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ENGLISH REFORM OF PROVOCATION AND DIMINISHED RESPONSIBILITY: WHITHER SINGAPORE?

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English penal statutes, especially those of recent origin, are generally of little or no relevance to Singapore due to the fact that we have our own comprehensive set of penal legislation centred around the *Penal Code*[1]. However, there are occasions when a recent English statute is highly significant to Singapore because it revises an area of law which our courts or legislature had borrowed from the English law. The provisions in the *Coroners and Justice Act 2009*[2] dealing with the defences of provocation and diminished responsibility, fit this description.

The defence of provocation is governed by Exception 1 to section 300 of our *Penal Code* (hereinafter called "Exception 1"). Despite the "reasonable person" test devised by English common law not being featured in the wording of the exception, our courts have made it an essential requirement of the defence, and closely followed English common law pronouncements on the test. The *Coroners and Justice Act* abolishes the common law defence of provocation and replaces it with a defence of "loss of control" which nevertheless retains a test of reasonableness for the provocative conduct and the accused's response to it. This new test embodies certain aspects of the common law "reasonable person" test but modifies others. Consequently, our courts will no longer be permitted to follow English decisions based on this new defence provision without qualification. It would also be prudent for our legislators to ascertain the changes to the English law and the reasons for them, and whether or not Exception 1 should be amended to follow suit.[3]

The defence of diminished responsibility appears as Exception 7 to section 300 of our *Penal Code* (hereinafter called "Exception 7") and is virtually identical to

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1 Cap. 224, 2008 Rev. Ed. Sing. [*Penal Code*].

2 (U.K.), 2009, c. 25 [*Coroners and Justice Act*]. The Act applies to England, Wales and Northern Ireland and received Royal Assent on 12th November 2009.

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

section 2 of the English *Homicide Act, 1957*[4]. Due to its origin, our courts have adopted English judicial pronouncements on the various requirements of the defence. The *Coroners and Justice Act* retains the defence of diminished responsibility but makes certain material changes to its requirements with a view to clarifying the law and rendering the defence more workable in practice. Given this background, our legislators would want to evaluate the revised English version of the defence to see if it should replace the current Exception 7.

The English revisions to provocation and diminished responsibility were the culmination of lengthy and carefully considered deliberations by two Law Commissions[5] and by the Ministry of Justice[6]. These bodies had consulted extensively with stakeholders, academics, legal practitioners and interested community organizations, and conducted an impact assessment[7] that the proposed changes to the law will have on the criminal justice system. The Ministry of Justice declared that the aim of this comprehensive exercise was "to ensure that the law in this area is just, effective and up-to-date, and produces outcomes which command public confidence"[8]. For this reason alone, our legislators should give serious consideration to the English revisions, mindful of course that there may be Singaporean cultural or social conditions and mores which dictate against adopting these revisions.

It is also worth highlighting that the English revisions have been made in the context of leaving the law of homicide intact. In particular, murder continues to be a single offence attracting a mandatory penalty; and the newly revised partial defences have the effect of reducing the crime of murder to manslaughter. This accords broadly with the Singaporean law of homicide which likewise regards murder as a single offence attracting a mandatory penalty, and with the partial defences of provocation and diminished responsibility reducing that offence to one of culpable homicide not amounting to murder. Accordingly, when studying the English revisions, our legislature need not be concerned that they have been devised in the light of variables pertaining to the structure of murder or its penalty, which it might not be prepared to adopt.

I. The Partial Defence to Murder of Loss of Control

This defence, which is expressed in sections 54 and 55 of the *Coroners and Justice Act*, seeks to solve a number of problems with the defence of provocation which it replaces.[9] Those problems were that the defence of provocation was "a confusing

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4 (U.K.), 5 & 6 Eliz. 2, c. 11 [*Homicide Act*]. It was introduced into the *Penal Code* in 1961.

5 Namely, U.K., Law Commission, *Partial Defences to Murder* (2004) ["The Partial Defences Report"]; and U.K., Law Commission, *Murder, Manslaughter and Infanticide* (2006) ["The Murder Report"].

