Cultural blindness

CRIMINAL LAW IN MULTICULTURAL AUSTRALIA

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Ignorance of the law is no defence: a truism that operates harshly in a multicultural society.

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The last decade has seen much rethinking of the criminal law. Doctrinal concerns about coherence and certainty have been displaced by concerns about the discriminatory rules and practices embedded in the criminal law.[1] This article analyses how the criminal law responds to the demands placed on it by multiculturalism through an examination of the defence of provocation and the legal truism that 'ignorance of the law is no defence'. Provocation provides a fertile ground for such an inquiry since insults, anger and modes of violent retaliation often have a significant cultural dimension. More significantly, since provocation is a defence which is constructed around the reactions of the hypothetical 'ordinary person', it provides unique insights into the purported 'cultural blindness' of the criminal law.[2]

Similar insights are provided by an examination of the rule that 'ignorance of the law is no defence'. The rule purports to uphold the principles of equal protection and equality before the law, but in reality operates harshly in a multicultural society, unfairly penalising individuals who are unaware of the relevant prohibition and who are hindered by language and cultural barriers from finding out. We examine whether the justifications for maintaining this rule based on equality and expediency outweigh the interests of individual justice, or whether an exception which allows justifiable ignorance of law as a defence should be made on cultural grounds.

The provocation defence: the ordinary 'Anglo-Saxon-Celtic' person test

The law governing provocation, which operates to reduce murder to manslaughter,[3] reveals the tension between subjective and objective standards in the criminal law. These tensions precisely mirror the debates surrounding *mens rea* and whether the fault standard should be based on the subjective state of mind of the defendant (intent, recklessness, knowledge) or should be determined by reference to an objective standard (the mental state of a hypothetical reasonable or ordinary person placed in the defendant's position).

In the context of provocation, the question becomes whether the test for loss of self-control should be determined exclusively by reference to the subjective characteristics of the defendant or should be qualified by objective standards of self-control which can reasonably be expected from a hypothetical reasonable or ordinary person placed in the defendant's position. It should be noted that community expectations about 'reasonable' or 'ordinary' responses to provocative conduct have always limited the availability of the defence. Before the emergence of the 'reasonable man' standard,[4] these limitations took the form of substantive rules that required the defendant's retaliation to occur 'suddenly' without delay or premeditation, while at the same time being proportionate to the deceased's wrongful act or insult.[5] Over the last 20 years, the High Court has transformed the provocation defence in many ways. The 'reasonable man' has been transmogrified to the

'ordinary person', a concession both to gender neutrality and the fact that it is the ordinary person, not necessarily the reasonable prudent person, who kills in the face of provocation. Also, the rules requiring suddenness and proportionality of response have been banished from the substantive law, although they remain relevant 'factors' that the jury may use as evidence to infer that the defendant had lost self-control, and that the defendant's response is one which could be shared by the ordinary person.[6]

The High Court in *Stingel* (1990) 171 CLR 312 and more recently in *Masciantonio* (1995) 183 CLR 58 reviewed the ordinary person test and affirmed that there is a large degree of conformity between the common law and the Code provisions dealing with provocation. Stripped to its bare essentials, the question the jury must determine in a case raising provocation is whether the defendant killed in a state of loss of control in circumstances where an ordinary person, faced by that degree of provocation, could have formed the intent to kill or do grievous bodily harm. The test is whether an ordinary person *could* have done what the defendant did, corresponding to the nature and extent of the violence used by the defendant (at 69).

