The Law Commission

(LAW COM. No. 83)

CRIMINAL LAW

REPORT ON DEFENCES OF GENERAL APPLICATION

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) *of the Law Commissions Act* 1965

Ordered by The House of Commons *to be printed*
28*th July* 1977

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman.*
Mr. Stephen Edell.
Mr. Derek Hodgson, Q.C.
Mr. Norman S. Marsh, C.B.E., Q.C.
Dr. Peter M. North.

The Secretary of the Law Commission is Mr. J. M. Cartwright Sharp and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

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THE LAW COMMISSION

Item XVIII of the Second Programme

DEFENCES OF GENERAL APPLICATION

To the Right Honourable the Lord Elwyn-Jones, C. H.,
Lord High Chancellor of Great Britain

PART I

GENERAL

Scope of report

1.1 This report is concerned with duress, coercion, necessity and entrapment in the criminal law and with the extent to which each should constitute a defence to criminal liability.

1.2 These questions fall within the general principles of the criminal law, the examination of which was undertaken as part of our *Second Programme of Law Reform*[1]. In our initial examination we were assisted by a Working Party[2] who prepared a working paper[3] setting out provisional proposals, which we published in order to seek views. A list of those who sent us comments on the proposals forms Appendix 3.

1.3 It will be seen that it is only in regard to duress, coercion and necessity that implementation of our recommendations will require legislation, and in Appendix 1 are draft clauses which would give effect to those recommendations.

1.4 Working Paper No. 55 did not deal with mistake of law or superior orders as matters of defence to criminal liability, and, not having had the benefit of consultation on these questions, we have not covered them in this report. The legislation we are recommending is intended to be a contribution, which could now be enacted, to an eventual comprehensive code of criminal law. Before the code is finally completed it will be necessary to consider in what circumstances, if at all, mistake of law or superior orders should constitute a general defence to criminal liability.

PART II

DURESS

A. THE PRESENT LAW

1. General

2.1 Since the issue of Working Paper No. 55 the whole question of the place of duress in the criminal law has been exhaustively considered by the

[1] (1968) Law Com. No. 14, Item XVIII, *Codification of the Criminal Law.*
[2] See Appendix 2 for the names of its members.
[3] Working Paper No. 55, "Defences of General Application" (1974).

House of Lords in *Director of Public Prosecutions for Northern Ireland* v. *Lynch*[1], and by the Judicial Committee of the Privy Council in *Abbott* v. *R.*[2] (an appeal from Trinidad and Tobago). The main issue in each of these cases was whether the defence of duress was available on a charge of murder. In the first case the defendant was alleged to have aided and abetted the murder of a police officer by driving the murderer to and from the place of the murder. In the second case the defendant was alleged to have actively taken part in the killing of the deceased, holding her while she was stabbed, and assisting in burying her while she was obviously still alive though seriously injured.

2. Extent of duress

2.2 It was decided in *Lynch*[3] by a majority of three to two that the defence of duress should have been left to the jury and in *Abbott*[4] by the same majority that the defence was not available. In reaching these decisions there was an examination of the authorities relating to the range of offences to which duress could be raised as a defence. From this examination it was concluded that, with the possible exception of some forms of treason,[5] duress was an available defence in all cases except on a charge of murder against a person who takes part in the actual killing.

3. Essential features of duress

(a) General

2.3 In neither of the two recent cases referred to above was there an authoritative statement of the essential features of the defence of duress. Lord Simon of Glaisdale[6] referred to the "extremely vague and elusive juristic concept" of duress; he summarised the law thus—

> "I take it for present purposes to denote such [well-grounded] fear, produced by threats, of death or grievous bodily harm [or unjustified imprisonment] if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it. I am quite uncertain whether the words which I have put in square brackets should be included in any such definition. It is arguable that the test should be purely subjective, and that it is contrary to principle to require the fear to be a reasonable one. Moreover, I have assumed, on the basis of *Reg.* v. *Hudson* [1971] 2 Q.B. 202, that threat of future injury may suffice, although *Stephen's Digest of the Criminal Law* art. 10 is to the contrary. Then the law leaves it also quite uncertain whether the fear induced by threats must be of death or grievous bodily harm, or whether threatened loss of liberty

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[1] [1975] A.C. 653.

[2] [1976] 3 W.L.R. 462. (P.C.).

[3] [1975] A.C. 653; *cf.*, *R.* v. *Harding* [1976] V.R. 129, decided before this, which held that duress was no defence to a charge of aiding and abetting murder.

[4] [1976] 3 W.L.R. 462, 470F; see, too, *R.* v. *Evans and Gardiner* (*No. 1*) [1976] V.R. 517, decided after *D.P.P.* v. *Lynch* and before *Abbott* v. *R.*, which held that the defence was not available to an abettor of murder who was a participant in the fatal assault.

[5] Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 165; *R.* v. *Purdy* (1946) 10 Jo. Cr. L. 182 and *R.* v. *Steane* [1947] K.B. 997, 1005.

[6] *D.P.P.* v. *Lynch* [1975] A.C. 653, 686.

suffices: cases of duress in the law of contract suggest that duress may extend to fear of unjustified imprisonment; but the criminal law returns no clear answer. It also leaves entirely unanswered whether, to constitute such a general criminal defence, the threat must be of harm to the person required to perform the act, or extends to the immediate family of the actor (and how immediate?), or to any person."

(*b*) *The effect of the threat*

2.4 Both Lord Simon[7] and Lord Edmund-Davies[8] consider the various phrases that have been used in the past to describe the state of mind that must be induced by a threat before duress will be regarded as established[9]. They conclude that the basis of the defence is not that the threat negatives the will, nor shows that the defendant had no *mens rea*, but that it makes excusable the conduct of the defendant by so influencing him that his intention conflicts with his wish. This accords with the view expressed in the working paper[10] that, although a defendant under duress may act through fear, he still intends, unlike an automaton, to do as he did, and that, since his mind accompanies his action, it cannot be said that he did not have the requisite *mens rea*, nor that his will was destroyed or neutralised.

2.5 Lord Simon said in the passage cited above that it is arguable that the test should be purely subjective and that it is contrary to principle to require the fear to be a reasonable one. Assuming always that there must in fact be a threat of harm, there are two aspects to this question, the first relating to the defendant's belief in the nature of the threat and its effect upon him, and the second relating to whether the threat which the defendant believed to exist was sufficient to excuse his conduct in committing the offence.

2.6 It is difficult to see how the proper test in regard to the defendant's belief as to the nature of the threat and the effect of the threat upon him could be other than a subjective one. Indeed this seems to have been the test assumed in the few cases[11] where the question has been mentioned, although no decision has turned on the point.

(*c*) *The nature of the threat*

2.7 Under the present law it is clear that the only threats that are sufficient to excuse the defendant's conduct are threats of death or of serious personal injury, though they may be directed against the defendant himself or another

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[7] *D.P.P.* v. *Lynch* [1975] A.C. 689.

[8] *ibid.*, at p. 710.

[9] Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 164 refer to the threat being so great as to overbear the ordinary powers of human resistance; Lord Parker C.J. in *R* v. *Hudson and Taylor* [1971] 2 Q.B. 202, 206 speaks of the threat being effective to neutralise the will of the defendant, and of the will of the defendant being overborne so that the commission of the offence was no longer the voluntary act of the defendant.

[10] Working Paper No. 55, para 12.

[11] *R.* v. *Purdy* (1946) 10 Jo. Cr. L. 182; *R.* v. *Gill* [1963] 1 W.L.R. 841, 846; *R.* v. *Hudson* [1971] 2 Q.B. 202; *cf.*, Indian Penal Code s.94, which requires that the threat must reasonably cause the apprehension that instant death will otherwise be the consequence.

person[12]. To this extent at least there is an objective element to be applied to the nature of the threat. Apart from this, however, it is said that the threat has to be "so great as to overbear the *ordinary* powers of human resistance". This phrase is taken from the general statement of the law by Smith and Hogan,[13] but the point is not elaborated. *Archbold*[14] states that the threats (of death or serious injury) "must be of such gravity that they might well have caused a reasonable man placed in the same situation to act as he did". It is also there stated that the jury should be told to consider the gravity of the threat in relation to the gravity of the offence. This is in accord with the *dictum* of Lord Wilberforce in *D.P.P.* v. *Lynch*[15] that "the greater the degree of seriousness of the crime, the greater and less resistible must be the pressure, if pressure is to excuse". It is true that some of the Commonwealth codes[16], which are based on the common law, do not have any such objective test, but they exclude the defence in the case of a number of serious crimes such as treason, murder, piracy, attempted murder, causing grievous bodily harm, robbery and arson. Section 2.09 of the American Law Institute's Model Penal Code does, however, require the threat to be such that "a person of reasonable firmness in the [defendant's] situation would have been unable to resist"[17]. It does seem, therefore, that not only does the threat have to be of death or serious personal injury, but that it must also be such as to overbear the ordinary powers of human resistance.

(d) Immediacy of the threatened harm

2.8 Until the decision in *R.* v. *Hudson*[18] it was thought that only threats of immediate harm were sufficient. That case concerned two girls, one nineteen, the other seventeen years of age, who gave false evidence because of threats of injury made before they gave evidence. Each believed when she gave evidence that if she told the truth she would be injured after the trial, a belief reinforced by the presence in the gallery of the court of one of the group that had made the threats. It was held that, although the threats were of future harm, they could have been effective and operative upon each defendant at the time she gave the false evidence, and that the question of duress should have been left to the jury. The court also referred to the necessity to seek police protection where the threat was not of immediate harm before the defence would avail[19]. It was said that it was open to the prosecution to prove that the defendant failed to avail himself of an opportunity reasonably open to him to render the threat ineffective; in considering this the jury would have regard to the defendant's age and circumstances, and to any risks to him

[12] *R.* v. *Hudson* [1971] 2 Q.B. 202; *R.* v. *Hurley and Murray* [1967] V.R. 526. The *dictum* of Lord Goddard C.J. in *R.* v. *Steane* [1947] K.B. 997, 1005 that a threat of wrongful imprisonment may suffice does not seem to represent the present law.

[13] *Criminal Law* (3rd ed., 1973), p. 164; see too *R.* v. *Hurley and Murray*, n.12, above.

[14] (39th ed., 1976), para. 1449e.

[15] [1975] A.C. 653, 681; see too *Abbott* v. *R.* [1976] 3 W.L.R. 462, 475.

[16] Canadian Criminal Code 1954–66, s.17; New Zealand Crimes Act 1961, s.24; Queensland Criminal Code 1899, s.31; Draft Criminal Code for the Australian Territories, s.19.

[17] This is closely followed by the New York Penal Code 1965, s.35.35.

[18] [1971] 2 Q.B. 202. This case goes further than *R.* v. *Hurley and Murray* [1967] V.R. 526, where the threats were of harm to the defendant's "wife" who was held hostage, and the defendant could have gone to the police before committing the offence.

[19] [1971] 2 Q.B. 202, 207.

involved in that course of action. The court took the view that the police could provide effective protection in some cases, but not in others, although, since it was not necessary for the decision, this point was not fully explored.

(*e*) *Burden of proof*

2.9 Where the defendant relies on the defence of duress the burden is in practice upon him to adduce sufficient evidence, either by cross-examination of the prosecution witnesses, or by evidence given or called on his own behalf or by a combination of the two, to raise duress as a live issue; if he does that the burden is on the prosecution to negative the defence so as to leave no reasonable doubt that the accused cannot be absolved on the ground of duress.[20]

(*f*) *Effect of illegal association*

2.10 The question of whether a person who, by associating himself with violent criminals, has voluntarily exposed himself to the risk of compulsion to commit criminal acts can avail himself of the defence of duress, when he is compelled by his associates to commit a criminal act, was fully considered in *R.* v. *Fitzpatrick*[21].

2.11 The facts of the case are as follows. The appellant had been convicted of armed robbery and of murder committed in the course of it in October 1975. He went with an accomplice to an office to steal the weekly wages of a firm to obtain funds for the I.R.A. There he threatened six members of the firm with a loaded revolver while the accomplice gathered the money. As the deceased moved quickly forward the appellant shot him in the chest from which wound he died. The other members of the firm overpowered and disarmed the appellant, but the accomplice escaped leaving the money behind. The appellant advanced the defence of duress relying on the following evidence. In January 1975, when he was 19 years of age and studying for his "A" levels, he was induced to join the I.R.A. into which he was sworn over the flag of the Irish Republic. He knew that the I.R.A. was an illegal organisation, which had been involved in serious crimes including robbery, and that he might be required to take part in criminal offences. He received regular training in the use of firearms including revolvers, and he carried out armed vigilante duty in the Antrim Road area of Belfast. By October the appellant wanted to get away to England to resume his studies and he had asked to be released from the I.R.A. Early in October he was ordered to go to an I.R.A. club in the area where he was put up against a wall, kicked on the legs, told he could not leave the I.R.A. and ordered to take part in a robbery. The appellant stated that when he said he would leave the country the reply was that the I.R.A.would then shoot his parents. This threat convinced the appellant that he would have to obey and he agreed to carry out the robbery, feeling that he had no alternative. He also thought that he himself would be killed or "kneecapped". Several police officers gave evidence at the trial that the I.R.A. had recently in Northern Ireland been responsible for many violent

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[20] *R.* v. *Gill* [1963] 1 W.L.R. 841.

[21] Court of Criminal Appeal for Northern Ireland, 8 October 1976; details are taken from the transcript of the judgment of the court, delivered by Lowry L.C.J.

crimes, including murders, bombings and robberies, and had maintained internal discipline by acts and threats of murder and personal injury.

2.12 The court was satisfied that there were circumstances in which persons who associated with violent criminals and voluntarily exposed themselves to the risk of compulsion to commit criminal acts could not according to the common law avail themselves of the defence of duress, and that, wherever the line should be drawn in this regard, the appellant fell on the side of the line where that defence was not available to him. The court held further that, having voluntarily exposed and submitted himself to illegal compulsion, the appellant could not rely on the duress to which he had exposed himself as an excuse either in respect of the crimes he committed against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress upon which he relied, and that he could not revive for his own benefit the defence of duress by trying to leave the organisation.

B. SHOULD DURESS BE A DEFENCE?

1. General

2.13 The first question for consideration is whether duress should in principle continue to be a defence which absolves from criminal liability. This is a question in which moral and jurisprudential, and also, to some extent, purely practical considerations fall to be considered, and it is a question upon which opposing opinions are strongly held. Some writers, including Stephen[22], have taken the view that duress should never be regarded as furnishing an excuse from guilt but only as a factor to be considered in the assessing of punishment; others, including Blackstone[23], that it is "highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion".

2. The arguments against a defence of duress

2.14 Those who favour the conclusion that duress should not afford a defence which absolves from criminal liability contend that it can never be justifiable for a person to do wrong, in particular to do serious harm to another, merely to avoid some harm to himself; that it is not for the individual to balance the doing of wrong against the avoidance of harm to himself. They argue that duress does not destroy the will or negative intention in the legal sense, but that it merely deflects the will so that intention conflicts with the wish; in short that it provides a motive for the wrongful act and that motive is, on general principle, irrelevant to whether a crime has been committed. On the more practical aspect it is said that the criminal law is itself a system of threats of pains and penalties, which would be undermined if some countervailing system of threats were allowed to override it, and that to allow this to happen would be to provide a charter for terrorists, gang leaders and kidnappers, allowing criminals of notorious violence to confer on others by terrorism immunity from the criminal law.

[22] *History of the Criminal Law in England* (1883), Vol. 2, pp. 107–108.
[23] *Commentaries on the Laws of England* (1862), Vol. 4, p. 23.

2.15 On this basis, it is maintained that the law should recognise the effect of duress upon the moral guilt of the defendant by allowing the threat to be taken into account only in the assessment of the penalty. This, it is said, can be achieved not only by the form of the sentence itself, which, in an appropriate case, might be no more than a conditional or even an absolute discharge, but also through administrative procedures such as the exercise of the royal prerogative of pardon, the powers of the Parole Board, and the discretion not to prosecute in suitable cases.

3. The arguments for a defence of duress

2.16 The main opposing argument is that the law should not insist upon condemning a person who acts under compulsion which he is unable to resist; that in doing so it would be making excessive demands on human nature and imposing penalties in circumstances where they are unjustified as retribution and irrelevant as a deterrent. The law must recognise that the instinct and perhaps the duty of self-preservation is powerful and natural, and that it would be "censorious and inhumane [if it] did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys"[24]. This argument is most cogently advanced by the majority in *Lynch's* case[25] and convinces us that it would be quite unjust that a person who has committed an offence only because of threats which he could not withstand (subject to qualifications as to the nature of the threats[26]) should face trial and conviction with the obloquy inherent therein.

2.17 We do not think that it is sufficient in the true case of duress for account to be taken of the duress by the exercise of some discretionary power, whether in regard to the bringing of proceedings, by mitigation of punishment, by the use of the power of the Parole Board or by the exercise of the royal prerogative of pardon. From its very nature duress is a question appropriate for determination by a jury after consideration of all the circumstances including the nature of the threat, the nature of the offence and the characteristics of the defendant as shown in the evidence and his appearance before them. While these features are, of course, before the trial judge, they may not necessarily be available in the same detail to the prosecutor, the Parole Board or those advising the Sovereign. Further, as Lord Edmund-Davies points out[27], in the nature of things there can be no assurance that even a completely convincing plea of duress will lead to an absolute discharge, and, of course, such a course would not be possible where the sentence is a mandatory one.

2.18 We feel that it is necessary for there to be a dividing line between the degree of pressure which is insufficient fully to excuse criminal conduct and the degree of pressure which the law regards as providing a defence. This will ensure that those who have been subjected to such pressure as the law regards as providing a defence will not suffer the stigma of conviction. Where there

[25] *D.P.P.* v. *Lynch* [1975] A.C. 653, 671, *per* Lord Morris.
[25] *ibid.*, *per* Lord Morris at pp. 670–672, *per* Lord Wilberforce at pp. 680–682 and 685, and *per* Lord Edmund-Davies at p. 707.
[26] See paras. 2.25–2.28, below.
[27] *D.P.P.* v. *Lynch* [1975] A.C. 653, 707.

has been pressure of a lesser nature there will, of course, continue to be the wide discretion that has always existed whereby the punishment is determined in the light of all the circumstances (save in those cases where the law provides a mandatory sentence).