6 U.K., Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law* (Consultation Paper CP19/08) (2008) ["The Ministry's Consultation Paper"]. See also the Ministry's response to consultation in U.K., Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law. Summary of responses and Government position* (Response to Consultation CP(R) 19/08) (2009) ["The Ministry's Response Paper"].

7 U.K., Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law. Impact Assessment* (2008).

8 The Ministry's Consultation Paper, *supra* note 6 at para. 10.

9 As a result, s. 3 of the *Homicide Act* concerning questions of provocation to be left to the jury, ceases to have effect.

mixture of common law rules and statute"[10], there was continuing uncertainty over the qualities of the "reasonable person" in the law of provocation, and over what constitutes permissible provocative conduct. Furthermore, the defence privileged men's typical reaction to provocation over women's by being too generous to those who killed in anger and too hard on those who killed from fear of serious violence. The new defence has two parts which share common features except that the "qualifying trigger" for each differs. For the first part, the accused's loss of self-control is attributable to his or her "fear of serious violence" from the deceased against the accused, while for the second, the loss of self-control is the result of conduct or words or both which caused the accused to have "a justifiable sense of being seriously wronged". To distance itself from the former defence which it replaces, the new one avoids the use of the term "provocation".[11]

The "fear of serious violence" part of the new defence involves the doctrine of excessive self-defence, and has been premised on the English law of self-defence.[12] That law differs from Singapore law in at least one important respect, which is that the accused need only honestly belief the nature of the threat[13], whereas our *Penal Code* provisions on self-defence require that belief to have been based on reasonable grounds[14]. Accordingly, it would be unhelpful for our legislature to consider this part of the new defence. This comment will therefore confine itself to the "conduct and words" part because it is the one which relates most closely with Exception 1.

A. *The "Reasonable Person" Requirement at Common Law*

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

> [T]he reasonable man … is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him …[15]

Based on this pronouncement, the law's recognition of an accused's personal characteristics or circumstances will depend on the function served by the recognition. If it pertains to assessing the gravity of the provocation, *any* of the accused's personal characteristics or circumstances would be relevant if it had the effect of

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[10] The Murder Report, *supra* note 5 at para. 5.3.

[11] The Ministry's Response Paper, *supra* note 6 at para. 85.

[12] See further, the Ministry's Consultation Paper, *supra* note 6 at paras. 26-30.

[13] See *R. v. Gladstone Williams* (1984) 78 Cr. App. R. 276; *Beckford v. R.* [1988] A.C. 130 (P.C.) and embodied in s. 76(4) of the *Criminal Justice and Immigration Act 2008* (U.K.), 2008, c. 4.

[14] See especially, s. 100(a) and (b) of the *Penal Code*, and the discussion in Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2007) at paras. 20.24–20.26.

[15] [1978] A.C. 705 at 718 (H.L.) [*Camplin*].

enhancing the provocation. However, over the years, judges and commentators have sought to qualify this aspect of the *Camplin* pronouncement by suggesting that the defence should be withheld when it might be seen as condoning some quite socially unacceptable response to provocation. Take, for example, a white racist killing a coloured person for speaking to him[16], or a carer killing an infant who would not stop crying[17].

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

Where the function served by the recognition of the accused's characteristics or circumstances pertains to the measure of self-control expected of a reasonable person, then, according to the *Camplin* pronouncement, only the accused's sex and age are relevant. This area of the law has elicited controversy among the English judges, with the House of Lords holding in *R. v. Smith (Morgan)*[18] that an accused's mental deficiency could also be taken into account when assessing a reasonable person's power of self-control, which view was not followed by the Privy Council four years later in *Attorney-General for Jersey v. Holley*[19].

The *Camplin* pronouncement has been adopted by our courts so as to form part of the defence of provocation under Exception 1.[20] Consequently, the same concerns and controversies besetting the English common law have found their way into our law. With respect to personal characteristics and circumstances of an accused affecting the gravity of the provocation, our judges and commentators have likewise found it necessary to deny the defence to a person where, otherwise, the law could be seen as condoning socially unacceptable responses to provocation. Thus, the Singapore Court of Appeal has rejected the plea of provocation by an accused who had killed a young child who was throwing a tantrum.[21] For the same reason, local commentators have suggested that our courts are unlikely to accept the leader of a Chinese triad society killing a subordinate for showing disrespect to him in breach of the society's code of conduct.[22] As for the accused's personal characteristics or

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[16] See Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 144.

