJ).

143 *Viro* (n 91) 102 (Barwick CJ).

144 *Williamson v Norris* (1899) 1 Q.B 7 (Lord Russell CJ, Wills J agreeing at 14), 14 (Lord Russell CJ).

145 For example, in *He Kaw Teh v The Queen* the High Court said “*Mens rea*” means ‘evil intention, or a knowledge of the wrongfulness of the act (citations omitted). *He Kaw Teh v The Queen* (1985) 157 CLR 523, 530 (Gibbs CJ), 549 (Wilson J), 566 (Brennan J).

In *R v Shipley* Lord Erskine said ‘[i]ntention to commit the crime is certainly of the essence of the crime’. *R v Shipley* (1784) 99 ER 774, 790 (Lord Erskine) (‘Shipley’). He also said ‘the criminal intention is a fact, and must be found by the jury; and that finding can only be
knowledge, we may infer that jurors are individually and collectively competent to use their common sense to infer the existence and difference between criminal and self-defensive intent when a defendant raises a self-defence argument. That is, we accept that juries can properly judge degrees of blameworthiness including the difference between the intent to murder and the intent to defend oneself.

In Zecevic Weinberg QC\textsuperscript{146} argued that self-defence ‘is a negative condition of the offence and is therefore an integral part of it’.\textsuperscript{147} In effect, Weinberg QC argued that the mental element necessary to demonstrate self-defence is an essential consideration in judging whether the accused had the intent to commit the offence concerned. It follows that when there is no intent to commit murder, it is unlikely that there is intent to create a lesser offence either, since the self-defensive intent will be found to be pervasive. That is, persons who act in self-defence do not plan their reactions, but act in a responsive manner out of necessity, fear of harm or fear for their lives.\textsuperscript{148}

It is axiomatic that to be a crime, an act which injures another must include both \textit{mens rea} and \textit{actus reus}.\textsuperscript{149} Crimes are serious offences. The history I have outlined in chapter three and in chapter four suggests that juries have long been unwilling to expressed upon the record by the general verdict of guilty which comprehends it’: \textit{Shipley} (n 145) 808 (Lord Erskine).

\textsuperscript{146} Counsel for the Appellant, Zecevic, in Zecevic (n 3) (as he was then. Now he is a justice of the Victorian Supreme Court).

\textsuperscript{147} Zecevic (n 3) 657 (Wilson, Dawson and Toohey JJ). Weinberg QC continued his argument and submitted to the High Court:

\begin{quote}
For that reason … the mental element necessary to raise the plea bears, in a negative sense, upon the mens rea of the offence itself making it inappropriate in cases of homicide to require, in addition to the subjective requirement that the accused should believe that he is threatened with death or serious bodily harm, an objective requirement that the belief should be reasonable (citations omitted).
\end{quote}

Weinberg QC’s argument was made in support of his submission that the defence of self-defence should no longer contain the objective element of ‘reasonable belief’ and judgment of the accused should concern the necessity of what he did in self-defence ‘according to the facts as he believed them to be’: at 651 (Mason CJ).


accept that public policy can justify any criminal conviction without proof of intent. If perverse verdicts are to be avoided, criminal law codes need to accord with common sense and in particular, with the democratic common sense of any jury summoned to decide a criminal case.

I now discuss the complexity that is introduced into the self-defence formula in s 418(2)(a)(i) by its reference to the idea of necessity.

5.7.1.2 The element of necessity under s 418(2)(a)(i)

The first limb of s 418(2)(a)(i) provides:

(2)(a)(i) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary (limb one).

The absence of the word "reasonable" before the word “believes” and the presence of the word "necessary" result in the conclusion that s 418(2)(a)(i) is not an objective

150 In Viro Mason J explained how to approach the issue of the accused's "reasonable belief" in relation to the nature of a threat in self-defence cases. He said:

[b]y the expression ‘reasonably believed’ is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

Viro (n 91) 146 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

"Reasonable Belief" has the same substance as “reasonable grounds for belief”. In Marwey Stephen J said:

To ask If reasonable grounds existed then the belief was itself reasonable. To ask "Had he a reasonable belief?" is not different in substance from asking "Had he reasonable grounds for belief?"

Marwey v The Queen (1977) 138 CLR 630, 641 (Stephen J) (‘Marwey’) cited, with approval in Taiapa v The Queen (2009) 240 CLR 95, 105 [29] (French CJ, Heydon, Crennan, Kiefel and Bell JJ) (‘Taiapa’).

151 See generally the analysis of Barwick CJ in Marwey (n 150). The analysis of Barwick CJ was concerned with s 271 of the Criminal Code 1889 (Qld) which imported an objective requirement (the existence of reasonable grounds) in relation to the accused’s belief. In particular, the analysis concerned the effect of the “insertion” or elimination of the word “reasonably” before the word “necessary”; how it “goes much deeper than the question whether the word "necessary" can properly be qualified in its context by the word "reasonably"”; and what effect the presence of the word “reasonably” (subs 271(1)) or absence of it (in subs 271(2)), of the Criminal Code 1898 (Qld), could have on the interpretation of that self-defence provision: at 635- 9. See s 271 of the Criminal Code 1898 (Qld) in the legislation schedule in part three of the appendix.
test of reasonableness. Rather, the accused determines for herself whether what she did was necessary for her defence.\textsuperscript{152} This makes the “belief” of the accused in the “necessity” of her defensive act, definitive in the circumstances.\textsuperscript{153} Consequently, there is no room for any objective consideration by the jury. The accused is the judge of the reasonableness of what she did in the circumstances and all the jury has to decide is whether that belief was honest or not. But this does not mean that the jury must accept that what the accused said is true. The reality is that the jury’s consideration will involve an assessment of the reasonableness of the accused’s belief when assessing whether she honestly held that belief. As Lord Griffiths said in \textit{Beckford v The Queen} (‘\textit{Beckford}’):\textsuperscript{154}

\begin{quote}
[N]o jury is going to accept a man’s assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances … where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.\textsuperscript{155}
\end{quote}

Perhaps because there are no obvious limits as to how a jury determines whether the degree of force used was appropriate, the legislature has tried to spell out limits. But that has resulted in overcomplication. Arguably, if the jury is to remain as a judicial institution which adjudicates guilt in our criminal justice system, the legislature needs to trust the jury to make its own decision without second guessing its common sense analysis. There are a number of ways in which the legislature has tried to direct the jury’s decision making under ss 418 and 421 and one of those arises in the way that the concept of necessity is expressed.

\subsection*{5.7.1.3 The plain English meaning of necessity}

In the absence of any definition of the meaning of necessary in s 418 or anywhere else in the \textit{Crimes Act 1900} (NSW), the jury would normally be guided by the plain

\textsuperscript{152} \textit{Marwey} (n 150) 635 (Barwick CJ).

\textsuperscript{153} Ibid 637 (Barwick CJ).

\textsuperscript{154} [1988] 3 All ER 425; AC 130 (‘\textit{Beckford}’).

\textsuperscript{155} Ibid 145 (Lord Griffiths) cited, with approval in \textit{R v Walsh} (1991) 60 A Crim R 419, 423 (Slicer J).
English meaning of the word.\textsuperscript{156} Self-defence is an excuse of natural necessity.\textsuperscript{157} In plain English terms, for the defence to succeed, the accused must convince the jury that what she did was necessary\textsuperscript{158} – although as already explained, under s 418(2)(a)(i), for the self-defence claim to succeed, the accused must convince the jury on the balance of probabilities that she believed that what she did was necessary.

William Blackstone said that when a man kills another in self-defence, it is an excusable necessity or ‘necessitas culpabilis [culpable necessity]’.\textsuperscript{159} “[I]t is necessary self defence which makes a homicide justifiable”... what is necessary in the eyes of the community will vary from age to age and according to the circumstances’.\textsuperscript{160} Sir James Stephen has written ‘the infliction [sic.] of death, or minor personal injuries’\textsuperscript{161} if self-defence is found justified, is based upon reasonable necessity. The Privy Council in \textit{Palmer} said that ‘[i]t is both good law and good sense that he may do, but may only do, what is reasonably necessary.’\textsuperscript{162} The word “reasonably” does not need to be added. It is included in the word necessary because it is an objective word. So even though s 418(2)(a)(i) presents as a subjective test, because it uses the word

\textsuperscript{156} In \textit{Palmer v The Queen}, Lord Morris said:

In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide.

\textit{Palmer} (n 87) 831 (Lord Morris of Borth-y-Gest for Lord Donovan and Lord Avonside).


\textsuperscript{161} Stephen, \textit{A History of the Criminal Law of England} (n 152) vol 3, ch 26, 12.

\textsuperscript{162} \textit{Palmer} (n 87) 831 (Lord Morris of Borth-y-Gest for Lord Donovan and Lord Avonside).
“reasonably”, it has objectivity subliminally laced into it which unnecessarily complicated things for the jury.

The threshold of self-defence remains as necessity, and the necessity is a matter for determination by the jury as the embodiment of community standards. When the jury considers whether what the accused did was necessary or “reasonably” necessary, factors like the imminence of the danger, the opportunity to retreat from that danger, and the personal characteristics or attributes of the accused (e.g. age, sex, ethnicity, religious beliefs, tribal beliefs and traditions, physical disabilities, and cognitive and volitional capacities), become relevant. While imminence, necessity, retreat and the personal characteristics or attributes of the accused were often specifically referred to in past self-defence statutes and got a lot of attention in jurisprudence and commentary, the writer submits that the omission of reference to these factors is a good thing. That is because their omission reduces the matters about which judges must give detailed instruction to the jury. Arguably they are factors that should be referred for jury consideration, but they do not require detailed judicial explanation. Juries know how to make judgments about the severity of danger and detailed judicial explanation of these matters arguably disrespects jury independence and competence. Indeed, the judicial break down of necessity into a number of forensic parts, including the difference between subjective and objective assessments, is apt to see the jury think that it is being assigned to do something other than what comes naturally. If we believe that juries can judge whether an accused person is guilty of murder, manslaughter or is entitled to an acquittal based upon all the factors raised in evidence at the trial, a trial judge need say no more than it is for the jury to judge whether what the accused did was necessary or not. If we still consider that juries are competent to make those judgment calls, then we ought to leave them to decide the matter by themselves, with a minimum of judicial explanation.

As we have seen above, William Blackstone and Sir James Stephen have merged subjective and objective elements together and assumed that merger is appropriate in the phrase “reasonably necessary”. With due respect, while that may be fine for the lawyers and judges that ponder over their analysis, that does not mean it is wise to merge all these issues together in modern statutes so that judges feel obliged to explain all they know about them to the jury. Certainly this complexity and merger of what lawyers recognise as objective and subjective tests is deeply embedded in the
law. But now that we can see that these phrases complicate the directions that trial judges may feel obliged to give juries, we need to consider simplification. That is, in the s 418(2)(a)(i) context, the word “reasonably” arguably does not add anything to the word “necessary”. The idea of reasonableness is already included in the word “necessary” because it is an objective word. With or without the word “reasonably” in s 418(2)(a)(i), the jury is not obliged to accept what the accused said is true. But judges who know that every statutory word must be given its due, wrestle to explain the unnecessary addition of the word “reasonably” and are apt to confuse jurors in the process. As Lord Griffiths said in *Beckford v The Queen* (*'Beckford'*),163 the reality is that the jury will assess the reasonableness of the accused’s belief when assessing the honesty of that belief as a matter of common sense.164 It is better to leave these issues to the jury without analysing them in detail in judicial directions as lawyers are want to do. As Oliver Wendell Holmes J has observed, ‘even a dog distinguishes between being stumbled over and being kicked’.165

The question that follows is — Should self-defence provisions be reformulated subjectively based upon the “necessity” of the self-defence conduct or should some objectivity requirement be included? That is, should a simplified definition add “reasonable grounds” to the definition of acceptable self-defensive conduct or should acceptable conduct be required to be “reasonably necessary”? That is a question that I will answer in chapter six.

This brings us to the second limb of the test in s 418(2) (a)(ii).

### 5.7.2 Second limb: s 418(2)(a)(ii)

The reader will recall that the self-defence test in 418(2)(a) has two limbs:

(2)(a)(i) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary (limb one); and

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163 *Beckford* (n 154).

164 Ibid 145 (Lord Griffiths).

(2)(a)(ii) the conduct is a reasonable response in the circumstances as he or she perceives them (limb two).

The jury under s 418(2)(a)(ii) is required to undertake a different exercise from that which they have taken under the first limb (s 418(2)(a)(i)). Unlike s 418(2)(a)(i) which is expressed in subjective terms, s 418(2)(a)(ii) is a test expressed in mixed objective/subjective terms even though it does not intend assessment according to independent third party standards. That is, the s 418(2)(a)(ii) test requires that the accused’s response be reasonable in the circumstances as he or she perceived them, but does not require that the accused’s perception of the circumstances be reasonable according to community standards. Under this subsection, the jury is required to assess whether the accused honestly thought that her response was reasonable, not whether an ordinary or reasonable person would think that the accused’s response was reasonable. The jury is not supposed to consider what another person or an objective person would have done in the circumstances. The section requires the jury to assess the honesty of the accused’s subjective belief, but not its objective reasonableness. Despite Barwick CJ’s concern that a jury should never be forbidden to consider objective factors, that is what the section requires. And yet the idea of reasonableness still appears in the subsection to confuse the jury and to complicate how the judge explains the subjective assessment required to the jury.

It is also difficult for the jury to judge the subjective belief of the accused and her subjective perception in the circumstances, if she elects not to give direct evidence and invokes the right to remain silent. Four judges in two recent cases recognised

166 Moore (n 88) [48] (Basten JA, RA Hulme agreeing at [94]).

167 Katarzynski (n 129) [23] (Howie J). See also discussion above.

168 Ibid [23] (Howie J).

169 Moore (n 88) [27] (Basten JA, RA Hulme agreeing at [94]).

170 Katarzynski (n 129) [25] (Howie J).

171 See above (n 151).

172 The right to silence is a common law right. For the “applicable legal principles of the common law right for the right to silence” see Sanchez v The Queen [2009] NSWCCA 171, [42]-[55] (Campbell JA, Latham J agreeing at [87], Harrison J agreeing at [88]) (‘Sanchez’). For the “time on direction for the right to silence” see Sanchez at [56]-[58].
this difficulty and added an “objective” element of “reasonableness” into their explanation of the operation second limb of subs 418(2)(a)(ii) in a manner that made the section wholly objective. While it is difficult to argue with their explanations why they chose to interpret subs 418(2)(a)(ii) in this way because of the absence of evidence in this case, the fact remains that their interpretation disregarded the statutory direction intended in subs 418(2)(a)(ii). Though neither case involved a jury trial, the Magistrates in both cases were required to make their decisions in accordance with subs 418(2)(a)(ii). The problem was that there was no defence evidence from which to infer the subjective intent or honesty of the accused. I explain.

In Colosimo & Ors v Director of Public Prosecutions (NSW) (‘Colosimo’) the defendants claimed self-defence but provided no evidence. The claim of self-defence was deduced or inferred by the defence lawyers from prosecution evidence and defence cross-examination of prosecution witnesses. Because the defendants did not participate in interviews, gave no statements to investigating police, and did not give evidence during their trial, there was no evidence from the defendants ‘as to their beliefs or perceptions’. Hodgson JA (with whom Handley and Ipp JJA agreed) said:

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Evidence Act 1995 (NSW) deals with the statutory right of silence in general terms. Section 89 “is narrower in its scope than the common law concerning the right of silence: at [71]. Section 89A of the Evidence Act 1995 (NSW) came into operation on 1 September 2013 with the commencement of the Evidence Amendment (Evidence of Silence) Act 2013 (NSW). This provision altered the right to silence of an accused in criminal proceedings for serious indictable offences in New South Wales:

In summary, s 89A permits unfavorable inferences to be drawn against a defendant who relies at trial upon a fact that was not mentioned at the time of questioning for the offence charged and where the defendant could reasonably have been expected to mention the fact in the circumstances existing at the time. Such inferences can only be drawn where the special caution is given to the defendant who has been provided with legal assistance in respect of the caution. The provision only applies to offences carrying a maximum penalty of life imprisonment or a term of imprisonment of five years or more. It does not apply to a defendant under the age of 18 years.