2.19 On the more practical point that the defence of duress offers a charter to thugs and terrorists by exonerating those whom they may intimidate from the crimes they may be forced to commit, we would point out that, over the many years that duress has been accepted as a defence, the few reported cases in which it has arisen for consideration, and the even fewer occasions when it has apparently been successfully relied upon, seem to indicate that the fears are without serious foundation. It is after all a defence of last resort, which entails acceptance of participation in the offence, and a degree of courage is required to advance the defence if the threats are really serious and convincing because of the possibility of reprisals against the defendant or those close to him. Finally, protection against the likelihood of the defence succeeding where it should not lies in the safeguard of the decision of a properly instructed jury[28]. It is, perhaps, significant that Lynch was convicted when he was retried for aiding and abetting the murder of a policeman by driving the murderer to and from the scene[29].

2.20 We note too that the common law has in principle recognised duress as a defence to a number of offences including some forms of treason since the 14th century[30]; that the defence has been recognised as a defence to all but some excepted offences in almost all common law jurisdictions[31]; that it has a place in many civil law jurisdictions[32]; that it has been accepted in Roman-Dutch law[33]; and that it is included in a number of modern draft penal codes[34]. In addition, of those who commented on our working paper, only a very small minority were in favour of a change in the law to limit the effect of duress to mitigating punishment[35].

4. Conclusion as to duress as a defence

2.21 In our view it would not be right now for the criminal law to insist that in no circumstances should duress ever be a defence to criminal liability. The way in which the defence should be defined, and whether it should be excluded in relation to some offences, are matters we consider below[36]. But in principle we think that the law should provide that within certain defined limits duress should exonerate from criminal liability. Beyond those limits the fact that lesser threats than those which would exonerate were made would,

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[28] *Abbott* v. *R.* [1976] 3 W.L.R. 462, 475; *R.* v. *Fitzpatrick*, see n. 21, above.

[29] *Abbott* v. *R. supra*, 466.

[30] *D.P.P.* v. *Lynch* [1975] A.C. 653, 681.

[31] *e.g.*, Canadian Criminal Code 1954–66, s.17; New Zealand Crimes Act 1961, s.24; Queensland Criminal Code 1899, s.31; New York Penal Code 1965, s.35.35.

[32] *e.g.*, German Penal Code, s.52.

[33] *S.* v. *Goliath* 1972(3) S.A.1 (Translation p. 456), a case in which duress was held to be a defence available to a defendant charged with murder as an actual perpetrator.

[34] *e.g.*, Draft Criminal Code for the Australian Territories, s.19; American Law Institute's Model Penal Code, s.2.09.

[35] *cf.*, Glazebrook, "Committing Murder under Duress Again" [1976] C.L.J. 206.

[36] See paras. 2.22–2.31 and 2.39–2.45, below.

of course, be a matter for consideration together with any other relevant circumstances in assessing the seriousness of the offence committed and the punishment for it.

C. NATURE OF THE DEFENCE

1. General

2.22 In considering the two main matters in relation to a defence of duress, namely the ingredients of the defence and the range of offences to which it should apply, it is difficult to reach a conclusion on one without having reached a conclusion on the other. If duress is to be available as a defence to the most serious offences, such as murder and wounding with intent to do grievous bodily harm, it will have to be strictly defined to ensure that only threats of immediate and serious harm will suffice. On the other hand, if the defence is defined to include a threat of something less than immediate harm, it would almost certainly be necessary to exclude its availability in certain serious offences, as is done in the Commonwealth codes referred to in paragraph 2.7, above.

2.23 For reasons which appear in paragraphs 2.39 to 2.45 below, we have decided that the defence of duress as we recommend that it should be defined should apply over the whole range of offences. This conclusion is, of course, influenced by the definition of the defence which we favour, and for ease of exposition we deal first with the way in which the defence of duress should be defined.

2. Effect of the threat

2.24 The starting point must be that the defendant was induced by a threat of harm to himself or another to commit the offence with which he is charged and that there was no way of avoiding or preventing the harm other than by committing the offence. If there is no evidence of this there will be no basis for allowing the defence to be put before the jury. In any but the most unusual case it will, therefore, be necessary for the defendant himself to give evidence that a threat was made to him and that he was induced by it to commit the offence.

3. Nature of the threat

2.25 It is clear that there must be some minimum requirement in respect of the harm threatened. There is early authority[37] that on a charge of damage to property a threat of damage to property can be sufficient, but it is now established that the present law requires that the threats must be of death or of grievous bodily harm[38], and this is certainly the requirement of most modern criminal codes. None of those who commented on the working paper suggested that the present law was unsatisfactory in this regard and we think

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[37] *R.* v. *Crutchley* (1831) 5 C. & P. 133.

[38] The *dictum* of Lord Goddard C.J. in *R.* v. *Steane* [1947] K.B. 997, 1005 that a threat of wrongful imprisonment may suffice would not seem to represent the present law.

that with a slight modification it should be retained. The first modification we recommend is that the phrase "serious personal injury" should replace "grievous bodily harm"[39]. The second modification is that it should be made clear that serious injury includes not only physical but also mental injury. It is not impossible to envisage a case where the threat is a threat to destroy a person's sanity, or seriously to damage his mind, by the administration of drugs, and this may be an even more serious matter than a threat of physical harm.

2.26 As we have indicated[40], the present law almost certainly requires that some objective test must be applied to assess whether the threat of harm is one which will exonerate from liability, but the way in which such a test is to be applied has never arisen for decision.

2.27 The defence of duress is essentially a concession to human weakness in the face of an overwhelming threat of harm by another, and it is therefore right that so far as possible the criteria to be applied should be subjective. It should be sufficient, provided always that there is a threat of harm, that the defendant believes that the threat is of death or serious personal injury and believes that there is no way of avoiding or preventing the threatened harm other than by committing the offence. That a reasonable person would not have so believed may be relevant in testing the defendant's evidence as to his own belief but it should not of itself disentitle the defendant to the defence.

2.28 It may be said that the whole test as to whether the requirements of duress exist should be subjective, but we feel that this would create too wide a defence. Serious personal injury can cover a wide range of threatened harm, and if the defence is to be available even in respect of the most serious offences, it would be unsatisfactory in the final event to dispense with some objective assessment of whether the defendant could reasonably have been expected to resist the threat. The solution which is adopted by section 2.09(1) of the American Law Institute's Model Penal Code is to provide that the threat of unlawful force (which is left undefined) must be that "which a person of reasonable firmness in his situation would have been unable to resist". Whether the words "in his situation" comprehend more than the surrounding circumstances, and extend to characteristics of the defendant himself, it is difficult to say, and for that reason we would not recommend without qualification the adoption of that solution. We think that there should be an objective element in the requirements of the defence so that in the final event it will be for the jury to determine whether the threat was one which the defendant in question could not reasonably have been expected to resist. This will allow the jury to take into account the nature of the offence committed, its relationship to the threats which the defendant believed to exist, the threats themselves and the circumstances in which they were made, and the personal characteristics of the defendant. The last consideration is, we feel, a most important one. Threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person.

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[39] *D.P.P.* v. *Smith* [1961] A.C. 290, 334–335 points out that "really serious injury" is what is meant by the older phrase.

[40] See para. 2.7, above.

4. Immediacy of the threatened harm

2.29 The final requirement in regard to the nature of the threat concerns its immediacy. The decision in *R.* v. *Hudson*[41], by stressing the effect of the threat itself rather than the immediacy of its implementation, seems to have widened what was until then the ambit of the defence. In our view there would be considerable danger in admitting as exoneration a threat of harm to be inflicted in the future in circumstances which allow time for steps to be taken to avoid the harm. This could result in the defence being available, for example, to a person who, though not under continuous surveillance, commits an offence as ordered, merely because he believes that, if he does not, he or a hostage will suffer the threatened harm at some later time.

2.30 Nevertheless a requirement that nothing but a threat of immediate harm will suffice would certainly be too stringent. It is not difficult to envisage a situation where the threat made to the defendant, who is held captive, whether it be of harm to him or to another, will not be implemented there and then, but only after the defendant is removed to a suitable place, or after his failure to comply with the demand has been communicated to those holding the hostage.

2.31 We considered whether it might not be possible to provide a test based upon whether the defendant believed that he would be able to seek effective protection against the implementation of the threat, as was suggested in *R.* v. *Hudson*[42]. We decided, however, that to leave to the jury the question of whether the defendant believed that the protection would be effective, which in itself would involve some consideration of whether the protection would be effective, would be unsatisfactory, both because of the width of the questions and because of the scope for misuse of the defence. We feel that, if threats of future harm are to avail the defendant, there must be a strict test of whether the defendant had, or believed he had, a real opportunity before the time when the threat would be implemented of seeking official protection. This may in some cases give rise to liability in what appear to be hard cases[43], but as we have indicated above we aim to provide a strictly defined defence which can be applicable over the widest possible field. We use the term "official protection" rather than "police protection" as there may be occasions when threats are made, for example, in prison[44] where the appropriate authority may be the prison staff rather than the police.

5. Burden of proof

2.32 The law relating to the burden of proof should, in our view, be restated in statutory form substantially as set out in *R.* v. *Gill*[45]. Where the defendent

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[41] [1971] 2 Q.B. 202, 207: "... the existence at [the moment he has to make up his mind] of threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval"; see para. 2.8, above.

[42] [1971] 2 Q.B. 202, 207.

[43] *R.* v. *Carker* [1967] S.C.R. 14. In this case it was held that a prisoner in solitary confinement, who broke up fittings in his cell under threats of serious injury from fellow prisoners who could not immediately carry them out, was not entitled to the defence of duress, although he believed with justification that the threats would eventually be carried out, even if he sought protection.

[44] *ibid.*

[45] [1963] 1 W.L.R. 841.

relies on duress there must be sufficient evidence—either from a prosecution witness, or from the defendant or a witness called on his behalf—to raise duress as a live issue. If there is such evidence the burden is then on the prosecution to negative the defence so as to leave no reasonable doubt that the defendant cannot be absolved on the ground of duress.

6. Notice of reliance on duress

2.33 In order to ensure that the defence of duress is not raised frivolously, or at a stage when it may be difficult for the prosecution to refute the allegations, we recommend that it should be necessary for a defendant to give notice of his intention to rely on the defence at least seven days before the trial. This requirement should not be absolute and the trial court should have power to allow the defence to be raised despite the lack of notice. In summary proceedings, where there is no rule of procedure which obliges the prosecution to give a defendant prior notice of the evidence upon which the case against him is based, and where a defendant is less likely to be legally represented, we think that a requirement of notice may create difficulties. We note that section 11 of the Criminal Justice Act 1967 requires notice of evidence in support of an alibi only in the case of trial on indictment. We think, therefore, that it will suffice to recommend that the provision for the giving of notice in regard to duress should be limited to proceedings on indictment[46].

7. Liability of accomplices

2.34 The question of the liability of a person who by duress compels another to commit what, but for the defence of duress, would be an offence on the latter's part can give rise to difficulty. In most cases where, for example, one person compels another to kill, to steal or to damage property, there is little difficulty in regarding the former as committing that offence through an innocent agent, just as if he had used a young child to do the act. It is not easy, however, to regard a defendant who, as in *R.* v. *Bourne*[47], forced his wife to have connection with a dog, as committing that crime himself. In that case the defendant was charged with, and convicted of, abetting the offence of his wife, and this conviction was upheld on appeal, although it was accepted that because of coercion the wife was not guilty of the offence herself. The decision has been strongly criticised[48], and we feel that there should be a specific provision to deal with this problem. We recommend, therefore, that there should be a provision to ensure that, where the person compelled has the defence of duress, this should not affect the liability of any other person who participates[49].

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[46] We do not think that the detailed provisions of s. 11 are necessarily appropriate. Duress is, after all, a special defence in which there is an evidential burden on the defendant, whereas a defendant who relies on an alibi is only reinforcing his denial of guilt by saying he was elsewhere at the time of the offence.

[47] (1952) 36 Cr. App. R. 125.

[48] Edwards, (1953) 69 L.Q.R. 226 and Cross, (1953) 69 L.Q.R. 354.

[49] *cf.*, s.2(4) of the Homicide Act 1957 which deals with the liability of a person who is party to a killing by one who is not guilty of murder by reason of diminished responsibility.

8. Voluntary exposure to duress

2.35 The Court of Appeal for Northern Ireland in *R.* v. *Fitzpatrick*[50] considered in some detail the question of whether a person who, by associating himself with violent criminals, has voluntarily exposed himself to the risk of compulsion, can avail himself of the defence of duress when compelled by his associates to commit an offence. The Court did, however, expressly refrain from defining precisely where the line should be drawn between cases where a defendant would and would not be entitled to the defence. It is this problem with which we are now faced.

2.36 We considered whether there should be explicit rules laid down to cover the various situations that might arise, by which it should be determined whether or not a person should be able to avail himself of the defence of duress. It was clear to us that a person who had voluntarily, and with knowledge of its nature, joined a criminal association which he knew might bring pressure to bear on him to commit an offence, and was an active member when he was put under pressure to commit an offence, should not be entitled to avail himself of the defence. It was also clear to us that a person who has joined a criminal association without knowledge of its criminal nature, but which he only discovers when forced by a member to commit an offence, should not be precluded from relying on the defence. The cases for which it is not easy to lay down an explicit rule are those which fall between these two: where, for example, a person joined such an association in the full knowledge of its nature, but later repented and dissociated himself from it, or where, having joined innocently, he later discovers the association's true nature and takes no further part in its activities until he is forced by the association to commit some offence.

2.37 In our view the vital issue in these types of cases—and it is an issue of fact for a jury—is whether, at the time of the threat which induces him to do the act required of him, the defendant has voluntarily put himself in a situation in which he knows that he will or may be subjected to duress to do such an act. If he has, the defence should not be available to him; if he has not then he should be able to rely on it. If the test is expressed in this way we think that a properly instructed jury will be able to take into account all the relevant circumstances, such as whether the defendant joined a criminal association with knowledge of its nature, and what steps he had taken to dissociate himself from it. Of course, less may be required of him if he joined in ignorance but subsequently ascertained its true nature than if he joined with full knowledge but maintains he has since dissociated himself. There may also be cases where a person, employed, for example, by the police to infiltrate a ring of drug smugglers or to seek out information about an illegal organisation, has to put himself in a situation in which he knows that he may be subjected to duress because of his activities. It would be wrong to deny him the defence in those circumstances, and for that reason we think that the defence should be excluded only where the person has acted without reasonable cause in putting himself in that situation.

2.38 Accordingly we recommend that the defence of duress should not apply where, when the relevant threat is made, the defendant is voluntarily

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[50] See paras. 2.10–2.12, above.

and without reasonable cause in a situation in which he knows he will or may be subjected to duress to induce him to commit the offence with which he is charged, or an offence of the same or similar character.

D. TO WHAT OFFENCES SHOULD DURESS APPLY?

2.39 Having arrived at a definition of the defence of duress and determined the circumstances in which it should be applicable, we now consider the range of offences to which it should apply. In general, it seems to us that it would be very much more satisfactory to have a defence of wide application than one which is excluded from applying to certain offences, provided that in every case the nature of the threat is balanced against the seriousness of the offence. With that in view we have tended towards a strict definition of the defence and of the circumstances when it should be available.

2.40 Once the principle is accepted, as we are convinced that it must be, that duress should operate as a defence to liability, the real remaining issue is whether it should be available as a defence to a person charged with murder as the actual perpetrator[51] of the offence. If we were to conclude that the defence should be so available, then clearly it should also be available to a person charged with murder as an aider and abettor, and to all other offences. If, however, we were to conclude that the defence should not be available to a person charged with murder as the actual perpetrator, it would be necessary to consider the validity of drawing a distinction between a charge of murder as an actual perpetrator and as an aider and abettor, and whether it should be available to the latter, as at present[52].

2.41 The decision in *Abbott* v. *R.*[53] that the defence of duress is not available to the actual perpetrator of a murder was clearly based upon the conclusion that such was the existing common law, and that it was not open to the Privy Council to hold that in those circumstances duress was an admissible defence. Nevertheless, the majority went further and indicated explicitly that they would not approve of what they called a "revolutionary change" which would be "the destruction of a fundamental doctrine of our law which might well have far-reaching and disastrous consequences for public safety to say nothing of its important social, ethical and maybe political implications"[54].

2.42 Like the minority in *Abbott* v. *R.* and the judges in the South African case of *S.* v. *Goliath*,[55] who accepted duress as a defence to murder by an actual perpetrator, we are conscious of the social and ethical implications founded upon regard for the sanctity of human life, and upon the fact that there can be no threat that is greater in kind than the harm one is forced to commit when murder is involved. Some may even feel, with Blackstone, that a man "ought rather to die himself than escape by the murder of an innocent"[56]. Once, however, it is accepted that the underlying analysis of duress

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[51] The actual perpetrator is referred to in both *Lynch's* case and *Abbott's* case as a principal in the first degree.
[52] *D.P.P.* v. *Lynch* [1975] A.C. 653.
[53] [1976] 3 W.L.R. 462.
[54] *ibid.*, at p. 470.
[55] 1972 (3) S.A.1.
[56] *Commentaries*, IV, 30.

is that it takes account of the infirmity of human nature, and recognises that ordinary people cannot be compelled by the fear of a criminal sanction when by duress they are deprived of their proper judgment, it would not seem appropriate to apply such a demanding moral judgment to the defence. That the law recognises the defence of self-defence in relation to killing another is likewise a recognition of the instinct of self-preservation, although, of course, this defence is distinguishable at once from duress as the person killed is an aggressor and not an innocent victim. Furthermore, we do not think that making duress, as we have defined it, a complete defence to murder will undermine the administration of justice or open the way for violent criminals to achieve their ends by intimidation of others who will escape liability. As Lord Wilberforce said in *Lynch's* case[57]—

> "Nobody would dispute that the greater the degree of heinousness of the crime, the greater and less resistible the degree of pressure, if pressure is to excuse. Questions of this kind where it is necessary to weigh the pressures acting upon a man against the gravity of the act he commits are common enough in the criminal law, for example with regard to provocation and self-defence."