[17] *R. v. Doughty* [1986] Crim. L.R. 625.

[18] [2001] A.C. 146 (H.L.) [*Smith (Morgan)*].

[19] [2005] 2 A.C. 580 (P.C.) [*Holley*] and subsequently endorsed by the Court of Appeal in *R. v. James; R. v. Karimi* [2006] 1 All E.R. 759 (C.A.).

[20] For example, see *Ithnin bin Kamari v. Public Prosecutor* [1993] 1 S.L.R.(R.) 547 at para. 40 (C.A.); *Public Prosecutor v. Kwan Cin Cheng* [1998] 1 S.L.R.(R.) 434 at paras. 48–50 (C.A.); *Lau Lee Peng v. Public Prosecutor* [2000] 1 S.L.R.(R.) 448 at para. 29 (C.A.).

[21] *Mohammed Ali bin Johari v. Public Prosecutor* [2008] 4 S.L.R.(R.) 1058 (C.A.) [*Mohammed Ali*].

[22] Yeo, Morgan and Chan, *supra* note 14 at para. 29.40, citing the observation by Beg J. in the Indian case of *Akhtar v. State* A.I.R. 1964 All. 262 at 269 that "provocation … must … be capable of being considered grave, according to the norm and standards which govern the accused … In every case, the test applied is an objective one in the sense that it must be capable of acceptance by reasonable men".

circumstances affecting the reasonable person's power of self-control, the Singapore Court of Appeal has considered the judicial controversy in England and ruled in favour of the Privy Council decision in *Holley*.[23]

B. *The "Reasonable Person" Requirement under the New Defence*

For the purposes of this comment, the relevant parts of the defence of loss of self-control involving the qualifying trigger of conduct and words (hereinafter called "the new defence"), state as follows:

> 54 (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder [but of manslaughter] if –
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
>
> (b) the loss of self-control had a qualifying trigger, and
>
> (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
>
> (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
>
> (3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
>
> (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
>
> 55 (1) This section applies for the purposes of section 54.
>
> …
>
> (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which –
>
> (a) constituted circumstances of an extremely grave character, and
>
> (b) caused D to have a justifiable sense of being seriously wronged.
>
> …
>
> (6) In determining whether a loss of self-control had a qualifying trigger –
>
> …
>
> (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

Although the expression "reasonable person" is dispensed with, a test of reasonableness nonetheless features prominently in the new defence. That test appears in two parts—in the description of the type of provocation which the law will recognise; and in the reaction of a person with a normal degree of tolerance and self-restraint to the provocation.

In respect of the description of the provocation, section 55(4) states that it must have comprised things done or said or both which "constituted circumstances of

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[23] *Mohammed Ali*, *supra* note 21 at paras. 91–94.

an extremely grave character, and caused the accused to have a justifiable sense of being seriously wronged". While the description "extremely grave character" informs the jury that the provocation must have been exceptional, it is the latter portion of this clause which imposes a significant limitation on the permissible types of provocation. The Law Commission which had proposed this restriction, recognised that it was controversial since the common law of provocation does not have any restrictions on the kinds of provocation which might be considered by the jury.[24] In the following statement, the Commission helpfully elaborated on how the jury are to decide on whether there was a "justifiable sense of being seriously wronged":

> The jury may conclude that the defendant had no sufficient reason to regard [the deceased's conduct] as gross provocation, or indeed that the defendant's attitude in regarding the conduct as provocation demonstrated an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilized society.[25]

This restriction on the type of provocative conduct has the effect of confining the personal characteristics or circumstances of the accused to those which could make a jury sharing them to have a justifiable sense of being seriously wronged. This would undoubtedly exclude characteristics such as those referred to in the quote above, as well as others such as homophobia, misogyny and possessing the values of a criminal sub-cultural group. It would also exclude circumstances like being provoked by a incessantly crying infant or a "nagging" wife.