But before applying the ordinary person test, the jury must determine the seriousness of the provocative conduct. In determining this threshold question, the High Court held that the jury may consider any of the defendant's characteristics which affect the gravity of the provocative conduct including age, sex, ethnicity, physical features, personal attributes, personal relationships or past history (at 67). Indeed any of the defendant's personal characteristics, whether permanent or transient, are relevant provided that there is a causal connection between the provocative words or conduct of the deceased and the particular characteristic.[7]

Although relevant to determining the gravity of the provocation, the subjective characteristics of the defendant (including ethnicity) are irrelevant to the standard of self-control imposed by the law; a standard which is determined by reference to the hypothetical ordinary person facing that degree of provocation. However, this purely objective approach to self-control has drawn criticism from both academics and judges. In 1970, Professor Brett, drawing on psychological and sociological research about human behaviour under stress, demonstrated that many aspects of the provocation defence are based on fallacies about human nature. Clinical research proved that it is impossible to identify an ordinary or average response to stress situations:

> Some men are highly vulnerable to stress, others are strikingly resistant to it. This fact has been demonstrated both by clinical observation and by experiment, though it is as yet unknown why these differences should occur. It seems likely, however, that a number of factors, some genetic, others environmental, combine to produce the differences of susceptibility and response'.[8]

Similar concerns were later reflected in the views of Murphy J in *Moffa* (1977) 138 CLR 601. His proposal for an entirely subjective test for provocation was rejected by the majority, but his criticism remains a powerful challenge to the appropriateness of an objective standard in a multicultural society:

> The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances. [at 626]

These words, spoken almost 20 years ago, have even greater force in an Australian society which is now avowedly committed to multiculturalism.

These reservations about the ordinary person test did not translate into legislative reform, although in some jurisdictions the courts denuded the test of its absolute objectivity by investing the ordinary person with the ethnicity of the particular defendant. In these cases, the law maintained the pretence of the objectivity of the ordinary person test by affirming the irrelevance of the personal idiosyncrasies of the particular defendant. This approach was not only inconsistent with the rationale of the objective test, but it was difficult to identify any consistent criteria being used to identify those subjective characteristics of the defendant that could be attributed to the ordinary person and those that could not. In one Victorian case, the defendant, who killed his daughter following her revelation that she had engaged in premarital sex, was described by the trial judge as being 'Turkish by birth', 'Muslim by religion' and 'a traditionalist'. The jury was directed to consider whether an ordinary person, whose make-up included these characteristics, could have reacted in this way.[9] In the Northern Territory, where the criminal courts have a long history of accommodating Aboriginal cultural perspectives, the 'ordinary person' in the Code provision dealing with provocation is attributed with the cultural background of the defendant, and in one case that was defined by the judge as an ordinary Aboriginal male person living today in the environment and culture of a remote Aboriginal settlement.[10] Arguably such an approach is not a departure from an objective standard, but is simply legal recognition that the standard of self-control can only be determined by reference to the *dominant* culture, in that case, indigenous culture.[11]

These judicial attempts to develop a multicultural dimension to the ordinary person test have been largely thwarted by the High Court. The only qualification to the ordinary person test that the High Court has been prepared to acknowledge is age in the sense of immaturity.[12] The High Court concluded in *Stingel* that to attribute to the ordinary person other characteristics of the defendant such as gender or ethnicity would depart from the principle of equality:

> 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. [at 329]

The Australian Law Reform Commission (ALRC) has expressed similar concerns that 'a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups

would lessen the protection to all afforded by the criminal law'.[13]

These conceptions of equality are seriously flawed. Feminist scholarship has highlighted that liberal conceptions of equality (which include both formal and substantive equality rights) operate to conceal and perpetuate discrimination against women. In many facets of public life, including the criminal law, women are judged by a standard, which though ostensibly neutral, is in fact *set by and for men*.[14] Both self-defence and provocation have generated rules based on 'truths' about human nature which have excluded the experiences of women and unfairly denied the opportunity of an acquittal or partial defence to women who, with justification or excuse, kill their violent partners.[15]

There are similar dangers that the conception of equality embodied within the ordinary person test, by excluding cultural and ethnic background as a relevant consideration, conceal and perpetuate discrimination against minority groups. When a tribunal of fact is called on to decide whether the defendant's conduct complies with the standards of reasonableness or ordinariness imposed by the law whose standard is being applied? Objective standards are predicated on the existence of a 'community consensus' about what constitutes reasonable and ordinary behaviour, but where minority groups are not adequately represented either on juries or on the bench, objective standards will be determined by the values of the dominant Anglo-Saxon-Celtic culture exclusively.[16] In reality each tribunal is constructing the standard of judgment according to its own values, and though represented as an 'objective' and 'neutral' standard it produces a highly discretionary system of regulation.[17]