This test is incorporated in our definition of the defence[58], and, like the majority in *Abbott's* case[59], we do not have any apprehension about the reliability of juries if they were to be called upon to consider duress in a case of murder.

2.43 It has been suggested[60] that there is much to be said for the view that on a charge of murder duress, like provocation, should not entitle the accused to a complete acquittal but should reduce murder to manslaughter and thus give the court power to pass whatever sentence might be appropriate. It is our view, however, that where the requirements of the defence as we have defined it are present there is no justification for any finding of guilt against a defendant, any more than there is in the case where self-defence has been established. The nature of the duress which will exonerate will, on our recommendations, vary with the nature of the offence, and where the duress is so compelling that the defendant could not reasonably have been expected to resist it, perhaps being a threat not to the defendant himself but to an innocent hostage dear to him, it would in our view be unjust that the defendant should suffer the stigma of a conviction even for manslaughter. We do not think that any social purpose is served by requiring the law to prescribe such standards of determination and heroism.

2.44 We recommend that duress should be available as a defence to a defendant charged with murder as an actual perpetrator. This makes it unnecessary to consider whether any convincing distinction can be drawn between that case and the case of a defendant charged with murder as an aider and abettor.

2.45 It was not suggested on consultation that there was any other offence to which the defence should not apply. Nevertheless there is one other

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[57] [1975] A.C. 653, 681.
[58] See para. 2.28, above, and clause 1(3) of the draft Bill.
[59] [1976] 3 W.L.R. 462, 470.
[60] *ibid.*, at p. 471; Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 166.

offence, namely treason, where the seriousness with which it is regarded is marked by the fact that it carries a mandatory sentence, and we consider specifically whether duress should apply to it. It has long been accepted that duress is a defence to at least some conduct which amounts to treason[61]. It is, however, difficult to differentiate between treasonable conduct which should have the defence and that which should not. Hale[62] suggested that duress should be a defence to treason only in time of war or public insurrection but not in peacetime, on the basis that a person who falls into enemy or rebel hands cannot resort to the law for protection. This does not seem to us to be a valid basis of distinction, and indeed treasonable conduct covers such a wide range that it would be unsatisfactory to break it down into categories to determine in which cases duress should be a defence and in which it should not. Nor do we think that this is necessary. The test of duress which we recommend requires the nature of the conduct, and, of course, its consequences, to be weighed against the degree of pressure brought to bear[63]. This means that so long as duress is not excluded as a defence there will be sufficient flexibility to allow the jury to accept duress as a defence in appropriate cases, and reject it in those which are not appropriate. Accordingly we recommend that duress should be a defence available on a charge of treason.

E. SUMMARY OF RECOMMENDATIONS

2.46

(1) Duress should be retained as a defence to criminal liability, and should be restated in statutory form (paragraph 2.21).

(2) Duress should be available as a defence to all offences, including murder, whether the defendant is charged as an accessory or as the actual perpetrator (paragraph 2.44).

(3) The basis of the defence should be that the defendant is induced by a threat of harm to himself or another to commit the offence with which he is charged (paragraph 2.24).

(4) The defendant must believe that—

- (*a*) the harm threatened is death or serious personal injury, whether physical or mental (paragraphs 2.25 and 2.27);
- (*b*) the threat will be carried out immediately, or, if not immediately, before he can have any real opportunity of seeking official protection (paragraph 2.31); and
- (*c*) there is no other way of avoiding or preventing the harm threatened (paragraph 2.27).

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[61] *Oldcastle's* case (1419) Hale 1 P.C. 50, where the accused supplied food to rebels; *R.* v. *Purdy* (1946) 10 Jo. Cr. L. 182, where the accused assisted the enemy in wartime with propaganda; *cf.* dicta by Lord Goddard C.J. in *R.* v. *Steane* [1947] K.B. 997, 1005.

[62] 1 P.C. 49–51.

[63] See para. 2.28, above.

(5) The threat must be such that the defendant could not reasonably be expected to resist it in all the circumstances of the case, including the nature of the offence, the defendant's belief as to the three matters in subparagraph (4) above, and any other relevant circumstances personal to him (paragraph 2.28).

(6) There should be an evidential burden on the defendant to ensure that there is sufficient evidence to raise duress as an issue, whereupon there should be a persuasive burden on the prosecution to negative the defence (paragraph 2.32).

(7) In proceedings on indictment the defendant should give notice of his intention to rely on duress, subject to a discretion in the court to allow him to advance the defence where he has not given notice (paragraph 2.33).

(8) The defence should be excluded where the defendant is voluntarily and without reasonable cause in a situation in which he knows he will or may be subjected to duress to induce him to commit such an offence as that with which he is charged (paragraph 2.38).

PART III

COERCION

A. THE PRESENT LAW

3.1 Coercion is the term used to denote the special defence available to wives who commit what would otherwise be an offence under pressure from their husbands, whereas duress is used to denote the more general defence available to anyone who falls within the common law definition of that defence.

3.2 The defence of coercion was available at common law to a wife who committed certain crimes in the presence of her husband. It was then presumed that she acted under such coercion as to entitle her to be excused, unless the prosecution proved that she took the initiative in committing the offence[1]. The defence did not extend to treason or murder, to brothel-keeping, nor, possibly, to manslaughter or robbery.

3.3 As early as 1845[2] the abolition of this common law presumption was recommended, and this was also proposed in the draft Code of 1879[3]. In 1922[4] the complete abolition of the defence was recommended but not implemented. In 1925[5], however, it was enacted that—

> "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the

[1] Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 168.

[2] Parl. Pa. xxiv, 114, *Report of Criminal Law Commissioners*, 1845.

[3] Sect. 23.

[4] (1922) Cmd. 1677, the Avory Committee *Report on the Responsibility of the Wife for Crimes Committed under the Coercion of the Husband.*

[5] Criminal Justice Act 1925, s. 47.

husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband".

3.4 It would seem that the pressure upon a wife that will excuse is less than that required under the present law of duress[6], and even that moral, as distinct from physical, pressure may be sufficient. This was the view of the Solicitor General when introducing what is now section 47 of the Criminal Justice Act 1925[7]. There is, however, very little authority as to the correct test to be applied[8].

3.5 There is also some uncertainty arising from the cases as to the strictness of the requirement that the wife must commit the offence in the presence of her husband. In one old case[9], where a husband was in a room adjoining that in which his wife committed the offence and immediately thereafter joined his wife, it was held that the offence was not committed in his presence. In another case[10] an offence committed in a shop, the husband remaining outside, was held to have been committed in his presence.

B. PROPOSALS FOR REFORM

3.6 The Working Party[11] drew attention to these uncertain features of the defence, and also drew attention to the fact that other women, who may well be regarded as in a similar position to a wife, for example, a woman living with a man as his wife, or a dependent daughter of seventeen years of age, have only the stricter general defence of duress. They also pointed out that there were very few instances of the defence being invoked[12].

3.7 The main question, of course, is whether the defence is appropriate to modern conditions, and in particular whether, because of the relationship of husband and wife, there is a need for a less strict defence than is provided by duress where a wife acts under pressure from her husband. The Working Party were of the view that the defence was not appropriate to modern conditions and their proposal to abolish the special defence of coercion received, on consultation, wide support and no opposition.

C. CONCLUSION

3.8 We agree with the view of the Working Party. We are convinced by the foregoing considerations that the provisional proposal should be accepted,

[6] Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 169.

[7] *Hansard* (House of Commons), 20 November 1925, Vol. 188, Col. 873 *et seq.*

[8] In *R.* v. *Pierce* (1941) 5 Jo. Cr. L. 124 the jury were directed that moral pressure was sufficient, but in fact convicted the defendant; and see *R.* v. *White, The Times,* 16 February 1974.

[9] *R.* v. *Hughes* (1813) 2 Lew. 229.

[10] *R.* v. *Connolly* (1829) 2 Lew. 229.

[11] Working Paper No. 55, paras. 63 and 64.

[12] *R.* v. *White* (see n.8, above) is the only recent case that has come to our attention. In *R.* v. *Neilson* (*Daily Telegraph,* 28 September 1976) the defence was not raised by a defendant charged with cashing for her husband postal orders stolen by him, although her offences were committed in his presence, and he gave evidence that he was prepared to use violence to maintain his "status as boss" in the house. Before her trial he had been convicted of four violent murders.

and that the general defence of duress, as we recommend it should be defined, should be the only such defence available to a wife whose husband compels her to commit an offence. Where threats by a husband fall short of those necessary for duress, the wife who has been influenced by them will (save where the sentence is a mandatory one) be able to rely on them as a circumstance of mitigation, though not as a defence to the crime she has committed.

3.9 We recommend that the common law defence of coercion of a wife by her husband be abolished, and that a wife who commits an offence under pressure from her husband should be able to avoid liability on that account only if she can bring herself within the limits of the general defence of duress.

PART IV

NECESSITY

A. THE PRESENT LAW

4.1 This section of the report considers the desirability of making provision for a general defence of necessity. The term "necessity" is used here to connote those situations in which "D is able to choose between two courses, one of which involves breaking the criminal law and the other some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law"[1]. An essential difference between necessity and duress is that the harm sought to be avoided in situations in which the latter defence is raised always proceeds from another person's wrongdoing. The defence of necessity has been much discussed as a matter of theory, and different views have been expressed as to what extent, if at all, English law at present recognises it as a general defence[2]. So far as authority is concerned, while there are numerous maxims in early cases and legal writings justifying conduct under necessity[3], such reference to the defence as there has been in recent cases is either contradictory or uncertain in effect. In one case[4] the Court of Appeal has said that "The plea may in certain cases [not including murder and larceny] afford a defence . . . [in] an urgent situation of imminent peril". But at about the same time the Court of Appeal denied (*obiter*) the existence of the defence to a charge of failing to obey traffic signals even in a situation of "imminent peril"[5]. More recently, the Divisional Court has denied that the defence "to the extent that it existed" was available on a

[1] Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 157.

[2] See, *e.g.*, Glanville Williams, *Criminal Law* (2nd ed., 1961), p. 724 *et seq.*; and compare Glazebrook, "The Necessity Plea in English Criminal Law", [1972A] C.L.J. p. 87 *et seq.*

[3] A selection is given in Glanville Williams, *op. cit.* pp. 724–5.

[4] *Southwark London Borough Council* v. *Williams* [1971] Ch. 734 at pp. 743–4, 745–6.

[5] *Buckoke* v. *Greater London Council* [1971] Ch. 655. Lord Denning M.R. at p. 668 said, "A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost." Nevertheless, he accepted counsel's submission that the defence of necessity would not be allowed and that the circumstances would go only to mitigation.

charge of driving without due care and attention, to a police motorway patrol driver involved in an accident in the course of answering an emergency call[6]. In any event, in no case has necessity been relied on successfully and we are very doubtful whether it at present provides a general defence at common law in this country. Nevertheless, since it has been the subject of considerable discussion, a decision must be taken as to whether it should find a place in a Criminal Code, although in the circumstances it is unavoidable that much of our consideration of the subject has a theoretical flavour.

4.2 While the existence of a general defence at common law may be in doubt, there are a number of statutes which provide specifically for what is, in effect, a defence of necessity in the context of particular offences. There are, in addition, provisions in some statutes specifying in more general terms exceptions and conditions which may in some situations operate in a manner comparable to a defence of necessity. The common law has also developed means of coping with certain situations of necessity. Some indication must be given of these various approaches[7], since their scope and effectiveness must clearly be of relevance in assessing whether a general defence ought to be recommended for inclusion in the Code.

1. Statute law

(a) Statutory constructions

4.3 In some older authorities[8] the courts held that, on the proper construction of particular statutes, the provision in question was not intended to apply to a case in which more harm would probably be caused by complying with the law than by contravening it. A plea of necessity was, therefore, not in terms required because of the manner in which the provision was construed. Conclusions so reached might be regarded as a variant of the so-called "golden rule" of statutory interpretation, that is, adherence "to the ordinary meaning of the words used, and to the grammatical construction" unless this would lead "to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience"[9]. The "rule" has never been explicitly applied in a criminal case although a situation such as that in *Burns* v. *Nowell*[10] might have been regarded as appropriate for it. Be that as it may, the method of statutory

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[6] *Wood* v. *Richards* [1977] Crim. L.R. 295. Eveleigh J., with whom the other members of the court agreed, said: "There was no evidence. . .of the nature of the emergency to which the defendant was being summoned. As the defence of necessity, to the extent that it existed, had to depend on the degree of the emergency or the alternative danger to be averted, it was impossible to express the view that the defence was open to the defendant." He was, however, given an absolute discharge.

[7] A more detailed exposition of these approaches is to be found in Glazebrook, "The Necessity Plea in English Criminal Law", [1972A] C.L.J. p. 87 *et seq.*

[8] *e.g., Reniger* v. *Fogossa* (1551) 1 Plow.1; *Burns* v. *Nowell* (1880) 5 Q.B.D. 444.

[9] *Per* Parke B., *Becke* v. *Smith* (1836) 2 M. & W. 191, 195; see further, The Interpretation of Statutes, (1969) Law Com. No. 21, Scot. Law. Com. No. 11, (1968–69) H.C. 256, p. 14.

[10] The Pacific Islanders Protection Act 1872, s. 3, prohibited the carrying of native labourers other than as crew on board ship without a licence. This came into operation while D's vessel was at sea, and for him to have put the labourers ashore immediately would have been a greater cruelty than that at which the section was aimed; thus "the [ship] was not. . .employed in the commission of any offence within [the] intent and meaning of [s. 3]": see (1880) 5 Q.B.D. 444 at 454–5, *per* Baggallay L. J.

construction under discussion is today called in aid infrequently, if ever, to avoid the imposition of penalties in inappropriate circumstances. For example, in *R.* v. *Kitson*[11], the defendant was held to be "driving" while drunk, even though he did no more than steer a car to a grass verge to avoid possible collision when without fault on his part he awoke in the passenger seat to find it moving of its own motion. And if, in the example given by Lord Denning M.R. in *Buckoke's* case[12], it can fairly be assumed that there is no risk of injury or danger to life in crossing the traffic lights when they are red, then that example is further evidence of the strict application of statutory terms by the courts in recent years.

(b) Express statutory terms

4.4 Perhaps because current methods of statutory construction have given no encouragement to the view that statutory penal provisions should not be applied in circumstances where more harm would probably be caused by complying with them than by contravening them, express provisions dealing with circumstances of necessity have been made in some fairly recent statutes. Some refer in terms to necessity; thus section 9 of the Midwives Act 1951[13], making it an offence for an uncertified person to attend a woman in childbirth other than under the supervison of a qualified medical practitioner, provides that no offence is committed if "the attention was given in a case of sudden or urgent necessity". Others use terms which would in all probability be regarded as having substantially the same meaning; for example, by section 36(3) of the Road Traffic Act 1972[14], a person is not to be convicted of driving on a footway or bridleway in contravention of subsection (1), if he proves that the motor vehicle was so driven "for the purpose of saving life or extinguishing fire or meeting any other like emergency".

(c) General statutory provisions

4.5 In some other statutes that are primarily offence-creating the prohibition contained in many offences is qualified in varying degrees by different words which have been construed, or may be construed, to cover situations in which a defence of necessity might be appropriate. For example, the word "unlawfully" in section 58 of the Offences against the Person Act 1861[15] was held in *R.* v. *Bourne*[16] to import the meaning expressed by the proviso in section 1(1) of the Infant Life Preservation Act 1929[17], so that a jury could reasonably take the view that a doctor acted to preserve the life of a mother if he thought on reasonable grounds that continuation of pregnancy

[11] (1955) 39 Cr. App. R. 66.

[12] See para. 4.1, above.

[13] As amended by the Sex Discrimination Act 1975, s. 83 and Sch. 4.

[14] See also s. 36A inserted by the Heavy Commercial Vehicles (Controls and Regulations) Act 1973, and s. 36(3A) and (3B) added by the Road Traffic Act 1974. And for further examples, see Education Act 1944, s. 39(2) (*a*); Fire Services Act 1947, s. 30(1); Abortion Act 1967, s. 5(2) and Road Traffic (Regulation) Act 1967, s. 79; regulation 34(1) (*b*) of the Traffic Signs Regulations and General Directions 1975, S.I. 1975 No. 1536.

[15] This made it an offence "with intent to procure the miscarriage of any woman . . . unlawfully [to] use any instrument".

[16] [1939] 1 K.B. 687.

[17] *i.e.*, the prosecution must prove that "the act which had caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother".

would make her a physical or mental wreck[18]. Other and more recent statutes[19] qualify the basic prohibition with the words "without lawful excuse" or "without reasonable excuse", which permit defences to be raised successfully in situations far wider than those likely to be covered by a defence of necessity. The addition of "dishonestly" in the definition of theft[20] may have a similar effect. Thus, proof of dishonesty in theft may perhaps be negatived if, although the defendant knows an appropriation is without the owner's consent, he takes the property to avoid a greater evil, for example, to save life.

2. Common law

4.6 Decisions relating to certain common law misdemeanours have been cited as proof of the existence at common law of a defence of necessity. For example, in *R.* v. *Vantandillo*[21] it was said that the necessity for a mother to carry her infected child through the streets to seek medical attention "might have been given in evidence as a matter of defence" to a charge of common nuisance by exposing a person with a contagious disease on the public highway. Such cases might, however, be regarded merely as examples of the flexibility in allowing for special cases to be found in any body of judge-made law. Certainly, it would not, we think, be safe to conclude from these authorities alone that English law recognises a defence of necessity.

4.7 The principal common law discussion of necessity has centred on murder and theft. So far as the latter is concerned, the position now remains open under the Theft Act[22]. In regard to the former, *R.* v. *Dudley and Stephens*[23] is often regarded[24] as authority against the existence of the defence of necessity, although it is possible to take the view that it is not decisive on the issue. The defendants were found guilty of murder, having killed and eaten a boy after being twenty days adrift in an open boat. They were rescued four days later. The court held that the facts did not disclose a situation of necessity which would have justified killing the boy to provide food; the defendants had not chosen the lesser of two evils, for when they killed him they did not, and could not, know that killing him would probably save their lives, or that the boy would probably have died anyway—they might have been picked up by a ship the next day or they might never have been picked up at all. "In either case it is obvious that the killing of the boy would have been an unnecessary and profitless act"[25].

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[18] While not questioning this decision, it must not be thought that we are making any judgment as to the balance of harms between termination of pregnancy and danger to the mother's health.

