

NORMATIVITY AND THE ORDINARY PERSON FORMULA: COMPARING PROVOCATION AND DURESS IN AUSTRALIA

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This article revisits the formulation of the ‘ordinary person’ test, the long-established normative test in criminal law in Australia. The ‘ordinary person’ test, where it applies, sets an ‘objective’ and uniform standard or legal norm: would (or might) an ordinary person have done the illegal act when confronted with similar circumstances as the accused? Although much debate has ensued as to who the ‘ordinary person’ is in Australia, in this article, we explore from a normative perspective, the possibility of reworking the test to achieve uniformity across two defences. We argue that although the justification for the defences of provocation and duress differ, constructing a minimum objective standard for the ordinary person test would promote law’s principle values such as fairness, impartiality, and predictability. The purpose of this article is thus to add a further voice lamenting the divergence in approaches to the ordinary person formula and arguing that normativity is given priority over other necessary considerations such as equality, human relations, or community protection.

INTRODUCING THE ORDINARY PERSON IN CRIMINAL LAW

This article relies on insights from Raz’s normative or ‘law is rules’ perspective to explore the formulation of the ordinary person test as a legal norm or what ought to be done. Here, we take law as a set of principles guiding behaviour¹ that is open to question regarding its normative stance. As legal norms stipulate the requirements for resolving a criminal law issue, what constitutes the ‘ordinary person’ ties in with evidence presented in court to justify, excuse or defend otherwise illegal behaviour. However, the judiciary relies on knowing

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¹ *Joseph Raz*, *The Concept of a Legal System: An introduction to the Theory of a Legal System* (*Oxford Scholarship Online*, March 2012) 3.

the 'ordinary person' without necessarily calling on evidence, empirical or evidentiary,² which is a requirement in other areas of law. We see law as discharging a normative task and 'justifying state coercion'.³ Warranted, therefore, is further consideration of the ordinary person formula.

Many excuses in criminal law typically call on the ordinary person test where an assessment is made as to what the ordinary person would or could do in the circumstances that the offender faced. Who then is the ordinary person? What would (or could) the ordinary person do in a similar set of circumstances?⁴ In some contexts, for example, regarding liability for negligence in tort law, the standard is high as the 'ordinary person' becomes the 'reasonable person and the reasonable person always performs at the peak of her or his abilities'.⁵ In contrast, for defences such as provocation, where the ordinary person test involves a lower standard that recognises human frailties, the question of reasonableness is not helpful or appropriate.⁶ Consequently, the critical question of who is the ordinary person requires reference to an objective standard that sets aside notions that the ordinary person is a reasonable person. Focus, instead, shifts from the hypothetical personhood of the ordinary person to the actual behaviour of the accused.

The ordinary person formula differs from defence to defence, between provocation and duress. Academics have grappled with these differences from various perspectives, arguing for one formulation or another. For provocation, for example, the formulation of the ordinary person does not vary, irrespective of substantial differences in code, statute and common law jurisdictions. For duress, there is some variation between jurisdictions, but the logical basis for the variation is shaky at best. No compelling reason for the differences in the ordinary person formula across these two defences has been offered. Absent clear statutory interference, judicial interpretation should favour fairness, impartiality, and predictability to limit bias and promote law as predictable.

² Katherine O'Donovan, 'Law's Knowledge: The Judge, The Expert, the Battered Woman, and Her Syndrome', (1993) 20(4) *Journal of Law and Society* 428.

³ Brian Leiter, 'Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence' (2003) 48 *The American Journal of Jurisprudence* 31.

⁴ The distinction between 'could' and 'would' is important, but beyond the scope of this article. For a persuasive argument that 'could' is the better threshold requirement, see Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 *Monash University Law Review* 197.

⁵ *Ibid* 201.

⁶ In *Stingel v The Queen* (1990) 171 CLR 312 ('*Stingel*'), it was held that any reference to the reasonable person would be inappropriate.

When viewed via a normative perspective, the different nature of excuses does not bear on the issue of whether to impose objective requirements or allow subjective ones, as explained below. Thus, there is no compelling reason to vary the minimum requirements for the ordinary person formula across defences. Required is the minimum standard of conduct that we expect or have a right to demand of our fellow citizens.

Depending on the excuse, it may be that the following factors can be taken into account in formulating the ordinary person: only age;⁷ or only age and gender.⁸ Objective factors, according to Raz, constitute a class of thought that provides a basis for practical thought as a precondition for discipline knowledge.⁹ The Commonwealth's *Criminal Code* excuse of duress may be an example of a purely objective test involving a threat and an offence where a person believes that the threat, which cannot be reasonably rendered ineffective, will be carried out if the offence is not committed and that the conduct is a reasonable response to the threat.¹⁰ The conduct is measured against the hypothetical 'ordinary' person placed in a similar situation.¹¹ In contrast, a subjective test means that 'liability is to be imposed only on a person who has freely chosen to engage' in conduct that must be punished.¹²

The controversial test has attracted much debate, from positions arguing for deleting the test altogether to attempts to formulate requirements to recognise and include characteristics of Australia's diverse population. However, the test is flawed where similar cases are treated differently, as explored below. As the test remains current, the opportunity, therefore, arises to discuss the consequences of the test. Where it is expected that the test for defences requiring a lower standard would reach a minimum level of conduct, it becomes possible to identify situations where either consistency across the

⁷ *Stingel* (1990) 171 CLR 312 with respect to an ordinary person's response to a provocative incident under the Tasmanian *Criminal Code* ('the *Tasmanian Code*'); *Masciantonio v The Queen* (1995) 183 CLR 58, 67, ('*Masciantonio*') following *Stingel* for the common law position. Compare McHugh J in dissent at 71-73.

⁸ *R v Abusafiah* (1991) 24 NSWLR 531, 545 ('*Abusafiah*'). The word 'maturity' was used, but this is likely to have been intended to be commensurate with age. See the construction of *Abusafiah* in *Morris v The Queen* 201 FLR 325, 351 ('*Morris*').

⁹ *Joseph Raz*, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press 2000) 118.

¹⁰ *Criminal Code* (Cth) s 10.2 ('the *Commonwealth Code*').

¹¹ Colvin, above n 4, 197.

¹² *Ibid.*

defences is not possible, or where the result is at odds with changed perceptions of justice or fairness and is an acceptable solution.¹³

This article adds to the debates by arguing in favour of a consistent minimum standard for the ordinary person formula or test to go some way to achieving law's values of fairness, impartiality and predictability. We accept that the test requires reformulating.¹⁴ We also accept that some flexibility is required to accommodate genuine handicaps, but also that a minimum standard of conduct is expected of all citizens. Critiquing the current ordinary person test offers a way forward. Why is inconsistency a flaw? The variance across defences as to who is the ordinary person points to the possibility of unaddressed underlying issues in its formulation, rather than only allowing for or accommodating the diversity of human responses and frailties. Although some flexibility is required, it is the minimum normative standard that concerns us here. Indeed, where there is variance as to what is the minimum standard, questions arise as to whether the situation represents a lost opportunity to establish norms for criminal responsibility and to establish a consistent message to what the criminal law in Australia requires of its population that we seek to address.