173 [2006] NSWCA 293 (‘Colosimo’).

174 Ibid [9] (Hodgson JA, Handley JA agreeing at [1], Ipp JA agreeing at [27]).

175 Ibid.
It is not essential that there be evidence from the accused as to the accused’s beliefs and perceptions: evidence of circumstances from which inferences may be drawn as to the accused’s relevant beliefs and perceptions may be sufficient. However, if the accused does not give evidence of his or her beliefs and perceptions, then generally, in the absence of other evidence suggesting the contrary, inferences have to be drawn on the basis of what beliefs and perceptions a person in the position of the accused could reasonably hold in the circumstances.\(^{176}\)

*Colosimo* was not appealed and was cited with approval about 11 years later in *Director of Public Prosecutions v Evans* (‘Evans’).\(^{177}\) *Colosimo* is thus a precedent which judges use to instruct the juries when the defendant claims self-defence but provides no evidence. In *Evans*\(^{178}\) the evidence as to whether the issue of self-defence arose was assessed on the basis of the evidence that had been given by the defendant and the prosecution. The prosecution called two police officers to give evidence. The defendant gave evidence and called his half-brother to give evidence,\(^{179}\) but the defendant gave no evidence as to his beliefs and perceptions nor any evidence as to whether he believed his conduct was necessary.\(^{180}\) Citing *Colosimo*, Davies J said ‘in the absence of such direct evidence, ordinarily inferences will be drawn on the basis of what beliefs and perceptions a person in the position of the Defendant could reasonably hold’.\(^{181}\)

*Evans* was not appealed. It now also stands as a precedent which judges use to instruct juries when the defendant claims self-defence, gives evidence but fails to give evidence as to her beliefs and perceptions or any evidence as to whether she believed her conduct was necessary or from which such beliefs or perceptions could be inferred.

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\(^{176}\) *Colosimo* (n 173) [19] (Hodgson JA, Handley JA agreeing at [1], Ipp JA agreeing at [27]).

\(^{177}\) [2017] NSWSC 33 (‘Evans’).

\(^{178}\) Ibid.

\(^{179}\) Ibid [10]-[11] (Davies J).

\(^{180}\) *Evans* (n 177) [51] (Davies J).

\(^{181}\) *Evans* (n 177) [51] (Davies J); *Colosimo* (n 173) [19] (Hodgson JA, Handley JA agreeing at [1], Ipp JA agreeing at [27]).
As in Abdallah and Patel, Colosimo and Evans suggest again that the legislative formulas are complicated and sometimes impractical. Notwithstanding the subjective nature of the second limb under subs 418(2)(a)(ii), the judges in Colosimo and Evans considered that they were obliged to revisit the statutory formulas and replace the statutory requirement that the perceptions of the accused guide judgment as to whether the self-defence was justified with an objective version of the test. The judges did their best with the formulas provided by the legislature, but one senses their concern about the utility of the formulas expressed in the statute since the law of evidence generally accords the accused a right to silence. The danger of creating complex formulas is that juries will not be able to understand, accept or apply them. History suggests complex formulas may result in perverse verdicts. The statutory formulas in ss 418 and 421 need to be revisited and simplified.

While those who drafted ss 418 and 421 have simplified the old common law by removing the requirements for judges to explain “imminence” and “retreat” to juries in great detail, there is room for further improvement. The new sections have not resolved the underlying disagreement between the High Court and the Privy Council between 1958 and 1978. That disagreement includes the perennial legal question of whether self-defence claims should be assessed objectively or subjectively. With respect, in the context of New South Wales’ continuing commitment to jury trial, the legislature’s failure to conclusively resolve that legal argument in the statute is unwise and unnecessarily complicates criminal trials where self-defence claims are made by the accused. The jury is competent to decide whether self-defence claims are honest and justified and to decide whether the appropriate verdict in a homicide trial is a murder, manslaughter or acquittal. They do not need legislators or judges instructing them about the differences between objective and subjective tests in law. They need to be trusted with the assessment of the evidence as they choose the appropriate verdict. The provisions in the New South Wales Crimes Act 1900 that deal with self-defence need to be simplified. I suggest ways in which those provisions may be simplified in chapter six. I now discuss the additional matters on which the second limb of the self-defence test set out in s 418(2)(a)(ii) requires that trial judges instruct juries.
5.7.2.1 The scope of the accused’s “conduct” under s 418(2)(a)(ii): Reasonableness of the “conduct” and proportionality: The problems with proportionality

In Howe,\(^{182}\) Palmer,\(^{183}\) Viro,\(^{184}\) and Zecevic,\(^{185}\) the resort to force, the intent in using that force, and the degree of that force — that is — the proportionality of that force, were the central issues in assessing the claim of self-defence. The issue that arises for lawyers when they consider whether a self-defence response was proportional is whether that is the same question in law as asking whether the accused’s response was reasonable? Even if there is no difference, explaining that these ideas mean the same thing, complicates the instructions that judges feel they must give juries under the ss 418 and 421 formulation of self-defence law in New South Wales and it is once again doubtful that the complexity or the explanations are necessary in the delivery of justice.

The requirement that self-defence ‘conduct is a reasonable response’ (s 418(2)(a)(ii)) is contingent upon the accused’s “belief” that it was necessary to defend herself (s 418(2)(a)(i)), in the circumstances as she perceived them (s 418(2)(a)(ii)). Self-defence (ss 418 and/or 421) is commonly raised to answer violent offences like common assault (s 61); assault occasioning actual bodily harm (s 59); wounding or causing grievous bodily harm with intent (s 33); assault causing death (s 25A); and murder and manslaughter (s 18). In all these offences, the degree of self-defensive force used by the accused is the factor which determines whether the accused is guilty or not guilty. In the case of charges of murder or manslaughter, the degree of self-defensive force used by the accused determines whether the accused is guilty of murder, manslaughter or whether she is entitled to an acquittal.

At core, it is the accused’s perception of the need to use force and the degree of force used that determines whether that force was proportional. But proportionality can be assessed subjectively or objectively. That is, did the accused honestly think that this

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\(^{182}\) See Howe (n 99).

\(^{183}\) See Palmer (n 87).

\(^{184}\) See Viro (n 91).

\(^{185}\) See Zecevic (n 3).
much force was required to prevent the perceived threat, or would a reasonable man have thought so? This brings our consideration back to what the Privy Council said in *Palmer*.\textsuperscript{186} That is, in deciding whether the degree of force was reasonable, it is necessary to take into account the fact that:

\begin{quote}
[A] person defending himself cannot weigh to a nicety the exact measure of necessary defensive action … If a jury is of the opinion that in a moment of unexpected anguish the person attacked did only what he honestly and reasonably thought was necessary, that should be regarded as most potent evidence that only reasonably defensive action was taken.\textsuperscript{187}
\end{quote}

In *Palmer*\textsuperscript{188} the Privy Council took the “unexpected anguish” of the accused into account when assessing whether the self-defensive force used was reasonable. This brings us to the issue of fear which is commonly raised in self-defence cases in connection with the “perception” of the accused ‘in the circumstances’ (s 418(2)(a)(ii)). It is unnecessary to discuss in detail the element of fear. It suffices so say that it is a relevant issue when a jury is judging the reasonableness of the self-defender’s conduct or response, and in particular when family violence is in issue.\textsuperscript{189} All jurors have experienced fear. They can assess how it should be factored into their assessment of subjective guilt and the overall reasonableness of a response. This is because fear does not discriminate with regard to a person’s race, age, height, weight, colour, ethnicity, national origin, culture, religious beliefs, tribal beliefs, sex, gender, sexual preference, physical or mental ability, or marital status.\textsuperscript{190}

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\textsuperscript{186} *Palmer* (n 87).
\textsuperscript{187} Ibid 832 (Lord Morris of Borth-y-Gest for Lord Donovan and Lord Avonside).
\textsuperscript{188} Ibid.
\textsuperscript{189} It is beyond the scope of this thesis to discuss or analyse domestic or family violence and the associated self-defence questions about “domestic-captives” or “dominated defendants”. But see the brief discussion of this phenomenon in part two of the Appendix under the heading ‘Self-Defence in Domestic Violence Cases’.
\textsuperscript{190} Kahan et al. argued that
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The foregoing analysis shows that the legal tests currently built into s 418(2) unnecessarily complicate the jury's task in reaching a verdict. As explained above, our democratic history has given the jury the task of making decisions in criminal cases according to their own best judgment. 'Juries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion, but are expected to exercise practical common sense.'

The foregoing analysis also shows that the adjudication of a claim of self-defence in a criminal trial is founded upon the assessment of necessity by whoever is assigned to make the judgment, whether judge or jury. The idea of necessity absorbs all the elements, circumstances and factors which were discussed above. Juries do not make their assessment in the same way as legally trained judges, but that does not mean they cannot judge necessity nor that they have to do it in the same way as judges. Understanding that juries make judgments in light of their own lay experience rather than in light of detailed legal training and judicial experience, suggests that it is legitimate to reformulate the way we express the law that we ask juries to apply when they make their decisions in self-defence cases. That is, we should simplify the assessments we ask them to make in self-defence cases in a way that recognises their lay approach to judgment which rests on their democratic common experience.

The Privy Council in Palmer and the High Court in Zecevic also favoured a simple approach that a jury using common sense can understand.

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*Colum. L. Rev. 269; Posner, Eric A., ‘Law and the Emotions’ (Working Paper No. 103, 2000). An analysis of the psychological aspect of self-defence is beyond the scope of this thesis but see a brief discussion under the heading ‘The Psychology of Self-Defence’ in part one of the Appendix to this thesis.

191 Hancock (n 1) 651 (Lord Scarman).

192 Palmer (n 87) 831-2 (Lord Morris of Borth-y-Gest for Lord Donovan, and Lord Avonside).

193 The majority in Zecevic stated the test as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

Zecevic (n 3) 662 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).
Because juries are required to consider not only s 418 but also s 421 when self-defence is raised in answer to a charge of murder or manslaughter, I now discuss s 421.

5.8 Analysis of s 421: The use of “force” in self-defence cases which “involves the infliction of death”

It will be remembered that at common law the idea that excessive self-defence could mitigate a murder charge had been confirmed in Howe, disapproved in Palmer, reinstated in Viro, and disapproved again in Zecevic. The statutory idea that excessive self-defence should result in a manslaughter conviction rather than an acquittal has been described as voluntary manslaughter by excessive self-defence.

The use of “excessive” force in self-defence which ‘involves the infliction of death’ is governed by s 421. Section 421 provides:

421 Self-defence —excessive force that inflicts death

(1) This section applies if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or ...

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194 Howe (n 99).
195 Palmer (n 87).
196 Viro (n 91).
197 Zecevic (n 3).
198 Lane v The Queen (2013) 241 A Crim R 321, 335 [50] (Bathurst CJ, Simpson and Adamson JJ); Grant (n 130) [62]-[64] (Lemming JA, Adams and Hall JJ); Abdallah Appeal (n 5) [45] (Hoeben CJ at CL dissenting dissenting).
(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.\(^{199}\)

The legislature’s intention when enacting s 421 was to partially depart from the *Model Criminal Code*\(^{200}\) to restore:

[T]he common law position as previously stated by the High Court in *Viro* (1978) 141 CLR 88. It was held in that case that self-defence, which was necessary but which involved the use of excessive force causing death, would lead to a finding of manslaughter instead of murder.\(^{201}\)

Neither s 421 nor s 418 approach the test of excessive self-defence in the same way as the High Court did in *Viro*. In *Viro*, the High Court did not require the accused to have believed that the excessive force “was necessary”, and *Viro*’s six propositions

\(^{199}\) It is to be noted, however, that from 22 February 2002 and until 12 January 2003, s 421 excluded the “intention to inflict grievous bodily harm” because s 421(1)(a) required “force that involves the intentional or reckless infliction of death”. Section 421(1)(a) was, therefore, amended by *Crimes Legislation Amendment Act 2002* (NSW), commencing on 13 January 2003, to omit the words “intentional or reckless”. Judicial Commission of NSW, *Partial Defences to Murder in NSW 1994-2004* (Monograph 28, 2006) 50 n 159. See also s 421 of the *Crimes Act 1900* (NSW) (Point-in-Time). See [CRIMES ACT 1900 (austlii.edu.au)](http://www.austlii.edu.au). This database provides ‘point in time’ version of the *Crimes Act 1900* (NSW). (The reader has: (1) to go to this website; (2) click on s 421; and (3) select the date in the three designates boxes (year, month, day), e.g., 13 January 2003.)

\(^{200}\) The explanatory notes were explicit that the *Crimes Amendment (Self-defence) Bill 2001* has not been drafted to accord with the *Model Criminal Code*. It stated:

(a) The Bill (and the Code) excludes self-defence in those circumstances if the accused uses force that inflicts really serious injury, and

(b) The Bill (but not the Code) reduces murder to manslaughter in the case of excessive self-defence, that is, where the defendant believed it was necessary for personal defence, but where the accused uses force that inflicts death and that is not a reasonable response in the circumstances.

Explanatory Notes (n 28).

\(^{201}\) Chrissa Loukas, citing, the second reading speech of the New South Wales Attorney General [Hansard 28.11.2001 at page 19093]. Chrissa Loukas, ‘Crimes Amendment (Self Defence) Act 2001’ (Published paper, 28 February 2002). But the way to understand a subject ‘is not to read something else, but to get to the bottom of the subject itself’. Holmes (n 2) 476.
were all premised in “reasonableness”. According to the reasoning in *Viro*, and contrary to s 421 (and s 418), the juries were required to apply the six steps in a sequential manner. Moreover, in *Viro*, the jury was required to assess the “reasonableness” of the accused’s belief (not what a reasonable man would have

202 *Viro* (n 91). *Viro’s* six propositions were in the following terms:

1 (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression “reasonably believed” is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter: at 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

203 The *Zecevic* test also required the jury to assess whether the belief of the accused was “on reasonable grounds”. The *Zecevic* test was in the following terms:

[Did] the accused believe...upon reasonable grounds that it was necessary in self-defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

*Zecevic* (n 3) 661 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666). It is to be noted that “reasonable belief” has the same substance as “reasonable grounds for belief”. In *Marwey* Stephen J said:

To ask if reasonable grounds existed then the belief was itself reasonable. To ask “Had he a reasonable belief?” is not different in substance from asking “Had he reasonable grounds for belief?”

*Marwey* (n 150) 641 (Stephen J) cited, with approval at *Taiapa* (n 150) 105 [29] (French CJ, Heydon, Crennan, Kiefel and Bell JJ).
believed) in the “imminency” of the ‘unlawful attack which threatened him with death or serious bodily harm’. In Viro the jury was also required to assess the “proportionality” of the “force” used by the accused, not the accused’s “conduct” at large. That is, whether the accused “reasonably believed” that ‘the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced’.

There are three “essential” elements that the jury must consider under s 421(1). They were set out by Simpson JA in Smith v The Queen (‘Smith’). She said:

- the accused uses force that involves the infliction of death;
- the accused believes that the conduct (that is, the use of the force in fact used) is necessary to defend himself or herself or another person; and
- that conduct is not a reasonable response in the circumstances as the accused perceives them.

Justice Simpson’s first element above comes from s 421(1)(a) and applies if the accused used force ‘that involve[d] the infliction of death’. However, Justice Simpson’s summary of the elements the jury must consider under s 421 does not take into account the fact that s 418(2) also applies in homicides that involve excessive

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204 The first proposition of Viro was in the following terms:

1 (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

Viro (n 91) 146 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

205 Ibid 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

206 Smith (n 127).

207 Ibid [20] (Simpson JA, Leeming JA agreeing at [1], Hamill J agreeing at [75]). See also Hamzy (n 89) [184] (Simpson JA dissenting). In Hamzy Simpson JA went on and observed that ‘by’ s 418, the second and third elements also arise in relation to the offence of wounding with intent to cause grievous bodily harm’: Hamzy [185].