There are signs that cracks are beginning to appear in the ordinary person test. In *Masciantonio* the majority affirmed the objective test of self-control in *Stingel*, and the fact that the defendant's characteristics were irrelevant (Italian migrant background, limited education, and that as a result of a head injury he reacted overtly to stress and was prone to dissociative states). McHugh J, however, delivered a powerful dissent in which he rejected the majority's view that the ethnic or cultural characteristics of the defendant were irrelevant to the ordinary person test:

> **Ethnic or cultural characteristics**
>
> The ordinary person standard would not become meaningless, however, if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation 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. [at 73, footnotes omitted]

He admitted that his views on this matter had been swayed by an article by Professor Yeo[18] and conceded that the judgment in *Stingel* (to which he was party) was liable to cause injustice:

> Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities. [at 74]

Unlike the provocation test suggested by Murphy J in *Moffa*, McHugh J's proposal does not abandon objective standards. It does expose the danger that an objective standard which does not comprehend and accommodate non-dominant cultural perspectives may be discriminatory and the cause of injustice.

However, the adoption of an ordinary person standard which is sensitive to cultural variation is not without its own dangers. Such a modified standard could accommodate cultural claims about the use of domestic violence to discipline women and children, providing a partial defence to murder in communities where violence is recognised as a culturally appropriate response to provocative acts of 'domestic disobedience'. This conflict of moral imperatives, between multicultural and feminist claims to equality, is irreconcilable. There is a tendency to obscure this conflict by means of a judicial 'sleight of hand'; namely the the law merely recognises but does not condone such cultural practices.[19] Certainly a multicultural model of provocation could legitimately refuse to recognise cultural claims which are discriminatory on the grounds of gender, sexuality or age. This limitation would be consistent with the protection offered under the law of assault, where violence inflicted for the purpose of 'domestic discipline' is unlawful irrespective of the cultural practices or consent of the parties involved.[20] Moreover, it would conform to the position in international human rights law, where in cases of irreconcilable conflict, the right of minorities to enjoy their own culture, religion or language is qualified by individual rights to equality and non-discrimination.[21]

Another danger with accommodating different cultural perspectives relates to proof. In determining the reactions of an ordinary person of a particular ethnicity there is a risk that judges and juries may draw on discriminatory generalisations about the cultures of minority groups of which they have little or no understanding. These dangers can, however, be overcome by both 'out of court' measures (crosscultural training for judges and lawyers, and better representation of minorities on juries) and 'in court' assistance from independent witnesses who have expertise in cultural issues. With respect to the latter, the admission of expert testimony is a matter for the discretion of the judge, and under the common law expert opinion can only be admitted where it is based on formal qualifications acquired through study or instruction in some relevant or specialised field.[22] This restriction results in a heavy reliance on academics or specialists, and the exclusion of knowledge which has been acquired through informal means. The recent changes introduced by the *Evidence Act 1995* (Cth) and (NSW) redefine expert opinion in terms which include 'specialised knowledge acquired through . . . experience' (s.79), providing a broader range of expertise from which the judge and jury can learn about different cultural norms and values.

Ignorance of law: the cultural perspective

Criminal liability is premised on blameworthy conduct, one indicator of which is the defendant's mental state. The common law has embodied this requirement in the legal maxim, *actus non facit reum nisi mens sit rea*. Roughly translated it means an act does not make a person guilty unless the person's mind is also guilty. This state of mind is commonly called *mens rea*. The courts originally construed the guilty mind as 'an evil intention, or a knowledge of the wrongfulness of the act' which was required in every offence.[23]

Knowledge of the unlawfulness or wrongfulness of the conduct was central to the legal concept of guilt. Under the modern law, the focus of *mens rea* has shifted from a normative conception of blame to a psychological one; hence the law disregards motive, defining *mens rea* in exclusive terms as intention, recklessness or knowledge.