The requirement in law to treat like cases alike, which reflects an internal legal norm of justice, (fairness, impartiality, and predictability), leads to the need for consistent decision-making.¹⁵ We accept that normative closure is required of the ordinary person test as 'the legal system must provide sufficiently reliable consistency in its decisions and, in this respect, in its function as a unity.'¹⁶ For justice, consistent decision-making about what is the ordinary person requires reducing law's complexity.¹⁷ Where defects in law appear, the opportunity arises for the defects to be amended.¹⁸

The lack of consistency in the area stems partly from attempts to prioritise concepts such as equality, human relations and community protection. In considering the problem of the ordinary person formula (including some examples of variance in the formula), Colvin proposed, for example, that

¹³ See Niklas Luhmann, *Law as a Social System* (Oxford University Press, 2004) 258.

¹⁴ See Peter Papathanasiou and Patricia Eastel, 'The "Ordinary Person" in Provocation Law: Is the "Objective" Standard Objective?' (1999) 11(1) *Current Issues in Criminal Justice* 53.

¹⁵ See Luhmann, above n 13, 60.

¹⁶ *Ibid* 107.

¹⁷ *Ibid* 219.

¹⁸ *Ibid* 258.

formal equality can lead to substantive inequality.¹⁹ Colvin found that in *Hill, Stingel* and *Tutton*, equality requires:

that the same standard of conduct applies to everyone and that there is equal responsibility for failure to meet this standard. This is, however, a principle of formal equality which, because it ignores differences in capacities to meet the standard, generates substantive inequalities in liability to criminal conviction. ... Substantive equality under the criminal law requires that the pattern of convictions correspond to patterns of culpability as well as conduct. This correspondence is violated if a person's likelihood of conviction increases simply because that person is handicapped with respect to the attainment of a standard.²⁰

For Yeo, the issue of equality could be resolved by taking into account further subjective characteristics, rather than just age.²¹ However, Yeo also recognised dangers of doing so, fearing that stereotypes and racism may be reinforced.²² Butler's call for Western Australia's evidence law to incorporate women's social reality²³ was not lost on Yeo who argued that 'sex informs the triers of fact on the type of reaction to the provocation which might be expected from an ordinary person of that gender' and/or ethnicity.²⁴ Later, Detmold considered that the base issue was one of human relations between the deceased and the accused, and that the 'question is simply its excessiveness'.²⁵ Colvin and Yeo may have come nearer to the normativity issue when discussing the demand for an objective standard to protect the community, although Colvin called for resisting such conclusions.²⁶

Considering the issue from the basis of normativity, however, would force lawmakers to consider the jurisprudential issues that underlie community protection. This brief literature review demonstrates that the inconsistencies and conceptual challenges in the area have been known and debated for quite

¹⁹ Colvin, above n 4, 226.

²⁰ Ibid.

²¹ Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3.

²² Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 305.

²³ Dell Marie Butler 'Holding Back the 'Battered Woman': *Western Australia v Liyanage* [2016] WASC 12' (2016) 41(1) *The University of Western Australia Law Review* 341.

²⁴ Yeo, above n 22, 305.

²⁵ Michael J Detmold, 'Provocation to Murder: Sovereignty and Multiculture' (1997) 19 *Sydney Law Review* 5, 17.

²⁶ Colvin, above n 4, 226–227. Colvin makes the point that fear about 'abnormally short-tempered persons being acquitted is largely unfounded'. Yeo above n 21, 12.

some time, but without resolution. This article adds a further voice lamenting the divergence in approaches to the 'ordinary person' and argues that normativity may provide a better platform for analysis than, as Colvin²⁷ has also argued against, equality, human relations, or community protection. The ordinary person formula as a normative legal principle should not vary within a given excuse without clear statutory direction. Further, it should not vary at least between provocation and duress, despite differences between the two in the power relation where, under duress, the accused is subjected to domination. Whether it should be the same for all excuses, justifications, defences, authorisations and offences is beyond the scope of this article.

There is scope to critique any formulation of the 'ordinary' person. First, a formulation may disguise unwritten social mores. Secondly, it may provide a shield from behind which a trier of fact 'goes with their gut' and then engages in reasons to support her or his answer (as a reductive sceptic might argue).²⁸ Although the plausibility of these criticisms is undeniable, any attempt to introduce consistency and rationality into the decision-making process should be lauded, especially when lives, justice and liberty are at stake. This article proceeds on the basis that an articulated and well-conceived formula can only advance law's rationality and predictability.

There is also scope to argue that an objective test should be adopted as it is better, more consistent, than a subjective one that is likely to be pluralist and unpredictable. Alternatively, a subjective test may be considered preferable to an objective test. However, rather than arguing for the adoption of a given formula, this article focuses on the significance of the formula generally. The formula, however it is constructed, may be determinative of guilt or innocence in a borderline case. Further, the formula may influence the admissibility of evidence. Information on gender, for example, may inform 'triers of fact on the type of reaction to the provocation which might be expected from an ordinary person of that gender'.²⁹

The formula also portrays social values. A formula that takes into account few or no subjective characteristics may seem to make predictable demands of a person, but may be nothing more than a portrayal of class dominance. The 'ordinary' person becomes, effectively, the ordinary white (possibly male)

²⁷ Colvin, above n 4, 226.

²⁸ For a definition of reductive scepticism, see Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 *Modern Law Review* 621, 622.

²⁹ Yeo, above n 22, 305.

middle-class person, together with their ordinary characteristics relevant to the charge (for example, self-control in provocation matters and trust in the police in duress matters). Alternatively, a formula (objective and subjective), which takes into account many subjective characteristics, may become unpredictable, difficult to apply or might fail to set aspirational standards to which all must comply in the interests of a healthy and safe community.³⁰ Put another way, an objective formula is more strongly normative, but carries a risk of conveying and portraying class dominance. A subjective formula is more empathetic and humane, less class dominant, but less predictable and loses normative value. For the purposes here, it is sufficient to note that these competing moral values lie at the heart of the ordinary person formula.