[19] *e.g.*, Criminal Damage Act 1971, ss. 1, 2, 3 and 5; Prevention of Crime Act 1953, s. 1; Criminal Law Act 1967, s. 4(1); Firearms Act 1968, s. 19.

[20] Theft Act 1968, s. 1; "dishonestly" is defined, but not exhaustively, in s. 2(1).

[21] (1815) 4 M. & S. 73, 76 (common nuisance); see also *R.* v. *Stratton* (1779) 21 How. St. Tr. 1045 (common law misdemeanour of assault).

[22] See para. 4.5, above.

[23] (1884) 14 Q.B.D. 273.

[24] *e.g.*, Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 160.

[25] (1884) 14 Q.B.D. 273, 279, *per* Lord Coleridge C.J. The law of murder and other offences against the person is under review by the Criminal Law Revision Committee, which published a working paper on the subject in August 1976.

3. Sentencing

4.8 The need to plead necessity as a defence is frequently bypassed by sentencing policy and related factors. Thus, firemen convicted of traffic offences committed when answering emergency calls are refunded their fines and costs "in appropriate cases" by local authorities[26] and the police for various reasons may decide not to prosecute. Furthermore, the court has, in its discretion, power to grant an absolute or conditional discharge upon conviction for any offence other than one for which the sentence is fixed by law, and the court in granting this takes into account, inter alia, the circumstances, including the nature of the offence. The existence of this wide power may explain in some degree the scarcity of cases of necessity and the courts may well regard it as the most practical way of dealing with cases in which the factor of necessity is present.

B. RESPONSE TO THE WORKING PAPER PROPOSALS

1. The proposals

4.9 In its working paper[27], the Working Party on the criminal law considered whether a general defence of necessity was justified. For a number of reasons, it concluded that it was, provided that it could "be framed in terms which would obviate its being invoked in extravagant and inappropriate cases".

4.10 In giving its reasons for proposing a general defence, the Working Party pointed to broad considerations of policy, such as the injustice of convicting someone faced with a situation of necessity[28], and the uncertainty of relying on the courts' discretion in regard to sentencing[29]. In addition it mentioned considerations more specifically connected with the present state of the law. In the first place, recent cases[30] indicate that, if a defence exists, the courts will be slow to apply it, and in any event their attention may not even be drawn to its possible existence. Secondly, attention was drawn to the proliferation of special statutory defences of necessity[31], and the uncertain ambit of some of them[32]. And thirdly, while the restrictions upon liability in some offences represented by terms such as "dishonestly" or "unlawfully"[33] may cover situations where a defence of necessity would otherwise be required, situations arising under other offences could only be dealt with by a

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[26] See *Buckoke* v. *Greater London Council* [1971] Ch. 655, 670; see also *Wood* v. *Richards* [1977] Crim. L.R. 295, n. 6, above, where D was given an absolute discharge.

[27] Working Paper No. 55, "Defences of General Application", para. 38 *et seq.*

[28] In this connection the view of Lord Denning M.R. in *Buckoke* v. *Greater London Council* [1971] Ch. 655, 678 was quoted; we refer to this at para. 4.21, below.

[29] See para. 4.8, above.

[30] *e.g., R.* v. *Kitson* (1955) 39 Cr. App. R. 66 and *Buckoke* v. *G.L.C.* [1971] Ch. 655; see para. 4.3, above.

[31] See para. 4.4, above.

[32] *e.g.,* the Fire Services Act 1947, s. 30(1) authorises members of fire brigades on duty and police constables to enter or if necessary break into premises where a fire has broken out, without the owner's consent, and do everything necessary to extinguish it. Because of its narrow terms, it seems doubtful if this protection would extend to off-duty firemen or members of the public acting similarly.

[33] See para. 4.5, above.

specific defence of necessity. But, qualifying these considerations, the Working Party pointed out that account should be taken of the effect of public security and good order in providing the defence.

4.11 With these factors in mind, the Working Party proposed that there should be a general defence with the following elements—

(i) the defence should be available where the defendant himself believes that his conduct is necessary to avoid some greater harm than that which he faces;

(ii) the harm to be avoided must, judged objectively, be found to be out of all proportion to that actually caused by the defendant's conduct;

(iii) the harm to be avoided need not be directed against the defendant; it may, provided always that the test in (ii) is satisfied, be directed against himself or his property or against the person or property of another;

(iv) the defence should not apply where the defendant has put himself into a position where he must commit one offence in order to avoid another;

(v) the defence should be available to a charge of any offence, however serious;

(vi) the defence should not be available where the greater harm, which the defendant alleges he was seeking to avoid by committing the offence with which he is charged, consists of the doing by some other person of an act which that person was legally entitled to do[34];

(vii) the burden should be on the defendant to give sufficient evidence to raise an issue as to necessity.

2. The response

4.12 While it is true to say that a majority of those commenting on the Working Party's proposals were prepared to accept that there should be a general defence on the lines described above, almost all of those favouring the defence commented on one aspect or another of the difficulties which it raised. For example, the Criminal Bar Association disagreed with the definition of "harm", considering that it should be judged on strictly objective criteria, with necessity confined to occasions of extreme urgency allowing of no time for consideration. The Society of Public Teachers of Law favoured a similar restriction; and they, like some other commentators, did not favour the terms in which the "political" exception[35] was drafted, while admitting some such provision to be necessary.

4.13 In addition, a minority were entirely opposed to any general defence. In particular the Senate of the Inns of Court and the Bar were unanimously of the view that provision for cases of necessity ought, where necessary, to be provided, as at present, in relation to individual statutes, and drafted in terms

[34] This restriction was proposed in order to exclude the defence being raised in cases where individuals are obstructed in their lawful business by others, and who excuse their actions by maintaining that this is the only practical means of achieving their aims.

[35] See para. 4.11 (vi) and n.34, above.

appropriate to them. This solution was also adverted to by some, such as the Society of Public Teachers of Law, who, despite their doubts, were on balance inclined to favour a general defence. Finally, and in our view, very importantly, some of the commentators pointed out to us the grave implications of a general defence if no exceptions or exclusions were made in relation to certain offences. This is a matter to which we revert below[36].

C. RECONSIDERATION OF THE PROPOSED GENERAL DEFENCE

4.14 The overall impression conveyed by the consultation on the working paper was of some unease as to whether a *general* defence of necessity was practicable; or whether, if one could be formulated satisfactorily, it would not be unattractively complex by reason of the qualifications and exclusions which would be required. In view of this, we think it necessary to reconsider whether the reasons advocated by the Working Party for proposing a general defence are sufficiently strong to justify provisions which may prove complex, if not contentious; and, whether or not this is so, to consider the effect which a general defence might have upon certain offences.

1. Is a general defence needed?

(a) General

4.15 From the record of reported cases, it seems to us fair to deduce that, while the state of the law may not in all respects be satisfactory, there has been no significant demand for or need of a general defence. The factors of sentencing[37] or non-prosecution probably to some degree account for this situation. The same factors, of course, apply in the context of duress, but, as we have seen[38], there has nonetheless been considerable judicial consideration of that defence in recent years. It is probable also that the exceptions and qualifications provided in most statutes concerned with the major criminal offences in recent years, to which we have referred in broadest outline[39], cover many situations in which a defence might otherwise be required.

4.16 In addition, as we have seen[40], statutes containing offences applying in particular contexts sometimes contain special defences of necessity. It is true, as the Working Party pointed out[41], that, since these defences are sometimes limited in scope, they may fail to provide protection in some instances where it may seem desirable to do so. Nevertheless, so far as we are aware, no cases have arisen which would indicate that they have in practice operated unsatisfactorily, and it must be assumed that their scope, however limited, was that which Parliament considered appropriate in the situations with which they deal.

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[36] See para. 4.22, below.
[37] See para. 4.8, above.
[38] See para. 2.1, above.
[39] See para. 4.5, above.
[40] See para. 4.4, above.
[41] See para. 4.10, above.

4.17 The Working Party were of the view[42] that necessity would be relevant for the most part as a defence to relatively minor offences. At the same time, it recognised[43] that the principal discussion of the possible availability of the defence has in the past been in the context of murder and theft. Discussion of the defence in the context of theft has now been settled by the terms of the Theft Act 1968[44], and, as we have seen, the terms of many other serious offences may well make the provision of a defence of necessity superfluous. For the purpose of further discussion here, therefore, we will assume that the working paper is correct in its estimation that the defence would have its greatest impact on offences at the extremes on the scale of gravity. It is, we think, worth considering what effects a defence might be expected to have in those contexts.

(b) Necessity and minor offences

4.18 What, in this context, is meant by "minor offences" may be a matter of dispute, but for present purposes we assume that it comprehends most offences triable only summarily, and most offences of strict liability; in many instances, of course, these criteria overlap. Certainly, the minor offences in the context of which the defence of necessity has been discussed in recent years appear to be offences of strict liability: for example, failure by the driver of a fire-engine to comply with a traffic-signal, contrary to section 22(1)(*b*) of the Road Traffic Act 1972[45]; or driving a motor vehicle while unfit to drive through drink or drugs, contrary to section 5(1) of that Act[46].

4.19 At first sight, it certainly seems desirable that in situations such as that described in *Buckoke's* case[47], where without danger to others the crew of a fire-engine cross traffic-lights at red in order to deal with a nearby emergency, there should be a defence available. Analogous examples could be multiplied without difficulty: a boy under seventeen years of age drives his seriously ill parent to hospital, or a man with a blood-alcohol concentration above the prescribed limit does the same for his wife, in each instance the conduct being the only means of saving life[48]. In all these instances, a defence based upon the test of "balance of harms" suggested by the Working Party, or of immediate danger to life suggested by some of those commenting on the working paper, might be expected to save the defendant from conviction. There are, however, two comments which might be made on the provision of a defence in this context.

4.20 It is necessary to bear in mind one of the fundamental distinctions between duress and necessity: the harm sought to be avoided in the former always proceeds from another person's wrongdoing, while in the latter the harm may arise from an infinite variety of circumstances. It must also be

[42] See Working Paper No. 55, paras. 30 and 42.
[43] See Working Paper No. 55, para. 35.
[44] See para. 4.5, above.
[45] *cf.*, *Buckoke* v. *Greater London Council* [1971] Ch. 655; see para. 4.1, above.
[46] *cf.*, *R.* v. *Kitson* (1955) 39 Cr. App. R. 66; see para. 4.3, above.
[47] See para. 4.1, above.
[48] The examples given would involve, respectively, offences under ss. 4(1) and 6(1) of the Road Traffic Act 1972. As to the position when an emergency arises after excess consumption of alcohol, see *Taylor* v. *Rajan* [1974] Q.B. 424, and generally, *Archbold* (39th ed., 1976), para. 2868g.

borne in mind that, at least in some instances, it is to be assumed that Parliament creates offences with no mental element because strict liability may induce persons to take much more stringent precautions than they otherwise would take to avoid the particular social evil (such as a danger to public health) at which the offence is aimed. Having regard to the variety of situations in which a necessity defence may arise and the great variety of offences to which a general defence would apply, it cannot be ruled out that its provision, particularly if it were to be based upon a test of the balance of harms, might defeat the intent of Parliament to ensure in a particular case that liability is "strict". The Working Party itself recognised that some exception to a general defence would have to be made to exclude it in circumstances brought about by the defendant's antecedent negligence[49], but we believe no exception, however refined, could cope with the more general problem which we have here outlined.

4.21 In the context of the minor offences with which we are here dealing, however, we place far greater reliance on another consideration. It would clearly be unfair for the defendants in the examples given above[50] to be punished for their conduct, even though they have undoubtedly committed offences. But is it necessary to construct a defence, unavoidably very elaborate, to avoid this outcome? It will be noted that, in the context of the example of the fire-engine crossing the traffic-lights to answer an emergency, Lord Denning M.R. remarked that the driver "should not be *prosecuted.* He should be congratulated."[51] The inequity, in this and in the other examples postulated, lies, then, not in the conviction of the defendant, but in the absurdity of instituting proceedings in the first place in cases in which, whatever view is taken of the purposes which the penal process is intended to serve, no possible social benefit can ensue. We doubt whether any general defence, however elaborately contrived, would succeed in sifting out only those defendants to whom Lord Denning's remarks might deservedly be applied. At the same time, we are of the view that the proper exercise of a discretion in instituting proceedings in the field of minor offences would render such a general defence unnecessary.

(c) Necessity and offences against the person

(i) *Murder*

4.22 We have noted[52] that much of the discussion concerning necessity in the context of common law offences has centred upon murder, and that in English law it may well be that, as a result of *R.* v. *Dudley and Stephens*[53], no plea of necessity is available to a charge of murder.

4.23 This conclusion, if it represents the present law, is relevant in the context of a highly controversial area which the Working Party did not touch upon, that of euthanasia. There is more than one way, conceptually, in which this problem may be approached, and such legal authority as there is avoids

[49] See para. 4.11(iv), above; the terms of this exception were criticised in [1974] Crim. L. R. at p. 498.

[50] See para. 4.19, above.

[51] *Buckoke* v. *G.L.C.* [1971] Ch. 655, 678 (emphasis added); see n. 28, above.

[52] See para. 4.7, above.

[53] (1884) 15 Q.B.D. 273; see para. 4.7, above.

analysis of the position by reference to any doctrine of necessity. At present it seems certain that the law forbids any decision to kill as a means of ending suffering, but, equally, the law does not forbid a decision to alleviate suffering by means which have as a foreseen side-effect the shortening of life, where these are the only available means for alleviating that suffering. These propositions seem to follow from the direction of Devlin J. to the jury in *R.* v. *Adams*[54]. But, as has been pointed out[55], the propositions involve a contradiction in terms of the present law of murder, for that offence is analysed as including killing with intent to kill, with intention defined to include consequences or effects foreseen as certain or probable. And, "if a doctor gives drugs with the object of relieving the pain and suffering of a dying man knowing that the drugs will certainly shorten life, then he intends to shorten life."[56]

4.24 There is an alternative approach to this problem which would justify the actions of doctors tending terminal patients by reference to the defence of necessity—

> "... when a patient is suffering from a painful illness the doctor may lawfully administer a narcotic to relieve pain even though he knows that the drug, used in quantity as it sooner or later has to be, is likely to prove fatal if not anticipated by the disease. The immediate relief of pain counterbalances the risk of accelerated death. If so much be admitted, it obviously becomes very difficult to determine when, if ever, there is an unlawful act of euthanasia in the progressive administration of the drug ... It would be extremely artificial to say that [the last dose] which is administered upon the same principle as all the previous ones, is alone unlawful ... This line of argument tends to show that a physician may give any amount of drug necessary to deaden pain, even though he knows that the amount will bring about speedy or indeed immediate death ... His legal excuse rests upon the doctrine of necessity, there being at this juncture no way of relieving pain without ending life."[57]

There is, however, no authority to support the application of a defence of necessity in the situation described above.

4.25 In this context, it is relevant to have regard to the work of the Criminal Law Revision Committee upon offences against the person. In their Working Paper on this subject[58] they have proposed for consideration a new

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[54] [1957] Crim. L. R. 365, quotes also in Glanville Williams, *The Sanctity of Life and the Criminal Law* (1958), p. 289. Devlin J. said: "If life were cut short by weeks or months it was just as much murder as if it were cut short by years. But that does not mean that a doctor aiding the sick or dying has to calculate in minutes or hours ... the effect on a patient's life of the medicines which he administers ... [A doctor] is entitled to do all that is proper and necessary to relieve pain and suffering even if measures he takes may incidentally shorten life."

[55] See Smith and Hogan, *Criminal Law* (3rd ed., 1973), pp. 214–215.

[56] Smith and Hogan, *op. cit.*, p. 215.

[57] See Glanville Williams, *The Sanctity of Life and the Criminal Law* (1958), p. 287 *et seq.*

[58] See Criminal Law Revision Committee, Working Paper on "Offences against the Person," August 1976.

offence of "mercy killing", punishable with a maximum of two years' imprisonment, which—

> "would apply to a person who, from compassion unlawfully kills another person who is or is believed by him to be (1) permanently subject to great bodily pain or suffering, or (2) permanently helpless from bodily or mental incapacity or (3) subject to rapid and incurable bodily or mental degeneration. The defendant should have reasonable cause for his belief that the victim was suffering from one of the conditions mentioned in (1), (2) or (3) and consideration should be given to the inclusion within the definition of a requirement that the killing was with the consent or without the dissent of the deceased."[59]

While this suggested offence appears to contemplate an immediate killing, it would also, in the absence of any definition of "unlawful", comprehend the shortening of life by the administration of pain-killing drugs. Consequently, if such an offence were created, it would be of great importance to decide whether a defence, whether of necessity or of some other special character, should be available to anyone charged with it, to ensure that no member of the medical profession was prosecuted for the offence for activities carried out in the course of his normal professional duties.

4.26 It will be evident from the foregoing discussion that the possible availability of a general defence of necessity to the offence of murder is, potentially, a matter at once important and controversial, impinging as it does on the unresolved question of euthanasia. Even if we were to recommend a general defence, we would not feel able to extend its application to that offence. The implications it has for euthanasia were, as we have mentioned, not a matter which was canvassed by our Working Party in the working paper, and without the benefit of the fullest range of views on that issue, it is not one upon which we would feel it right to pronounce. For the present, the absence of a defence will make little or no difference to the current legal position in relation to the issues of mercy killing and euthanasia since in our view, as we remarked at the outset of this section of the report[60], there is in all probability no general defence at common law in this country. For the future, we think that the provision of a defence in this area of the law is best left to be dealt with as a specific issue by the Criminal Law Revision Committee in the context of their provisional proposals, when it will be appropriate to consider such questions as whether and to what extent the patient's prior consent should be obtained, and whether a defence should be open to anyone outside the medical profession.

(ii) *Other offences against the person*

4.27 The ethical problems attaching to any general defence extending to murder are present also, if in somewhat less likely circumstances, in some other offences against the person. "An immediate blood transfusion must be made in order to save an injured person: the only one who has the same blood type as the injured refuses to give blood. Can he be overpowered, and the

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[59] *ibid.*, at p. 72.