208 Smith (n 127) [18] (Simpson JA, Leeming JA agreeing at [1], Hamill J agreeing at [75]).
self-defence. The question whether there is a need to refer to s 418(2) must arise if the jury decide that the self-defensive force used was not excessive.

The second and third elements in Justice Simpson's analysis come from s 421(1)(b). In Hamzy v The Queen (‘Hamzy’)209 she explained in dissent how the jury apply s 421(1)(b). She said:

Section 421(1)(b) is in two parts. One concerns the belief of the accused person as to the circumstances. That is to be determined subjectively. The other is the reasonableness of the conduct of the accused person in response to those circumstances (whether or not the circumstances were objectively verifiable). The question of reasonableness is to be determined objectively.210

McCallum J agreed with Simpson JA adding 'in that way, s 421 deliberately subjects an accused person's subjective assessment of his circumstances to the test of objective community standards'.211

In Grant v The Queen (‘Grant’)212 and Sutcliffe v The Queen (‘Sutcliffe’)213 the New South Wales Supreme Court of Criminal Appeal said that in assessing the “unreasonableness” of the accused’s response the jury is assessing whether a reasonable person in the position of the accused would have considered that her response was unreasonable in the circumstances.214

209 Hamzy (n 89).

210 Ibid [195] (Simpson JA dissenting, McCallum J agreeing with her at [207]).

211 Ibid [207] (McCallum J). Hoeben CJ at CL has not discussed this point.

212 Grant (n 130).

213 Sutcliffe (n 130).

214 See Grant (n 130) [65] (Lemming JA, Adams and Hall JJ); Sutcliffe (n 130) [11] (Leeming JA, Adams and Fullerton JJ). But note what Howie J said in Katarzynski (n 129) when he was discussing how the jury should ascertain the response of the accused under s 418(2)(a)(ii). He said:

It will be a matter for the jury to decide what matters it should take into account when determining whether the response of the accused was reasonable in the circumstances in which he or she found himself or herself. The jury is not assessing the response of the ordinary or reasonable person but the response of the accused: Katarzynski [25] (Howie J).

It is also to be noted that there is a difference between a reasonable person and an ordinary person. In Stingel v The Queen the High Court said that the reasonable person is not to be
The “emphasis” in s 421 on the response of the accused person “in the circumstances as he or she perceives them” (subs 421(1)(b)) requires the jury to undertake ‘an evaluation of the degree to which the response exceeds that which would be a reasonable response if those circumstances existed’. That analysis is “inherently both complex and evaluative” especially when family violence in issue. In *Hamzy v The Queen* (‘Hamzy’), Justice Simpson confirmed that s 421 ‘present difficulties of construction’. In relation to s 421(1)(b), she said:

> The jury is required to consider whether the conduct … was a reasonable response in the circumstances as the applicant perceived them. The provision requires that the question of reasonableness be answered in the light of the circumstances as the applicant perceived them. The circumstances as the applicant perceived them included … that it was necessary for him to do what he did … in order to defend himself.

So to construe s 421(1) would deprive the third element of meaning. It would mean that whether the third element was established would be dictated by the second, and have no real independent operation. “[T]he circumstances as he or she perceives them” in s 421(1)(b) must exclude the circumstance that the accused person believed that the conduct was necessary in order to defend himself. However, it does not exclude the basis upon which the applicant came to that belief.

The difficulties which Justice Simpson has identified are not something that a judge can simplify or take away from the jury as s 421 stands. The difficulty in explaining s 421 to a jury is compounded when a judge is required to explain s 418 as well just in case the jury decides that the force used was not excessive so that s 421 does not confuse with the ordinary person because “[a] reasonable person acts on reason. An ordinary person may not.” *Stingel v The Queen* (1990) 171 CLR 312, 314 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (‘*Stingel*’). The idea behind the ‘ordinary person’ test is that “all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard: *Stingel* at 324. See also *Masciantonio v The Queen* (1995) 183 CLR 58, 72 (McHugh J).

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215 *Smith* (n 127) [58] (Simpson JA, Leeming JA agreeing at [1], Hamill J agreeing at [75]).

216 *Silva v The Queen* [2016] NSWCCA 284, [93] (McCallum J).

217 *Hamzy* (n 89).

218 Ibid [183] (Simpson JA dissenting).

219 Ibid [189]-[190] (Simpson JA dissenting) (emphasis in original).
apply. New South Wales law in self-defence cases needs to be improved. I provide recommendations for reform in chapter six.

5.9 The combined effect of s 418 and s 421

Again, in a homicide self-defence case what the jurors are being asked to do under ss 418 and 421 is not simple. The jury is required to judge the “response” of the accused twice and apply different rules each time.220

Under s 418 (2)(a)(ii) the jury is required to consider whether the conduct of the accused was a reasonable response in the circumstances as he or she perceives them. In making that assessment, the jury is asked to subjectively decide whether the accused rather than a reasonable person responded appropriately to the circumstance as she perceived them.221 On the other hand, under s 421, the jury is asked to assess whether the accused’s response was “unreasonable” according to objective standards.222 The legislature has not explained this difference in their explanatory notes223 and it is difficult for trial judges to explain this difference to juries coherently when self-defence is raised by the accused in homicide cases. This complexity caused by ss 418 and 421 in New South Wales also raises the question why the self-defence rule should be different in homicide cases than in cases of lesser crime. In chapter six I outline a self-defence law that can enable simple judicial directions in lesser crimes of violence where the jury only has to decide between convict and acquit verdicts and

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220 It is even more complex if the jury in a self-defence case would also be required to consider an additional test under s 93FB of the Crimes Act 1900 (NSW) (Possession of dangerous articles other than firearms). See s 93FB of the Crimes Act 1900 (NSW) in the legislation schedule in part three of the appendix. It is beyond the scope of this thesis to analyse s 93FB and its combined effect with s 418 and/or s 421. It suffices to note that s 93FB(4) of the Crimes Act 1900 (NSW) specifically provides that in assessing whether the accused possessed a dangerous article for the purpose of self-defence (s 93FB(3)), “the court must have regard to its reasonableness in all the circumstances of the case, including-- (a) the immediacy of the perceived threat to the person charged.” For the difficulties that juries could face in dealing with the defence of self-defence in connection with s 93FB of the Crimes Act 1900 (NSW) (formerly s 545E) see the High Court decision in Taikato v The Queen (1996) 186 CLR 454.

221 Katarzynski (n 129) [25] (Howie J). In Moore (n 88) RA Hulme J said that he was ‘unaware of any case in which anything that was said in R v Katarzynski had (sic) been called into question’: Moore at [124].

222 Grant (n 130) [65] (Lemming JA, Adams and Hall JJ); Sutcliffe (n 130) [11] (Leeming JA, Adams and Fullerton JJ).

223 See Explanatory Notes (n 28).
the homicide cases where an intermediate manslaughter verdict is also a possible outcome.

The use of the idea of reasonableness in both subjective and objective ways in ss 418 and 421 is confusing and as will be suggested in chapter six, unnecessary. The subjective use of reasonableness in ss 418 and 421 is unwise and should be changed. That is, let us find a way to redraft these sections simply using words without baggage that do not interfere with the simple reasoning required of a jury. As I am recommending that ss 418 and 421 be repealed and we start with a clean sheet of paper it is unnecessary to analyse whether the jury should consider ss 418 and 421 simultaneously, sequentially, or whether they could be flexible in how they analyse the case. Nevertheless, I comment briefly on this issue.

A number of judges have recognised the confusion that I have identified in ss 418 and 421 and have tried to find a way to simplify jury consideration by suggesting that approaching the two different judgments required to be approached in a sequential way. In *Abdallah v The Queen* (‘*Abdallah Appeal*’) the threshold question was whether the jury should have been directed to consider the reasonableness of Katherine’s response under ss 418 and 421 simultaneously, sequentially or whether they could be flexible in how they analysed the case. The Court of Criminal Appeal did not know on what basis the jury acquitted Katherine of murder. The jury could have considered the reasonableness of Katherine’s response under ss 418 and 421 simultaneously, sequentially or could have been flexible as how they approached the case.228

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224 Perhaps taking a lead from the view of Mason J in *Viro* that his six points’ test simplified the issues involved if the test was approached sequentially. See *Viro* (n 91) 146-7 (Mason J, Gibbs J agreeing at 128, Stephen J agreeing at 134-135, Jacobs J agreeing at 158, Murphy J agreeing at 171, Aickin J agreeing at 180).

225 *Abdallah Appeal* (n 5).

226 *Abdallah Appeal* (n 5) [36], [46]-[51], [54] (Hoeben CJ at CL dissenting, Campbell agreeing at [84]), [84] (Campbell J), [106]-[108] (Button J).

227 Ibid [44] (Hoeben CJ at CL dissenting).

228 See *Abdallah Appeal* (n 5).
Hoeben CJ said ‘consider[ing] s 418 before considering s 421 … is certainly one way of approaching such consideration but it is not the only way and it is not mandatory. The flexibility of a jury in how they approach such matters was made clear’. In overall dissent, he said, ‘[t]he better approach in a case such as this where self-defence was the primary consideration is for the jury to consider the reasonableness of the response at the same time for the purposes of both s 418 and for s 421’. Campbell J agreed with Hoeben CJ that ‘the better approach to instructing the jury on self-defence in murder cases is to deal with ss 418 and 421 at the same time’.

Button J approached the “sequential approach” from another perspective. He said that even though the jury should be given flexibility and were ‘entitled to decide issues when deliberating in the manner and order that they see fit’,232 a sequential approach ‘in the particular context of the inter-relationship between homicide and self-defence generally is of significance’.233 This is because, Button J said:

[E]xcessive self-defence does not arise at all if the jury is satisfied merely of the elements of manslaughter and not murder … in a practical sense it will very often be essential for the jury to consider first the question of which, if any, form of homicide is proven, before turning to an assessment of the “defence”.234

Button J also said that the effect of s 418(2) was that ‘if the Crown failed on both legs of self-defence, the applicant was entitled to a complete acquittal’.235

Notably, in Smith v The Queen(‘Smith’)236 the New South Wales Court of Criminal Appeal identified how the jury approached ss 418 and 421. The Court said ‘[p]lainly,

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229 Ibid [46] (Hoeben CJ at CL dissenting) (citations omitted).

230 Ibid [48] (Hoeben CJ at CL dissenting, Campbell agreeing at [84]).

231 Abdallah Appeal (n 5) [84] (Campbell J).

232 Abdallah Appeal (n 5) [106] (Button J).


234 Ibid [107] (Button J).

235 Ibid [100] (Button J) (emphasis in original).

236 Smith (n 127).
having rejected the s 418 defence, the jury then turned to s 421. But this does not mean that the jury always take a sequential approach. The fact that five judges came to different conclusions in Hamzy and Abdallah as to whether the jury should be instructed by the trial judge to approach the tests in ss 418 and 421 sequentially or not, confirms that the drafting of these two sections results in a self-defence law that is less than transparent. I submit that lack of clarity is another good argument for reforming these provisions.

While it is doubtful that instructing a jury to take a sequential approach simplifies the task the jury faces in such cases, the problem could be avoided if the statutory provisions were simplified and expressed in plainer English. Reform is not a judicial task. Judges have to make the best of the cards they are dealt with by the legislature. While some judges think that instructing juries to take a sequential approach when they assess self-defence arguments under ss 418 and 421 can provide them with a logical framework which assists their deliberation, it is submitted that the legislation is still flawed and would be better if it were simplified. Simplification is the focus of chapter six.

**Conclusion to chapter five**

The self-defence formulas that the legislature have provided in the statute since 2002 are too complicated for judges to easily explain to juries. In practice they ask juries to undertake complex legal analysis which is incompatible with the principle of ‘democratic common sense’ which juries are expected to apply in reaching their verdicts. And, as has been consistently observed for hundreds of years, that is why we have continued to engage juries in criminal trials. While New South Wales judges of appeal and High Court judges have tried very hard to explain the formulas the legislature have provided, jury instructions in self-defence cases in New South Wales remain challenging to get right. Further, it is not the job of the courts in Australia to reform the law. The New South Wales legislature need to revisit and simplify the self-defence provisions in the Crimes Act 1900 (NSW).

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237 Ibid [20] (Simpson JA, Leeming JA agreeing at [1], Hamill J agreeing at [75]).
In chapter six I discuss and suggest simple reforms in New South Wales that would make jury instruction much easier for judges in self-defence cases. I also submit that if those reforms are effective, they will be influential in other Australian jurisdictions.
CHAPTER SIX

A SIMPLE SELF-DEFENCE TEST: RECOMMENDATIONS

Introduction

This purpose of this chapter is to propose a “simple” self-defence test to eliminate the difficulties and complexities of ss 418 and 421 of the Crimes Act 1900 (NSW) that judges and juries face in self-defence trials.

This chapter has three parts. In part one I briefly discuss why a ‘simple’ test matters. In part two I discuss the requirements of a self-defence test simple enough so that a jury cannot misunderstand it. In part three I propose a simple test that meets those requirements.

Part One: Why a “simple” self-defence test matters

The reader will remember that while jury push back is not as obvious today as it was before the 17th century, common sense jury decisions and the occasional aberrant verdict still exert pressure on the courts and modern parliaments to bring the law into line with jury common sense. The jury verdicts in the cases of Abdallah¹ and Patel² discussed in chapter five are cases in point. Abdallah and Patel suggest that juries in New South Wales do not easily understand the existing New South Wales statute. The decisions in Colosimo³ and Evans⁴ confirm that the legislative formulas are

³ Colosimo & Ors v Director of Public Prosecutions (NSW) [2006] NSWCA 293 (‘Colosimo’).
⁴ Director of Public Prosecutions v Evans [2017] NSWSC 33 (‘Evans’).
complicated and sometimes impractical. As discussed in chapter five, despite the subjective nature of the second limb under subs 418(2)(a)(ii), the appellate judges in Colosimo and Evans considered that they were obliged to revisit the formulas and replace the statutory requirement that the perceptions of the accused guide judgment as to whether the self-defence was justified, with an objective version of the test. The judges did their best with the formulas that the legislature provided, but the accused’s exercise of his right to silence in both of those cases made it difficult for any fact finder to infer anything about the accused’s subjective state of mind as the statute required.

The danger of creating complex formulas is that trial judges will find them difficult to explain and juries will also find them difficult to understand, accept and apply. History and research in the United States and in Australia suggests that complex self-defence formulas may result in perverse verdicts and unjust decisions. English history in criminal jury cases suggests that juries did not trust the king to grant a pardon in self-defence cases. Rather, juries manipulated the evidence in various ways to protect persons accused of homicide from the death penalty, if the jury considered the accused had acted in self-defence. Australian criminal law history has not been immune from difficulty in homicide cases where self-defence was claimed. The decisions in the Howe, Palmer, Viro and Zecevic cases confirm that complex statutory formulas in such cases are difficult to understand and apply in practice. The statutory formulas that have been developed in New South Wales in the wake of those cases in ss 418 and 421 of the Crimes Act 1900 remain difficult to understand and apply and need to be simplified.

The overseas studies discussed in chapter five are relevant in Australia. The American studies demonstrate the impact of juror confusion on jury verdicts. When jurors “seriously” misunderstand trial judge instructions, they make mistakes. The American studies also suggested that ‘juror comprehension of [judicial] instructions is pitifully low’. The law relating to self-defence in homicide cases needs to be simplified.

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6 Ibid 78.
7 Ibid 79-83.
8 Ibid 109.
to enable trial judges to give juries clear and simple instructions that all jurors can understand.⁹ The English research discussed in chapter five is also relevant in Australia. The difficulties that jurors face in self-defence trials in England is also applicable in Australia.¹⁰ This research demonstrated that out of 797 jurors, only one third were able to fully understand the law of self-defence.¹¹

Judge Sydney Tilmouth’s 2012 Australian study of criminal appeals, which was discussed in chapter five, also suggested that complex and confusing judicial directions in self-defence homicide cases are causing problems in Australia.¹² His study was focused on identifying where judges had fallen into error when directing juries in criminal proceedings. ‘[J]udge induced error…[was] more common than expected’.¹³ Though he said that judicial directions about self-defence in homicide cases ‘ha[d] long been recognised as confusing and complex for juries’, he concluded ‘matters have not become any clearer by a succession of legislative interventions, which if anything [those legislative changes] have only served to compound the complexities involved’.¹⁴ But Judge Tilmouth made no reform recommendations following his study.