Part I of the paper establishes the theoretical framework for this paper. Considering the issue as one of normativity (as defined in this article) provides a more constructive analysis than equality, human relations or community protection, that have been proffered in cases and academic literature.³¹ Part II of the paper analyses the formulation of the ordinary person across two defences: provocation and duress. Much has been said on the ordinary person in cases on these 'excuses'.³² There is also useful dicta on whether the excuses are analogous with conclusions about the relevant nature of the ordinary person flowing from that dicta. Provocation and duress are examples. Therefore, these defences provide a convenient place to start.

There are several important lines of enquiry that this article does not consider. There are many ways normative standards may be set outside the ordinary person formula. Parliament has a role in limiting, maintaining or expanding the availability of excuses. The role of the judiciary in raising the bar

³⁰ For an exploration of the historical development of normative responsibility and its aspirational aspects, see Nicola Lacey, 'In Search of the Responsible Subject' (2001) 64 *Modern Law Review* 350, 364.

³¹ See Colvin, above n 4.

³² A provoked killing may be more accurately described as a killing where the 'malice that is implicit in the intention to kill [...] is denied: *Lindsay v R* (2015) 255 CLR 272, 278. How this might be reconciled with codified definitions of murder that do not incorporate malice is uncertain, and beyond the scope of this article. For convenience, the term 'partial excuse' will be used. More generally, the term excuse is used to denote a defence where the accused has an evidentiary burden of proof, and once that burden is met, the Crown must disprove one element of the excuse (together with the elements of the charge, obviously) beyond reasonable doubt, in order to prove guilt of the offence. It is noted that Parliament can, and does, change the burden of proof of excuses from time to time. For example, provocation is now more properly considered a defence in Queensland, as the accused has the burden of proving the defence on the balance of probabilities. See *Criminal Law Amendment Act 2011* (Qld) s 5, amending Queensland's *Criminal Code* (the 'Queensland Code') s 304.

for the evidentiary burden may be understated in favour of undue reliance on a jury of randomly selected lay people, whose reasons for the decision are confidential. Lastly, it is noted that required is further analysis before the conclusions of this article might be transposed to other areas that reference objective standards. This analysis is confined to the objective standards in provocation and duress.

I THEORETICAL FRAMEWORK AND LEXICON

A 'Normative'

There may be several different ways in which the word 'normative' might be used. In this article, normative is used in the same way Raz (ostensibly) uses the term.³³ According to Raz, 'the most important concepts of value theory are value, good, bad and better or worse than'³⁴ that typically inform what sort of *conduct* is criminalised. Value theory 'is primarily concerned with comparing various actual or possible situations to determine which is better than the other and to identify their good- or bad-making features.'³⁵ The debate in the United States regarding the piecemeal approach to legalising the medicinal use of marijuana is a current example of value theory in operation.³⁶ Attention is given to investigating costs and benefits, and assessing known and potential effects that policymakers must take into account.³⁷ Apportioning blame, according to Raz, is another concern,

Normative theory ... presupposes some value theory and derives from it the requirements which it imposes on the behaviour of individuals. Who ought to realize which values and how is the main problem of normative theory. Its most important concepts are ought, reasons for action, rules, duties and rights.... It is the job of normative theory to determine whose responsibility it is to realize this or that value, whose responsibility it is to look after the sick, etc. The theory of ascription deals with the ascription of blame and praise to people who fulfilled or failed to fulfil their responsibilities.³⁸

³³ Joseph Raz, *Practical Reason and Norms* (Hutchinson & Co, 1975) 9–10.

³⁴ *Ibid* 11.

³⁵ *Ibid* 11.

³⁶ See Peter Homel and Rick Brown, 'Marijuana legislation in the United States: An Australian perspective' (2017) 535 *Trends & issues in crime and criminal justice* <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi535.pdf>.

³⁷ *Ibid*.

³⁸ Raz, above n 33, 11–12.

Although this article adopts Raz's framework to consider the 'ordinary person test', one point of distinction must be made to fit with provocation and duress defences. Raz identifies two reasons for acting – one is based on values,³⁹ the other on reason.⁴⁰ He further notes that practice theory – HLA Hart's view that rules have an external aspect (viewing what people routinely do) coupled with an internal aspect (a belief in the obligatory nature of the practice) – 'deprives rules of their normative character'.⁴¹ This is so because, if practice theory categorises rules as things which everyone does, there may be times where a speaker 'explains a demand by reference to the rule that promises ought to be kept... But more often than not, this is not the speaker's intention.'⁴² Raz does not explain what the speaker's intention might otherwise be.

Raz posits that if practice theory is a belief that one must act in a certain way because a rule exists, then 'rule sentences are used to make normative statements. They are not, however, statements of a reason. They are merely statements that there is a reason.'⁴³ However, where something is a law it is not just a reference to a reason. It is, often enough, the reason for acting, especially when someone might act differently were it not for the law in question. The core submission here is that the normative function of the law comes about because it is the law.

If a contrary view is taken suggesting that the law merely reflects existing norms, then the main philosophical basis of this paper is simpler: a decision needs to be made about what those norms are vis-à-vis the ordinary person. What standards do we expect of a person? Who is the person who finds her or himself standing before a judge? In what way do individual characteristics bear on this question? For those who take this latter view, this article will continue to be useful, if not persuasive, as it collates varying approaches to this question across two excuses. For the former view, in the primary submission of this article, normativity is about establishing an aspirational standard to which all must ultimately comply in the interests of a safe and harmonious society.

³⁹ Ibid 34.

⁴⁰ Ibid 50.

⁴¹ Ibid 57. The categorisation of Hart's view seems to proceed on a basis that de-couples the standard practice (wearing a hat to Church, to use Hart's example) with the required belief in the obligatory nature of that practice. However, the two cannot be de-coupled in any fair representation of Hart's views. Compare H L A Hart, *The Concept of Law* (Oxford University Press, 1961) 56–57.

⁴² Ibid.

⁴³ Ibid 58.

B Normativity and the Ordinary Person

Except for the Tasmanian *Criminal Code*, the defences of provocation and duress⁴⁴ have an objective component in all Australian states and territories. The complexities of the objective component are canvassed in more detail below. For now, it is sufficient to note the following. For duress, the accused must have an ‘ordinary firmness of mind’. For provocation, the provocative incident must be capable of driving an ordinary person to lose his or her self-control. A similar analysis could be made for other excuses of general application, not covered in this article, such as self-defence, accident and mistake. Each excuse mentioned here imposes a required standard of mental acuity on all those who are the subject of the criminal law in Australia.⁴⁵ For provocation and duress, the law requires the ordinary person to have a certain minimum strength of character.