[60] See para. 4.1, above.

blood taken from him?"[61] The necessity defence advocated by the Working Party would by its terms almost certainly answer this in the affirmative. But one of those commenting on the working paper expressed doubts as to whether this would be regarded as a generally acceptable solution. We share those doubts. It is, however, almost, if not entirely, impossible to devise any generalised exception which would exclude the availability of a general defence in this situation. It may, of course, be objected that such examples are mere academic puzzles, and are so unlikely to arise in practice that they may safely be ignored. That is not, we believe, an adequate rationalisation of this type of situation in a period in which the donation of rare blood-groups and bone-marrows, and the making of organ transplants, is increasingly common; and if in the face of the multiplication of such examples no satisfactory general exception could, in legislative terms, be devised to cope with them, this provides evidence for the view that a general defence, as distinct from particular exceptions to specific offences, is not the right approach in the field of offences against the person.

2. Conclusions

4.28 The principal difference between duress and necessity, as we have noted, lies in the source of the threatened harm: in the case of the former it always proceeds from another's wrongdoing. This difference was noted by the Working Party, which also pointed out that necessity, in contrast to duress, is most frequently discussed in the case of minor offences. Neither difference, it suggested, "can be regarded as an adequate juristic basis for permitting one defence to be raised but denying the other."[62] So far as the second difference is concerned, we have come to the conclusion[63] that the difficulties attaching to a general defence extending to minor offences would outweigh its advantages, and that it is preferable for awkward situations which involve technical breaches of such offences to be dealt with by other means. The other difference requires a further brief comment at this stage.

4.29 Any general defence ought, we think, to be capable of dealing with the exceptional and difficult case, and to apply to all offences save any to which, on rational and defensible grounds, an exception is thought to be desirable. In the case of duress, the form of defence we are recommending does, we believe, cope with the exceptional and difficult cases which may arise out of the various forms of illegal threats made by one person against another, and it is limited in such a way that we consider it requires no exceptions to be made as regards the offences in respect of which the defence may be raised.

4.30 In contrast with duress, the difficulties arising in any defence of necessity are manifold: this much was evident from the range of exceptions which the Working Party felt were needed, which were themselves subject to adverse criticism by many of those commenting on the working paper. It is probable that situations where necessity may be in issue are so diverse as not to be readily classifiable; and in this respect the difference between, on the

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[61] Andenaes, *The General Part of the Criminal Law of Norway*, p. 169, quoted by Glazebrook, "The Necessity Plea in English Criminal Law" [1972A] C.L.J. at p. 99.

[62] See Working Paper No. 55, para. 29; and see, to the same effect, *D.P.P.* v. *Lynch* [1975] A.C. 653, 692, *per* Lord Simon and 701, *per* Lord Kilbrandon.

[63] See para. 4.21, above.

one hand, necessity and, on the other, duress and other defences applicable in more narrowly defined circumstances, such as self-defence, is perhaps more fundamental than the Working Party appreciated. Significantly, in our view, even some of those who, on the whole, were inclined to favour the creation of a general defence were in doubt as to how it would operate in relation to many offences. We are very doubtful whether a defence operating with such a degree of uncertainty ought to find a place in a Code.

4.31 Furthermore, even if a general defence were thought feasible there are a number of offences, among them the most serious of all, in relation to which, as we have seen, the operation of the defence would have to be excluded. Those exceptions, in particular those relating to murder and some serious offences against the person, would be necessary because of the unexplored implications the defence would have for sensitive questions of ethics and social responsibility, or because of the unacceptable results which might ensue from the application of the defence in special cases. Such exceptions, made necessary by expediency rather than principle, weigh further against the view that a general defence is desirable.

4.32 It is, perhaps, significant in this context that the number of criminal codes containing a specific defence of necessity is, by comparison with those containing provisions relating to duress, very small[64]. Historically, there is a simple explanation for this. While the Criminal Code Bill drafted by Stephen contained a provison covering necessity, no section corresponding to this was inserted in the Draft Code prepared by the Criminal Code Bill Commissioners in 1879, upon which Code many of the Commonwealth Codes now in force were based. In explanation of this omission, the Commissioners said—

> "... ingenious men may suggest cases which, though possible, have not come under practical discussion in courts of justice ... We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."[65]

In contemporary circumstances, in which statute law regulates a wider range of activity, the Commissioners might have been expected to say that, where circumstances indicate the need for a defence to be available in respect of a particular offence, a provision tailored to those needs should be provided. This, as we have seen[66], is in fact what has happened in a number of cases, and, having regard to the difficulties attaching to a general defence, we believe that this is probably the preferable course to choose.

[64] A number were set out in the Appendix to Working Paper No. 55. In *R.* v. *Morgentaler* (No. 5) (1974), 47 D.L.R. (3d) 211, it was held that s. 7(3) of the Canadian Criminal Code (preserving common law defences except so far as changed or amended by statute) preserves a common law defence of necessity, protecting an accused who must choose between committing a crime or suffering a greater evil. The defence is available to a physician who must consider performing an abortion otherwise than in accordance with the procedure of s. 251 of the Code, which makes lawful those abortions carried out within its terms.

[65] Note A to the Report of the Criminal Code Bill Commissioners, quoted in (1885) 1 L.Q.R. 56.

[66] See para. 4.4, above.

D. RECOMMENDATION

4.33 We have indicated that any general defence might sometimes be uncertain in operation; that various qualifications[67] would be needed to the generality of its operation; that, in respect of some important offences, such as murder, exceptions to its application would be required, while, in respect of minor offences, it would be preferable for no defence to be available; and, finally, that in respect of yet other offences[68], there is probably little need for any defence. These considerations lead us to recommend that there should be no general defence of necessity in the Code. We indicated at the outset that it is very improbable that any such defence exists at common law. For the avoidance of doubt, we recommend that, if any such defence does exist, it should be abolished.

PART V

ENTRAPMENT

A. INTRODUCTION

5.1 The final section of this report considers the difficult and controversial subject of entrapment. The word "entrapment" is not a term of art and has no precise definition. Loosely used, it can refer in general terms to the participation of informers or the involvement of individual police officers themselves in the commission of an offence for the purpose of apprehending the actual criminals involved. It is well recognised that in many situations such involvement is perfectly legitimate. To take two obvious examples: in offences concerned with the sale of liquor, the readiness of the holder of a licence to sell otherwise than in accordance with its terms may be properly tested by purchases made by or on behalf of the police; and in offences of supplying drugs the only practicable method of discovering the source and identifying those engaged in the supply may be infiltration of the network of suppliers. But in such cases as these the police and their informers do not in any sense act as agents provocateurs. In the true sense an agent provocateur means "a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds or informs against him in respect of such offences"[1]. In between these two extremes cases may occur where it is difficult to say whether the line between acceptable involvement and direct incitement to crimes has been passed. In considering whether there should be, in English law, a general defence of entrapment we, however, are only concerned with cases where that line has been crossed and where the defendant has been incited by the police or their agents to commit an offence which, had it not been for the incitement, he would not have committed.

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[67] *e.g.*, the "political" exception referred to in paras. 4.11 and 4.12, above.

[68] See para. 4.15, above.

[1] *Report of the Royal Commission on Police Powers and Procedure*, (1929) Cmd. 3297, cited by the Court of Appeal in *R.* v. *Mealey and Sheridan* (1974) 60 Cr. App. R. 59, 61.

B. THE PRESENT POSITION

1. No defence of entrapment in English law

5.2 The courts have for long expressed strong disapproval of the use of agents provocateurs. In *Brannan* v. *Peek*[2] a policeman entered a public house where illegal gambling was in progress and persuaded the appellant to accept a bet from him. Of this conduct Lord Goddard C.J. said—

> "But before parting with this case, there is another point of much greater public importance. The court observes with concern and with strong disapproval that the police authority at Derby apparently thought it right in this case to send a police officer into a public house for the purpose of committing an offence in that house. It cannot be too strongly emphasized that unless an Act of Parliament provides that for the purpose of detecting offences police officers or others may be sent into premises to commit offences therein—and I do not think any Act does so provide—it is wholly wrong to allow a practice of that sort to take place. I am not commenting here so much on the conduct of the police officer, because obviously he must have been obeying the orders of his superiors. If the police authorities have reason to believe that offences are being committed in public houses, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officers or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence. If, as the police authority assumed, a bookmaker commits an offence by taking a bet in a public house, it is just as much an offence for a police constable to make a bet with him in a public house, and it is quite wrong that the police officer should be instructed to commit this offence. I hope the day is far distant when it will become common practice in this country for police officers, who are sent into premises for the purpose of detecting crime, to be told to commit an offence themselves for the purpose of getting evidence against another person."[3]

But it was not suggested that the fact that a person had been incited by the police or their agents to commit an offence could amount to a defence to a charge of the offence so committed.

5.3 In two cases[4] in 1974 the Court of Appeal held, unequivocally, that there was no defence of entrapment in English law. In the latter of these two cases, Lord Widgery C.J. said—

> ". . . it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be described as an

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[2] [1948] 1 K.B. 68. See also *Browning* v. *J. W. H. Watson (Rochester) Ltd.* [1953] 1 W.L.R. 1172, 1177.

[3] [1948] 1 K.B. 68, 72.

[4] *R.* v. *McEvilly and Lee* [1974] Crim. L. R. 239 (following *Wright* v. *Cox*, unrep. C. A. (Crim. Div.) July 19, 1973); *R.* v. *Mealey and Sheridan* (1974) 60 Cr. App. R. 59.

agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty."[5]

5.4 Although it is now clear that there is no defence of entrapment in English law, it is still necessary to examine carefully what the courts have done, both before and since 1974, when faced with cases of official instigation to crime. Where the courts have taken any account of the fact that a defendant has been officially incited to commit the crime with which he is charged they have done so either by mitigation of sentence or by exercising a supposed discretion to exclude admissible evidence.

2. Mitigation of sentence

5.5 It has for some time been recognised that official involvement in crime may afford grounds for the mitigation of penalty. In *Browning* v. *Watson*[6] coach proprietors were charged with unlawfully permitting their coach to be used as an express carriage without the necessary licence; their defence was that the vehicle was being used "on a special occasion for the conveyance of a private party". This defence succeeded in respect of all but one of the occasions which were the subject of the charges. On that one occasion two persons in the service of the licencing authority boarded the coach unknown to the defendants with the result that the offence was committed by the defendants. The Divisional Court, whilst strongly disapproving of the conduct of the officials, did not consider the offence an entirely technical one[7]. Nevertheless, in remitting the case to the magistrates with a direction that the offence was proved, the court reminded them that it was possible for them "to grant an absolute discharge", adding that it was not "even necessary for them when doing so to order payment of costs"[8].

5.6 In *R.* v. *Birtles*[9], the court adopted the same approach in a case of serious crime. In reducing the sentence on the defendant for robbery from five years' imprisonment to three, the court took into account the "real possibility" that the offence might not have been committed but for police assistance and encouragement, and added—

> "It is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed. It is one thing for the police to make use of information concerning an offence that is already laid on. In such a case the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so. But it is quite

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[5] *R.* v. *Mealey and Sheridan*, *ibid.*, at p. 62.

[6] [1953] 1 W.L.R. 1172.

[7] The court said that the proprietors ought to have taken some precautions either by issuing tickets or taking other precautions to see that no unauthorised passengers were on the coach.

[8] *Browning* v. *Watson* [1953] 1 W.L.R. 1172, 1177.

[9] (1969) 53 Cr. App. R. 469: while in prison B devised a plan to rob a bank; on release a police informer introduced a police officer to him as a "top criminal". One or other of them supplied B with a getaway car and imitation firearm, which B used when carrying out a raid on a sub-Post Office. B was arrested and convicted.

another thing, and something of which this Court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out."[10]

This important dictum was referred to in *R.* v. *McCann*[11], an appeal against a four-year sentence for theft, in which the Court of Appeal considered it possible that the defendant might not have carried through the theft had not the opportunity of doing so been presented by the police through the intervention of an informer. But there was ample evidence of conspiracy and the court therefore dealt with the matter of sentence on this basis, the two-year term it substituted being the appropriate sentence, in the court's view, had the defendant been charged with conspiracy to steal. This appears to be the most recent reported case in which the courts have exercised the power to mitigate sentence.

3. Exclusion of evidence

5.7 A more drastic and more questionable way of dealing with cases of entrapment has been recently employed by the courts. On the assumption that the discretion to exclude admissible evidence is relevant to entrapment, the courts have on occasion achieved the same practical result as might be obtained by a defence of entrapment. It is necessary to examine this recent development in some detail.

5.8 At one time the courts were thought to have no discretion to exclude admissible evidence. In 1914, during the argument in *Director of Public Prosecutions* v. *Christie*[12], the Earl of Halsbury said that he "must protest against the suggestion that any judge has the right to exclude evidence which is in law admissible, on the grounds of prudence or discretion, and so on". However, there is now no doubt that the courts do have a discretion to exclude admissible evidence[13] although the precise limits of the discretion are not easy to state. There is a number of different situations in which the discretion of the court to exclude has been held to exist: similar fact evidence has been excluded on the ground that its admission would be unfair because its prejudicial effect would exceed its probative value[14]; the same reason has been given for the exclusion of the cross-examination of the defendant as to his previous misconduct and convictions[15] and for the exclusion of a confession made by a defendant aged 19 but who was severely subnormal, having a mental age of $5\frac{1}{2}$ years[16]. Evidence obtained in breach of the Judges'

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[10] (1969) 53 Cr. App. R. 1049 *per* Lord Parker C.J.

[11] (1972) 56 Cr. App. R. 359.

[12] (1914) 10 Cr. App. R. 141, 149.

[13] *Selvey* v. *Director of Public Prosecutions* [1970] A. C. 304. For the view that the judicial source of the power is not well founded in the authorities, see Livesey, "Judicial discretion to exclude prejudicial evidence", [1968] C.L.J. See also, Heydon, "Illegally obtained evidence", [1973] Crim. L. R. 608 and 690 and Cross, *Evidence* (4th ed., 1974), p. 27 *et seq.*

[14] *R.* v. *Noor Mohamed* [1949] A.C. 182, 191–192; *Harris* v. *Director of Public Prosecutions* [1952] A.C. 694, 707 where it was considered whether evidence of other similar offences was relevant to the proof of the offence charged.

[15] *Selvey* v. *Director of Public Prosecutions* [1970] A.C. 304.

[16] *R.* v. *Stewart* (1972) 56 Cr. App. R. 272.

Rules[17] and evidence where the defendant was misled as to the purpose for which he was providing the evidence[18] has also been excluded. There is authority that evidence obtained by illegal means after the commission of an offence can also be excluded at the discretion of the court[19].

5.9 Although, as will be seen from the previous paragraph, there is a wide variety of different situations in which a discretion to exclude evidence can be exercised, they are all cases where the excluded evidence is evidence which has been obtained or elicited at some stage after the commission of the offence; it is always the mode of obtaining or the consequence of admitting this evidence which are judged to be unfair or unduly prejudicial. In cases of entrapment, however, the conduct about which complaint is made takes place before, indeed is the cause of, the commission of the offence. Nevertheless, in entrapment cases the courts have sometimes exercised a discretion to exclude evidence and have thereby brought about the acquittal of the defendant. We therefore now turn to an examination of this development in the law.

5.10 In 1971, in *R.* v. *Foulder, Foulkes and Johns*[20] the defendants were charged with the unlawful possession of drugs. On defence submissions a trial within a trial was held. From the short report it would seem that the deputy chairman was satisfied that the police had incited the defendants to obtain the drugs. The only evidence for the prosecution was that of the police. The deputy chairman ruled that it should be excluded and as there was no other evidence the defendants were acquitted. Presumably, if the defendants had already been in possession of the drugs before the incitement, the conduct of the police would have fallen on the permissible side of the line, and any encouragement to supply, as distinct from obtain, the drugs would have been a trick to obtain the evidence of possession. It appears, however, that it was not the evidence of the offence which was obtained by the incitement but the commission of the offence, although the charge itself related to possession rather than supply.

5.11 In *R.* v. *Burnett and Lee*[21], a case decided in 1973, the defendants were charged with conspiracy to utter forged banknotes[22]. In this case the trial seems to have run its full course until the end of the evidence. The report of the case does not reveal what the evidence for the prosecution was but presumably it was sufficient to raise a prima facie case. Thereafter, as part of the defence case, one of the defendants gave evidence that a police informer named Edith had persistently urged him for some two months to obtain forged U.S. dollar bills which eventually led to his obtaining them from his co-defendant. Edith had not given evidence for the prosecution and did not give evidence in rebuttal. The case was withdrawn from the jury and the defendants acquitted. The short report records the decision thus—

> "Held, the evidence was inadmissible. There was a strong suspicion that the conduct of the informant tempted the defendant and en-

[17] *R.* v. *Collier and Stenning* (1965) 49 Cr. App. R. 344, 350; *R.* v. *Roberts* [1970] Crim. L. R. 464.

[18] *R.* v. *Payne* (1963) 47 Cr. App. R. 122.

[19] *Kuruma, Son of Kaniu* v. *R.* [1955] A.C. 197, 203–205; *King* v. *R.* [1969] 1 A.C. 304.

[20] [1973] Crim. L. R. 45 (Inner London Quarter Sessions, 15 Dec. 1971).

[21] [1973] Crim. L. R. 748.

[22] One defendant was also charged with possessing forged banknotes.

couraged him to commit crime. The absence of Edith's testimony left Lee's account uncontradicted and strengthened the suspicion that her conduct fell on the wrong side of the line. The conduct of Edith could only be regarded as that of an agent provocateur and that on the principles laid down as to the conduct of informants the case should be withdrawn from the jury on the general ground of unfairness."[23]

5.12 From the very short report it is impossible to determine the real ratio decidendi of *R.* v. *Burnett and Lee*[24]. But it would seem that what probably happened was that the judge withdrew the case from the jury "on the general ground of unfairness". This is a clearer example than *R.* v. *Foulder, Foulkes and Johns*[25] of a case where the incitement had caused the commission of the offence rather than the obtaining of evidence, and the court's decision seems to amount, in effect, to allowing entrapment as a defence to a charge of crime, although its availability depends on the court's exercise of a discretion.