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¹¹ To illustrate the difficulties that jurors face in self-defence trials in England, citing Professor Cheryl Thomas’ research in 2010, Lord Justice Moses, quoted the results for a film used by Professor Thomas in her research to see how potential jurors would respond in a criminal trial for a charge of an assault occasioning actual bodily harm. The accused pleaded self-defence. The judge “posed” to the jury the following two questions (which were similar to the test in s 418 of the Crimes Act 1900 (NSW)): “did the defendant believe it was necessary to defend himself”? and, “did he use reasonable force?” Out of 797 jurors “only 31% accurately identified both questions, 48% one and 20% neither” (ibid).


¹³ Ibid 18.

¹⁴ Ibid, citing Crimes Act 1900 (NSW) ss 418–423; Criminal Law Consolidation (Self Defence) Amendment Act 1991 (SA) s 15; Crimes (Homicide) Act No 77 of 2005 (Vic); Criminal Code 1899 (Qld) ss 267, 271, 272, 278; Criminal Code 1913 (WA) ss 244, 248–255; Criminal Code 1983 (NT) ss 27, 28, 29; Criminal Code Act (NT) 1991 ss 46 and 47 of the Criminal Code 1924 (Tas) (s 46, s 47, s 49, as amended by the Criminal Code Amendment (Self-Defence)Act 1987 (Tas)); the Criminal Code (ACT) 2002 s 42 and the Criminal Code Act 1995 (Cth) s 10.4 (Tilmouth J citations): at 34 n 336.
All of these studies suggest or infer that self-defence directions in homicide cases need to be simple to be effective and legally safe. If the jury can understand the relevant statutory provision with minimum judicial direction, that would be ideal.

As discussed in chapters four and chapter five, the difficulties that New South Wales’ juries face when deciding homicide cases where self-defence is argued by the defendant are the result of several factors. Those factors can be summarised as follows. First, the mixture of objective and subjective tests in ss 418 and 421 is confusing. Secondly, under s 418(2)(a)(i) (the first limb), it is also confusing that juries are required to consider “all of the personal characteristics of the accused whereas under s 418(2)(a)(ii) (the second limb) they are required to consider “some”, but not, all of these characteristics. Thirdly, the difficulties in the construction of s 421 because of the complexity involved in considering the three essential elements of s 421(1). Fourthly, it is easy for a lawyer to mix up the self-defence tests in ss 418 and 421 because they are different but must both be considered in homicide cases.  

15 R v Katarzynski [2002] NSWSC 613, [23] (Howie J) (‘Katarzynski’).


17 Hamzy v The Queen [2018] NSWCCA 53, [183] (Simpson JA dissenting) (‘Hamzy’). There are three “essential” elements that the jury must consider under s 421(1). They were set out by Justice Simpson in Smith v The Queen as follows:

- the accused uses force that involves the infliction of death;
- the accused believes that the conduct (that is, the use of the force in fact used) is necessary to defend himself or herself or another person; and
- that conduct is not a reasonable response in the circumstances as the accused perceives them.

Smith v The Queen [2015] NSWCCA 193, [20] (Simpson JA, Leeming JA agreeing at [1], Hamill J agreeing at [75]) (‘Smith’). See also Hamzy [184] (Simpson JA dissenting). In Hamzy Simpson JA went on and observed that ‘by’ s 418, the second and third elements also arise in relation to the offence of wounding with intent to cause grievous bodily harm’: at [185].

18 Under s 418 (2)(a) the jury is required to consider whether the conduct of the accused was a reasonable response in the circumstances as he or she perceives them. In assessing whether the accused’s response was reasonable, the jury are assessing the response of the accused, not the response of the ordinary or reasonable person. Katarzynski (n 15) [25] (Howie J). In Moore v The Queen, RA Hulme J said that he was ‘unaware of any case in which anything that was said in R v Katarzynski had (sic) been called into question’. Moore v The Queen ([2016] NSWCCA 185, [124] (RA Hulme J) (‘Moore’). On the other hand, under s 421(1)(b), the jurors are no longer assessing the “reasonableness” of the response, they are assessing its “unreasonableness”. Moreover, when assessing whether the accused’s response was unreasonable, the jury are assessing the response of a reasonable person, not
Fifthly, there is judicial disagreement whether the juries should be instructed to consider the tests under ss 418 and 421 simultaneously or sequentially.\(^{19}\) Sixthly, the subjective aspects of the tests set out in ss 418 and 421 have proven impossible for judges sitting alone in homicide cases involving self-defence to apply when the accused invokes the right to remain silent and elects not to give direct evidence. In cases where the accused invokes the right to silence, there is little or no evidence from which a judge (or a jury) can infer the accused’s intent. The resulting lacuna has seen New South Wales appellate judges affirm that the judicial decision makers have no option but determine the accused’s intent objectively — in clear breach of the intent expressed in s 418(2)(a)(ii).\(^{20}\)

The judicial disagreement as to whether the tests in ss 418 and 421 should be considered simultaneously or sequentially noted in the fifth point in the last paragraph, raises a broader question about jury process that is beyond the scope of this thesis. However, the reason why the judges of appeal noted in the fifth point above have not dictated whether juries should consider the tests in ss 418 and 421 simultaneously or sequentially, is apparently because their process is considered inscrutable. In particular there is no requirement under the *Crimes Act 1900* (NSW), the *Criminal Procedure Act 1986* (NSW), or at common law, to require jurors to take a specific path before reaching a verdict. A verdict is a process that begins long before the deliberations of jurors and represents ‘the end point of jurors’ decision-making process’.\(^{21}\) Jurors ‘are required to agree only on the ultimate verdict, not on the precise path to that verdict’,\(^{22}\) and ‘[h]ow individual juries approach their deliberations is not

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\(^{19}\) *Abdallah v The Queen* (‘Abdallah First Appeal’) (n 1) [44]-[47] (Hoeben CJ at CL, Campbell J agreeing at [84]), [84] (Campbell J), [108] (Button J); *Smith* (n 17) [20] (Simpson JA).

\(^{20}\) *Colosimo* (n 3) [19] (Hodgson JA, Handley JA agreeing at [1], Ipp JA agreeing at [27]); *Evans* (n 4) [49]-[50] (Davies J).

\(^{21}\) Norman J. Finkel and Jennifer L. Groscup, ‘Crime Prototypes, Objective versus Subjective Culpability, and a Commonsense Balance’ 21 *Law and Human Behavior* 209, 211.

\(^{22}\) *R v Randhawa*, 2019 BCCA 15, [38] (Griffin J, Tysoe and Harris JJ agreeing) A judge, however, who tries criminal proceedings without a jury must include in the judgment the
known'. In Zecevic the majority said that ‘[t]here is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone.’

The above complexities and difficulties dictate that judges try to provide juries with instructions that accurately explain the technical terms of the law. In Brown v The Queen, Brennan J said while reminding us that once the ordeal was no longer permitted and trial by jury became the only mode of trial in criminal cases:

> Trial by jury is not only the historical mode of trial for criminal cases … it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice. The verdict is the jury's alone, never the judge's. Authority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community.

Justice Brennan’s insight into the historical foundation of jury independence and inscrutability, introduces the following discussion of how a “simple” self-defence test should be formulated and what consequences follow the chosen formulation.

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Section 133 of Criminal Procedure Act 1986 (NSW) provides:

**133 Verdict of single Judge**

(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

23 Virginia Bell AC, Jury Directions: the Struggle for Simplicity and Clarity (Banco Court Lecture Supreme Court of Queensland, 20 September 2018), 28.

24 Zecevic v Director of Public Prosecutions (Vic) (1987) 162 CLR 645, 662 (Wilson, Dawson and Toohey JJ) (‘Zecevic’).

25 (1986) 160 CLR 171 (‘Brown’).

26 Ibid 197 (Brennan J).
Part Two: What features should a simple self-defence test have?

6.1 Governing principles in the formulation of the self-defence test

The principles governing the formulation of a “simple” self-defence test are that the test should be simple, it should be free from any technical legal terms, and it should allow the jurors to discuss it in everyday language without the need for explanatory directions from trial judges. That is not to say that a simple self-defence formulation will make trial judge directions redundant in a homicide case involving self-defence issues. The intention is rather to focus on the need to ensure that the single test provided is so simple that a jury could not misunderstand it. The simple test should also recognise that when trial is by jury, the jury should be recognised as the final and independent arbiter and, like judges in judge-alone criminal trials, should be completely autonomous when deciding the guilt or innocence of the accused. If we leave this all to the jury, we get decisions according to community standards that are not parroted responses following legislative or judicial direction. To achieve these outcomes, the test chosen to determine whether a homicide was committed in self-defence or not, should be drafted in plain English.

6.1.1 Plain English

Complexity is apt to confuse. But this recommendation is not just about plain English expression. It is about simplifying concepts so the simple cannot misunderstand. Simplicity is an underrated but essential virtue. That virtue is perhaps at its most important in statutory drafting. The ideal in the drafting of criminal legislation is to use plain English so that ordinary people can understand it. This is especially important in the criminal law where personal liberty is at stake. The law should speak to its subjects.27 Dissatisfaction with legislative drafting and the excessive complexity of the law has been an issue for many centuries.28 In 1362 King Edward III realised that his


subjects ‘have no Knowledge nor Understanding of that which is said for them or against them by their Serjeants and other Pleaders’. 29 The King, therefore, enacted the ‘English Statute of Pleading’ 30 which has been ‘considered to be the first of the “plain English” laws’. 31 It was also reported that young King Edward VI (born October 12, 1537, London, England — died July 6, 1553) said:

I would wish that . . . the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them. 32

Sir John Donaldson and Lord Scarman have reiterated what King Edward III and King Edward VI had said. For Sir John Donaldson:

The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First, people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Second, they must know what those rules are. Both are equally important . . . 33

Lord Scarman also said ‘[j]uries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion, but are expected to exercise practical common sense.’ 34 ‘Common sense . . . always triumphs over technical rules of law’. 35 In the context of homicide self-defence cases, this common


31 Gillies (n 30) 171 (emphasis in original). See also Firman (n 30) 104.


33 Merkur Island Shipping v Laughton [1983] 2 All ER 189; 2 AC 570, 594 (Sir John Donaldson MR)

34 R v Hancock [1986] AC 455; 1 All ER 641, 651 (Lord Scarman) (‘Hancock’).

sense has compelled the courts to recognise that the accused is entitled to inflict “great” bodily harm or even “kill” the victim “without retreating” if that was necessary for her to save her own life or protect herself from bodily harm.\textsuperscript{36} The House of Lords in \textit{Palmer}\textsuperscript{37} and the High Court in \textit{Zecevic}\textsuperscript{38} favoured a simple approach that a jury using common sense could understand.

Australian law reform bodies have also endorsed the idea of drafting legislation in “plain English”. The Law Reform Commission of Victoria (“LRCV”) noted that plain English is ‘not a special language, it is an ordinary language’.\textsuperscript{39} The LRCV further noted that:

> When Parliament passes a law applying to citizens or to a selected group of citizens, its prime concern is not with the reaction of judges or lawyers or even administrators. Its prime concern is with the conduct of the citizens whom it regulates or on whom it imposes burdens or confers benefits. … the prime aim should be to ensure that those to whom the law is addressed act in accordance with it. The law should be drafted in such a way as to be intelligible, above all, to those directly affected by it.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{36} Ibid 556.
\item \textsuperscript{37} \textit{Palmer v The Queen} [1971] 1 All ER 1077; AC 814 (‘\textit{Palmer}’), 831-2 (Lord Morris of Borth-y-Gest for Lord Donovan and Lord Avonside).
\item \textsuperscript{38} The majority in \textit{Zecevic} stated the test as follows:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

\textit{Zecevic} (n 24) 662 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).
\item \textsuperscript{39} Victoria Law Reform Commission, \textit{Plain English and the Law} (Report No. 9, 2017) ix. This report was originally published by Victoria Law Reform Commission in 1987 (“the Commission”) but it was then “republished by the Commission in 2017 with original contents in a new format, and a new preface.” \textit{Plain English and the Law - the 1987 report} | Victorian Law Reform Commission
\item \textsuperscript{40} Ibid 35.
\end{itemize}
The Queensland Government endorsed the same principles in *The Queensland Legislation Handbook* ("QLHB"). The QLHB emphasises that the drafter “must” draft the legislation in “plain English”. The Queensland Government said that:

The plain English approach to legislation is based on the idea that laws should be as simple as possible so the ordinary person in the community can understand them. Further, the ordinary person is regarded as the ultimate user of the law rather than bureaucrats and lawyers.

We have to simplify the concepts and use plain English. Legalistic ideas including references to objective and subjective standards are not ideas that lay people chosen for jury service use. They are not words which potential jurors use to describe how they make judgments in their everyday lives, so they will not help lay jurors fulfil their judicial responsibility.

Though the use of plain English is desirable in drafting all legislation, plain English in drafting criminal legislation is more critical because juries need to understand it. But following Sir John Donaldson and Lord Scarman above, all citizens should be able to understand it. Plain English is also essential in the way that criminal laws are expressed because criminal laws identify crime, and criminal trials by jury enable the community to forgive or condemn a person for antisocial behaviour. This “community” is not the “political community” or the “judicial community”. A conviction by jury as representative members of the public is ‘an expression of the community’s moral outrage, directed at the criminal actor, for her act’. Therefore, if lay jurors are to forgive or condemn a person accused of crime on behalf of the community, they should be able to understand the law in simple terms.

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42 (Ibid)18 [3.5.1].


44 Ibid 452 (citations omitted).
Confidence in a just verdict is also enhanced when criminal laws are written in plain English. But the “plain English” phrase I am using here is not about “plain legislation” or “plain meaning”. The problem identified in this thesis about self-defence law in New South Wales arises largely because that law is not simple for lay person jurors to understand. It will be remembered that the majority in Viro endorsed Mason J’s six propositions of the self-defence test. Mason J (as he then was) thought that he was simplifying the law but in fact he was not. In Zecevic, Mason CJ later acknowledged that the six propositions he had set out in Viro were unduly complex.

The only thing a jury needs to decide when determining whether a homicide was mitigated by self-defence, is whether the force used was necessary or not. If the force used was necessary, then the accused is entitled to an acquittal. If the force used was more than necessary, then the accused is still responsible for the death, but it is not murder and so the accused should be convicted of manslaughter. If the force used was not necessary at all, then the accused should be convicted for murder. The jury’s decision rests on its assessment of necessity and its decision is final, subject to limited rights of appeal.

The task of the legislature is to translate these simple concepts into an explanation that lay people will understand. Once the underlying concepts are clear, the legislative drafters should be able to write the law simply enough so that lay jurors can understand it. But the simplification of the underlying concepts has been a challenging journey — a journey that began in English jury pre-history but which came to a climax in the tussle between the High Court of Australia and the Privy Council in England as

45 It is beyond the scope of this thesis to discuss or analyse the subject matters of statutory interpretation, ‘plain legislation’ or ‘plain meaning’.

46 Viro v The Queen (1978) 141 CLR 88 (‘Viro’).


48 Zecevic (n 24).

49 Ibid 653 (Mason CJ).

to whether excessive self-defence entitled a defendant to a complete acquittal or whether the conviction should be reduced from murder to manslaughter. In the context of such high level jurisprudential disagreement and the law reform consideration which followed, it is not surprising that the statutory drafting has not yet achieved ideal simplicity. That means we must try again. But how do we best express these self-defence concepts in plain English?

6.2 How a “simple” self-defence test should be formulated in terms of necessity

The conclusions arrived at about the unsatisfactory nature of the existing self-defence formulations in chapter five provide context. Self-defence is an excuse of natural necessity. For the defence to succeed, the accused must convince the jury that what she did was necessary. William Blackstone said that when a man kills another in self-defence, it is an excusable necessity or ‘necessitas culpabilis [culpable necessity].’ ‘[I]t is necessary self defence which makes a homicide justifiable’ … what is necessary in the eyes of the community will vary from age to age and according to the circumstances. Sir James Stephen has written ‘the inflection[sic] of death, or minor personal injuries’ in self-defence is founded upon reasonable necessity. The House of Lords in Palmer said that ‘[i]t is both good law and good sense that he may do, but may only do, what is reasonably necessary.’