Determining who is the ordinary person is critical to the normative function of the criminal law. To determine what a person ought to do, one must proceed on some shared understanding of what ‘a person’ is. At the theoretical level, if the law is to set norms, the subject is fraught with difficulty. If we use the ordinary person as a means to create normative standards we must, at least to some extent, refuse to take account of certain background experiences of an accused, such as education. When we deny the relevance of a person’s background, we are denying the relevance of something that is, indeed, relevant to their mental capacities. Lacey’s sympathetic statement is apposite:

Most people are born, certainly, with some underlying potential to develop a capacity for self-direction, but the extent to which we ultimately enjoy it depends largely on the practices and norms which parents, educational institutions, and peers inculcate and communicate. And for those brought up in highly disorganized contexts, the opportunities to cultivate these powers may well be systematically lower.⁴⁶

⁴⁴ Section 20. This exception is considered in more detail in Part II of the article.

⁴⁵ See *He Kaw Teh v R* (1985) 157 CLR 523, 564-565 and Toby Nisbet, ‘The Mental Elements of Assault in Western Australia’ (2015) 38 *The University of Western Australia Law Review* 46, 55. The same can also be said for the United Kingdom. See Lacey, above n 30, 352-353 and Nicola Lacey, ‘Socialising the subject of criminal law: criminal responsibility and the purposes of criminalisation’ (2016) 99 *Marquette Law Review* 541, 544.

⁴⁶ Lacey, above n 45, 548.

We are then engaging in something of a utilitarian exercise – but it is one that runs a real risk of reflecting class dominance. As McHugh J (in dissent) noted in *Masciantonio*,

Worse still, its invocation [the invocation of an objective ordinary person] in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar.⁴⁷

If the ordinary person standard is set in pursuit of setting an aspirational normative standard – people choosing to act *because* of the law – it might be pursuing a greater good but may do so at the expense of, and perhaps driven by ignorance regarding, people from disadvantaged backgrounds. To be effective, aspirational normative standards need to be coupled with programs to assist people to meet the standard.⁴⁸ This coupling has practical difficulties in an environment where governmental power is separated. Courts may be called upon to set a standard, but they are removed from the political branches that can direct and fund relevant policy programs.

There are therefore three questions to settle in Part II. The first is the fundamental one relating to the degree of normativity, if any, (in the particular utilitarian sense in which that word is used in this article) that we might argue the Courts need to extract from a formulation of the ordinary person. For example, the more the background of a person is relevant, the more sympathetic the ordinary person formula will be. The less the background of a person is relevant, the more normative it will be. *Stingel* below assists in answering that question. Part II analyses two further questions. The second question is whether the formula should be the same across jurisdictions concerning the one excuse. The third question is whether it should be the same irrespective of the excuse in question. The analysis of the third question focuses on provocation and duress. It will be submitted that when the question is considered as a legal principle that sits firmly in a normative framework, a statute would need to be clear before it could be taken to vary the formula.

⁴⁷ *Masciantonio* (1994) 183 CLR 58, 73–74 (McHugh J, dissenting). See also Yeo, above n 21.

⁴⁸ For example, as public awareness about the prevalence of rape grew, more education programs became available to raise awareness, including among the classes of people more likely to be offenders. For a meta-analysis of education programs and their efficacy, see Leanne R Brecklin and David R Forde, 'A Meta-Analysis of Rape Education Programs' (2001) 16 *Violence and Victims* 303.

II AN EXAMINATION OF PARTICULAR EXCUSES

A *Provocation*1 *Introduction*

Provocation is a partial excuse to murder at common law, and in most code jurisdictions, although it has been the subject of significant statutory interference in recent times.⁴⁹ Western Australia, Tasmania and Victoria do not have the partial defence now. Provocation can excuse assault in Western Australia and Queensland.⁵⁰ The historical position of Tasmania is highly relevant and shall be considered first, as *Stingel* provides a useful anchor for the analysis that follows. It is the lead case on the ordinary person formula for provocation notwithstanding the professed focus on the Tasmanian *Criminal Code*. A selection of the decisions that have followed *Stingel* will then be considered to expand the point made earlier in this article: the ordinary person formula is an underlying – or normative – issue. It should not, and it will be seen that it does not, vary according to whether provocation is governed by a code, statute or the common law.⁵¹

The element of provocation that is relevant here is whether a given provocative incident is capable of driving the ordinary person to lose her or his powers of self-control.

2 *Stingel*

The facts of *Stingel* are as follows. Michael James Stingel killed Jason Scott Tyler by stabbing him in the chest with a butcher's knife. Jason was sitting in a car with Michael's ex-girlfriend, 'A', who was 17 years old at the time. A had a restraining order against Stingel. According to Stingel's unsworn evidence, A was performing fellatio upon Mr Tyler. Stingel felt aggrieved by the sex act (although he had no right to be there, and was indeed under a positive duty not to be there because a restraining order was in place). Stingel confronted the pair, to which Mr Tyler responded by telling Stingel 'Piss off you cunt, piss off'. Stingel then stabbed Mr Tyler to death.

⁴⁹ The High Court of Australia usefully traced relevant amendments in *Lindsay v R* (2015) 255 CLR 272, 282–83 [23] n 66.

⁵⁰ *WA Code* ss 245–246; the *Queensland Code* ss 268–269.

⁵¹ Note provocation for murder in the *Queensland Code* takes its definition from the common law: *Pollock v The Queen* (2010) 242 CLR 233, 245.

To consider the first question raised above about normative considerations and personal characteristics or background differences, we turn to the ordinary person formula that was among the issues canvassed in *Stingel*. At issue was whether this incident (assuming it was capable of being viewed as provocative at all) was capable of depriving the ordinary person of his or her powers of self-control. The High Court of Australia (HCA) stated:

No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. *The lowest level of self-control which falls within those limits or that range is required of all members of the community.* There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test.⁵²

The phrase ‘equality before the law’ points to differences among people; yet in setting a standard that applies to everyone, and in any case, it is very much open to debate as to what constitutes equality.⁵³ Questions also arise as to where on the continuum of normativity, equality sits, given the diversity of people’s differences.

Further, the background factors that could be taken into account in assessing the gravity of the provocative incident are myriad. The distinction between the wide variety of personal characteristics taken into account in the first stage of the *Stingel* test (assessing the gravity of the provocation to the accused) and the restriction to the age of the accused as the only personal characteristic taken into account in the second stage appears contradictory.⁵⁴ It is nonetheless necessary to contextualise the provocative incident while maintaining some degree of normativity.⁵⁵

⁵² *Stingel* (1990) 171 CLR 312, 329 (emphasis added).

⁵³ See Yeo, above n 22, and the text referred.

⁵⁴ Yeo, above n 21, 7-8.

⁵⁵ *Ibid* 8-9 and Colvin, above n 4, 216.