5.13 Soon after the cases referred to in paragraphs 5.10–5.12 above a similar case[26] reached the Court of Appeal. Once again the case is but briefly reported; the facts were stated to be—

> "M was convicted of handling stolen goods. A police officer H, acting on information from W, met M and W. H represented that he was willing to buy stolen spirits from M and a quantity, price and arrangements for delivery were agreed on. Subsequently spirits were stolen from a warehouse and received by M. Objection was taken to the evidence of H on the ground that he was an agent provocateur but the judge, after a trial within a trial, admitted it. The defence invited the judge to leave the defence of entrapment (to the jury) but he declined."

The court apparently held that the evidence objected to was rightly admitted. It also stated that in the two previous first instance cases[27] the evidence there excluded "was admissible and should have been admitted". The court held that "where the evidence showed that an offence had been 'laid on' and a plan for carrying it out was already clearly contemplated the mere fact that there was only a possibility that the offence as it was ultimately committed might not have taken place but for the intervention of the police was not of itself a ground for a judge exercising his discretion to exclude evidence." They further held that there was nothing wrong in what H did. This report is puzzling, because, in each of the two previous cases[28], it is fairly clear that the court was satisfied that the offences would not have been committed at all but for the incitement.

5.14 Soon after *R.* v. *McEvilly*[29] another case, *R.* v. *Mealey and Sheridan*[30], reached the Court of Appeal. This is fully reported. The defendants had been convicted, inter alia, of conspiracy to rob. They had been arrested by the

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[23] [1973] Crim. L. R. 748–749.
[24] *ibid.*
[25] [1973] Crim. L. R. 45.
[26] *R.* v. *McEvilly and Lee* [1974] Crim. L. R. 239.
[27] See paras. 5.10–5.12, above.
[28] *ibid.*
[29] [1974] Crim. L. R. 239; see para. 5.13, above.
[30] (1974) 60 Cr. App. R. 59; see para. 5.3, above.

police red-handed "with all the impedimenta of armed robbers about them". It seems clear that this resulted from a "tip-off" by a man called Lennon, a police informer who had infiltrated the society to which the defendants belonged. It does not seem that his name was even mentioned at the trial but, after the defendants' conviction, he was shot dead, after making a statement to an officer of the National Council for Civil Liberties in which he disclosed that in his capacity as a police informer he had associated with the defendants. The court considered the propriety of using methods of infiltration—

> "So far as the propriety of using methods of this kind is concerned, we think it right to say that in these days of terrorism the police must be entitled to use the effective weapon of infiltration. In other words, it must be accepted today, indeed if the opposite was ever considered, that this is a perfectly lawful police weapon in appropriate cases, and common sense indicates that if a police officer or anybody else infiltrates a suspect society, he has to show a certain amount of enthusiasm for what the society is doing if he is to maintain his cover for more than five minutes. Accordingly one must expect, if this approach is made by the police, that the intruder who penetrates the suspect organisation does show a certain amount of interest and enthusiasm for the proposals of the organisation even though they are unlawful. But, of course, the intruder, the person who finds himself placed in the organisation, must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all."[31]

The court then went on to say—

> "It is not possible in this case, as I say, in our judgment to decide positively whether Lennon overstepped the mark or not. We really have no reason to suppose that he did, but are prepared for the purposes of this case to assume that he did without it being established before us."[32]

5.15 From the passages from the judgment of the Court of Appeal cited in the last paragraph it seems clear that the court was deciding the case on the basis that Lennon had caused the offences charged to be committed and that they would not have been committed at all had it not been for his intervention. On the basis of this assumption the court first held, in the words cited in paragraph 5.3 above, that there was no general defence of entrapment in English law. But the defence had also argued that "this was really a question of evidence which was unfairly obtained"[33], and the court accepted the "general proposition that a judge in an English criminal trial has a wide discretion to exclude evidence unfairly obtained"[34]. But the court went on to hold that "the present application has nothing to do with evidence unfairly obtained"[35], and drew the distinction between the obtaining of evidence and the instigation of an offence by a police informer.

[31] (1974) 60 Cr. App. R. 59, 61–62.
[32] *ibid.*, at p. 62.
[33] *ibid.*, at p. 63, R. 63.
[34] *ibid.*
[35] *ibid.*, at p. 64.

5.16 The last case dealt with by the higher courts was decided by the Court of Appeal in 1976. In *R.* v. *Willis and Others*[36], the defendants were convicted of conspiracy to supply drugs. The facts were that a police officer received some information about the existence of a drug-supplying conspiracy. In consequence he telephoned T, pretending to be an American. In the course of the conversation T volunteered that he was involved with a "connection and could supply cocaine". The police officer said he would buy some and T said it would take time to obtain. Thereafter the policeman telephoned T a number of times asking when the cocaine would be available. T said each time that there were difficulties but he was willing to go on trying. After continued encouragement from the police officer, W and others handed cocaine over to him and were arrested. At the trial[37] the defence, after arraignment, invited the judge to withdraw the case because, it was alleged, the circumstances in which the prosecution had obtained its evidence were unfair. This the judge declined to do, and he further declined to rule that there was a defence of entrapment which the accused were entitled to put forward. Finally, the judge was asked to exclude the prosecution's evidence in the exercise of his discretion, a "submission founded upon some observations" in *R.* v. *Birtles*[38]. It was argued in the Court of Appeal that, although accepting this submission, the judge had failed to apply what was said in that case. It is not evident from the Court of Appeal's judgment to which dicta in *R.* v. *Birtles* reference was being made.

5.17 The Court of Appeal concerned itself for the most part with the submission that, when the police use unfair methods to obtain evidence, that evidence ought on grounds of unfairness to be excluded. Applied to the facts of the case, this, the court said,—

> "would have meant that the Judge would have been entitled to rule after arraignment that the Crown were not to put their evidence before the Court. We consider this to be a startling proposition. It is clear on the authorities that judges have a discretion to exclude certain types of evidence. They can exclude evidence which has been obtained in breach of the Judges' Rules; and they can exclude evidence which has minimal probative value and much prejudicial value; but under this so-called rule of fairness, if it is as wide as counsel at the trial seem to have assumed it was, a judge can stop the Crown from presenting their case altogether."

However, after referring to *D.P.P.* v. *Christie*[39] and *Harris* v. *D.P.P.*[40] the court said—

> "We do not feel it necessary, for the purposes of this case, to inquire further into the basis of the power of a judge, if he has any, to stop the Crown putting forward a case which they wish to put forward because he considers that they have obtained the evidence unfairly. We will assume that there is a discretion for a judge to do something of that kind."

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[36] [1976] Crim. L. R. 127.
[37] The account here is based upon the transcript of the judgment delivered by Lawton L.J.
[38] (1969) 53 Cr. App. R. 469; see para. 5.6, above.
[39] (1914) 10 Cr. App. R. 141.
[40] [1952] A.C. 694; see para. 5.8, above.

Having considered the facts as contained in the depositions, the Court held that the police had not encouraged the commission of an offence which would not otherwise have been committed, that the police conduct did not offend against the standard laid down by Lord Parker C.J. in *R.* v. *Birtles*, and that the trial judge had been entitled and, indeed, bound to admit the evidence. But, while refusing leave to appeal, the Court did certify three points of law: whether, and to what extent, a defence of entrapment exists in English law; and—a point to which we revert below— in what circumstances may a judge refuse to allow certain kinds of relevant evidence to be given[41].

5.18 The distinction which seemed, in *R.* v. *Mealey and Sheridan*[42], to be emerging between the unfair obtaining of evidence and the improper instigation of an offence was not elucidated by *R.* v. *Willis and Others*. The third point certified by the Court was: "Does a trial judge have a discretion to refuse to allow evidence—being evidence other than evidence of admissions—to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?" There seems to be no doubt, upon the authorities we have mentioned[43], that, leaving aside its possible application in the sphere of entrapment, such a discretion does in some cases exist. Yet this was not really the point at issue in *R.* v. *Willis* at all. The issue was, in the words of the judgment, "the power of a judge to stop the Crown putting forward a case which they wish to put forward" because, in effect, of the unfair means which had brought the case into being, a matter held in *R.* v. *Mealey and Sheridan* to be entirely irrelevant to the question of evidence unfairly obtained. The issue did not in the event fall to be decided by the Court because it found no impropriety in the police behaviour. But framed as it was in the wide terms quoted above, that issue would appear to raise the more general question, considered but not conclusively decided in *D.P.P.* v. *Humphrys*[44], whether a court may refuse to allow a prosecution to proceed because it considers that its continuation would amount, for example, to an abuse of the process of the court and would be oppressive and vexatious. This is a question going far beyond the issue of the exclusion of evidence in terms of which the court in *R.* v. *Willis* certified the third point of law for appeal.

5.19 Despite these decisions by the Court of Appeal, courts at first instance continue seemingly to exercise a wide discretion, in effect, to disallow prosecutions where blatant forms of entrapment have been used. Thus in *R.* v. *Ameer and Lucas*[45], a case involving the use by a police informer of pressure upon the defendant to procure large quantities of cannabis, with the possession of which he was charged, the prosecution evidence was ruled inadmissible because it had been obtained by the activity of an agent provocateur. In deciding to exercise this discretion, the judge, according to the short report, accepted the relevance of various factors extrapolated from decided cases, the Royal Commission of 1929[46] and the Home Office guidelines to the

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[41] The points of law are set out in full in [1976] Crim. L. R. 127 at p. 128.
[42] (1974) 60 Cr. App. R. 59: see paras. 5.3 and 5.14, above.
[43] See the authorities cited in para. 5.8, notes 13–19, above.
[44] [1976] 2 W.L.R. 857: see especially pp. 869B (*per* Lord Dilhorne), 889E (*per* Lord Salmon) and 895F (*per* Lord Edmund-Davies).
[45] [1977] Crim. L. R. 104 (Central Criminal Court, Judge Gillis).
[46] See para. 5.1, above.

police[47]. These included, inter alia, the questions whether the defendant had committed an offence of a class which he would not have committed but for the encouragement of the police agent; whether the agent played a major part in the criminal activity, and whether his participation was approved at senior police level; and whether the offence was so grave that the public interest could justify the use of entrapment techniques. Three months later in another case the prosecution withdrew charges because the offences might have been brought about by the same informer acting as agent provocateur, and other cases arising from his activities were also later dropped[48]. In addition, the judge in R. v. *Ameer and Lucas* ordered that the papers in the case should be sent to the Director of Public Prosecutions, though for what purpose is not entirely clear.

5.20 It is clear from this review of the law that no defence of entrapment exists in English law. It is less clear to what extent there is a discretion in the courts, by exclusion of evidence, to bring about the same result as a general defence of entrapment would achieve. But we think that this lack of clarity is due to a failure to distinguish between causing, by incitement and encouragement, the commission of an offence which would not otherwise have been committed, and obtaining evidence unfairly of an offence which has already been committed. It is evident that the first does not provide a defence; the second, despite the attempts to use the discretion, is not, we think, relevant in cases of entrapment such as we are here considering. Save as a matter to be taken into account in sentencing, it would not, therefore, seem that the improper conduct of the police or informers acting as agents provocateurs can, in English law, properly assist a defendant. If this view of the law is correct, the courts cannot, by ruling either as to the substantial merits or as to the admission of evidence, exercise that indirect control of police activities which has been thought desirable in other jurisdictions[49]. But they no doubt exercise a substantial influence by the strong expressions of judicial disapproval referred to in the previous paragraphs of this report, and in very flagrant cases they can, and occasionally do, order that the papers be passed to the Director of Public Prosecutions[50].

4. Administrative control

5.21 The only direct control of the police in the use of informers and over their own involvement in crime is by guidance from the Home Office to the police. Guidelines relating to the use of informers are contained in the Home Office Consolidated Circular to the Police on Crime and Kindred Matters. An extract from this circular, which has not generally been made public, is set out in Appendix C of the Report to the Home Secretary from the Commissioner of Police of the Metropolis on the Actions of Police Officers concerned with the case of Kenneth Joseph Lennon (the informer in the case referred to in paragraphs 5.14 and 5.15 of this report). The text of that Appendix is set out in Appendix 4 of this report. Of these instructions the Court of Appeal said in R. v. *Mealey and Sheridan*[51] that it approved them "so far as they go".

[47] See para. 5.21, below.
[48] See *The Guardian*, 5 November 1976; *The Sunday Times*, 19 December 1976.
[49] See paras. 5.23–5.27, below.
[49] See para. 5.23–5.27, below.
[50] See para. 5.19, above.
[51] (1974) 60 Cr. App. R. 59, 64.

Breach of this administrative guidance by a police officer could lead to internal disciplinary proceedings.

C. ENTRAPMENT IN OTHER JURISDICTIONS

5.22 Before examining further the implications of the present state of the law in this country described in the foregoing paragraphs, it will be of assistance to survey how the problem of entrapment is dealt with in other jurisdictions.

1. In the U.S.A.

5.23 Most States in the U.S.A. have recognised a defence of entrapment, lying where government officials have induced an accused to commit an offence he would not otherwise have committed. The defence finds a place in both the Model Penal Code and in the Final Report on the Proposed New Federal Criminal Code[52]. In the two cases which were decisive in establishing the defence[53], the majority in each differed from the minority as to the basis for holding that the defence existed. The majority of the judges thought the defence arose when the criminal design originated in the mind of the government officers; important considerations were whether the defendant was innocent and law-abiding and whether the offence was one which the defendant would never have committed if the officers had not inspired, incited, persuaded and lured him to commit it. The minority thought the defence existed because the methods used to secure conviction could not be countenanced when they fell below accepted standards for the proper use of governmental power, thus giving effect to considerations of public policy. The latter view is reflected in the formulation in the Model Penal Code.

5.24 A few examples will suggest the very varied circumstances in which the defence will succeed or fail. Inducement must be such as to overcome the resistance of a defendant with no prior criminal intention, such as threats of violence, harassment or prosecution for past offences, or offers of exorbitant gain, particularly where the defendant is poor or unemployed. Constant pressure over a prolonged period may indicate lack of predisposition. But creation of a friendly atmosphere alone will not suffice[54], nor an inducement not disproportionate to the defendant's normal employment or standard of

[52] The Model Penal Code provision (s. 2.13), which was suggested as a possible model in Working Paper No. 55, makes the defence available (except when causing or threatening bodily injury is an element of the offence charged) where the defendant proves that this conduct occurred in response to an entrapment. It provides that: "A public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offence, he induces or encourages another person to engage in conduct constituting such offence by either: (*a*) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (*b*) employing methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it." The Final Report simply provides (para. 702(2)) that: "Entrapment occurs when a law enforcement agent induces the commission of an offence, using persuasion or other means likely to cause normally law-abiding persons to commit the offence. Conduct merely affording a person an opportunity to commit an offence does not constitute entrapment."

[53] *Sorrels* v. *U.S.* 287 U.S. 435 (1932); *Sherman* v. *U.S.* 356 U.S. 369 (1958).

[54] *cf.*, *R.* v. *Capner* [1975] 1 N.Z.L.R. 411, para. 5.25, below.

living[55]. It will be for consideration whether a defence, however framed, can avoid the uncertainty of application which the American experience may suggest.

2. In New Zealand

5.25 Recently the courts in New Zealand have shown themselves willing to deal with the problem of unacceptable conduct by the police or their agents in the nature of entrapment by exercising the discretion to exclude evidence obtained by a police officer "who acted unfairly or instigated the offence." While, as has been shown, it is doubtful whether the discretion exists in this particular field in this country, the New Zealand courts "have not hesitated to develop the use of this discretion."[56] Nevertheless, there seems as yet to be no reported case in which a defendant has been acquitted through exercise of the discretion to exclude evidence, and little indication of how serious police misconduct must be to induce the courts to exercise this discretion in favour of a defendant[57]. Whether this type of discretion is an appropriate or adequate means of dealing with entrapment is one of the principal questions which we have to examine[58].

3. In other jurisdictions

5.26 While there exists a discretion in some jurisdictions, for example, Scotland, Ireland and Canada, to exclude admissible evidence unfairly obtained, this discretion appears not to have been exercised so far in the sphere of entrapment[59]. But it seems that some lower courts in Canada have ordered a stay of proceedings because the foundation of the prosecution has been the entrapment of the defendant while the Provincial Court of British Columbia has held that entrapment is a defence when it is shown that a police officer induces a person to commit an offence not contemplated by that person for the purpose of prosecuting him[60]. For the rest, entrapment as a defence has, it seems, received support only from certain decisions in Ghana and dicta in Southern Rhodesia.

5.27 It is of interest to note in this context that the Australian Law Reform Commission has proposed[61] that "evidence obtained in contravention or in

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[55] Further detailed examples are given by Heydon, "The Problems of Entrapment", [1973] C.L.J. 268 at pp. 282–283.

[56] Quotations from *R.* v. *Capner* [1975] 1 N.Z.L.R. 411, *per* McCarthy P. The recent cases in New Zealand are discussed by Barlow, "Recent Developments in New Zealand in the Law relating to Entrapment", [1976] N.Z.L.J. pp. 304 *et seq* and 328 *et seq.*

[57] In *R.* v. *Capner, supra,* C, an employee of the Justice Department, was befriended by B, a young policeman and undercover agent. Over a period of many weeks, during which B became C's closest friend, they attended many "pot parties", including one given by B, and purchased cannabis for their own use. Eventually C supplied B with cannabis on three occasions. He was charged five months later with three offences of supply. He was convicted, but on appeal argued that the close association with B produced an atmosphere which would inevitably lead to him, as a cannabis user, supplying B, and that in law this amounted to entrapment. The appeal court, dismissing the appeal, found the evidence incapable of supporting the plea of entrapment.

[58] See para. 5.29, below.

[59] See Heydon, "Illegally obtained evidence", [1973] Crim. L. R. 603 and 690, at p. 606 *et seq.*

[60] *R.* v. *Haukness* [1976] 5 W.W.R. 420.

[61] *Report No. 2 (Interim) Criminal Investigation* (1975), para. 298 and Clause 71 of draft Criminal Investigation Bill annexed.

consequence of any contravention of any statutory or common law rule should not be admissible in any criminal proceedings for any purpose unless the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual". The burden of satisfying the court that such evidence should be admitted would be on the party seeking its admission, normally the prosecution. Certain broad factors are suggested for inclusion in legislation to which the courts should have regard in exercising this discretion[62]. These provisions would operate in relation to entrapment by virtue of a further provision forbidding this conduct[63].