Although the courts originally considered knowledge of wrongfulness as an element of *mens rea*, this normative conception of blame was qualified by the effect of another legal maxim, *ignorantia juris non excusat*, that is, ignorance of the law is not a defence.[24] This rule is one of convenience, not one of justice nor one of principle.[25] One of the reasons why the maxim has remained unchallenged is the notorious 'floodgates' argument — to allow individuals to plead ignorance of the law would encourage others to do so, and the law would fail in its educative role and the criminal justice system would grind to a halt. Notwithstanding these concerns, there is some academic support for the introduction of a defence based on justifiable ignorance of law with the qualification that the ignorance of law must be 'reasonable in the circumstances' in order to counter frivolous claims and to ameliorate concern about proliferation of specious defences.[26]

The ALRC recognised that the rule that ignorance of the law is not a defence has the potential to operate harshly in a multicultural society. To punish a person for acting without knowledge of wrongfulness is unjust, and the present law reflects this position by excusing defendants who, because of their infancy or mental disorder, are unable to appreciate the legal or moral quality of their conduct. Similarly it would be unjust to punish a person who does not know, and could not reasonably be expected to know, the content of the criminal law because of language and cultural barriers. The Commission acknowledged the lack of moral blameworthiness in this situation, but rejected proposals for a defence of justifiable ignorance of law based on cultural experiences or expectations:

> The basic principle of imposing responsibility on all members of the community to know what is and is not allowed should not be disturbed merely because it is difficult for some people to know what the law is. Instead, governments and responsible agencies should improve their efforts to communicate the substance of legal restrictions to those likely to be affected by them.[27]

The problem with this recommendation is two-fold. First, as the ALRC recognised, the rejection of the proposed defence means that in these circumstances a person's conduct may be criminal, but not morally blameworthy. The principle of individual justice requires that criminal liability should not be imposed unless individuals had a fair opportunity to conform their conduct to the law.[28] Indeed in some jurisdictions, ignorance of an offence created by subordinate legislation is a defence where the person does not know, and could not reasonably be expected to know, of its existence.[29] In our view, a similar defence of justifiable ignorance of law should be enacted for a person who, due to language or cultural barriers, does not know, and could not reasonably be expected to know, of the prohibition which has been infringed. Unlike the ALRC's proposal, our approach provides governments with a legal incentive, not just a political one, to 'do the right thing'. The provision of appropriate educational materials on particular criminal laws which address these cultural and language difficulties would limit the scope of the defence; the availability of such material would provide cogent evidence that it is reasonable to expect that a person in the defendant's position ought to know and understand those laws. This approach promotes the educational function of the criminal law, while simultaneously keeping faith with the principle of individual justice by ensuring that only truly blameworthy conduct is punishable.

The second problem relates to the ALRC's recommendation that the responsibility to know the law should be applied equally to all members of the community. This conception of equality is seriously flawed — as with provocation, culpability is measured against a standard determined exclusively by reference to the dominant culture, in this context the ability and opportunity of members of the dominant culture to know and understand the applicable criminal laws. To ameliorate unfairness, the ALRC did recommend that ignorance of the law based on cultural factors should be taken into account in the exercise of the court's sentencing discretion (including the discretion not to record a conviction) and the prosecutor's discretion not to prosecute.[30]

The ALRC's proposal to give effect to the fundamental principle of individual justice by resorting to discretion at the pre-trial and sentencing stage is inherently problematic. It is widely acknowledged that minority groups are subject to a greater amount of discretionary justice and that discretion is often exercised in a discriminatory manner. As one commentator has observed:

> It is indeed ironic to leave the 'cultural defence' to discretionary procedures that have traditionally been biased against the very groups that the defence is intended to benefit.[31]

As discretionary practices are *ad hoc* and lack transparency, they cannot provide consistency in the law, nor guidance on how similar cultural factors are to be dealt with in future cases. It is our contention that these fundamental questions about criminal culpability should not be pushed to the margins, but should be tackled from within the framework of the substantive law.