In order not to endorse male violence against women who confess to adultery or seek to leave a relationship for another man, the new defence explicitly provides that "the fact that a thing done or said constituted sexual infidelity is to be disregarded"[26]. This measure was opposed by several respondents to the Ministry of Justice's consultation paper who contended that the defence should succeed if the other requirements of the defence were met, that sexual infidelity constituted an exceptional circumstances which gave the accused a justifiable sense of being seriously wronged, and the jury accepted that a person of ordinary tolerance and self-restraint could have acted in the same way.[27] In response, the Ministry did not accept that sexual infidelity should ever provide the basis for a partial defence to murder, and was adamant that it should be made explicitly clear statutorily that sexual infidelity should not provide an excuse for killing.[28]

Regarding the objective appraisal of the reaction to the provocation, section 54(1)(c) embodies the *Camplin* pronouncement by stating that "a person of D's [the accused's] sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D". For added clarity, section 54(3) goes on to say that "the reference to 'the circumstances of

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[24] The Murder Report, *supra* note 5 at paras. 5.62–5.66.

[25] The Partial Defences Report, *supra* note 5 at para. 3.70. See further A. Norrie, "The Coroners and Justice Act 2009—Partial Defences to Murder (1) Loss of Control" (2010) Crim. L. Rev. 275 at 277-279 who suggests that the underlying philosophy of this restriction is "imperfect justification": "the conduct is wrong, but, in that overall setting, invokes an element of justification".

[26] S. 55(6)(c), *Coroners and Justice Act*.

[27] The Ministry's Response Paper, *supra* note 6 at para. 48.

[28] *Ibid*. at para. 54.

D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint". These statutory provisions put to rest the controversy at common law represented in cases like *Smith (Morgan)* and *Holley* over whether other personal characteristics of the accused, besides age and sex, might be relevant when assessing the power of self-control that is expected of the reasonable person in the circumstances of the accused.

The recognition of an accused's age is relatively uncontroversial, the underlying rationale being that the law would be unrealistic and unduly harsh to insist on an emotionally and mentally immature youth possessing the capacity for tolerance and self-restraint of an older person. However, issue may be taken over recognising an accused's sex. The implication of doing so is to condone the highly debatable proposition that women generally have a higher capacity for tolerance and self-restraint than men. Such stereotyping perpetrates the image of women who kill as either aberrational and evil monsters or excessively pathological. This would have explained why the Law Commission only included age but not sex in its proposed reformulation of the defence of provocation.[29] The Ministry of Justice does not explain its inclusion of sex in the new defence provision, and it is quite possible that this was an oversight since the Ministry's assessment report describes the new defence as "retaining a requirement for a loss of self-control, but amended to make it more gender-neutral"[30]. If the inclusion of sex was deliberate, the Ministry might have had in mind the purportedly *lower* capacity for tolerance and self-restraint of battered women in violent domestic relationships who kill their male battering partners. Should this have been the case, the Ministry may be criticized for not accepting the social reality that female homicides might be exceptional because they are rare but they are the actions of ordinary or normal women who have been pushed to the extreme. Furthermore, the Ministry's stance fails to recognise that the battered partner of a domestic violent relationship need not always be a woman, but could be a male.[31] In sum, it is submitted that the new defence should have insisted on a single standard of tolerance and self-restraint for both sexes.

Singapore's law on provocation could benefit greatly by incorporating into Exception 1 the description under the new English defence of the permissible types of provocation. Presently, all that the exception says is that the provocation must have been "grave", providing no guidance whatsoever to the courts as to when this condition is made out. By requiring the provocation to have caused the accused "to have a justifiable sense of being seriously wronged", the English defence provides an objective test based on contemporary community values and standards by which to measure the provocation experienced by the accused. Certainly, our courts have the ability to adopt this test or devise a similar one without waiting for the legislature to do so. But having the test expressed in statutory form ensures that the law

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[29] The Murder Report, *supra* note 5 at paras. 5.11 and 5.38. See also the Partial Defences Report, *supra* note 5 at para. 3.78 where the Commission argued that the law should be gender neutral unless it was absolutely necessary not to be.

[30] *Supra* note 7 at 13.