51 See Palmer (n 37); Viro (n 46)


57 Palmer (n 37) 831 (Lord Morris of Borth-y-Gest for Lord Donovan, and Lord Avonside).
Self-defence at common law or in any of its statutory forms has always been based upon necessity. Though the courts have not always agreed on how necessity should be defined, the importance of the element of necessity in self-defence was agreed in Howe,58 Palmer,59 Viro,60 and Zecevic.61 The foundation of necessity is also clear in the various self-defence provisions in all Commonwealth, state and territory legislation that has engaged with self-defence.62

The problem is how the existing self-defence provisions in the Crimes Act 1900 (NSW) can be simply reformulated so that they can be understood by juries without a great deal of judicial assistance and can also be simply explained by trial judges. The questions that flow from the problems identified in chapter five is whether the idea of “necessity” in New South Wales’ self-defence law should be explained in subjective, objective, or mixed terms? Does that kind of semantic analysis assist jury understanding or would a plain English formulation avoid those concepts no matter how well they are by legally trained lawyers and judges?

William Blackstone and Sir James Stephen appear to have pioneered the use of merged subjective and objective elements when they used the phrase “reasonably necessary” to explain when self-defensive conduct was justified. But the fact that the “reasonably necessary” phrase is well understood by lawyers and judges does not mean it is the right plain English phrase to enable competent jury understanding and verdict delivery. Though this merger of objective and subjective elements is deeply embedded in the law, the analysis in chapter five suggests that combinations of

58 R v Howe (1958) 100 CL.R. 448, 662 (Dixon CJ).
59 Viro (n 46) 100 (Barwick CJ dissenting), 115 (Gibbs J).
60 Palmer (n 37) 831-2 (Lord Morris of Borth-y-Gest for Lord Donovan, and Lord Avonside).
61 Zecevic (n 24) 662 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654, Brennan J agreeing at 666).
62 Criminal Code 1995 (Cth) s 10.4; Criminal Code 2002 (ACT) s 42; Crimes Act 1900 (NSW) ss 418, 419; Criminal Code Act 1983 (NT) ss 29, 43BD; Criminal Code 1899 (Qld) ss 271, 272; Criminal Law Consolidation Act 1935 (SA) s 15; Crimes Act 1958 (Vic) ss 322K, 322M; Criminal Code 1913 (WA) s 248. In Tasmania s 46 of the Criminal Code Act 1924 (Tas) is not based on necessity. Nevertheless, in R v Walsh. Slicer J said that the first limb required the jury to consider whether the accused ‘genuinely and honestly believed that force was necessary’. R v Walsh (1991) 60 A Crim R 419, 423 (Slicer J).
subjective and objective language complicate matters for many juries. For example, it is doubtful that the word “reasonably” adds anything to the word “necessary” when explaining whether self-defence is justified or not to someone who has not had legal training. The idea of reasonableness is already included in the word “necessary” because it is an objective word. With or without the word “reasonably”, the jury is not obliged to accept what the accused has said is true. But judges who know that every statutory word must be given its due wrestle to explain the “unnecessary” addition of the word “reasonably” and are apt to confuse jurors in the process. As Lord Griffiths said in *Beckford v The Queen* (‘Beckford’), the reality is that the jury will assess the reasonableness of the accused’s belief when assessing the honesty of that belief as a matter of common sense. It is better to leave these issues to the jury without analysing them in detail in judicial directions as lawyers are want to do.

The adjudication of a claim of self-defence in a criminal trial is founded upon the assessment of necessity, and this is a matter for determination by the jury. As the embodiment of community standards, when the jury considers whether the accused’s conduct was necessary or reasonably necessary, factors like the imminence of the danger, the opportunity to retreat from that danger, and the personal characteristics or attributes of the accused (e.g. age, sex, ethnicity, religious beliefs, tribal beliefs and traditions, physical disabilities, and cognitive and volitional capacities), are all factored in. For a lay jury, the idea of necessity by itself includes and takes account of all these elements. This analysis suggests that breaking the elements of justification into subjective and objective parts, unnecessarily complicates what the jury is required to do. Indeed, when a judge breaks down necessity or justification into a number of forensic parts, aberrant trial results suggest that jurors think that they are being asked to do something other than what comes naturally.

The expressions “was that necessary (or really necessary)?” or “was any of this necessary (or really necessary)?” are commonly and frequently used in everyday language by members of the community. It is then legitimate to ask whether any of this needs more than a superficial explanation? Why explain the word “necessary” if it has no meaning beyond its common sense meaning?

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63 [1988] 3 All ER 425; AC 130 (‘Beckford’).

64 Ibid 145 (Lord Griffiths).
For Seymour Thompson the ‘right’ to use force in self-defence ‘[as] it is founded in necessity, it is limited by necessity’, 65 and the use of defensive force ‘must cease as soon as the necessity, real or apparent, ceases’. 66 Joseph Beale has similarly stated that the right of self-defence begins and ends with necessity. 67 The person’s necessity to avoid a threat of death overrides her necessity in avoiding using excessive force in self-defence in repelling that threat. Necessity also naturally avoids or disdains the use of excessive force. As Justice Oliver Wendell Holmes has stated:

[T]he law cannot prevent [a person using excessive force in self-defence] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a [person] choose death now in order to avoid the threat. 68

The resulting principle is that when self-defence is raised as an answer to any charge other than homicide, the question for the jury is quite simple: was it necessary in self-defence for the accused to do what she did?

The focus of this chapter so far has been to formulate a simple self-defence provision that will explain when self-defence is justified in offences other than homicide. The recommendation resulting is that subsection one of the self-defence provision would be improved if it read as follows:

A person is not guilty of an offence if it was necessary in self-defence to do what he or she did.

I now discuss whether the self-defence provision should be different when self-defence is raised in homicide cases. Does this “simple” test need to recognise that homicide cases raise different self-defence issues as ss 418 and 421 seem to accept? That is, could one simple provision explain how self-defence should be applied in every criminal case whether involving homicide or any lesser offence?

This part of the thesis considers whether the provisions explaining self-defence should be any different when a homicide is alleged to have resulted from self-defensive

65 Seymour (n 35) 546.

66 Ibid.


68 Oliver Wendell Holmes, The Common Law (Boston, Little Brown and Company, 1881) 47.
action. Does the fact that there is always a dead body in a homicide case where self-defence is alleged mean that different common sense factors apply? Does the existence of a dead body change community notions of what constitutes common sense adjudication of self-defence? In Howe, Palmer, Viro and Zecevic, the proportionality of the force used was the central issue for the judges who formulated the self-defence tests that came out of those cases.

The New South Wales public servants who prepared ss 418 and 421 for the legislators also focused on the proportionality of the force used. But the reality is that the concept of necessity includes that idea of proportionality for the jury whether a homicide resulted or not. The core of the decision as to whether the accused should be acquitted, found guilty of manslaughter, or guilty of murder, lies in the jury’s assessment of the necessity of what was done in self-defence. That is, if the jury decides the accused in self-defence did “no more” than was necessary, she is not guilty of murder and not guilty of manslaughter. If the jury decides the accused used more force than was necessary, she is guilty of manslaughter but not guilty of murder. If the jury decides that the force that the accused used was not necessary at all, she is guilty of murder.

A single simple provision explaining how self-defence should be considered and applied in all criminal cases can suffice even if a homicide has resulted. There is thus

69 See generally Howe (n 58).

70 See generally Palmer (n 37).

71 See generally Viro (n 46).

72 See generally Zecevic (n 24).

73 Self-defence (ss 418 and/or 421) is commonly raised to answer violent offences like common assault (s 61); assault occasioning actual bodily harm (s 59); wounding or causing grievous bodily harm with intent (s 33); assault causing death (s 25A); murder and manslaughter (s 18). In all of these offences, the degree of self-defensive force used by the accused is the factor which determines the gravity of the offence. At core, it is the perceived “necessity” to use force and the degree of force used that determine whether that force was proportional. Jeremy Horder has argued that ‘English law conceals the requirement for both necessity and proportionality in the notion that the force used defensively must have been “reasonable.”’ Jeremy Horder, ‘Self-Defense, Necessity and Duress: Understanding the Relationship’ (1998) 11 Can. J. L. and Jurisprudence 143, 144 n 7.
no need for more technical definitions that feature the convoluted requirements of objectivity/subjectivity found in ss 418 and 421.

6.3 The “simple” self-defence test for homicide offences, and various offences other than homicide

It is therefore proposed that the following provision be introduced into the New South Wales Crimes Act to replace all the existing provisions that explain how self-defence should be adjudicated when it is raised by the defence:

(1) A person is not guilty of an offence if it was necessary in self-defence to do what he or she did.
(2) In homicide murder trials, a person will be guilty of manslaughter and not guilty of murder if it was necessary for the person in self-defence to do what he or she did, but the force used by the person was more than necessary.

The phrase test “not guilty” is used because when a jury returns its verdict, they say whether the accused is “guilty” or “not guilty”. They do not say whether the accused was “criminally responsible” or “not criminally responsible”.74

It is submitted that this provision would eliminate the complexities and difficulties which juries and judges face in self-defence cases like Abdallah, Patel, Colosimo and Evans.

This self-defence provision is the more virtuous because it is written in plain English. It gives the judicial decision maker complete autonomy subject only to appeal on matters of law.75 Because it is simple enough for a jury to understand without judicial

74 Section 418(1) provides:

A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

Section 418(1) is premised on whether “a person” is “not criminally responsible” notwithstanding the form of the verdict the jury is asked to return is: “guilty” or “not guilty”, not “criminally responsible” or “not criminally responsible”.

75 The question of proper directions in law for the jury is discussed later in this chapter.
explanation, it will also likely reduce appeals premised in arguments that the trial judge misdirected the jury on the relevant law.\textsuperscript{76}

This plain English test may have potential application in other parts of the \textit{Crimes Act 1900} (NSW) where complicated objective and subjective tests are used such as in defining consent in sexual assault cases, but that consideration is beyond the scope of this thesis.

\textbf{6.4 Onus of proof issues}

It is elementary that the prosecution retains an overriding obligation to prove an offence including a murder or manslaughter charge beyond reasonable doubt (s 419).\textsuperscript{77} That prosecution obligation is unchanged in a case where the accused alleges exonerating or mitigating self-defensive conduct.\textsuperscript{78} The changes to the self-defence test recommended above require consequential amendment to s 419. My recommendation for a change to s 419 is as follows:

\begin{itemize}
\item \textsuperscript{76} New South Wales Law Reform Commission, \textit{Jury Directions} (Consultation paper 4, 2008) 13 [1.35] (‘\textit{Jury Directions}’). Despite the fact that it is inappropriate that defence counsel would interrupt a trial judge when giving directions to correct him/her, the NSWLRC stated

\begin{quote}
Quite apart from difficulties with individual directions, there is the tangible risk that trial counsel are prepared to remain silent at the trial concerning the lack of or inadequacy of these directions in the confidence that any error will permit a successful appeal – a “forensic culture” which has been described as regrettable (citations omitted): at 15 [1.43].
\end{quote}

\item \textsuperscript{77} Section 419 of the \textit{Crimes Act 1900} (NSW) provides:

\begin{verbatim}
419 Self-defence—onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.
\end{verbatim}

\item \textsuperscript{78} It is beyond the scope of this thesis to discuss or analyse the subject matter of alternative verdicts. However, it is appropriate to observe that the possibility of manslaughter alternative verdicts has been unavoidably engaged in New South Wales ever since the High Court began discussing excessive self-defence in homicide cases. While counsel advising persons accused of homicide retain forensic choices as to if and how they try for an acquittal rather than a manslaughter verdict when self-defence facts exist, the operation of s 421 of the \textit{Crimes Act 1900} (NSW) and the replacement section recommended in this thesis will significantly change those forensic choices. Those choices and the importance of the separating the prosecutorial and judicial functions have been discussed in some detail in \textit{James v The Queen} (2014) 253 CLR 475.
\end{itemize}
In any self-defence case, the prosecution has the onus of proving, beyond reasonable doubt, that it was not necessary for the person in self-defence to do what he or she did.

The final question then is what directions a trial judge would need to give the jury if the recommended plain English provision is adopted.

6.5 Model judicial directions in self-defence cases under the recommended provision

Model directions should be written in plain English so that lay jurors can understand. No generic judicial direction would be appropriate because the facts of every case are different. As Gleeson CJ in *Doggett v The Queen*\(^{79}\) said ‘[d]irections are not ritualistic formularies. Their purpose is to assist the jury in the practical task of resolving fairly the issues which have been presented to them by the parties.’\(^{80}\) In *Zoneff v The Queen*\(^{81}\) Kirby J warned against using complex instructions. He said:

> Instructions to a jury should be comprehensible. They should avoid the unrealistic imposition on a jury of over-subtle distinctions and the imposition on judges of a duty to give directions that may actually be counter-productive to the end sought. Where matters are tried by jury, our legal system operates on an assumption that jurors will obey the judge’s directions concerning matters of law and other matters upon which the judge has authority to speak. It is realised that sometimes jurors are likely to be "dumbfounded" by judicial statements about the law.\(^{82}\)

In 2008 the New South Wales Law Reform Commission (“NSWLRC”) found that “difficult language in model directions” has been attributed to:

> The desire to be legally accurate. To prevent possible appeals, directions use the language found in case law and statutes. Directions therefore contain complex legal rules and explain concepts in legal language that is foreign to jurors. Efficiency in terms

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82 Ibid 260 [65] (Kirby J dissenting) (emphasis in original) (citations omitted).
of time-savings and legal accuracy overshadow the aim of ensuring that jurors properly understand the relevant legal rules and concepts.\textsuperscript{83}

In practice however, complex language back-fires and has led to many appeals.\textsuperscript{84} The NSWLRC also recommended plain English model judicial instructions and if this provision were adopted, that counsel could also be applied in self-defence cases. The NSWLRC has found that the “model directions” in the Bench Book ‘may contain language that is very difficult to understand. They may contain legal jargon and many words and phrases that are unfamiliar to most people’.\textsuperscript{85} The NSWLRC has stated, ‘jury directions should use language that jurors can understand. This is a key element in enabling juries to make well-informed decisions.’\textsuperscript{86} The NSWLRC recommended that model plain English judicial directions be adopted.\textsuperscript{87}

In 2012 the NSWLRC reiterated its recommendation that the legislature provide model plain English directions and suggested the legislature could most effectively do that by directing the “Bench Book Committee” to rewrite the Bench Book in ‘consultation with experts in plain English drafting’.\textsuperscript{88} Because such model plain English directions have never been officially drafted, I now set out recommended model judicial directions.

\textsuperscript{83} Jury Directions (n 76) ch 3, 54 [3.32].

\textsuperscript{84} See for example Bell (n 23); Tilmouth (n 12); Justice M Weinberg, “Jury Directions on Trial – A Pathway Through the Labyrinth?” (Supreme and Federal Court Judges’ Conference, Darwin, 5–9 July 2014).

\textsuperscript{85} Jury Directions (n 76) ch 3, 54 [3.31]. The New South Wales Law Reform Commission throughout this “Consultation Paper” was referring to the “Judicial Commission of NSW, Criminal Trial Courts Bench Book (October 2008)”. See Jury Directions (n 76).

\textsuperscript{86} Ibid ch 3, 54 [3.33].

\textsuperscript{87} Ibid.


The NSWLRC stated that

The Bench Book has been prepared under the direction of the Criminal Trial Courts Bench Book Committee, which includes judges from the Supreme and District Courts, primarily to assist the judges of these courts in the conduct of trials.