Within the present framework of defences there is some scope for acknowledging ignorance which stems from cultural differences. Statutory defences of reasonable care and due diligence can be founded on reasonable ignorance of law.[32] Although the rule that ignorance of law is no defence has not developed a specific exception on cultural grounds,[33] the courts have circumscribed the scope of the rule by adopting a restrictive notion of what constitutes ignorance of law. Generally, where the defendant is acting under a mistaken view of the civil law the rule does not apply.[34] Also the law treats mistakes which relate to matters of fact and those which relate to matters of law differently. Since a mistake of fact may operate as a defence, the legal characterisation of the defendant's mistake is crucial.[35] In the High Court case of *Ianella v French* (1968) 119 CLR 84 at 114. Windeyer J in his discussion of ignorance of law and the distinction between matters of fact and law held that foreign law was a matter of fact. By analogy, a mistake based on customary law ought also to be regarded as one of fact. The Court also held that a mistake based on both law and fact would be treated as a mistake of fact. In many cases it will be unclear whether the mistake is strictly one of law (a belief that the Australian law permits the particular conduct) or one of fact (a belief that under foreign law or custom this practice is lawful). In cases of uncertainty, the 'mixed mistake' rule is likely to apply, and courts will regard the mistake as one of fact.[36]

Another exception to the ignorance of law rule, the claim of right defence, has the potential to accommodate the defendant's cultural beliefs. But as we shall see this cultural accommodation is both indirect and incomplete. This is

because the defence is not premised on the legitimacy of those cultural beliefs, but rather on the defendant's ignorance of law. A claim of right is a common law defence that is applicable only to property offences, arising where a person acts under the belief that they are entitled in law to engage in the conduct concerned.[37] Only a legally recognised claim of right will be taken into account, albeit that claim may be based on a mistaken view of the facts or the law.[38] A moral claim of right is not recognised and is unlikely ever to be recognised.[39] To be effective, the belief in a legal entitlement to the property must relate to the law of the relevant State or Territory, and therefore claims based exclusively on customary law are not effective. However, the clarity of this distinction is muddied by the growing judicial recognition of international and customary law norms within the fabric of domestic law. Thus a claim of right defence may be effective where it is based on a belief that the custom is one which is recognised by the law of the relevant State or Territory. An example of this type of claim of right is a belief that Australian law, following Mabo, requires the recognition of rights under Aboriginal customary law. Such a belief may provide a valid defence even where this belief is not based on reasonable grounds or is wrong as a matter of law.[40] A similar belief that a cultural practice or rule is recognised by Australian law should provide a valid basis for a claim of right defence.

The ALRC rejected the proposal for a general cultural defence, though it did recognise that for some offences a special exemption on cultural grounds should be enacted. The ALRC argued that the enactment of a cultural defence or even widespread cultural exemptions would mean that the obligations under the criminal law would be determined by reference to one's membership of a particular cultural or ethnic group — not only are the parameters of this defence difficult to draw, but such a defence would violate the principles of equality. But it does not follow that ignorance of law is therefore irrelevant to the question of culpability where the defendant, due to language or cultural barriers, did not know and could not reasonably be expected to know of the existence of the offence. In these situations, the law should acknowledge these cultural perspectives by providing a defence — this is not the creation of a special multicultural defence, but rather further evidence of our legal system's commitment to the fundamental principle of individual justice. There may be fears that the defence could be abused for serious offences like murder. But such fears are unfounded. Crosscultural claims of ignorance of law would be unlikely to be justifiable for many core offences. As Professor John Braithwaite has pointed out, criminological research has established that there is 'a global consensus about a set of core offences which are regarded as crimes by citizens everywhere: murder, assault, rape, robbery, theft, fraud'.[41] Accordingly, defendants raising ignorance of law in these cases would find it extremely difficult to establish that their ignorance of law was 'reasonable' in the circumstances.