3 Following *Stingel* Across Jurisdictions

With respect to the ordinary person formulation for provocation, *Stingel* has been consistently followed in a series of HCA cases arising from a variety of jurisdictions. In chronological order, those cases are *Masciantonio v R*;⁵⁶ *Green v R*;⁵⁷ and *Pollock v R*.⁵⁸ *Stingel* has been followed even though the Court in *Stingel* was careful to keep itself entirely within the confines of the Tasmanian *Criminal Code*.

One finds in the authorities [...] a perception that, in this particular field of criminal law [provocation], the common law, the Codes and other statutory provisions, and judicial decisions about them, have tended to interact and to reflect a degree of unity of underlying notions. While we share that perception, *we have thought it preferable, in disposing of the present appeal, to keep the focus of our consideration firmly fixed upon the provisions of s. 160 of the Code. In that regard, we are influenced by the fact that the provocation provisions of the Code differ significantly from the provocation provisions of the Criminal Codes of Queensland and Western Australia.*⁵⁹

Stingel was applied in the common law jurisdiction of Victoria in *Masciantonio v R* with respect to the ordinary person.⁶⁰ The HCA took the (unanimous) view that the formulation of the ordinary person reflected a ‘unity of underlying notions’.⁶¹ It was not so much an extension of *Stingel*, but rather an application of the same underlying principles to two different legal contexts: code and common law.

The ultimate foundation of adherence to the objective test was explained in *Stingel*, in Wilson J’s reasons, citing the Supreme Court of Canada, in *R v Hill*:

⁵⁶ (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ) (*‘Masciantonio’*).

⁵⁷ (1997) 191 CLR 334 (*‘Green’*).

⁵⁸ (2010) 242 CLR 233 (*‘Pollock’*). The recent case of *Lindsay v The Queen* (2015) 255 CLR 272 (*‘Lindsay’*) is omitted from this analysis. *Lindsay* was a common law case. The common law position was settled in *Masciantonio* according to underlying notions (see discussion below). *Lindsay* turned on the Court and jury’s respective roles in considering whether an incident (such as a homosexual advance) was provocative in light of contemporary social attitudes: see especially *Lindsay*, 284. The Parliament’s role in this context was noted also – see n 66 tracing the relevant legislative amendments.

⁵⁹ *Stingel* (1990) 171 CLR 312, 320 (emphasis added).

⁶⁰ (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ).

⁶¹ *Ibid* 66 (Brennan, Deane, Dawson and Gaudron JJ) and at 71 (McHugh J). McHugh J dissented on how that standard should be expressed, not on the question of its consistent application.

The objective standard ... may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.⁶²

Stingel was further applied in *Green*,⁶³ a case involving the statutory excuse of provocation in New South Wales, notwithstanding submissions that *Stingel* should be distinguished because of its different statutory context.⁶⁴ Particular attention was paid to whether the phrase ‘in the position of the accused’, found in the *Crimes Act NSW* s23(b) yielded a different result to that in *Stingel*. The answer was no. Justices Brennan, Toohey, Gummow and Kirby applied the same test as in *Stingel*.⁶⁵ Justice McHugh, consistent with his Honour’s dissent in *Masciantonio*, applied his preferred test that included the accused’s ‘ethnic or cultural background’ in the ordinary person formula.⁶⁶

Justice Kirby also found that the question turned on the statute, but his Honour was at pains to point out that the statute had to be read in light of legal history: a whole line of decisions upholding the formula in *Stingel*.⁶⁷ In maintaining the *Stingel* formula, Kirby J wrote ‘Wherever possible, commonality of such bedrock legal doctrine should be upheld, whether the case is governed by the common law, by statute or by a code’.⁶⁸ Justice Gummow also noted that undermining notions of equality and personal responsibility is an outcome that ‘is not lightly to be attributed to the legislature’.⁶⁹ For the whole Court, the phrase ‘in the position of the accused’ was read to reflect the authority in *Stingel*: the gravity of the insult is to be assessed by reference to all

⁶² *Green* (1997) 191 CLR 334.

⁶³ *Green* (1997) 191 CLR 334.

⁶⁴ *Ibid* 351 (Toohey J). Toohey J provided the most detailed comparative analysis and the other judgments are consistent with Toohey J in this regard.

⁶⁵ *Ibid* 340 (Brennan J), 351 (Toohey J), 382 (Gummow J), 405-406 (Kirby J). Kirby J was in dissent, but not on this point.

⁶⁶ *Ibid* 368. For a criticism of conflating ethnicity and culture, see Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *Melbourne University Law Review* 110, 121.

⁶⁷ *Green* (1997) 191 CLR 334, 402-406. The earlier decisions cited were *Packett v The King* (1937) 58 CLR 190, at 217-218 in turn citing *R v Lesbini* [1914] 3 KB 1116; *Parker v The Queen* (1964) 111 CLR 665, 679-680; *Johnson* (1976) 136 CLR 619, comparing Murphy J in dissent at 670-671 with the majority view at 656 (Gibbs J); *Moffa* (1977) 138 CLR 601, 624-627; *Stingel* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 CLR 58 at 69.

⁶⁸ *Green* (1997) 191 CLR 334, 406.

⁶⁹ *Ibid* 386.

the circumstances of the accused, but the ordinary person's response to a provocation of that gravity remains an objective (and consistent) standard.⁷⁰ Notwithstanding the reduced focus on underlying notions, *Green* represents a consistency in approach notwithstanding statutory variance.

*Pollock*⁷¹ is a Queensland case and again it applied *Stingel*. However, although Queensland is a code State, the definition of provocation for murder takes its definition from the common law.⁷² There is, therefore, no particular statutory variance to consider. Nonetheless, one quotation from the (unanimous) judgment bears extracting here:

Stingel was concerned with provocation under the Tasmanian Code and *Masciantonio* with the doctrine under the common law. In each case, the Court observed that in this area of the criminal law the Codes and other statutory provisions and the common law have tended to reflect a degree of unity of underlying notions.⁷³

Lastly, the ordinary person formulation has been adopted for Western Australia's *Criminal Code* excuse of provocation for assault, again for reasons relating to the 'degree of unity of underlying notions'.⁷⁴

4 Summary

It is worth noting that substantial differences in the legal framework – code, statute or common law – at no stage were determinative of the ordinary person formula. Whereas there were several instances where members of the Court confined their analysis to the jurisdiction at hand, nothing that was jurisdiction-specific relevantly featured in the deliberations as to what would constitute the ordinary person. Indeed, in cases after *Stingel*, the *Stingel* formula was applied – most recently in *Pollock* by reference to notions of an

⁷⁰ Ibid 340 (Brennan J), 351 (Toohey J), 382 (Gummow J), 405-406 (Kirby J).

⁷¹ (2010) 242 CLR 233 (*Pollock*).