[31] As pointed out by Kirby J. in the High Court of Australia case of *Osland v. R.* (1998) 197 C.L.R. 316 at para. 160 (H.C.A).

has the qualities of precision, comprehensibility, being democratically made, and accessible.[32]

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

Our law on provocation would likewise be significantly improved were the English defence's requirement of "a person of [the accused's] age, with a normal degree of tolerance and self-restraint", be incorporated into Exception 1. Once again, it would be preferable for such a requirement to be statutorily expressed rather than left to be pronounced by our courts. Such a development would not comprise a radical departure from our current law which, as previously noted, has adopted the relevant rulings in *Camplin* and *Holley* on this matter. The only change would be that the accused's sex would be taken out of the equation. This legislative move would also resolve the controversy over whether an accused's ethnicity should be recognised, especially in relation to foreign visitors or workers.[33] The fact that England, which has much larger numbers of such people on its shores, has chosen not to recognise ethnicity as having a bearing on the normal degree of tolerance and self-restraint, is highly persuasive for Singapore to do the same.

C. *The "Suddenness" Requirement*

As its name indicates, a core feature of the new defence is that the accused must have killed while deprived of his or her self-control. While agreeing with the Law Commission that the concept of loss of self-control posed difficulties of interpretation and application[34], the Ministry of Justice nevertheless thought that it should form part of the defence in order to deny it to cold-blooded killers[35]. Loss of self-control is specified in section 54(1)(a) and, as an additional measure, section 54(4) denies the defence to a person who had "acted in a considered desire for revenge"[36].

Having determined thus, the Ministry turned its attention to the temporal issues surrounding the concept. It accepted the longstanding concern expressed by commentators and organisations supporting victims of violence that the common law

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[32] These were the qualities which Thomas Macaulay, the principal framer of the Indian Penal Code from which our own code is derived, said made a good code: see further Yeo, Morgan and Chan, *supra* note 14 at paras. 38.5–38.11.

[33] Chan Wing Cheong, "The Present and Future of Provocation as a Defence to Murder in Singapore" (2001) Sing. J.L.S. 453 at 462–463.

[34] Leading the Commission to recommend removing the concept altogether as a requirement of the defence: see the Murder Report, *supra* note 5 at paras. 5.17–5.19.

[35] The Ministry's Response Paper, *supra* note 6 at para. 62.

[36] This requirement was proposed by the Law Commission on account of its recommendation to remove the requirement of loss of self-control. The Ministry's inclusion of this requirement, in addition to that of loss of self-control, seems superfluous since it is difficult to imagine a defendant who is deprived of his or her self-control to simultaneously have "a *considered* desire for revenge".

defence of provocation tended to favour the typical male reaction to provocation of reacting to it immediately. This tendency had the undesirable effect of excluding the defence from defendants, particularly women, whose reaction was delayed or built up gradually. Accordingly, the Ministry included section 54(2), which declares that "it does not matter whether or not the loss of control was sudden"[37].

One insight which our own legislature could gain from these English deliberations is that the concept of lost self-control appearing in Exception 1 should be retained, despite its ambiguity. Another is that it would enhance the clarity of the law to introduce into Exception 1 a subsection along the lines of section 54(2) of the English legislation which makes it clear that the loss of self-control need not be sudden.[38] In this regard, there appears to be a common misconception that the stipulation under Exception 1 that the provocation must have been "sudden" is concerned with this issue.[39] The correct position is that "sudden provocation" is distinguishable from "sudden loss of self-control", with the former being concerned with the deceased offering the provocation unexpectedly, while the latter involves the accused's reaction to such provocation.

The description of provocative conduct in section 55(4) of the English legislation does not expressly require such conduct to have occurred suddenly, preferring instead for suddenness of the provocation, if it formed part of the evidence, to be considered under the phrase "circumstances of extremely grave character". This is very much in line with the suggestion made by one local commentator that the suddenness of the provocation should be regarded together with the gravity of the provocation as indicated by the words "grave and sudden provocation" found in Exception 1.[40] This approach would render the analysis a holistic one, which evaluates the response elicited by the provocation and not simply whether the provocation was in fact "sudden". All told, should the proposal be adopted to incorporate within Exception 1 the description of provocative conduct found in section 55(4) of the English legislation, serious consideration should be given to dispensing with a separate requirement that the provocation must have been sudden.