Conclusion

The tension between individual justice and broader interests of the community lies at the heart of many debates in the criminal law. Multiculturalism builds a symbolic bridge between these two values. Incorporating different cultural perspectives into the substantive rules allows the law to address those individual differences which derive from membership of a distinct cultural group. It does not abandon the question of culpability to the perils of subjectivity, but rather ensures that the objective standard that is applied is one which accommodates non-dominant cultural perspectives. It has been suggested that the function of the criminal law, as well as to prevent harm to others, is to promote the welfare of the community.[42] The principle of welfare is not simply morality in another form — rather it encompasses the values, needs and interests which a community has decided, through its democratic processes, are fundamental to its functioning and, therefore, require protection by the criminal law. It is undeniable that the Australian people through their elected representatives are now committed to a policy of multiculturalism. The task for the legal system is to embrace an inclusive rather than exclusive conception of 'community', one which recognises the many different communities which exist in Australia, and to develop a criminal justice system which can be responsive to those different cultural values, needs and interests.

References

1. See for example, Lacey, N., Wells, C. and Meure, D., *Reconstructing Criminal Law*, Weidenfeld and Nicolson, 1990; Norrie, A., *Crime, Reason and History*, Weidenfeld and Nicolson, 1993; Brown, D., Farrier, D. and Weisbrot, D., *Criminal Laws*, Federation Press, 1996, 2nd edn. This scholarship may be contrasted with the rethinking of an earlier generation of criminal lawyers — a 'rationalising enterprise' typified by the influential treatises of Fletcher, G., *Rethinking the Criminal Law*, Little, Brown and Co., 1965 and Williams, G., *Criminal Law — The General Part*, Stevens, 1961, 2nd edn.
2. This feature is not unique to provocation. See also the defence of duress which employs a hypothetical person of 'ordinary firmness of mind and will': *Abusafiah* (1991) 24 NSWLR 531. By contrast self-defence does not apply a hypothetical person test, but rather requires the defendant's actual belief (that it is necessary to do what he or she did in self-defence) to be based on reasonable grounds: *Zecevic* (1987) 162 CLR 645.
3. In the Code States of Queensland and Western Australia, provocation also operates as a defence to assault offences. The High Court recently held that provocation is not a defence to attempted murder: *McGhee* (1995) 183 CLR 82.
4. The reasonable man of provocation emerged at a relatively late stage, first appearing in *Welsh* (1869) 11 Cox 336.
5. Also the law originally provided that 'mere words' could not constitute provocation: see *Holmes* [1946] AC 588 at 600. This strict rule was relaxed by the High Court in *Moffa* (1977) 138 CLR 601 and abolished by statute in some jurisdictions: s.23(2)(a), *Crimes Act 1900* (NSW) provides that 'grossly insulting words' may constitute provocation.
6. *Johnson* (1976) 136 CLR 619, 639-640. Similar developments occurred in the law governing self-defence: see *Zecevic* (1987) 162 CLR 645.
7. *Croft* [1981] 1 NSWLR 126.
8. Brett, P., 'The Physiology of Provocation' [1970] *CrimLR* 634 at 637.
9. *Dincer* [1983] 1 VR 460 at 466-467, per Lush J. See also *Voukelatos* [1990] VR 1 at 24, where Hampel J held that psychotic illness could be a characteristic attributable to the ordinary person even where that illness may have been induced by the defendant's chronic alcoholism.
10. *Jabarula v Poore* (1989) 68 NTR 26 at 33.
11. The Privy Council, hearing an appeal from the West African Court of Appeal, recognised the objective standard for provocation must accommodate the dominant indigenous cultural perspectives: 'The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable': *Kwaku Mensah* [1946] AC 83 at 93, per Lord Goddard.
12. Cf in England, the House of Lords has been prepared to acknowledge the relevance of gender, as well as age, to the ordinary person test: see *Camplin* [1978] AC 705 at 708.
13. ALRC, 'Multiculturalism and the Law', Report No. 57, 1992, p.187.
14. Lacey, N., 'Legislation against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411.
15. The literature exposing this embedded gender bias in these homicide defences is voluminous: see Sheehy, S., Stubbs J. and Tolmie, J., 'Defending Battered Women on Trial: the Battered Woman Syndrome and its Limitations' (1992) 16 *CrimLJ* 369; O'Donovan, K., 'Law's Knowledge: The Judge, The Expert, The Battered Woman and her Syndrome' (1993) 20 *Journal of Law and Society* 427; Leader-Elliott, I., 'Battered But Not Beaten: Women Who Kill in Self-Defence' (1993) 15 *Sydney Law Review* 403. In addition to the removal of many of the overtly discriminatory rules governing self-defence and provocation, expert evidence on battered woman's syndrome is now admitted to