⁷² *Pollock* (2010) 242 CLR 233, 245.

⁷³ Ibid 242 (references omitted).

⁷⁴ *Hart v The Queen* (2003) 27 WAR 441, 450 (Steytler J). At *Hart* [30], the High Court is cited: Their Honours in *Van Den Hoek v The Queen* (1986) 161 CLR 158, 'found it unnecessary, in that case, to decide whether or not the common law or s245 should be looked to for elucidation of the defence of provocation as, given the question which had arisen (whether the defence embraced a sudden and temporary loss of self-control due to an emotion such as fear or panic as well as anger or resentment), the result was the same either way.' Also, the *Stingel* test was accepted after the 2008 amendments, for the assault-provocation provision in s246, in *Doust v Meyer* [2009] WASCA 65, [71]-[73]. Several propositions emerge that are said to apply in Western Australia. Section 245 was relied upon in *Roche v R* (1987) 29 A Crim R 168.

‘underlying’ principle. It is this article’s submission that what makes it an underlying principle is its priority over other concepts such as equality before the law. It is its normative value and consistency that a given ordinary person formula as an underlying principle can provide.

B Duress

1 Introduction

Duress, sometimes referred to as compulsion,⁷⁵ will excuse an accused where (simplistically) a threat of violence to the accused or another would have been carried out if the accused did not commit the offence with which she or he had been charged. At common law, the objective requirements are that a person must go to the police to neutralise the threat where there is a reasonable opportunity to do so; and if that opportunity does not arise, there is a requirement to resist the threat if an ordinary person would have done so.⁷⁶ The former objective requirement has probably collapsed into the latter.⁷⁷ The objective requirement is usually expressed as the accused needing to have an ‘ordinary firmness of mind’.⁷⁸

The objective requirements in the codes are expressed in varying ways that focus on reasonable conduct as distinguishable from any notion of a ‘reasonable man’. However, in Tasmania, the common law defence applies,⁷⁹ together with an excuse of compulsion that does not mention reasonableness.⁸⁰ In Queensland, the objective requirement depends on the particular aspect of compulsion upon which the accused seeks to rely. In the case of a threat of violence, the response to that threat must be a reasonable one.⁸¹ In the case of a threat of serious harm to person or property, there must be a reasonable belief that the act is necessary to avoid the harm, and the act is reasonably proportionate to the harm threatened.⁸² The Commonwealth requires a series of beliefs to be reasonable: that the threat will be carried out unless the offence is committed; there is no [other] reasonable way to render the threat ineffective,

⁷⁵ The *Queensland Code* s 31 and the *Tasmanian Code* s 20 refer to the excuse as ‘compulsion’.

⁷⁶ *R v Lawrence* [1980] 1 NSWLR 122, 142 (‘*Lawrence*’).

⁷⁷ The two are not treated as distinct in the model jury directions suggested in *R v Abusafiah* (1991) 24 NSLWR 531, 545 (‘*Abusafiah*’).

⁷⁸ *R v Palazoff* (1986) 43 SASR 99 (‘*Palazoff*’).

⁷⁹ The *Tasmanian Code* s 8.

⁸⁰ *Ibid* s20.

⁸¹ The *Queensland Code* s 31(1)(c).

⁸² *Ibid* s31(1)(d).

and the conduct is a reasonable response to the threat.⁸³ In Western Australia, the objective requirement is that the response to a threat is a reasonable one.⁸⁴ There is a further objective requirement that relevant beliefs as to circumstances (and probably necessity) are also reasonably held.⁸⁵ The Northern Territory effectively follows the common law.⁸⁶

Concerning duress, there is no single guiding authority on the objective requirement to anchor analysis such as there is for provocation. The formulation of the ordinary person reflecting the objective requirements of the excuse is, therefore, chaotic. Set out below is an analysis of the ordinary person at common law and in code jurisdictions, followed by an analysis concluding that there are sufficient relevant similarities between provocation and duress to suggest there is no reason to vary the objective requirement between the two. The critical common law cases have been analysed elsewhere,⁸⁷ but a fresh analysis is required partly to consider the issue in light of the normative framework, and partly to present a context for more recent developments in code jurisdictions.

2 Common Law

*R v Lawrence*⁸⁸ involved a conspiracy to import a significant amount of cocaine into South Australia by ship. The captain of the ship pleaded duress. It was a weak case for duress, the captain was found guilty at trial and his appeal was dismissed. In dismissing the appeal, the Court considered the common law position on the objective standard for duress. The Court cited *R v Hudson and Taylor* with approval:

In the opinion of this court it is always open to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that upon this being established the threat in question can no longer be relied upon by the defence. In deciding whether such

⁸³ The *Commonwealth Code* s 10.2(2)(a)–(c) respectively.

⁸⁴ The *WA Code* s 32(2)(b).

⁸⁵ *Ibid* s 32(2)(c). The requirement for reasonableness in this sub-section probably also extends to the belief as to necessity element in s32(2)(a), although this is not at all clear from the drafting.

⁸⁶ Northern Territory's *Criminal Code* s40(1)(d) (the excuse will hold where 'an ordinary person similarly circumstanced would not have reported that threat' to the police; and s40(1)(c) 'an ordinary person similarly circumstanced would have acted in the same or a similar way'. We found no cases from the Northern Territory that turn on the ordinary person formula. It is mentioned here for the sake of completeness.

⁸⁷ Colvin, above n 4.

⁸⁸ [1980] 1 NSWLR 122 ('*Lawrence*').

an opportunity was reasonably open to the accused the jury *should have regard to his age and circumstances*, and to any risks to him which may be involved in the course of action relied upon.⁸⁹

*R v Abusafiah*⁹⁰ concerned an armed robbery, where the accused had alighted from a car to rob a man on the sidewalk at knifepoint. Abusafiah asserted that he had been threatened at gunpoint before the incident to commit the *armed* robbery. Justice Hunt, with whom Gleeson CJ and Mahoney J agreed, found that the ordinary firmness of mind could take into account only gender and maturity (probably meaning age).⁹¹ The case was decided after *Stingel*, and *Stingel* was referred to in the judgment. The discussion of *Stingel* centred on whether the test should be ‘would have yielded’ or ‘might have yielded’ to the threat. *Stingel* was not discussed vis-à-vis the objective standard. Nonetheless, *Abusafiah* probably involved a deliberate decision to add gender as a relevant subjective factor. It was a deliberate departure from the objective test laid down in *Stingel* that included only age. *Abusafiah* remains an authoritative statement of the common law.⁹²

3 Code Jurisdictions

The *Tasmanian Code’s* excuse of duress contains no words suggesting any objective standard.⁹³ It is, however, limited to a belief of immediate threats to kill or cause grievous bodily harm, and it will not excuse serious offences such as murder, rape and armed robbery. To date, no objective requirement has been read into the section.⁹⁴ There are several reasons why this is so. The *Tasmanian Code* saves common law defences,⁹⁵ and so the *Tasmanian Code* excuse of duress must be read together with the common law defence. An objective requirement exists in the common law, but the common law excuse is capable of a much broader application.⁹⁶ The *Tasmanian Code* excuse, on the other hand, does not have an objective requirement, but has minimal application. It

⁸⁹ Ibid 135, citing *R v Hudson and Taylor* [1971] 2 QB 202, 207 (emphasis added). Also approved by Nagle CJ and Yeldham J at 163 and quoted at 164. However, Morris P seemed to move away from ‘age and circumstances’ to ‘age and sex’ in his conclusion at 143.