II. The Partial Defence to Murder of Diminished Responsibility

The main impetus for reforming this defence was because the previous provision was very poorly drafted, resulting in ambiguity and including concepts which were not known to psychiatrists and out of step with clinical science. One highly respected English judge went so far as to decry the wording of that provision as "disastrous"

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[37] The Ministry's Response Paper, *supra* note 6 at para. 66.

[38] Certainly, there have been occasions when our courts, like their English counterparts, have risen to the occasion without the benefit of any express wording of Exception 1, to allow the defence to operate in cases where there was an interval of time between the final triggering provocative incident and the homicidal act of the accused: see, for example, *Koh Swee Beng v. Public Prosecutor* [1991] 2 S.L.R.(R.) 662 at para. 11 (C.A.). There is no need for Exception 1 to also introduce s. 54(4) of the English legislation for the reason given in note 36 above. Our courts have held that a killing motivated by revenge runs counter to one that was done under loss of self-control: see, for example, *Public Prosecutor v. Sundarti Supriyanto* [2004] 4 S.L.R.(R.) 622 at para. 137 (H.C.).

[39] For example, see Tan Seng Teck, "Battered Women Who Kill and the Defence of Provocation—A Malaysian Perspective" (2008) The Law Review 466.

[40] Chan Wing Cheong, "Criminal Law" (2004) 5 Sing. Ac. L. Ann. Rev. 208 at paras. 10.39–10.40.

and "beyond redemption".[41] The revised defence seeks to rectify these problems by drawing upon the New South Wales experience.[42] The English provision on diminished responsibility, which appeared as section 23A of the New South Wales *Crimes Act 1900*, was significantly amended in 1997 after years of struggling with that provision in the courts.[43]

For the purposes of this comment, the relevant parts of the revised section 2 of the *Homicide Act* read as follows:

2 (1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which –
  (a) arose from a recognised medical condition,
  (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
  (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are –
  (a) to understand the nature of D's conduct;
  (b) to form a rational judgment;
  (c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

The main criticisms against the former provision were three-fold. The first pertained to the uncertain nature of the term "abnormality of mind" and the narrow range of permissible causes stipulated in parenthesis in the provision.[44] The second was that the provision did not clarify what was involved in a "substantial impairment of mental responsibility". Thirdly, the provision was unclear whether the abnormality of mind must, in some sense, have "caused" the accused to kill. What follows is a brief appraisal of the way the new defence resolves these criticisms.

A. *Abnormality of Mental Functioning*

Adopting the recommendations of psychiatrists, the revised defence uses the expression "abnormality of mental functioning", removes the list of permissible causes of such abnormality, and replaces it with the requirement that the abnormality must have arisen from a recognised medical condition.[45] All these revisions have the single

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[41] Lord Justice Buxton, in the Partial Defences Report, *supra* note 5 at para. 5.43, note 40.

[42] The Murder Report, *supra* note 5 at para. 5.112.

[43] The defence was introduced in 1974. The amendments to s. 23A were the direct result of a call for legislative reform by the New South Wales Court of Criminal Appeal in *R v. Chayna* (1993) 66 A. Crim. R. 178 at 191. For a detailed discussion of this amended provision and comparison with Exception 7, see Stanley Yeo, "Reformulating Diminished Responsibility: Learning from the New South Wales Experience" (1999) 20 Sing. L.R. 159.

[44] Namely, that the abnormality of mind must have arisen from "a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury".

[45] S. 2(1)(a), *Homicide Act*.

aim of aligning the defence more closely with clinical science. Thus, "abnormality of mind" which is not a psychiatric term has been replaced with "abnormality of mental functioning" which psychiatrists find easier to understand and accept. As for the permissible causes, there has never been an agreed psychiatric meaning to them and, besides, the diagnostic practice in cases of diminished responsibility have long since developed beyond mental malfunctioning as identified by this narrow range of causes.[46]

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

> The presence of [a recognised medical condition] is, we believe, consistent with the general nature and purpose of 'diminished responsibility' as a defence and would ensure that any such defence was grounded in valid medical diagnosis. It would also encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental conditions (WHO ICD10 and AMA DSM) without explicitly writing those systems into the legislation … Such an approach would also avoid individual doctors offering idiosyncratic 'diagnosis' as the basis for a plea of diminished responsibility. Overall, the effect would be to encourage better standards of expert evidence and improved understanding between the courts and experts.[47]

At this juncture, the observation should be made that the recognition of a medical condition is not the sole domain of psychiatrists but, where relevant, could extend to other members of the medical profession and psychologists.