combat the myths about women who remain in a violent relationship: see *Runjanjic* (1991) 53 A Crim R 362; *Kontinnen*, (unreported decision of Supreme Court, South Australia, 27 March 1992); *Lavallee* [1990] 1 SCR 852.

16. ALRC, above, pp.183-4
17. Lacey, N., Wells, C. and Meure, D., *Reconstructing Criminal Law*, Weidenfeld and Nicolson, 1990, p 33.
18. Yeo, S., 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3.
19. Indeed a similar argument is used to justify sentencing decisions where payback by spearing within Aboriginal commuities, while not condoned, is recognised as a factor relevant to the mitigation of sentence: see *R v Minor* (1992) 70 NTR 1 at 11, per Mildren J; *R v Wilson Jagamara Walker* unreported, Supreme Court of the Northern Territory, Martin CJ, 10 February 1994, SCC No. 46 of 1993.
20. See *Watson* [1987] 1 Qd R 440. By contrast, the law still permits adults to use some force for the 'reasonable chastisement' of children.
21. See Evatt, E., 'Cultural Diversity and Human Rights' in P. Alston (ed.), *Towards an Australian Bill of Rights*, Centre for International and Public Law, Australian National University and Human Rights and Equal Opportunity Commission, Camberra, 1994.
22. *Weal v Bottom* (1966) 40 ALJR 436.
23. *Sherras v De Rutzen* (1895) 1 QB 918 at 921 per Wright J. See also *Tolson* (1889) 23 QB 168 at 172 per Wills J.
24. The rule has been enacted in s.9(3), *Criminal Code Act 1995* (Cth). Mistake and ignorance are conceptually different, reflected in the earlier debates whether a mistake of law (positive belief) or ignorance of law (absence of belief) should ground a defence: see Keedy, E., 'Ignorance and Mistake in the Criminal Law' (1908) 22 *Harvard Law Review* 77, cf Hall, J., *General Principles of Criminal Law*, 2nd edn, 1960. The better view, reflected in s.9(3), is that there is no legal difference between mistakes and ignorance: 'ignorance is the genus of which simple ignorance and mistake are the species' in Williams, G., *Criminal Law: The General Part*, 2nd edn, 1961, pp.151-2.
25. Several justifications have been provided for the rule including the presumption that everyone should know the law: see Blackstone, W., 4 *Commentaries* 27; utilitarianian arguments: see Holmes, O., *The Common Law*, 1881, p.48; pragmatic concerns: see Austin, J., *Jurisprudence*, 1861, p.688; and more recently and more interestingly, duties of citizenship: Ashworth, A., *Principles of Criminal Law*, 1991, p.209. Ashworth argues that each citizen has a duty to acquaint themselves with the criminal law. For criticism of Ashworth's views see Husak, D., 'Ignorance of Law and Duties of Citizenship' (1994) 14 *Legal Studies* 105.
26. Husak, D., above, p.115; Amirthalingam, K., 'Mistake of Law: A Criminal Offence or A Reasonable Defence' (1994) 18 *CrimLJ* 271.
27. ALRC, above, p.179.
28. See Hart, H.L.A., *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford, 1968, pp.180-3. 'Criminal law is concerned with social control through the deterrence of crime, but it is a system of control qualified by the requirement that justice be done to the individual': Norrie, A., 'Freewill, Determinism and Criminal Justice' (1983) 3 *Legal Studies* 60.
29. See s.9(4), *Criminal Code Act 1995* (Cth); *Lim Chin Aik* [1963] AC 160 (Privy Council).
30. ALRC, above, pp.179-81.
31. See Editorial Note, 'The Cultural Defence In the Criminal Law', (1986) 99 *Harvard Law Review* 1293 at 1298.