\textit{Jury Directions} (n 76) ch 3, 44 [3.2].
6.5.1 Model judicial directions in self-defence cases that do not involve homicide

The foregoing discussion has suggested that model self-defence directions should also be written in plain English so that lay jurors find them simple to understand. I recommend that the trial judge start the direction by stating to the jury the offence (or offences) in respect of which the plea of self-defence has been raised. That is, the trial judge should say: The accused has been charged with the following offence(s) [specify the offence, for example, Assault]. The trial judge should then tell the jury that the accused says that she is not guilty because she was defending herself. The judge should say that “the accused says she is not guilty because she was defending herself”. The judge should then remind the jury of what their role. The direction should be in words to the following effect: Your role is to apply the law and determine whether the accused is guilty or not guilty based on the evidence that has been placed before you in this courtroom. The judge should then tell the jury the law of self-defence that they must apply, which is as follows:

The law recognises the right of the accused to defend herself. Although self-defence is referred to as a defence, it is for the Crown to prove beyond reasonable doubt that it was not necessary for the accused to do what she did in self-defence. That will be overwhelmed if the defence proves on the balance of probabilities that the self-defensive force used was necessary. The question as to whether the accused should be acquitted or found guilty lies in the necessity of what she did in self-defence. The word necessary has no meaning beyond its common sense meaning that you members of the jury use in your everyday conversation. Therefore, the law you must apply is as follows:

1. If you decide that it was necessary for the accused in self-defence to [do what she/he did. Specify the offence, for example, assault], then your verdict must be not guilty.

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89 For the lengthy and complex self-defence directions in relation to ss 418, 421 and 419 of the Crimes Act 1900 (NSW) see the “[s]uggested direction self defence — cases other than murder”, Judicial Commission of New South Wales, Criminal Trials Courts Bench Book (Judicial Commission of New South Wales, 2019) 1298-1300 (‘Criminal Trials Courts Bench Book’). See also the “[s]uggested direction self defence — murder cases”: at 1300-1302.
2. If you decide that it was not necessary for the accused in self-defence to [do what she/he did. Specify the offence, for example, assault], then your verdict must be guilty.

6.5.2 Model judicial directions in self-defence cases that involve homicide

I recommend that the judge start the direction in homicide cases where the accused claims self-defence by stating to the jury the offence (or offences) in respect of which the plea of self-defence has been raised. That is, the judge should say: The accused has been charged with the following offence(s) [specify the offence, for example, murder]. The judge should then tell the jury that the accused says that she is not guilty because she was defending herself. I recommend that the judge should do this by saying: "The accused says she is not guilty because she was defending herself". The judge should then remind the jury of their role. The direction should be in the following terms: “Your role is to apply the law and determine whether she is guilty or not guilty based on the evidence that has been placed before you in this courtroom.” The judge should then tell the jury the law of self-defence that they must apply, which is as follows:

The law recognises the right of the accused to defend herself even to the point of killing. Although self-defence is referred to as a defence, it is for the Crown to prove beyond reasonable doubt that it was not necessary for the accused to do what she did in self-defence. That will be overwhelmed if the defence proves on the balance of probabilities that the self-defence used was necessary. The question as to whether the accused should be acquitted, or found guilty of manslaughter or murder, lies in whether it was necessary for her to do what she did in self-defence and whether the level of force she used was excessive or not. The word necessary has no meaning beyond its common sense meaning that you members of the jury use in your everyday conversation. Therefore, the law you must apply is as follows:

1. If you decide that it was necessary for the accused in self-defence to do what she did and she used no more force than was necessary, then your verdict must be not guilty of murder and not guilty of manslaughter.
2. If you decide that it was necessary for the accused in self-defence to do what she did and she used force more than was necessary, then your verdict must be not guilty of murder but guilty of manslaughter.

3. If you decide that the accused was not intending to defend herself and that the force she used resulted in this homicide, then your verdict must be guilty of murder.

The trial judge should then provide every individual juror with the directions she has given in writing.

Part Three: Recommendations

The recommendations in relation to the test of self-defence, the onus of proof, and the model directions in law for the jury to be told by the trial judge, are as follows:

6.6 Self-defence test: Recommendations

6.6.1 Recommendation One

Section 481 of the Crimes Act 1900 (NSW), self-defence, should be repealed.

6.6.2 Recommendation Two

Section 421 of the Crimes Act 1900 (NSW), the partial defence of excessive self-defence, should be repealed.

6.6.3 Recommendation Three

The new test of self-defence should be in the following terms:

(1) A person is not guilty of an offence if it was necessary in self-defence to do what he or she did.

(2) In homicide murder trials, a person will be guilty of manslaughter and not murder if it was necessary for the person in self-defence to do what he or she did and the force used by the person was more than necessary.
6.7 Onus of Proof Recommendation

The new onus of proof section should be drafted in the following terms:

In any self-defence case, the prosecution has the onus of proving, beyond reasonable doubt, that it was not necessary for the person in self-defence to do what he or she did.

6.8 Judicial Model Directions: Recommendations

6.8.1 Recommendation One: Model judicial directions in self-defence cases that do not involve homicide

The model directions are as follows:
1. The accused has been charged with the following offence(s) [specify the offence].
2. The accused says she is not guilty because she was defending herself.
3. Members of the jury, your role is to apply the law and determine whether she is guilty or not guilty based on the evidence that has been placed before you in this courtroom.
4. The self-defence law that you must apply is as follows:
   4.1 The law recognises the right of a person to defend herself.
   4.2 Although self-defence is referred to as a defence, it is for the Crown to prove beyond reasonable doubt that it was not necessary for the accused to do what she did in self-defence. That will be overwhelmed if the defence proves on the balance of probabilities that the self-defence used was necessary.
   4.3 The question as to whether the accused should be acquitted or found guilty lies in the necessity of what she did in self-defence. Therefore, the law you must apply is as follows:
      4.3.1 If you decide that it was necessary for the accused in self-defence to [do what she/he did. Specify the offence, for example, assault], then your verdict must be not guilty.
      4.3.2 If you decide that it was not necessary for the accused in self-defence to [do what she/he did. Specify the offence, for example, assault], then your verdict must be guilty.
6.8.2 Recommendation Two: Judicial directions in self-defence cases that involve homicide

The model directions are as follows:

1. The accused has been charged with the following offence(s) [specify the offence, for example, murder].
2. The accused says she is not guilty because she was defending herself.
3. The law recognises the right of a person to defend herself even to the point of killing.
4. Although “self-defence” is referred to as a defence, it is for the Crown to prove, beyond reasonable doubt, that it was not necessary for the accused to [specify act, for example, stabbing, shoot the victim] in self-defence. That will be overwhelmed if the defence proves on the balance of probabilities that the self-defence used was necessary.
5. The question as whether the accused should be acquitted, or found guilty of manslaughter or murder, lies in whether it was necessary for her to do what she did in self-defence and whether the level of force she used was excessive or not.
6. The word necessary has no meaning beyond its common sense meaning that you members of the jury use in your everyday conversation. Therefore, the law you must apply is as follows:
   6.1 If you decide that it was necessary for the accused in self-defence to do what she did and she used force no more than was necessary, then your verdict must be not guilty of murder and not guilty of manslaughter.
   6.2 If you decide that it was necessary for the accused to defend herself but that she used force more than was necessary, then your verdict must be not guilty of murder but guilty of manslaughter.
   6.3 If you decide that the accused was not intending to defend herself and that the force she used resulted in this homicide, then your verdict must be guilty of murder.

6.8.3 Recommendation Three

The trial judge should provide every individual juror with the self-defence test in writing.
6.8.4 Recommendation Four

The trial judge should provide every individual juror with the directions she has given in writing.

Conclusion to chapter six

I have recommended different self-defence tests for criminal cases involving homicide and those which do not. But the tests are consistent. The only difference between the homicide and non-homicide tests arises because of the need to recognise that manslaughter is an appropriate conviction in a homicide case where the accused used more force than was necessary to defend herself. The self-defence test I have proposed when arguments of self-defence are raised in homicide cases, eliminates the problems that I have identified in the existing tests set out in ss 418 and 421 of the Crimes Act 1900 (NSW). The recommended self-defence test for homicide cases is more virtuous because it is conceptually simple and is written in plain English. It gives the judicial decision maker, whether judge or jury, complete autonomy in making the conviction or acquittal decision, subject only to appeal on matters of law. Because it is simple enough for a jury to understand without judicial explanation, it will likely reduce appeals premised on arguments that the trial judge misdirected the jury on the relevant law.

Dissatisfaction with legislative drafting and the excessive complexity of the law has been an issue for many centuries. King Edward III and King Edward IV endorsed enacting plain and short statutes. Sir John Donaldson and Lord Scarman reiterated what the two Kings said. The House of Lords in Palmer and the High Court in Zecevic favoured a simple approach. Various governments’ law reforms bodies have endorsed the idea of drafting legislation in plain English. The legislature should recognise that conceptually they are writing the criminal law for lay people.

The governing principles in the formulation of a “simple” self-defence test are that the test should be simple, it should be free from any technical legal terms, and it should allow the jurors to discuss it using everyday language without the need for explanatory directions from trial judges. That is not to say that a simple self-defence formulation will make trial judge directions redundant in a homicide case involving self-defence
issues. The intention is rather to focus on the need to ensure that the single test provided is so simple that a jury could not misunderstand it. The simple test eventually chosen should also recognise that when trial is by jury, the jury should be recognised as the final and independent arbiter and, like judges in judge-alone criminal trials, should be completely autonomous when deciding the guilt or innocence of the accused. If we leave this all to the jury, we get decisions according to community standards that are not parroted responses following legislative or judicial direction. To achieve these outcomes the test chosen to determine whether a homicide was committed in self-defence or not, will be drafted in plain English.

I submit that if implemented, these recommendations would simplify the law and reduce aberrant jury verdicts in New South Wales in the future because they are drafted in plain English and recognise the autonomy of the jury as the relevant judicial decision-maker.

Because the ultimate question in a self-defence case is whether the accused was defending him or herself and whether what was done was necessary, the recommendations have avoided legal jargon and the legal predilection to explain self-defence in either objective or subjective terms. That is because many self-defence cases will be decided by lay jurors who do not use objective or subjective tests in their everyday lives and conversations. The recommendations therefore proceed from the premise that there is no need for more technical definitions that feature the convoluted requirements of objectivity/subjectivity currently found in ss 418 and 421. Nor are judges who can understand objective and subjective tests in legislation disadvantaged by the changes recommended. That is because they can also understand the plain English rules that are recommended here. The expressions “was that necessary (or really necessary)?” or “was any of this necessary (or really necessary)?” are commonly and frequently used in everyday language by members of the community. Because the lay jurors, and judges, who are required to adjudicate claims of self-defence in criminal law cases understand the idea of necessity as it is used in regular conversational English, the recommendations here are sound even though they omit legal jargon.

Section 419 should also be amended to be compatible with the recommended self-defence test.
I have also recommended model judicial directions for self-defence cases in criminal law in plain English. The plain English used follows the plain English used in the recommended new statutory language and it is submitted that lay jurors will find these model directions easy to understand.
CHAPTER SEVEN
FINAL CONCLUSION

Introduction

The purpose of this thesis has been to formulate and recommend a “simple” self-defence test that lay person jurors in New South Wales can understand and apply in self-defence cases, when self-defence is raised in answer to various offences including homicide offences.

The law of self-defence is simple. As Deane J said in Zecevic and as I stated in the chapter one:

The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of the school child who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.¹

Nevertheless, it has become challenging. In part, that difficulty arises because lay juries have to draw a line that determines whether an accused was committing an offence, or whether she was just defending herself. In part, that difficulty arises because in homicide cases where self-defence is claimed, juries have to draw the line between murder, manslaughter, self-defence, or in lay terms, between limited guilt or no guilt whatsoever. In part, the difficulty arises because what was supposed to be a simple law became unnecessarily complex.

7.1 Chapter one

In chapter one, I discussed the research questions that this thesis answered, and the methodology in answering those questions. Because the law related to self-defence in homicide cases in New South Wales became very contested during the 20th century for reasons that are explained within the thesis, the research questions that this thesis

¹ Zecevic v Director of Public Prosecutions (VIC) (1987) 162 CLR 645, 675 (Deane J).
answered were: (1) Is it possible to define self-defence within the existing *Crimes Act 1900* (NSW) so simply that no reasonable jury could misunderstand it; and (2) If so, how should self-defence be so defined? The thesis also answered the ten supporting questions which assisted in responding to those primary questions: (3) Did English common law always recognise that self-defensive action by a person accused of homicide mitigated that action?; (4) if not, how and when did self-defence come to be recognised as a defence that mitigated the severity of a finding of homicide against a person accused of homicide?; (5) what part did the English jury play in the development of a law of self-defence in English common law?; (6) what part did the High Court of Australia and the Privy Council in England play in the development of a law of self-defence in Australia common law?; (7) how have the parliaments of the Australian states and territories responded to the uncertainties in Australian self-defence law?; (8) have legislative amendments in New South Wales since *Zecevic* improved clarity or have they compounded complexity?; (9) does a “simple” self-defence test matter?, and; (10) if so, what are the requirements of a simple self-defence test simple that a jury cannot misunderstand?; (11) how can such a simple test be formulated?; and (12) how should self-defence law in New South Wales be reformed?

The methodology section explained the approach that I have taken in this thesis to answer those questions. The primary methodological approach was a qualitative approach which used ‘doctrinal’ research and ‘black-letter’ legal methodology in the

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2 Terry Hutchinson offered an explanation as what doctrinal research in reforming the law might involve. She stated, ‘[t]he essential features of doctrinal scholarship involve ‘a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation’.


3 Terry Hutchinson and Nigel Duncan has offered one explanation of the term back letter, they stated:

The term ‘black letter’ refers to research about the law included in legislation and case law. The term originated from the name of the Gothic type which continued to be used for law texts. It is defined in Bryan A Gardner (ed), *Blacks Law Dictionary* (Westlaw International, 9th ed, 2009) as: ‘One or more legal principles that are old, fundamental, and well settled.’ In addition, the definition notes: ‘The term refers to the law printed in books set in Gothic type, which is very bold and black’.

process. However, because this thesis includes law reform recommendations, it may not be categorised as ‘pure’ doctrinal research. The primary materials used in that doctrinal and black letter research were case law and the legislation/statutes. However, the thesis began with a detailed historical section to place the common law materials in context, and after the analysis of common law reviews law reform and academic commentary to identify the reasons for statutory amendments that flowed from a number of jurisprudential blockages in Australia in the 20th century. The research questions were thus not answered using a single research methodology. This thesis used a number of different methodologies, which sometimes overlapped.

The structure and contents section, together with the table of contents, pointed to the signposts of this thesis.

7.3 Chapter two

In chapter two I began by tracing the idea of self-defence in criminal law history back to medieval English life and and “the peace” that the king was trying to establish as his contribution to the good of English society as a whole. Because this thesis is about the law of self-defence, I traced the idea of self-defence in the criminal law back to medieval England because the lay idea that ordinary people should not be found guilt of crime if they acted in self-defence, conflicted with the idea of Norman kings who wanted a conviction for every homicide. The royal focus was on enforcing the peace.

In chapter two, I explained that the story of self-defence in English law is the story of the complicated interaction of new institutions in a very lawless time. I explained where the criminal law came from. I noted that criminal law and the law of torts were not separated until about the early 14th century. Before that there was no distinction between wrongs between individuals and wrongs committed against the state, and more specifically “the peace” that the king was trying to establish as his contribution to the good of English society as a whole. The king’s desire to establish peace was the foundation of the entire system of criminal procedure and led to its growth. The Crown enacted several statutes to press the need for convictions for homicide to maintain the king’s peace with assurances to juries that those they convicted would be fairly treated if those juries simply noted that the homicide concerned was a killing

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4 Hutchinson (n 2) 132.
in self-defence. Those statutes are part of the story of how juries decided self-defence cases from about late 13th century to the 18th century. That history is the story of how English juries responded to the king’s statutes.

In chapter two I also explained how the jury came to decide the guilt or innocence of persons accused of wrongdoing. I explained that was the result of the Pope’s proclamation at the Fourth Lateran Council in 1215, that priests could no longer be involved in the king’s ordeal trials. Though the Pope probably intended to secure ecclesiastical jurisdiction and control over matters of sin by this proclamation, the dexterous experimental development of the jury as a fact deciding institution by the king and his judges not only created a popular institution, but an institution that came to be perceived as a protector of citizen rights and liberty. I explored how early juries dealt with homicide cases when they accepted that there was an element of self-defence in the story.