In reply to queries as to how the courts would deal with a new emerging medical condition which had yet to appear on the established classificatory systems, the Ministry of Justice expressed confidence that the courts would be able to hear the evidence tendered by advocates of the particular condition and reach a common sense conclusion.[48]

It is submitted that Exception 7 would be greatly improved by adopting these changes to the revised English provision on diminished responsibility. Based on an examination of a number of local cases, the changes would simply affirm what some of our judges and the psychiatrists appearing before them have been doing, which is to inquire whether the accused was suffering from a recognised medical condition.[49] In doing so, they have ignored or else downplayed the requirement under Exception 7 that the abnormality of mind must have arisen from one of the permissible causes. If this is the practice in criminal proceedings, the proposed amendments to Exception

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[46] The Murder Report, *supra* note 5 at para. 5.111. *Contra* R.D. Mackay, "The Coroners and Justice Act 2009—Partial Defences to Murder (2) The New Diminished Responsibility Plea" (2010) Crim. L. Rev. 290 at 294-295 who contends that "a recognised medical condition" could be broader in some respects and narrower in others compared to the limitation based on permissible causes.

[47] Reproduced in the Murder Report, *supra* note 5 at para. 5.114.

[48] The Ministry's Response Paper, *supra* note 6 at para. 94.

[49] For a discussion of some of these cases, see Yeo, Morgan and Chan, *supra* note 14 at paras. 27.27–27.29. See also Michael Hor, "Murder: The Abnormal Mind—Mad or Just Bad" (2008) 20 Sing. Ac. L.J. 662 at para. 4. It is also noteworthy that in Kok Lee Peng, Molly Cheang and Chee Kuan Tsee, *Diminished Responsibility: with special reference to Singapore* (Singapore: Singapore University Press, 1990), the authors construe the causes of abnormality of mind under Exception 7 according to established classificatory systems of mental malfunctioning.

7 would bring the statutory wording into line with it, besides attracting the benefits described by the Royal College of Psychiatrists.

B. *The "Substantial Impairment" Requirement*

The revised provision retains the notion of "substantial impairment" but relates it to the accused's ability "to understand the nature of his or her conduct, to form a rational judgment, or to exercise self-control"[50]. These stated abilities are derived from the definition of "abnormality of mind" given by Lord Parker CJ in *R. v. Byrne*[51]. This arrangement is a vast improvement compared to the one under the former provision where the substantial impairment was related to the ambiguous concept of the accused's "mental responsibility". The impairment of the stated abilities also accords with the expression "abnormality of mental *functioning*" used in the revised provision.

The Law Commission which drafted the revised provision thought that it made clearer the relationship between the roles of the expert and the jury.[52] It was for the expert to offer an opinion on (i) whether the accused was suffering from an abnormality of mental functioning arising from a recognised medical condition; and (ii) whether and in what way the abnormality impacted on the accused's abilities as listed in the revised provision. It was then for the jury to determine whether, taking into account the expert opinion and all other relevant evidence, the relevant abilities of the accused had been "substantially impaired". This determination involves the moral judgment of whether such impairment was of a sufficiently high degree to warrant convicting the accused of manslaughter instead of murder. As such, this "ultimate issue" is for the jury alone to decide. Interestingly, the clinical experts themselves have voiced discomfort over engaging with this issue, as is clear from the following comment by the Royal College of Psychiatrists:

> Although it is common for the courts to accept, or even encourage a psychiatric expert to comment upon whether the defendant should be seen as 'substantially impaired', the College believes that this should be resisted … Our belief is that this restriction should apply irrespective of the 'side' which is calling an expert. We believe that this can be achieved without in any way leaving the jury 'floundering' with materials and issues with which they are not in a position to cope … Hence, for example, an expert can inform the jury in a murder trial of the likely effects of the defendant's disorder in terms of the various mental capacities, yet still fall short of saying whether these 'amounted to' substantial impairment of mental responsibility.[53]

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[50] S. 2(1)(b) read with s. 2(1A), *Homicide Act*.