32. Amirthalingam, K., above, ref.26, pp.277-80.
33. *R v Esop* (1836) 7 C & P 456; 173 ER 203.
34. *Maintenance Officer v Starke* [1977] 1 NZLR 78; *Bonollo* [1981] VR 633.
35. For crimes of *mens rea*, a mistake of fact (which if true would render the defendant's conduct innocent) will operate as a defence even though the mistake is unreasonable in the circumstances: *DPP v Morgan* [1976] AC 182. For crimes of strict liability (where *mens rea* is not required), a mistake of fact to operate as a defence must be reasonable in the circumstances: *He Kaw Teh* (1985) 157 CLR 523.
36. *Thomas* (1937) 59 CLR 279.
37. The common law defence has been codified in some jurisdictions, see s.9(5), *Criminal Code Act 1995* (Cth); s.22, *Criminal Code* (Qld), s.22, *Criminal Code* (WA); s.12, *Criminal Code* (Tas.). In those jurisdictions adopting the UK model of the *Theft Act*, a belief based on claim of right negates dishonesty: see s.73(2)(a), *Crimes Act 1958* (Vic); s.96(4)(a), *Crimes Act 1900* (ACT).
38. *Bernhard* [1938] 2 KB 264, *Walden v Hensler* (1987) 163 CLR 561, *Mitchell v Norman; Ex parte Norman* [1965] Qd R 587, *R v Love* (1989) 17 NSWLR 608.
39. *Walden v Hensler* (1987) 163 CLR 561.
40. For consideration of the arguments for the recognition of an inherent Aboriginal criminal jurisdiction which survived settlement, see Yeo, S., 'Recognition of Aboriginal Criminal Jurisdiction' (1994) 18 *CrimLJ* 193. The High Court, per Mason CJ, recently rejected these claims to recognition in *Walker v New South Wales* (1994) 182 CLR 45.
41. Braithwaite, J., 'Towards Criminology' in K.Hazlehurst (ed.), *Crime and Justice: An Australian Textbook in Criminology*, LBC Information Services, 1996.
42. Lacey, N., *State Punishment*, Routledge and Kegan Paul, 1988.

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Specifically in resolving or improving the plight of immigrant women:

further modification of the immigration laws as they affect battered women;

improving migrant women's access to information about their rights;

further screening of sponsors;

improving migrant women's access to information about domestic violence and services;

improvements to refuges and more assistance for women trying to leave the violence;

increased outreach programs for remote and rural areas;

appropriately skilled and bilingual workers;

greater co-ordination of government services.

Violence against women is about control. Policies and practices that are constructed without an understanding of what it means both to be a migrant and a battered woman collude in the victimisation of these women. It is also too easy to ignore or minimise the predicaments of people whose words we may not understand. And yet if we look a bit closer and start to put names like Marguerite, Safia, Melina, Thu, Maria and Rajendra to the numbers, then perhaps they become a little harder to forget and their hope of a better tomorrow becomes a tenable dream.

References

1. In *Killing the Beloved* (1993) Easteal pointed to a higher than expected incidence of marital homicide among overseas-born, speculating that it could reflect either a higher incidence of domestic violence or a lower reporting rate.
2. Easteal, Patricia, *Shattered Dreams, Marital Violence Against Women: the Overseas-Born in Australia*, Bureau of Immigration and Multicultural Population Research, Melbourne, 1996. The research was conducted with a grant from the Bureau.