To stop juries meddling in the fate of persons accused of homicides, successive English kings passed a variety of statutes. Each of those statutes was designed to convince juries to let the king decide who should escape capital punishment for homicide by royal pardon. But because juries did not trust the king to always pardon in self-defence cases despite his statutory assurances, they continued to manipulate the evidence and added explanations to convince the king why this was not a homicide. The goal of those ancient juries was to protect people accused of homicide if the jury considered that they had acted in self-defence and not with malice aforethought. By adding explanations, or finding that persons accused of crime had acted in undeniable self-defence, juries ensured that accused persons would escape punishment altogether or be granted royal pardons.

The line between murder, manslaughter, self-defence, limited guilt or no guilt has thus always been challenging. Different degrees of homicide developed in large part because of what the executive perceived as jury perversity. A distinction between homicide in the execution of the law and homicide by misadventure or self-defence was also developed, and the categories of justifiable homicide and excusable homicide were established as the primary categories of non-felonious homicide.
Jury perversity only became obvious after the development of the role of public prosecutor. That exposure increased the ability of judges to insist on jury independence and impartial fact finding. Though juries did not have to have personal knowledge of the facts of a case from the 13th century, they were not excluded from trial if they did have personal knowledge until perhaps, the 16th century. Juries were popular because they were believed to protect the common man against excessive executive action. Juries continued to find ways to protect people accused of homicide in self-defence cases, even when statutory rules theoretically dictated very limited scope for acquittal.

7.4 Chapter three

In chapter three I explained the criminal self-defence law that New South Wales inherited and how it was developed during the 20th century. I discussed the four cases which defined Australian common law on self-defence between 1958 and 1987 and which recognised a partial defence to murder which was generally, but not always accurately described as excessive self-defence. Three were decided by the High Court of Australia and one by the Privy Council in England. Those cases are: R v Howe (HC), Palmer v The Queen (PC), Viro v The Queen (HC), and Zecevic v Director of Public Prosecutions (Vic) (HC). Gleeson J (as he then was) said that the High Court decisions in Howe, Palmer, Viro and Zecevic, were an “experiment” with criminal law and justice.

Even though the decisions in Howe, Palmer, Viro and Zecevic did not succeed in creating a simple and predictable modern law of self-defence in Australia, they did identify the competing arguments as to what a good modern law of self-defence should look like. The underlying questions were about whether modern self-defence law

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5 (1958) 100 CLR 448 (‘Howe’).
6 [1971] 1 All ER 1077; AC 814 (‘Palmer’).
7 (1978) 141 CLR 88 (‘Viro’).
8 (1987) 162 CLR 645 (‘Zecevic’).
should focus on overall intent or the proportionality of the force that was used. A secondary intellectual conflict concerned whether proven intent should result in an acquittal or a manslaughter conviction in a self-defence case. Some judges focused on whether the accused’s intent was determinative. If there was no intent to kill but just to self-defend, then an acquittal was appropriate. Other judges believed that if the accused used more force than was necessary, then an acquittal was inappropriate, and the jury should be instructed to consider a manslaughter verdict.

The decisions in Howe, Palmer, Viro and Zecevic have attracted considerable academic commentary. I discussed the reasoning of those commentators. Most of that commentary was directed to whether, there should be a manslaughter half-way house or middle-ground verdict in proven self-defence homicide cases. Some commentators liked the half-way house or middle ground approach. Others rejected it for various reasons. The High Court appears to have been discouraged in their efforts to modernise the law of self-defence in Australia before 1987 because they were still subject to English common law precedent. But the complexity and impracticality of these decisions did not assist modernisation efforts and did not garner universal support, state legislatures stepped in and made the law more complex as I explained in chapter four.

7.5 Chapter four

In chapter four I discussed how the parliaments of the Australian states and territories responded to the uncertainties in Australian self-defence law occasioned by the lack of clear High Court direction in homicide cases that involved self-defence. I first explored the statutory self-defence provisions which were passed in the various states and territories. I identified the various tests as to what constitutes self-defence that those legislatures devised and what judges have said about those tests. I then discussed the New South Wales statutory self-defence provisions. I explained the context in which these provisions were passed and the alternatives that were considered before they were passed. I also briefly discussed the self-defence provisions they settled on and what judges have said about them. I analysed these provisions and what judges said about them in more detail in chapter five.
7.6 Chapter Five

In chapter five I analysed the effectiveness of the New South Wales legislative responses to the uncertainties in Australian self-defence law occasioned by the absence of unanimous High Court direction when a homicide had been charged as murder and self-defence had been claimed. I noted how juries had resisted verdict direction in homicide cases involving homicide elements in English history and questioned whether juries were still behaving in similar ways. I observed that the near obsession of executive governments in Westminster democracies with the need for a conviction for every homicide resulted in harsh legislation that did not resonate with jury common sense and which is difficult for trial judges to explain in simple terms. I then analysed the statutory self-defence provisions in New South Wales. I showed why ss 418-421 of the Crimes Act 1900 (NSW) were passed to “codify” self-defence law in homicide cases in New South Wales. I explained why these legislative amendments in New South Wales post Zecevic have not improved clarity. And I explained why even these new provisions need to be simplified.

I explained that the primary reason New South Wales’ self-defence law still needs simplification is because the statutory provisions provided in 2002 are too complicated for judges to easily explain to juries. They require juries to undertake complex legal analysis which is incompatible with the “democratic common sense” juries are expected to apply in reaching their verdicts. And, I noted, as has been consistently said for hundreds of years, that is why we persist with juries in criminal trials. While New South Wales trial judges have tried hard to explain when giving trial directions to juries the formulas provided by the legislature, jury instructions in self-defence cases are not easy to get right. Nor is it the job of the courts in Australia to reform the law. I therefore proposed that the New South Wales legislature needs to revisit and simplify the self-defence provisions in the Crimes Act 1900 (NSW). That is the task that I set myself in chapter six of the thesis.

7.7 Chapter six

The thesis concludes with the formulation of a “simple” self-defence test. I recommended different self-defence tests for criminal cases involving homicide and those which do not. But the tests are consistent. The only difference between the homicide and non-homicide self-defence tests I proposed arises from the need to
recognise that manslaughter is an appropriate conviction in a homicide case where the accused used more force than was necessary to defend herself. The self-defence test I proposed when self-defence arguments are raised in homicide cases eliminates the problems that I identified in the existing tests set out in ss 418 and 421 of the Crimes Act 1900 (NSW). The recommended self-defence test for homicide cases is better because it is conceptually simple and written in plain English. It gives the judicial decision maker, whether judge or jury, complete autonomy in making the conviction or acquittal decision subject only to appeal on matters of law. Because it is simple enough for a jury to understand without judicial explanation, it will likely reduce appeals premised on arguments that the trial judge misdirected the jury on the relevant law.

Dissatisfaction with legislative drafting and the excessive complexity of the law has been around for many centuries. King Edward III and King Edward IV endorsed the enactment of plain and short statutes. Sir John Donaldson and Lord Scarman reiterated what those two Kings said. The House of Lords in Palmer and the High Court in Zecevic favoured a simple approach. Various government law reforms bodies have endorsed the idea of drafting legislation in plain English. There is thus no doubt that simple drafting is better. But the current self-defence provisions in the Crimes Act 1900 (NSW) are not drafted in plain English. They use a number of tests that mix objective and subjective approaches which cannot be readily understood by lay jurors.

The governing principles in the formulation of a “simple” self-defence test are that the test should be simple, it should be free from any technical legal terms, and it should allow the jurors to discuss the facts and law in everyday language without the need for complex explanatory directions from trial judges. That is not to say that a simple self-defence formulation will make trial judge directions redundant in a homicide case involving self-defence issues. The intention is rather to focus on the need to ensure that a single test be provided that is so simple that a jury could not misunderstand it. Plain English is essential if that simplicity ideal is to be realised.

I have also submitted that the implementation of these recommendations would simplify the law and reduce aberrant jury verdicts in New South Wales in the future.

Because the ultimate question in a self-defence case is whether the accused was defending him or herself or not and whether what was done was necessary, the recommendations have avoided legal jargon and the legal predilection for the
explanation of self-defence in either objective or subjective terms. That is because many self-defence cases will be decided by lay jurors who do not use objective or subjective tests in their every day lives and conversations. The recommendations are therefore premised on the notion that there is no need for more technical definitions that feature the convoluted requirements of objectivity/subjectivity currently found in ss 418 and 421. Nor are judges who can understand objective and subjective tests in legislation disadvantaged by the changes recommended. That is because they can also understand the plain English rules that have been recommended. The expressions “was that necessary (or really necessary)?” or “was any of this necessary (or really necessary)?” are commonly and frequently used in everyday language by members of the community. Because the lay jurors and judges who are required to adjudicate self-defence claims in criminal law understand the idea of necessity as it is used in regular conversational English, the recommendations here are sound even though they omit legal jargon.

I have also recommended consequential change to s 419 about the onus of proof in homicide trials so that it is compatible with the recommended self-defence test.

I concluded the thesis by recommending plain English model judicial directions for use in criminal law self-defence cases. The plain English used follows the plain English used in the recommended statutory amendments. It is submitted that lay jurors will find these model directions easy to understand.
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Appendix

Note: This Appendix has three parts.

The first provides a summary and source material under the heading 'The Psychology of Self-Defence' as mentioned in footnote 2 in chapter one and footnote 190 in chapter five.

The second provides a summary and source material under the heading 'Self-Defence in Domestic Violence Cases' as mentioned in footnote 51 in chapter 4 and footnote 189 in chapter five.

The third provides a schedule of Australian legislation by jurisdiction indicating how self-defence is currently treated in cases of domestic violence/intimate partner violence in Australia.

1. The Psychology of Self-Defence

It is beyond the scope of this thesis to discuss or analyse the psychological aspect of self-defence. It suffices to provide a brief note.

In chapter one in *Zecevic v Director of Public Prosecutions (VIC)*\(^1\) Deane J said:

> The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of the school child who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.\(^2\)

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\(^1\) *Zecevic v Director of Public Prosecutions (VIC)* (1987) 162 CLR 645 (‘Zecevic’).

\(^2\) Ibid 675 (Deane J).
Justice Deane’s insight into the emotions that arise in circumstances of self-defence echo what Justice Oliver Wendell Holmes said in *Brown v United States of America*:³ 'Detached reflection cannot be demanded in the presence of an uplifted knife'.⁴ In *Palmer*,⁵ the House of Lords said:

[A] person defending himself cannot weigh to a nicety the exact measure of necessary defensive action … If a jury is of the opinion that in a moment of unexpected anguish the person attacked did only what he honestly and reasonably thought was necessary, that should be regarded as most potent evidence that only reasonably defensive action was taken.⁶

The phrase ‘unexpected anguish’ in this test from *Palmer* recognises the psychological element of self-defence which is premised in the emotion of fear. Fear⁷ does not discriminate. Anyone can feel fear regardless of their race, age, height, weight, colour, ethnicity, national origin, culture, religious beliefs, tribal beliefs, sex, gender, sexual preference, physical or mental ability, or marital status.⁸

The fear of death or other bodily harm is a contributor to that ‘compulsion or necessity, … which [can] take away… the guilt of many crimes and misdemeanours.’⁹ The fear of an attack, or the perception that an attack is imminent may trigger the need for the accused’s necessity to defend herself. ‘Fear perceives the impending harm as

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⁴ Ibid 343 (Holmes J).

⁵ *Palmer v R* [1971] AC 814 (Lord Morris, Lord Donovan and Lord Avonside).

⁶ Ibid 832 (Lord Morris for Lord Donovan, and Lord Avonside).

⁷ Fear is one of the major emotions. “The major emotions include joy, grief, fear, anger, hatred, pity or compassion, envy, jealousy, hope, guilt, gratitude, disgust, and love”. Dan M. Kahan and Martha C. Nussbaum, ‘Two conceptions of Emotion in Criminal Law’ (1996) 96 Colum. L. Rev. 269, 276 (citations omitted).

⁸ Kahan etl. stated that: “Numerous studies show that risk perceptions are skewed across gender and race: women worry more than men, and minorities more than whites, about myriad dangers—from environmental pollution to handguns, from blood transfusions to red meat.” Dan M. Kahan; Donald Braman; John Gastil, ‘Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception’ (2007) 4 J. Empirical Legal Stud. 465, 465-466.

significant'. In *R v Phillips* Barwick CJ said: ‘the apprehension of injury or the instillation of fear or fright … does not necessarily involve physical contact.’ A person who fears an attack or perceives that an attack is imminent may ‘overestimate…the probability of harm associated with the threat that causes his fear.’

A fearful person does not make a distinction between inevitable and reasonable necessity. In *Zecevic*, Wilson, Dawson and Toohey JJ said that judges should direct the jury to give ‘proper weight to the predicament of the accused.’ The reason for this approach was that at the time of the occasion or situation in question the accused ‘may have…little, if any, opportunity for calm deliberation or detached reflection.’

People are not responsible and should not be held responsible for their fear, but they are responsible for their anger. In *People v Trevino* the Court said:

The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his decision to use deadly force…. But if the only causation of the killing was the reasonable fear that there was imminent danger … then the use of deadly force in self-defense is proper regardless of what other emotions the party who kills may have been feeling but not acting upon.

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10 Kahan and Nussbaum, Two conceptions of Emotion in Criminal Law (n 7) 285.
11 (1971) 45 ALJR 467.
12 Ibid 472 (Barwick CJ).
14 Zecevic (n 1) 662-663 (Wilson, Dawson and Toohey JJ).
15 Ibid 663 (Wilson, Dawson and Toohey JJ).
The emotions of an accused person who necessarily acted in self-defence are not immaterial. A pattern of abuse or violence ‘heightens the awareness of persons who have suffered violence, shaping their perception of harm.’ Sir James Stephen has written:

An emotion (anger, love, fear, &c.) may be roused by associations connected with the perceptions and acts of intelligence in which it originated, by links at once uncertain and obscure, and may prompt to volition and action after the lapse of years.

In 1881 the Court in *Batten v State* said:

An ideal man is thus made the standard … by which the guilt or innocence of the accused is to be determined. Is this correct? Should not the standard be the man himself? Ought regard to be had to real things, the man, the situation, the surroundings, or should some imaginary person be taken as the guide? Our conclusion is that the question must be decided upon the appearances present to the eyes and mind of the accused himself and upon the belief actually and in good faith entertained by him …. The court is not to set up … as the belief tested, an ideal man. In cases involving life, actual, real things rather than ideal should be taken as standards and

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19 Kahan and Nussbaum, Two conceptions of Emotion in Criminal Law (n 7) 328. Dan Kahan and Martha Nussbaum stated the following questions and said the law has not provided answers to these questions. They said:

Emotions are ubiquitous in criminal law, as they are in life. But how do they, and how should they, affect legal assessment? Should the law be more sympathetic to defendants who are taken over by passions such as anger and fear, or should it view such defendants as especially dangerous? Or should the response of the law depend on an appraisal of the emotion itself—whether it is appropriate or inappropriate, "reasonable" or "unreasonable"? What does it mean for an emotion to be reasonable? Aren't emotions, after all, just disturbances of the personality that can be more or less strong but that are always hostile to reason? Or do they embody judgments, ways of seeing the world? If they do, should we hold people morally accountable for those judgments?: at 270.

In the context of self-defence: at 327-333.


22 80 Ind. 394 (1881).
tests. It is much safer and better to take the real man, the actual situation, and the real surroundings.\textsuperscript{23}

In \textit{Grainger v State}\textsuperscript{24} the issue of reasonableness as a limitation upon self-defence was raised and the Court “definitely” rejected that objective limitation.\textsuperscript{25} The Court held that:

\begin{quote}
if Grainger himself thought that he was in danger, even if that was an unreasonable belief, the killing was in self-defense. The court made clear that it was the defendant's mental state, and not that of a reasonable man – certainly not a reasonable timid coward - that was to be assessed. Mistake, and fear, were to be judged by a subjective test.\textsuperscript{26}
\end{quote}

The emotions that arise when people feel the need to defend themselves have been the subject of considerable academic research. The following sources will enable the interested reader to research the way human emotions work inside a person who feels the need to defend herself:


\textsuperscript{24} 13 Tenn. 459 (1830).