D. CAN ENTRAPMENT BE CONTROLLED SATISFACTORILY AT THE TRIAL STAGE?

5.28 We entirely agree with the strong criticisms which have been levelled by the courts at the use of agents provocateurs by the police, and we think it would be wholly unacceptable for their use to become prevalent. At present, whilst it is clear that the bounds of proper investigative methods are on occasion crossed, we have no reason to believe that the abuse is widespread. Nevertheless, because a number of bodies with practical experience of the administration of the criminal law have expressed their concern to us about the use of entrapment, we believe careful consideration must be given to possible means of controlling it. We therefore consider first whether the methods of preventing the use of entrapment which have received consideration by the courts in this country are adequate for that purpose; and, if not, whether they could be sufficiently improved to meet the problem.

1. The discretion to exclude the prosecution's case

5.29 As has been shown, while the existence of a discretion to exclude the prosecution's case on grounds of unfairness in cases of entrapment remains in some doubt in this country, its utility has been affirmed elsewhere. Yet, even if this discretion exists, it is not in our view an appropriate means of controlling entrapment. We have pointed out above[64] that, while the courts possess a discretion to exclude admissible evidence which can be exercised in a variety of situations, these are all cases where the excluded evidence is evidence which has been obtained or elicited at some stage after the commission of the offence; it is the mode of obtaining or the consequence of admitting this evidence which are judged to be unfair or unduly prejudicial. The court's discretion in this type of case is an essential weapon which we think should be retained. By contrast, in cases of entrapment, the conduct about which complaint is made takes place before, and is the very cause of,

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[62] *e.g.*, the seriousness of the crime, the urgency or difficulty of its detection, the accidental or trivial nature of the contravention, and the extent to which the evidence could have been lawfully obtained.

[63] Clause 67 of the draft Bill provides that "a Police Officer shall not induce a person to commit, either alone or with the Police Officer or another person, an offence that, but for the inducement, he would not have committed on the occasion on which he committed the offence."

[64] See paras. 5.9 and 5.20, above.

the commission of the offence; the defendant's allegation is, not that the evidence has been unfairly obtained, but that a conviction for the offence itself is "unfair", in that it would not have occurred but for the pressure or persuasion of the State's own law enforcement officers or their agents. In our view, the extension of a discretionary power relating to admission of evidence to the case where what is really in issue is whether it is "fair" that the proceedings should have been instituted at all is wholly illogical, and, indeed, raises issues going far beyond the merely evidential[65].

5.30 Even if the discretion to exclude admissible evidence were not irrelevant in cases of entrapment there are other factors which would weigh heavily against any reliance upon it. The first of these lies in the discretionary nature of the power itself. Having regard to the current state of the law, it might well take many years before it became clear upon what guidelines the courts would be prepared to act in situations of entrapment; and if entrapment presents real problems this could not be considered satisfactory. Indeed, were the present discretion to be extended in this direction, this would in substance amount to requiring the courts to deal with cases of entrapment without, however, having the benefit of any clear statement of legal principles as to what constitutes entrapment. In those circumstances, there could be no guarantee that the desired results would be achieved[66].

5.31 Finally, it should be noted that reliance only upon a discretion of this nature could produce inconsistent results depending solely upon what evidence there was of the offence. Where there is independent evidence of the commission of the offence, not related to the entrapment itself, that evidence might not be subject to exclusion; and where that evidence is gained through the ready confession of the defendant, again, that confession might not be excluded. It might, therefore, be that the discretion could operate to benefit those fortunate enough not to have to face such independent evidence of their offence or those sufficiently hardened to resist attempts to persuade them to make an inculpatory statement. Our conclusion is that the discretion to exclude admissible evidence offers no assistance in the context of the control and prevention of entrapment.

2. Mitigation of sentence

5.32 The outline of the present position given above[67] indicates that the courts will, in some circumstances, reduce the penalty imposed on a defendant where the conduct of the police or their agents is regarded as of doubtful propriety.

5.33 Whether or not present practice can be regarded as just towards a defendant who has been entrapped is a matter which we consider in more detail later[68]. We are, however, like some of those commenting on Working Paper No. 55, in no doubt that mitigation of penalties is neither adequate nor, perhaps, even relevant in the control of the activities of those responsible for

[65] See *D.P.P.* v. *Humphrys* [1976] 2 W.L.R. 857, discussed in para. 5.18, above.
[66] *cf.*, the New Zealand experience in *R.* v. *Capner*, n.57, above. We refer to this case again in the context of a possible defence of entrapment: see n. 80, below.
[67] See paras. 5.5–5.6, above.
[68] See para. 5.37, below.

entrapment. Unless the courts go so far as frequently to discharge unconditionally defendants who have been entrapped, a course which at present is extremely rare indeed[69], it is difficult to see how mitigation by itself can exert any influence upon those responsible for the entrapping conduct. Mere mitigation is no sufficient disincentive to the continuance of objectionable practices; it cannot be regarded as an adequate means of control in pursuance of the overall aim of ensuring that the State's law-enforcement agencies, in combating crime, do not themselves instigate it. In entrapment cases, the conduct of both prosecution and defendant is reprehensible for the latter has, after all, been held to have committed an offence. Mitigation, however, is essentially of relevance only to his conduct, not to that of the prosecution.

3. A defence of entrapment

5.34 Consulatation on Working Paper No. 55 showed that there was a considerable weight of opinion in favour of some alleviation of the position of a person entrapped. Among those expressing such views were the Magistrates' Association, the Prosecuting Solicitors' Society of England and Wales, the Senate of the Inns of Court and the Bar and the National Council for Civil Liberties. Views differed, however, as to whether the precedent of the Model Penal Code provision[70] should be followed, as tentatively suggested in our working paper, or whether there should be a wider defence, or some other procedural device which would result in a reduction of penalty such as a special verdict of "guilty but entrapped".

5.35 At first sight there appear to be some strong arguments favouring a defence. Most obviously such a defence, assuming that it was capable of being drafted with sufficient clarity, might resolve some of the difficulties of the present position, in which mitigation and discretion as to admission of evidence play only a limited role. The defence, if it operated effectively, would certainly be a more explicit means than any presently available of marking the disapprobation with which such conduct is regarded. Furthermore, unlike internal disciplinary measures[71], the defence would apply in respect of the activities of informers and others outside the police forces, as well as individuals in other forces engaged in a broader sense in law-enforcement, such as prison officers, customs officers or security guards.

5.36 Nevertheless, we have come to the conclusion, after considering the full range of arguments, that a defence would not be the best solution to present difficulties, whether as a matter of principle or in practice. The approach adopted by some of our commentators is predicated on the assumption that the practices of the police and, more particularly, of police informers revealed by some recent cases (not all of which have been reported) are so unacceptable that the defendant ought in justice to be absolved from liability; and the further assumption is made that such practices can only be checked by provision of a substantive defence. We doubt whether these assumptions are soundly based.

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[69] But see Lord Goddard C.J. in *Browning* v. *Watson* [1953] 1 W.L.R. 1172, 1177, para. 5.5, above.

[70] See para. 5.23, n. 52, above.

[71] We discuss these further below, at para. 5.43.

5.37 A defendant who would not have committed an offence but for inducement by others to do so is, in respect of the actus reus and any necessary mens rea, in no different position from any other criminal: he has committed the offence. Whether the inducement comes from fellow-criminals or from any other source can from the point of view of his guilt make no difference, except, perhaps, in the hypothetical case of a police officer inciting, openly in his capacity as a police officer, the commission of an offence. It is true that, when committing an offence under duress, the defendant is also usually regarded as possessing the necessary mens rea, but in such a case he is absolved from liability because of the overwhelming pressure directed against him. Normally, no such pressure is involved in cases of entrapment[72]. From his viewpoint, then, a defence of entrapment where the inducement alleged is solely that of the police or informers corresponds with no moral distinction in his behaviour[73]. It appears to us that the proponents of the defence of entrapment seek to control admittedly unacceptable conduct on the part of the State's law-enforcement agencies, not by penalising them or otherwise preventing the repetition of such conduct, but by absolving the defendant. This is in our view illogical. A proper reflection of the defendant's guilt in any case of entrapment, whether or not officially inspired, can be effected by the practice of mitigating the penalty; and if the entrapment is clearly the result of conduct by the police or informers, that mitigation may in an appropriate case extend so far as an unconditional discharge.

5.38 Another indication of the flawed character of any defence lies in the admitted need for exceptions to it[74]. We have seen that the Model Penal Code excepts from its formulation entrapment cases where the defendant has caused or threatened bodily injury[75]. There seems no basis in logic for making this exception. Nor does public policy require that the defendant should not allow himself to be induced to commit this kind of offence: public policy requires rather that he should not permit himself to be induced to commit any offence at all. Yet if it is admitted that some such exception has to be made, it becomes difficult to justify the availability of the defence in other serious cases, such as "pushing" hard drugs. We believe these conflicting considerations arise from the fundamental illogicality of the defence, which fails to discriminate between a proper reflection of the defendant's guilt and the more important problem of controlling the activities of the State's law-enforcement agencies.

5.39 This last point leads us to question whether a defence would actually be effective in achieving what its proponents claim for it, namely, a cessation or reduction of unacceptable practices. Some of those from whom we have received comments have pointed out (and this is a contention we accept)[76] that mere mitigation of penalty is inadequate to secure a reduction of irregularities on the part of the police or their agents. We question whether non-conviction as a result of invoking a defence would be substantially more

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[72] If it is, then it is open to a defendant to raise the defence of duress.

[73] *cf.*, Heydon, "The Problems of Entrapment", [1973] C.L.J. 268 at p. 284.

[74] This necessity was accepted by commentators most strongly pressing the desirability of a defence.

[75] See para. 5.23, n. 52, above.

[76] See para. 5.33, above.

effective for this purpose. It must be remembered that, even assuming a defence could be drafted with precision, the occasions upon which it could be called in aid successfully would in all likelihood be very few. Like duress, it would be an "all or nothing" defence involving an admission of guilt subject to the defence. In the context of the continual struggle against crime in which the police are engaged, we doubt whether this small number of cases would act as a check upon any undesirable conduct[77].

5.40 These fundamental objections to a defence of entrapment are such that we feel unable to recommend a defence in any form. This makes it unnecessary for us to consider in depth the other problems attaching to a defence. Nevertheless it is worth mentioning that the form of defence tentatively suggested in Working Paper No. 55, that of the Model Penal Code[78], is not free of difficulty, referring as it does to inducements which create "a substantial risk" of the commission of an offence by persons other than those "ready" to commit it. As we have noted[79], this formulation is designed to reflect a principle of public policy as to minimum standards of conduct by State law-enforcement agencies, but it does entail, it seems to us, considerable uncertainty of application. At the same time, a formulation restricted to instances where it is shown that the defendant would not have committed the offence at all but for the inducement in question might be so narrow of application as to have negligible impact upon the problem of entrapment[80]. While, therefore, we find it unnecessary to explore this aspect of the problem further, we have some doubts as to whether any formulation of the defence would be fully satisfactory, quite apart from the scope of the offences it would be necessary to except from the defence.

E. OTHER POSSIBLE METHODS OF DEALING WITH ENTRAPMENT

5.41 We conclude from our consideration of the ways in which entrapment is or might be dealt with at the trial of an entrapped defendant that this is an unsatisfactory stage at which to take preventative measures. Nevertheless, we have indicated that substantial problems exist in regard to entrapment to which a solution ought to be found. In this report we are only considering what substantive defences of general application ought to be included in the criminal code and, having decided not to recommend a defence of entrapment, any other recommendations we might have for more effective measures

[77] *cf.*, Heydon, *op. cit.*, p. 284. The verdict of "guilty but entrapped" with a mitigated penalty suggested by one of our commentators seems to us to have the disadvantages of both mitigation and defence: it seeks, not to control the activities of the police and informers, but to alleviate for the defendant the consequences of his conduct, and in so doing would have little effect upon the conduct of the police and their agents.

[78] See para. 5.23, n. 52, above.

[79] See para. 5.23, above.

[80] It is questionable whether either the Model Penal Code formulation or the narrower "subjective" formulation would cover even such a serious case as *R.* v. *Capner* [1975] 1 N.Z.L.R. 411, n. 57, above: there was, it seems, nothing so specific in that case as an inducement to commit an offence. This lends support to the view that the facts of cases are potentially so diverse that some remedy is needed other than a defence which would have to be very widely and loosely drawn in order effectively to cover them.

to prevent entrapment methods being used would, strictly speaking, be a matter beyond the limits of our present task. Nevertheless, we have had the benefit of full consultation on the problem of entrapment with a wide variety of interested bodies. In the circumstances, then, we think it would be wrong if we did not, in this report, give close consideration to the question whether some more effective means could be devised for preventing the use of entrapment methods.

5.42 If any sort of conduct is to be prevented the way in which this is achieved in a civilized society is by making that conduct illegal and meeting it with some form of sanction. If, therefore, it is desired to prevent people from persuading or inciting others to commit offences, this ought to be done by making such persuason or incitement illegal and by providing sanctions against those responsible. The law at present imposes criminal sanctions on those inciting a person to commit a crime or those participating in another's crime; and, as we have seen[81], the Home Office, by administrative circulars, seeks to guide the activities of the police in the detection of crime. We consider these two existing means of control first, and finally the possibility of creating a new offence.

1. Administrative control

5.43 The administrative circular from the Home Office to the police relevant to entrapment and the use of informers is set out in Appendix 4 of this report. Failure by a police officer to follow this guidance may lead to disciplinary proceedings. We have no evidence of any general failure to take disciplinary proceedings in this area or of a general failure to conform to the provisions of the Home Office circular. We are, however, not persuaded that the prospect of disciplinary proceedings can reasonably be regarded as fully adequate to prevent methods of entrapment being used. Nor do we think it satisfactory that, in situations so relevant to the liberty of the subject, reliance should be placed solely upon administrative circulars and internal police discipline, even though there is now a procedure established under the Police Act 1976 for bringing complaints against the police before the Police Complaints Board.

5.44 The first serious disadvantage in relying upon administrative guidance to the police is that it applies only to the police themselves and not to other enforcement agencies. Where, as the examples we have cited show is frequently the case, the entrapment has arisen because an informer has exceeded his authority, the Home Office guidance may be ineffective as disciplinary proceedings cannot be taken against police agents. In these circumstances, there is the possibility that a useful but over-zealous informer may continue to be employed.

5.45 We think it an even more serious disadvantage that control of police procedures in an area such as this should be entrusted to administrative circulars and the possibility of disciplinary proceedings. The police have a natural and laudable desire to catch villains and the boundary between zeal and misconduct in this particular field is a very narrow one. It would be only

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[81] See para. 5.21, above.

natural if there was a certain reluctance within a police force for instituting disciplinary proceedings against a policeman for alleged shortcomings in his handling of an informer, particularly if the person against whom the informer acts has a criminal record.

2. Prosecution as a secondary party

5.46 Wherever a person, for the purpose of entrapping another, himself commits a criminal offence he can, of course, be prosecuted for that offence[82]. But the essence of entrapment is that the trapper incites someone to commit an offence or participates in the commission of an offence, intending that the person incited or assisted shall himself be convicted of a criminal offence but that the evil at which Parliament directed the offence shall not be successfully completed. The trapper intends, for example, that the goods stolen shall be recovered, or that the drugs supplied shall be taken by the police before they can be used. It has been suggested that, in such cases, the trapper is in fact an accomplice[83], and, where the mental element of the offence incited is limited to an intent to do the acts constituting the offence, this may at present be the case. In principle, however, we do not think it appropriate that a trapper should in such circumstances be guilty of complicity in the offence committed or attempted by the trapped criminal. Complicity as an accessory in the offence carries with it the risk of the same maximum penalty on conviction as for those actually committing it; and, however undesirable the methods used in particular instances of entrapment may be, we cannot think it right that a trapper who, for example, succeeds in entrapping drug-pushers should lay himself open to a penalty of fourteen years in prison[84], since his activities are, after all, aimed at stultifying the offence. Still less would this be justified where an informer confines himself to mere acts of assistance in the commission of the offence by others. The view we take here was also the provisional view of the Working Party which assisted us in our examination of the general part of the criminal law and is set out in their working paper[85] which we published in June 1972. It met with general acceptance on consultation but we have not yet reported on this aspect of the law.

5.47 We have seen[86] that in rare instances the courts have sent the papers to the Director of Public Prosecutions in cases where they were dissatisfied with the role played by an entrapper. It is not clear, however, whether this was with a view to the Director prosecuting the entrapper or to bring to his notice an undesirable practice. It is, we think, inappropriate for the reasons given above to prosecute the entrapper as a secondary party to the offence he has encouraged. And for other reasons, we do not think this an advisable course to take in order to control undesirable practices. In the first place, it is

[82] *Brannan* v. *Peek* [1948] 1 K.B. 68, 72 *per* Lord Goddard C.J.: see the extract from his judgment quoted at para. 5.2, above. *Sneddon* v. *Stevenson* [1967] 1 W.L.R. 1051, sometimes cited to the contrary, is not in point since the court found that police conduct "never got near a case of aiding and abetting inciting or encouraging or anything of the sort"; *ibid.*, at p. 1056 *per* Lord Parker C.J.

[83] See Heydon, "The Problem of Entrapment", [1973] C.L.J. 268 at 274.

[84] Misuse of Drugs Act 1971, ss. 4–5.

[85] Working Paper No. 43, "Parties, Complicity and Liability for the Acts of Another".

[86] See para. 5.19, above.

by no means clear that in all cases the trapper would be guilty; and secondly, it is possible that the threat of prosecution may inhibit even the legitimate activities of informers and police traps.

3. A possible offence of entrapment

5.48 We have indicated why, in our view, it would be inappropriate for trappers to be made liable generally for complicity in offences which they instigate[87]. Much of our consultation has, however, shown that there is a need for some effective means to deal with entrapment and the agent provocateur. We believe that it may be possible to provide such means by the creation of a new criminal offence. This would in essence make it an offence to take the initiative in inciting or persuading someone into committing or attempting to commit a crime even though it was intended that the completion of the offence should be prevented or that its effect should be nullified.