⁹⁰ *Abusafiah* (1991) 24 NSWLR 531.

⁹¹ *Abusafiah* (1991) 24 NSWLR 531, 545 (Hunt J), 532 (Gleeson CJ and Mahoney J).

⁹² *Makrynikos v Regina* [2006] NSWCCA 170, [34]-[35].

⁹³ The *Tasmanian Code* s 20.

⁹⁴ See *Rice v McDonald* (2000) 113 A Crim R 75, 87.

⁹⁵ The *Tasmanian Code* s 8.

⁹⁶ See generally *Palazoff*. *Abusafiah* over-ruled *Palazoff*, but only with respect to the matters noted above. It left intact the breadth of the excuse.

can therefore be readily inferred that the Tasmanian Parliament intended to create a separate and different excuse of duress.

The Queensland *Code* seems to have been held to incorporate a purely objective test. *R v Smith*⁹⁷ concerned an appellant with a ‘borderline intellectual disability’,⁹⁸ who was convicted of manslaughter. He had handed a rifle to Brennan Emmett, knowing that Emmett was going to use it to shoot two people in the boot of Emmett’s car. The appellant asserted that Emmett had threatened him by waking him in the night and saying “Give me the gun or you’ll be in the boot too”.⁹⁹ The Court simply referred to the test as an objective one couched in terms of reasonableness – reasonable necessity, reasonable proportion, and so on and did not engage the hypothetical ordinary person at all. The ideas of reasonableness were confirmed in *Taiapa v the Queen*.¹⁰⁰

The Commonwealth *Code* has been interpreted to include a purely objective test. In *R v Oblach*¹⁰¹ the appellant was convicted of importing 728.2 grams of cocaine into Australia. He asserted he was acting under duress. Threats of violence had allegedly been made toward him and his ex-wife.¹⁰² Justice Spigelman noted the differences between the duress provision in the Commonwealth *Code* s 10.2 and self-defence in s 10.4. The latter omits all references to ‘reasonable’. On that basis, and following a detailed analysis of the *Queensland Code* and authorities on the insertion of the word ‘reasonable’,¹⁰³ Spigelman J concluded:

The Code requires that the relevant belief should be objectively justifiable. What is objectively reasonable must remain the primary focus. This focus is, at the least, blurred and perhaps overwhelmed if idiosyncrasy or even perversity in the knowledge or perception of an individual accused is a permissible subject of inquiry [...] It is not appropriate to interpret the words “reasonably believes” in either s10.2 or s10.3 to encompass a formulation which the very next section of the Code expressly deploys.¹⁰⁴

⁹⁷ [2005] 2 Qd R 69 (*Smith*).

⁹⁸ *Smith* [2005] 2 Qd R 69, 77.

⁹⁹ *Ibid* 70.

¹⁰⁰ (2009) 240 CLR 95 (*Taiapa*).

¹⁰¹ (2005) 65 NSWLR 75 (*Oblach*).

¹⁰² *Ibid* 76.

¹⁰³ *Ibid* 82–83.

¹⁰⁴ *Ibid* 85.

Justice Hulme followed a similar line of reasoning.¹⁰⁵ Justice Sully agreed with, the ‘normal jurisprudential concept of an objective test seems to me to militate in favour of a purely objective test.’¹⁰⁶ In a later case, *Morris v The Queen*,¹⁰⁷ in obiter, Roberts JA approved the objective test.¹⁰⁸ McLure JA preferred a test which incorporated the characteristics of the accused, citing authorities on provocation and self-defence.¹⁰⁹ Buss JA refrained from comment.¹¹⁰ In *Taiapa*,¹¹¹ the HCA hinted that the decision in *Oblach* might require closer scrutiny, but refrained from further comment.¹¹²

An earlier version of the excuse in the Western Australian *Criminal Code Act Compilation Act 1913 (WA Code)* was found to create a purely objective standard. In *Quartermaine v Western Australia*,¹¹³ the accused was convicted as a party to a drug offence, and asserted that she was acting under duress. She asserted she was in a violent and abusive relationship with Jason Caporn, who was one of the principal offenders. The excuse as it then stood read as follows. Section 31:

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

(3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, [sic] or to another person in his [sic] presence.¹¹⁴

The Court found that ‘reasonably’ was not ambiguous, on the dubious ground that WA Code s31(3) ‘does not make any explicit reference to the belief of the accused person’.¹¹⁵ Comparisons were drawn to the *Commonwealth Code* s 10 (duress), *WA Code* s 24 (mistake of fact) and *WA Code* s 248 (self-

¹⁰⁵ Ibid 90.

¹⁰⁶ Ibid 87.

¹⁰⁷ (2006) 201 FLR 325 (*Morris*).

¹⁰⁸ Ibid 342.

¹⁰⁹ Ibid 351, citing *Stingel, Viro v The Queen* (1978) 141 CLR 88, 146 (Mason J) and *R v Conlon* (1993) 69 A Crim R 92, 98–99 (Hunt CJ). These latter two authorities did not, however, suggest that the personal characteristics of the accused were relevant.

¹¹⁰ *Morris* (2006) 201 FLR 325, 356.

¹¹¹ *Taiapa* (2009) 240 CLR 95.

¹¹² Ibid 103.

¹¹³ (2008) 26 WAR 384, 388 (*Quartermaine*).

¹¹⁴ The extracted legislation can be found in *Quartermaine* at 387. Duress is now found in *Criminal Code Act Compilation Act 1913 Code (WA Code)* s32. The new provision has not attracted much discussion. In *Smith v Western Australia* (2010) 204 A Crim R 280, 286, there was a bare assertion that the test is ‘objective’ but it was not made explicit that the test was purely objective.