\textsuperscript{25} Singer (n 23) 479.

\textsuperscript{26} Ibid 480.

2. Self-defence in Domestic Violence Cases

Questions concerning self-defence often arise in cases concerning “domestic-captives” or “dominated defendants” and “battered women”. This note acknowledges the issues that arise in these cases and identifies literature which readers can explore for themselves to study the subject further.

Domestic and family violence have attracted the attention of many historians, authors, and scholars. Mackenzie and Colvin have explained that:

[p]ersons who have suffered [such] violence are not confined to a particular gender, age, sexual preference or culture, nor to a particular type of domestic relationship … persons who have suffered violence may be in a heterosexual, homosexual or familial relationship or a relationship of care with the abuser.27

Brooks Holland has argued:

The question of how broadly or narrowly to define “domestic violence” itself invites debate and can vary from jurisdiction to jurisdiction. “Domestic violence is not merely generic violence exhibited in a particular locale or by a perpetrator with a particular

27 Mackenzie and Colvin (n 20) 13-14 (citations omitted).
relationship to his victim. It is this pattern of domination, and not a particular level of violent force, that is central to the concept of domestic violence.”

A context of such violence is particularly relevant when legal culpability for criminal conduct is assessed with subjective tests. Subjective tests recognise the specific emotions experienced by individual accused persons and those emotions are material to the question of whether that person perceived the necessity to act in self-defence. The scholarly literature generally recognises that patterns of abuse and violence ‘heighten...the awareness of persons who have suffered violence, shaping their perception of harm.’ Sir James Stephen has written:

An emotion (anger, love, fear, &c.) may be roused by associations connected with the perceptions and acts of intelligence in which it originated, by links at once uncertain and obscure, and may prompt to volition and action after the lapse of years.

The idea of excessive self-defence was said to be ‘fashioned by men’, for men who kill men, and it failed to take into account the circumstances of women who kill men in

28 Holland (n 27) 90 n 8 (emphasis in original) (citations omitted).

29 Kahan and Nussbaum, Kahan and Nussbaum, Two conceptions of Emotion in Criminal Law (n 7) 328. Dan Kahan and Martha Nussbaum stated the following questions and said the law has not provided answers to these questions. They said:

Emotions are ubiquitous in criminal law, as they are in life. But how do they, and how should they, affect legal assessment? Should the law be more sympathetic to defendants who are taken over by passions such as anger and fear, or should it view such defendants as especially dangerous? Or should the response of the law depend on an appraisal of the emotion itself—whether it is appropriate or inappropriate, “reasonable” or “unreasonable”? What does it mean for an emotion to be reasonable? Aren’t emotions, after all, just disturbances of the personality that can be more or less strong but that are always hostile to reason? Or do they embody judgments, ways of seeing the world? If they do, should we hold people morally accountable for those judgments?: at 270

In the context of self-defence see Kahan and Nussbaum (n 7) 327-333.

30 Mackenzie and Colvin (n 20) 20.


self-defence as a response to domestic violence within a family.³³ Ian Leader-Elliot has argued:

None of those who developed the new partial defence considered the question whether a doctrine formulated for men who kill men in response to threatened harm might fail to reflect the exculpatory circumstances when women kill men in self-defence.³⁴

Self-defence laws have become more accommodating to women who kill their violent abusers since 2005.³⁵ In some jurisdictions, self-defence has been made available even where a person was responding to a threat of force or violence that was not imminent,³⁶ and, in those cases, pre-emptive self-defence is thus permitted. In Wright v Tasmania³⁷ Blow J said:

A person who believes he or she is about to be attacked does not necessarily have to wait for the assailant to strike the first blow or fire the first shot. Circumstances may justify the use of pre-emptive force in self-defence.³⁸

In R v Conlon³⁹ Hunt CJ said:

However, it is well established that a person defending himself from a threatened attack and who has to react instantly to imminent danger cannot be expected to weigh precisely the exact measure of self-defensive action which is required. The accused was not obliged to wait until the attack upon him was repeated. If he honestly believed that the attack would be repeated, he was entitled to take steps to forestall that

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³³ Ibid 76.

³⁴ Ibid 76.


³⁸ Ibid [17] (Blow J, Tennent J agreeing at [33]) (citations omitted).

threatened attack before it was begun. This was a situation in which a pre-emptive strike was justified.\textsuperscript{40}

The historical rule that a threat was only imminent if it was likely to occur immediately had two temporal aspects: force was neither to be used too soon nor too late.\textsuperscript{41} But there was no precise meaning of these ideas of time in criminal law.\textsuperscript{42} Imminence also had many definitions and those differences caused many injustices, particularly in cases which involved various forms of intimate partner violence.\textsuperscript{43} In some of these intimate partner violence cases where the victim acted in self-defence, the clock was said to tick at exactly the same speed as it did in other cases. But again, it has now been generally accepted that time measurement in such cases needs to be considered more carefully.\textsuperscript{44} Victoria Nourse has explained: ‘We know that the imminence rule is

\begin{itemize}
  \item Ibid 98 (Hunt CJ) (citations omitted).
  \item Nourse, Self-Defense and Subjectivity (n 18) 1236-1237.
  \item Victoria Nourse has explained that point by discussing the case of In re Christian S. 20 Cal App 4th 1210, 13 Cal Rptr 2d 232 (1992). A self-defence case involving a skinhead named Elliott who repeatedly harassed a juvenile named Christian. She said:

  There was no dispute that the defendant, Christian, had killed Elliott after an extended set of confrontations on a beach, each time pointing the gun but then running away. The question was whether the presence of malice aforethought had been sufficiently established in the trial court. To the trial judge, time implied malice. It was the "substantial interval during which Christian aimed at Elliott before firing" that convinced the court of Christian's malice: the defendant "had sufficient time to carefully consider what he was doing. Reversing, the appellate court interpreted the meaning of time rather differently, finding lack of malice. "Elliott's repeated threats and his continued pursuit of Christian in the face of his request to be left alone confirmed the immediacy of that risk."

  Notice what has happened here: the clock did not change, but its meaning did. There was no dispute between the trial and appellate courts about the actual temporal lapse between the threat and the shooting. To the trial court, time signified Christian's malice, his motive or emotion. To the appellate court, it signified a different set of emotions and a lack of motive-Christian's fear of Elliott's taunts." For both courts, imminence served as a proxy for emotion and motive, fear or malice.

Nourse, ‘Self-Defense and Subjectivity’ 1257-1258 (emphasis in original) (citations omitted).
\end{itemize}
not invariable.' The rule of imminence became a rule not of time, but of the human relationships we know as family and gender. Self-defence by those who are the victims of intimate partner violence is thus a subject of separate expertise. The following sources will enable the interested reader to research the way human emotions work inside a person who feels the need to defend herself:


46 Ibid 43.

3. Examples of Australian Legislation which responds to Domestic Violence - The Legislation Schedule

Section 10.4 of the Criminal Code 1995 (Cth) provides:

10.4 Self-defence

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

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

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

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

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

(a) to protect property; or

(b) to prevent criminal trespass; or

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

(4) This section does not apply if:

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

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

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

**Section 418 of the **Crimes Act 1900 (NSW)** provides:**

418 Self-defence — when available

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

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

(a) to defend himself or herself or another person, or
(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

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

Section 419 of the *Crimes Act 1900 (NSW)* provides:

419 Self-defence—onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

Section 421 of the *Crimes Act 1900 (NSW)* provides:

421 Self-defence —excessive force that inflicts death

(1) This section applies if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or
(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

Section 93FB of the *Crimes Act 1900* (NSW) provides:

93FB *Possession* of dangerous articles other than *firearms*

1. A *person* who, in a *public place*, possesses--
   
   (a) anything (not being a *firearm* within the meaning of the *Firearms Act 1996*) capable of discharging by any means--
   
   (i) any irritant matter in liquid, powder, gas or chemical form or any dense smoke, or
   
   (ii) any substance capable of causing bodily harm, or
   
   (b) a fuse capable of use with an explosive or a detonator, or
   
   (c) a detonator, or
   
   (d) a distress signal, or distress flare, that operates by emitting a bright light,

   is liable, on conviction before the Local *Court*, to imprisonment for 2 years, or a fine of 50 penalty units, or both.

2. A *person* is not guilty of an offence under this section for possessing anything referred to in subsection (1) if the *person* satisfies the *court* that he or she had a reasonable excuse for possessing it or possessed it for a lawful purpose.

3. A *person* is not guilty of an offence under this section for possessing anything referred to in subsection (1) (a) if the *person* satisfies the *court* that he or she possessed it for the purpose of self-defence and that it was reasonable in the circumstances to possess it for that purpose.

4. In considering a defence under subsection (3), the *court* must have regard to its reasonableness in all the circumstances of the case, including--
(a) the immediacy of the perceived threat to the person charged, and
(b) the circumstances, such as the time and location, in which the thing was possessed, and
(c) the type of thing possessed, and
(d) the age, characteristics and experiences of the person charged.

Section 43BD of the Criminal Code Act 1983 (NT) provides:

43BD Self-defence

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

(2) A person carries out conduct in self-defence only if:

(a) the person believes the conduct is necessary:

   (i) to defend himself or herself or another person; or
   (ii) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
   (iii) to protect property from unlawful appropriation, destruction, damage or interference; or
   (iv) to prevent criminal trespass to any land or premises; or
   (v) to remove from any land or premises a person who is committing criminal trespass; and

(b) the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) However, the person does not carry out conduct in self-defence if:

(a) the person uses force that involves the intentional infliction of death or serious harm:

   (i) to protect property; or
(ii) to prevent criminal trespass; or

(iii) to remove a person who is committing criminal trespass; or

(b) the person is responding to lawful conduct that the person knew was lawful.

(4) Conduct is not lawful for subsection (3)(b) merely because the person carrying it out is not criminally responsible for it.

Section 29 of the Criminal Code Act 1983 (NT) is also relevant. It provides:

29 Defensive conduct justified

(1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.

(2) A person engages in defensive conduct only if:

(a) the person believes that the conduct is necessary:

(i) to defend himself or herself or another person;

(ii) to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;

(iii) to protect property in the person's possession or control from unlawful appropriation, destruction, damage or interference;

(iv) to prevent trespass to land or premises occupied by or in the control of the person;

(v) to remove a trespasser from land or premises occupied by or in the control of the person; or

(vi) to assist a person in possession or control of property to protect that property or to assist a person occupying or in control of land or premises to prevent trespass to or remove a trespasser from that land or premises; and
(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

(3) A person does not engage in defensive conduct if the conduct involves the use of force intended to cause death or serious harm:

(a) to protect property; or

(b) to prevent trespass or remove a trespasser.

(4) For the purposes of subsections (2) and (3), a person trespasses if he or she enters or remains on land or premises:

(a) with intent to commit an offence; or

(b) in circumstances where the entry on to or remaining on the land or premises constitutes an offence.

(5) A person does not engage in defensive conduct if:

(a) he or she is responding to the lawful conduct of another person; and

(b) he or she knows that the other person's conduct is lawful.

(6) Nothing in subsection (5) is to be taken to prevent a person from engaging in defensive conduct in circumstances where the other person's conduct is lawful merely because he or she would be excused from criminal responsibility for that conduct.

(7) Sections 31 and 32 do not apply in relation to defensive conduct.

Section 271 of the *Criminal Code 1899* (Qld) provides:

271 Self-defence against unprovoked assault

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Section 272 of the Criminal Code 1899 (Qld) provides:

272 Self-defence against provoked assault

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person’s preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Section 15 of the Criminal Law Consolidation Act 1935 (SA) provides:

15 Self defence

(1) It is a defence to a charge of an offence if—
(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and

(b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist. ¹

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if—

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but

(b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist. ²

(3) For the purposes of this section, a person acts for a "defensive purpose" if the person acts—

(a) in self-defence or in defence of another; or

(b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

(4) However, if a person—

(a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or

(b) resists another who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party, the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.
(5) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

Notes—

1 See, however, section 15C. If the defendant establishes that he or she is entitled to the benefit of that section, this paragraph will be inapplicable.

2 See, however, section 15C. If the defendant establishes that he or she is entitled to the benefit of that section, the defendant will be entitled to a complete defence.

Section 322K of the *Crimes Act 1958* (Vic) provides:

Self-defence

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if—

(a) the person believes that the conduct is necessary in self-defence; and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

Notes

1 See section 322M as to belief in circumstances where family violence is alleged.

2 The circumstances in which a person may carry out conduct in self-defence include—

• the defence of the person or another person;
• the prevention or termination of the unlawful deprivation of the liberty of the person or another person;

• the protection of property.

Section 322M of the *Crimes Act 1958* (Vic) provides:

Family violence and self-defence

(1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—

   (a) the person is responding to a harm that is not immediate; or

   (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—

   (a) a person has carried out conduct while believing it to be necessary in self-defence; or

   (b) the conduct is a reasonable response in the circumstances as a person perceives them.

Section 322 J of the *Crimes Act 1958* (Vic) provides:

(1) Evidence of family violence, in relation to a person, includes evidence of any of the following—

   (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person
towards the family member or by the family member or the person in relation to any other family member;

(b) the cumulative effect, including psychological effect, on the person or a family member of that violence;

(c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;

(d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

(2) In this section—

"child "means a person who is under the age of 18 years;

"family member", in relation to a person, includes—

(a) a person who is or has been married to the person; or

(b) a person who has or has had an intimate personal relationship with the person; or

(c) a person who is or has been the father, mother, step-father or step-mother of the person; or

(d) a child who normally or regularly resides with the person; or

(e) a guardian of the person; or

(f) another person who is or has been ordinarily a member of the household of the person;
"family violence", in relation to a person, means violence against that person by a family member;

"violence" means—

(a) physical abuse; or

(b) sexual abuse; or

(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—

(i) intimidation;

(ii) harassment;

(iii) damage to property;

(iv) threats of physical abuse, sexual abuse or psychological abuse;

(v) in relation to a child—

(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(3) Without limiting the definition of violence in subsection (2)—

(a) a single act may amount to abuse for the purposes of that definition; and

(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Section 59 of the Jury Directions Act 2015 (Vic) provides:

59 Content of direction on family violence
In giving a direction under section 58, the trial judge must inform the jury that—

(a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and

(b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and

(c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending; and

(d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.

**Section 60 of the Jury Directions Act 2015 (Vic) provides:**

60 Additional matters for direction on family violence

In giving a direction requested under section 58, the trial judge may include any of the following matters in the direction—

(a) that family violence—

   (i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

   (ii) may involve intimidation, harassment and threats of abuse;

   (iii) may consist of a single act;

   (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
(b) if relevant, that experience shows that—

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence—

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.

Section 322I of the *Crimes Act 1958* (Vic) provides:

**Onus of proof**

(1) The accused has the evidential onus of raising self-defence, duress or sudden or extraordinary emergency by presenting or pointing to evidence that suggests a
reasonable possibility of the existence of facts that, if they existed, would establish self-defence, duress or sudden or extraordinary emergency (as the case may be).

(2) If the accused satisfies the evidential onus referred to in subsection (1), the prosecution has the legal onus of proving beyond reasonable doubt that the accused did not carry out the conduct in self-defence, under duress or in circumstances of sudden or extraordinary emergency (as the case may be).

Section 248 of the Criminal Code 1913 (WA) provides:

248. Self-defence

(1) In this section —

*harmful act* means an act that is an element of an offence under this Part other than Chapter XXXV.

(2) A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).

(3) If —

(a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and

(b) the person’s act that causes the other person’s death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be,

the person is guilty of manslaughter and not murder.

(4) A person’s harmful act is done in self-defence if —

(a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
(b) the person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and

(c) there are reasonable grounds for those beliefs.

(5) A person’s harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.

(6) For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.

Section 24 of the Criminal Code 1913 (WA) provides:

24. Mistake of fact

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.