5.49 Obvious problems present themselves in regard to the constituent elements of any such offence. Since there is no doubt of the legality and legitimacy of much conduct on the part of informers, ought the offence to attempt to demarcate those activities which are legitimate from those which are not? Should the offence be limited to those cases of instigation where, but for the instigation, the trapper's victim would not have committed the offence? We think that, by focusing on the conduct of the entrapper alone, it may be possible to avoid complicating any offence with considerations of this character. The essential matter which, in our view, calls for the imposition of criminal sanctions is the trapper's positive instigation, incitement, or persuasion to commit an offence. Put in these terms, it would be plain that the offence would not penalise, to take two examples, either the inspector purchasing goods sold at short measure, or the intruder penetrating a suspect organisation who shows "a certain amount of interest and enthusiasm for the proposals of the organisation"[88]. Equally, cast in these terms, although perhaps relevant as a matter of evidence, it would not be necessary to provide as a condition of the offence being committed that the entrapper's victim would not have committed the offence but for the persuasion. By concentrating solely upon the reprehensible conduct of the entrapper, it would be possible for the offence to encompass situations both where the trapper has succeeded in the purpose of his incitement and where he has not.

5.50 Any new offence would, in our view, therefore, have to be framed in terms solely of the conduct and mental element of the trapper, and would not contain any element depending on the state of mind of his victim. The main advantage of such an offence would be that it would provide a sanction against reprehensible conducts by agents without exonerating the entrapped party. It would thereby avoid one of the illogicalities we found in the provision of a defence of entrapment[89].

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[87] See para. 5.46, above.
[88] *R.* v. *Mealey and Sheridan* (1974) 60 Cr. App. R. 59, 61 *per* Lord Widgery C.J.: see para. 5.14, above.
[89] See para. 5.37, above

5.51 It is possible to envisage certain disadvantages in an offence of this kind. For example, it may be that, without any prosecutions necessarily having been brought, the mere presence of the offence upon the statute book would have the effect of discouraging even the legitimate activities of informers for fear that they might overstep the newly-defined mark. This could in turn lead to a certain reluctance to prosecute the offence. This, however, might be regarded merely as support for the arguments which have already been advanced in favour of the introduction of an independent element into the prosecution process[90]. On the other hand, such an offence could also be open to abuse by persons who feel aggrieved, whether justly or not, by the conduct of informers in relation to their activities. This consideration may suggest that proceedings for any offence on these lines should only be instituted with the consent of the Director of Public Prosecutions.

5.52 We must conclude by emphasising once again that recommendation of a remedy for entrapment cases, other than the defence which we have rejected, is outside the formal scope of this report. Nevertheless, we have indicated a course of policy which would repay further investigation, namely, the introduction of an offence of entrapment, which it seems to us might deal effectively with those relatively few cases where there is evidence that the narrow boundary between zeal and misconduct has been crossed. Further consideration of this possibility, however, together with consultation with the police and others most closely concerned with its practical effects would be necessary before any recommendation could be made for the creation of such an offence.

F. CONCLUSIONS

5.53 Our consultations have indicated that the practice of entrapment does constitute a problem today. For reasons given in paragraphs 5.29–5.33, we consider that, of current methods employed by the courts to meet it, neither the exercise of a purported discretion to exclude evidence of offences committed in consequence of entrapment nor the practice of mitigating the sentences of those convicted of offences so committed are appropriate to control irregularities on the part of the police or their informers. Indeed, we believe that the former approach raises more important issues than the merely evidential ones which have so far been considered in reported cases. Furthermore, as we explain in paragraphs 5.43–5.45, we do not think that the internal disciplinary procedures of the police can reasonably be regarded as a fully adequate means of coping with cases of entrapment which involve the activities of informers.

5.54 We have come to the conclusion that some additional means are required to deal with the problem. Nevertheless, for reasons set out in paragraphs 5.35–5.40, we feel unable to recommend a defence of entrapment. In our view, further consideration should be given to the creation of a new offence of entrapment, which would penalise anyone who takes the initiative in instigating or persuading another person to commit an offence,

[90] See *The Prosecution Process in England and Wales*, Justice Educational and Research Trust, 1970.

even though he intends that that person should be prevented from successfully carrying it out (paragraphs 5.48–5.52). We are in any event obliged to report on the law of complicity[91] as part of our examination of the general principles of the criminal law. Our recommendations in that field will require to be framed in the light of the conclusions to be reached on a possible offence of entrapment. If we ourselves were to make recommendations regarding this offence, we should obviously consult those most closely concerned with administering the criminal law and with prosecuting offences. Subject to ascertaining the views of the recently appointed Royal Commission on Criminal Procedure, this is the course we have in mind to pursue.

PART VI

COMPREHENSIVE SUMMARY OF RECOMMENDATIONS

6.1 The following paragraphs summarise the conclusions and recommendations of this report. Reference is made in each case to the relevant paragraphs where the matters summarised are discussed and, where the recommendations involve the need for legislation, to the draft clauses in Appendix 1.

6.2 In relation to the defence of duress—

(1) Duress should be retained as a defence to criminal liability, and should be restated in statutory form (paragraph 2.21 and clause 1(1)).

(2) Duress should be available as a defence to all offences, including murder, whether the defendant is charged as an accessory or as the actual perpetrator (paragraph 2.44 and clause 1(2)).

(3) The basis of the defence should be that the defendant is induced by a threat of harm to himself or another to commit the offence with which he is charged (paragraph 2.24 and clause 1(3)).

(4) The defendant must believe that—

  (*a*) the harm threatened is death or serious personal injury, whether physical or mental (paragraphs 2.25, 2.27 and clause 1(3)(*a*));

  (*b*) the threat will be carried out immediately, or, if not immediately, before he can have any real opportunity of seeking official protection (paragraph 2.31 and clause 1(3)(*b*)); and

  (*c*) there is no other way of avoiding or preventing the harm threatened (paragraph 2.27 and clause 1(3)(*c*)).

(5) The threat must be such that the defendant could not reasonably be expected to resist it in all the circumstances of the case, including the nature of the offence, the defendant's belief as to the three matters in subparagraph (4) above, and any other relevant circumstances personal to him (paragraph 2.28 and clause 1(3)).

[91] See Working Paper No. 43, and para. 5.46, above.

(6) There should be an evidential burden on the defendant to ensure that there is sufficient evidence to raise duress as an issue, whereupon there should be a persuasive burden on the prosecution to negative the defence (paragraph 2.32 and clause 2(2)).

(7) In proceedings on indictment the defendant should give notice of his intention to rely on duress, subject to a discretion in the court to allow him to advance the defence where has not given notice (paragraph 2.33 and clause 2(1)).

(8) The defence should be excluded where the defendant is voluntarily and without reasonable cause in a situation in which he knows he will or may be subjected to duress to induce him to commit such an offence as that with which he is charged (paragraph 2.38 and clause 1(5)).

6.3 The common law defence of coercion of a wife by her husband should be abolished (paragraph 3.9 and clause 3(1) and (2)).

6.4 There should be no general defence of necessity and, if any such general defence exists at common law, it should be abolished (paragraph 4.33 and clause 3(3)).

6.5 There should be no defence or entrapment, but further consideration should be given to the creation of a new offence of entrapment, penalising anyone who takes the initiative in instigating or persuading another person to commit an offence, even though he intends that that person should be prevented from successfully completing it (paragraph 5.54).

(*Signed*) SAMUEL COOKE, *Chairman.*
STEPHEN EDELL.
DEREK HODGSON.
NORMAN S. MARSH.
PETER M. NORTH.

J. M. CARTWRIGHT SHARP, *Secretary.*

27 *July* 1977.

APPENDIX 1

Criminal Liability (Duress) Bill

DRAFT

OF A

BILL

TO

A.D. 1977

AMEND the law of England and Wales by making new provision (in place of the defence of duress at common law) for exempting from criminal liability persons acting under duress, by abolishing the special defence available to a wife of coercion by her husband, and by abolishing any defence of necessity at common law.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

The defence of duress.

1.—(1) The following provisions of this section provide a defence (referred to below in this Act as "the defence of duress") in place of the defence of duress at common law (which is consequently abolished except in relation to offences committed before the passing of this Act).

(2) Subject to section 2 and subsection (5) below, a person shall not be guilty of an offence by virtue of any action taken by him under duress.

(3) A person shall be regarded for the purposes of this section as having taken any action under duress if he was induced to take it by any threat of harm to himself or another and at the time when he took it he believed (whether or not on reasonable grounds)—

(*a*) that the harm threatened was death or serious personal injury (physical or mental);

(*b*) that the threat would be carried out immediately if he did not take the action in question or, if not immediately, before he could have any real opportunity of seeking official protection; and

(*c*) that there was no other way of avoiding or preventing the harm threatened;

EXPLANATORY NOTES

Clause 1

1. This clause provides a defence of duress in place of the defence of duress at common law. The new defence will be available to any offence, including treason and murder as an actual perpetrator.

2. *Subsection* (2) states the general proposition that a person is not guilty of an offence in respect of any action (defined in clause 4(2)) which he takes under duress.

3. *Subsection* (3) delineates the essentials of the defence. They are that—

   (i) there must have been a threat of harm,

   (ii) the defendant must have believed each of the matters detailed in subparagraphs (*a*), (*b*) and (*c*), and

   (iii) the defendant could not reasonably have been expected to resist the threat in all the circumstances. Included in the circumstances are the defendant's belief as to the matters mentioned in subparagraphs (*a*), (*b*) and (*c*), and any of his personal circumstances (*e.g.*, age and physical condition) that are relevant.

provided, however, that in all the circumstances of the case (including what he believed with respect to the matters mentioned in paragraphs (*a*) to (*c*) above and any of his personal circumstances which are relevant) he could not reasonably have been expected to resist the threat.

(4) The fact that any official protection which might have been available in the circumstances would or might not have been effective to prevent the harm threatened is immaterial for the purposes of subsection (3)(*b*) above.

(5) The defence of duress does not apply in any case where on the occasion in question the defendant was voluntarily and without reasonable cause in a situation in which he knew he would or might be called upon to commit the offence with which he is charged or any offence of the same or a similar character under threat of death or serious personal injury (whether to himself or to anyone else) if in the event he should refuse to do so.

(6) In this section "official protection" means the protection of the police, of the authorities governing any prison or other custodial institution, or of any other similar authority concerned in the maintenance of law and order.

(7) The fact that one party to any action is exempt by virtue of this section from criminal liability for that action shall not affect the question whether anyone else is guilty of an offence by virtue of being a party to that action.

Clause 1(*continued*)

4. *Subsection* (4) makes it clear that it is not open to the defendant to maintain that, because official protection (which is defined in subsection (6)) might not have been effective, he had no real opportunity to seek it.

5. *Subsection* (5) precludes a defendant from relying on duress where he is voluntarily and without reasonable cause in a situation in which he knows he will or may be subjected to duress to commit the type of offence with which he is charged. It will, in every case, be a question of fact whether he is voluntarily and without reasonable cause in a situation which precludes him from relying on the defence. The most likely circumstance in which this question will arise is where a defendant, who is a member of a criminal association or conspiracy, seeks to rely on duress brought to bear upon him to compel him to commit an offence in furtherance of the association or conspiracy. In such a case relevant factors will be, among others, whether he joined with full knowledge of the nature of the association or only later acquired such knowledge, the extent of his involvement with the association, whether he had attempted to dissociate himself from it, and, if so, what steps he had taken to achieve this.

6. *Subsection* (6) defines "official protection", the phrase used in subsection (3)(*b*). It follows that a person, for example, in prison, who raises the defence of duress in respect of some action must believe that the threat upon which he relies would be carried out before he could have any real opportunity of seeking protection from the prison staff.

7. *Subsection* (7) ensures that the criminal liability of any person, who is a party to the action of another who acts under duress, is not affected by the fact that the latter has the defence. Thus the effect of *R.* v. *Bourne* (1952) 36 Cr. App. R.125 is preserved.

Notice and proof of duress.

2.—(1) On a trial on indictment the defendant shall not, without leave of the court, be entitled to rely on the defence of duress unless he has served on the prosecutor at least seven clear days before the hearing a notice in writing—

(*a*) indicating his intention to rely on the defence;

(*b*) giving particulars of the words or conduct constituting the threat which induced him to take the action in question; and

(*c*) giving any information then in his possession to identify or assist in identifying any persons making the threat and any persons other than himself on whom the harm threatened would have been inflicted if the threat had been carried out.

(2) In any proceedings for an offence it shall be for the prosecution to prove that the defence of duress does not apply, but only if there is sufficient evidence to raise an issue with respect to whether or not it does.

EXPLANATORY NOTES

Clause 2

1. *Subsection* (1) provides that a defendant intending to rely on the defence of duress must give written notice of his intention to do so, specifying the details prescribed.

2. *Subsection* (2) states in statutory form the nature of the burden on the defendant, as laid down in *R.* v. *Gill* [1963] 1 W.L.R. 841. This will, if the issue arises in magistrates' court proceedings, override section 81 of the Magistrates' Courts Act 1952, which deals in general with the burden of proof of any defence in such proceedings.

Abolition of the defence of coercion, and of any defence of necessity at common law.

3.—(1) Without prejudice to whether or not the defence of duress is available to her in the circumstances of the case, a wife shall no longer be excused for committing any offence committed after the passing of this Act merely by virtue of the fact that she committed it in the presence of, and under the coercion of, her husband.

(2) Accordingly section 47 of the Criminal Justice Act 1925 (which abolished any presumption that an offence committed by a wife in the presence of her husband was committed under the husband's coercion but provided a defence if a wife committed an offence in the presence of, and under the coercion of, her husband) is hereby repealed except in relation to offences committed before the passing of this Act.

(3) Any defence of necessity at common law is hereby abolished.

EXPLANATORY NOTES

Clause 3

1. *Subsection* (1) abolishes the defence of coercion available to a wife acting in the presence of and under the coercion of her husband. The new defence of duress will apply in its place.

2. *Subsection* (2) repeals section 47 of the Criminal Justice Act 1925, which relates to coercion.

3. *Subsection* (3) abolishes any defence of necessity which might be available at common law.

Short title, interpretation and extent.

4.—(1) This Act may be cited as the Criminal Liability (Duress) Act 1977.

(2) In this Act "action" includes omission and any other conduct, and references to taking any action shall be construed accordingly.

(3) This Act does not extend to Scotland or to Northern Ireland.

EXPLANATORY NOTES

Clause 4

1. *Subsection* (2) defines "action", the word used in subsections (2) and (3) of clause 1, to include omission and any other conduct (such as being in possession) which might not at first sight seem to be covered by "action".

APPENDIX 2

Membership of the Law Commission's Working Party upon the General Principles of the Criminal Law

Joint Chairmen:	Mr Derek Hodgson, Q.C.
	Mr Norman S. Marsh, C.B.E., Q.C.
Law Commission member:	The Honourable Mr Justice Cooke
Members, other than representatives of the Law Commission	*The Right Honourable Lord Edmund-Davies
	His Honour Judge Buzzard
	Mr T. R. Fitzwalter Butler[1]
	Mr A. E. Cox[2]
	Mr R. Du Cann, Q.C.
	Mr J. N. Martin, O.B.E.
	*Professor Glanville L. Williams, Q.C., LL.D., F.B.A.
	Mr F. L. T. Graham-Harrison, C.B. (Home Office)
alternate	*Sir Kenneth Jones, C.B.E., Q.C. (Home Office)
	†Mr J. Nursaw (Home Office)
Secretary:	Mr J. C. R. Fieldsend (Law Commission)
Assistant Secretary:	Mr C. W. Dyment (Law Commission)

* Also members of the Criminal Law Revision Committee.
† Secretary of the Criminal Law Revision Committee.
[1] Mr Fitzwalter Butler died in March 1976.
[2] Now His Honour Judge Cox.

APPENDIX 3

Organisations and individuals who commented on the Law Commission's Working Paper No. 55, "Defences of General Application"

1. *Individuals*

   Mr R. Brazier
   His Honour Judge Bush
   Mr A. L. Close
   Dr J. M. Finnis
   Mr W. A. Leitch, C.B.
   Professor R. S. O'Regan
   Mr N. Trendle

2. *Organisations*

   Criminal Bar Association
   Home Office
   The Magistrates' Association
   The National Council for Civil Liberties
   Prosecuting Solicitors' Society for England and Wales
   Senate of the Inns of Court and the Bar
   Society of Public Teachers of Law

3. *Periodicals*

   [1975] Crim. L.R. 12 (Mr K. J. M. Smith)

APPENDIX 4

Extract from Home Office Consolidated Circular to the Police on Crime and Kindred Matters (Section I, paragraph 92)

(*a*) No member of a police force, and no police informant, should counsel, incite or procure the commission of a crime.

(*b*) Where an informant gives the police information about the intention of others to commit a crime in which they intend that he shall play a part, his participation should be allowed to continue only where:—

(i) he does not actively engage in planning and committing the crime;

(ii) he is intended to play only a minor role; and

(iii) his participation is essential to enable the police to frustrate the principal criminals and to arrest them (albeit for lesser offences such as attempt or conspiracy to commit the crime, or carrying offensive weapons) before injury is done to any person or serious damage to property.

The informant should always be instructed that he must on no account act as agent provocateur, whether by suggesting to others that they should commit offences or encouraging them to do so, and that if he is found to have done so he will himself be liable to prosecution.

(*c*) The police must never commit themselves to a course which, whether to protect an informant or otherwise, will constrain them to mislead a court in any subsequent proceedings. This must always be regarded as a prime consideration when deciding whether, and in what manner, an informant may be used and how far, if at all, he is to be allowed to take part in an offence. If his use in the way envisaged will, or is likely to, result in its being impossible to protect him without subsequently misleading the court, that must be regarded as a decisive reason for his not being so used or not being protected.

(*d*) The need to protect an informant does not justify granting him immunity from arrest or prosecution for the crime if he fully participates in it with the requisite intent (still less in respect of any other crime he has committed or may in future commit).

(*e*) The handling of informants calls for the judgment of an experienced officer. There must be complete confidence and frankness between supervising officers and subordinates; and a decision to use a participating informant should be taken at senior level.

(*f*) Payment to informants from public funds should be supervised by a senior officer.

(*g*) Where an informant has been used who has taken part in the commission of a crime for which others have been arrested, the prosecuting solicitor, counsel, and (where he is concerned) the Director of Public Prosecutions should be informed of the fact and of the part that the informant took in the commission of the offence, although, subject to (*c*) above, not necessarily of his identity.

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