¹¹⁵ *Quartermaine* (2008) 26 WAR 384, 388–389.

defence). Those sections did (and do) explicitly reference the accused's subjective beliefs. The contrast with the *Commonwealth Code* s 10 was particularly odd because as the Court noted, *R v Oblach* determined that the test be purely objective. Even if one assumes the presence of some subjective considerations in the *Commonwealth Code*, s 10 means that its reasonable requirement is purely objective, that simply cannot lead to the conclusion that their absence in *WA Code* s 31 means its objective requirement is purely objective. If we nonetheless accept that the presence of subjective factors in *WA Code* s 24 and s 248 are relevant differences, then one must still consider the interplay between s 24 and s 31. Section 24 necessarily incorporates subjective beliefs into the equation.¹¹⁶ Parliament could well be viewed as considering it unnecessary to mention subjective beliefs further. Failure to mention them, therefore, cannot determine the outcome. As the word 'reasonable' is ambiguous, resort to the common law could be made. In any event, it is submitted that not only is an absence of an explicit reference to subjective beliefs not determinative of the issue, it is irrelevant.

For all the code jurisdictions, the ordinary person formulation reflects (or ought to reflect) 'underlying notions' or principles in the law. On the HCA's view, it reflects the demands of equality. In the primary submission of this paper, it reflects the level of normativity society wishes to extract from objective standards in the criminal law. That is, both common law and code jurisdictions sit on the similar underlying principles. Whatever decision is made about normative values (or, if some consideration also of concepts such as equality, is warranted) those values must be prioritised. Although some might disagree with the further submission of this article that the underlying notions should not differ between duress and provocation, it is difficult to see why underlying notions should differ between examples of duress without clear statutory direction. As Gummow J noted in *Green*, undermining notions of equality (or, in our submission, a given normative value) is an outcome that 'is not lightly to be attributed to the legislature'.¹¹⁷ Thus, as McLure JA opined in *Morris*, the word 'reasonable' can readily import certain characteristics of the accused.¹¹⁸

¹¹⁶ The subjective element comes about because the beliefs must be honest – meaning they must be held in fact: *GJ Coles & Co Ltd v Goldsworthy* [1985] WAR 183, 187. Section 24 clearly has an application to duress: *R v Acton* [2001] QCA 155, [17].

¹¹⁷ *Green* (1997) 191 CLR 334, 386. Gummow J was in dissent as to whether the evidentiary burden had been met, but the whole Court agreed on the appropriate ordinary person test, as noted in Part II of this article.

¹¹⁸ See *Morris* (2006) 201 FLR 325, especially the text referred to above n 110.

Where the word ‘reasonable’ is omitted from elements of other excuses, it may reflect a legislative choice to have no objective requirement for that element. It does not, without more, signal an intention that the word ‘reasonable’ where it appears, connotes a purely objective formula. It remains a matter of construction in light of underlying principles, reflecting notions of equality or normativity.

4 *Provocation and Duress: Relevant Similarities*

Absent statutory interference, provocation and duress each operate similarly. The accused has an evidentiary burden to raise the excuse, and the Crown must disprove one element beyond reasonable doubt. Provocation is significantly exculpatory, duress completely so. More substantially, an ordinary person, however formulated, might be expected to have some strength of character – strength to withstand some provocation; and strength to hold firm against some threats.¹¹⁹

It is to these similarities that the Court in *Lawrence* directed attention. Comparisons in *Lawrence* to the law of provocation centred on the need to keep each excuse within proper bounds.¹²⁰ ‘The policy of the law is to discourage persons, at the moment of pressure, from giving way too easily to pressure to commit a crime’.¹²¹ Further:

Nobody would dispute that the greater the degree of heinousness of the crime, the greater and less resistible must be 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....¹²²

In *Palazoff*, Cox J noted that similar considerations underlie both duress and provocation.¹²³ Although Cox J did not provide a great amount of support for this proposition, it can readily be submitted that each relates to a person’s character development. Willpower, like self-control, is a thing that can be developed or retarded. The fact that provocation moved away from that

¹¹⁹ Compare Colvin above n 4, 215.

¹²⁰ *Lawrence* [1980] 1 NSWLR 122, at 137, 143 (Moffitt P) and 157 (Nagle CJ and Yeldham J).

¹²¹ *Ibid* 136 (Moffitt P).

¹²² *Ibid* 161 (Nagle CJ and Yeldham J), citing *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 681 (Lord Wilberforce).

¹²³ *Palazoff* (1986) 43 SASR 99, 109.

position does not lessen the need for consistency in approaches across defences. Instead, it merely highlights that there are, currently, inconsistencies.

In *Abusafiah*, the Court noted that provocation and duress are not ‘truly analogous issues’.¹²⁴ As the analysis centred on whether the test should be whether the ordinary person *could have* or *would have* succumbed to the threat, it is clear that the rejection of the comparison to provocation, if valid, has repercussions for the submission of this article. For Hunt J, provocation is about the loss of self-control and is only a partial excuse, whereas duress is about the loss of free choice and is a complete excuse.¹²⁵ Although these differences cannot be denied, the question remains one of relevance in light of strong policy reasons for uniformity. The ordinary person formulation is an underlying legal principle. As consistency in the law is necessary, strong reasons are required before different approaches are taken to what would otherwise be the same principle. There are differences, indeed, but there are also similarities between the two excuses. In any event, it is difficult to see how the differences touch and concern the basic underlying legal doctrine.

III CONCLUSION

Rather than prioritising concepts such as equality, human rights or community protections, it may be better to consider what normative value we wish, as a society, to extract from the ordinary person formula. Wherever that debate takes law-makers, it is clear that there is work to do in maintaining consistency in the law’s approach to the issue. For provocation and duress at least, the ordinary person formulation at the minimum should not vary. It should be the same between the two defences. The normative value of the ordinary person formula is a foundational, underlying principle.

For provocation, the HCA has consistently adhered to an ordinary person formula: only age is to be taken into account when assessing the ordinary person’s response to a provocative incident. The formula remains the same irrespective of differences, even some that appear substantial, across common law, statute and code. In provocation matters, the HCA consistently referred to the ‘degree of unity of underlying notions’ in the area. However, for duress, the requirements of a consistent ordinary person formulation to reflect underlying notions in the law was ignored.

¹²⁴ *Abusafiah* (1991) 24 NSWLR 531, 540.

¹²⁵ *Ibid.*

Instead, the most recent common law case, *Abusafiah*, favoured a focus on some surface-level differences between provocation and duress to justify its departure from such underlying legal principle. When considering the codified excuse of duress, Courts favoured a narrow, and at times quite bizarre, construction of the relevant code to move away from both provocation and the common law of duress. When the objective requirements for each excuse are considered in light of normative principles, one can readily see the foundational nature of the ordinary person formulation. Duress should not have a standard that varies across jurisdictions. The formulation should be the same between duress and provocation as the objectivity requirement for each sits on the same underlying principle.