[51] [1960] 2 Q.B. 396 at 403 (C.A.). This definition has been adopted by the Singapore courts, for example, see *Tengku Jonaris Badlishah v. Public Prosecutor* [1999] 1 S.L.R.(R.) 800 (C.A.); *Zailani bin Ahmad v. Public Prosecutor* [2005] 1 S.L.R.(R.) 356 (C.A.); *Took Leng How v. Public Prosecutor* [2006] 2 S.L.R.(R.) 70 (C.A.).

[52] The Murder Report, *supra* note 5 at para. 5.117.

[53] Reproduced in the Murder Report, *ibid.* at para. 5.118. Admittedly, this would still not resolve the problem of contested diagnosis of mental malfunctioning. For a proposed solution, see Hor, *supra* note 49 at para. 13.

Contrary to the view of the Law Commission, the revised provision does not clearly distinguish the roles of the experts and jury as described above. This would have been achieved had the Commission adopted the sub-section in the New South Wales provision which states that "evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible"[54].

Exception 7 would be greatly improved by adopting the requirement of substantial impairment as set out by the revised English provision. The wording of the exception, like the previous English provision, says nothing about what is involved in "a substantial impairment of mental responsibility" and does not make it clear nor explains in what way the effects of an abnormality of mind can reduce culpability for an intentional killing such as to warrant a conviction of culpable homicide not amounting to murder. The revised English provision rectifies these deficiencies by listing the specified abilities which could have been substantially impaired as a result of the accused suffering from a medically recognised condition.

In relation to the role of expert and jury, since Singapore no longer has trial by jury, the judge sits as trier of fact. It appears to be common practice in Singapore for the trial judge to request the expert witness to give an opinion on the ultimate issue, or at least to permit such opinion to be admissible.[55] In the light of the above discussion, especially the comment by the Royal College of Psychiatrists, this state of affairs should not be allowed to continue. This could be achieved by including a subsection like the one in the New South Wales provision which clearly declares that expert opinion on the ultimate issue is inadmissible.

C. *The Causal Requirement*

Another deficiency of the former English provision was that it did not make it clear whether the abnormality of mind must, in some sense, have "caused" the accused to kill. The provision simply stated that the abnormality of mind must have substantially impaired the accused's mental responsibility for his or her acts in doing or being a party to the killing. In its draft provision, the Law Commission proposed that the abnormality of mental functioning must have been "an explanation" for the killing.[56] The revised provision adopts this proposal[57] but goes further to state that such an explanation occurs "if it causes, or is a significant contributory factor in causing, [the accused] to carry out that conduct"[58].

Since the wording of Exception 7, like the former English provision, is unclear about the connection between the abnormality of mind and the killing, our courts

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[54] S. 23A(2), *Crimes Act 1900* (N.S.W.).

[55] For example, see *Zainul Abidin bin Malik v. Public Prosecutor* [1996] 1 S.L.R.(R.) 140 at para. 22 (C.A.); *G. Krishnasamy Naidu v. Public Prosecutor* [2006] 4 S.L.R.(R.) 874 at paras. 4 and 10 (C.A.) [*G. Krishnasamy*]; *Public Prosecutor v. Ong Pang Siew* [2009] 4 S.L.R.(R.) 474. (H.C.) at para. 31. See further Yeo, Morgan and Chan, *supra* note 14 at para. 27.36.

[56] The Murder Report, *supra* note 5 at para. 5.112.

[57] S. 2(1)(c), *Homicide Act*.

[58] S. 2(1B), *Homicide Act*. See further the Ministry's Consultation Paper, *supra* note 6, para. 51. By way of criticism, the words "if it causes" appears superfluous given the less demanding requirement of "a significant contributing factor in causing…" found in the sub-section.

have been left floundering over this issue.[59] Some sort of description, such as that proposed by the Law Commission of "an explanation" or the more demanding causal test found in the revised English provision, would certainly improve the operation of Exception 7. If a choice had to be made, it is submitted that the Law Commission's proposal of "an explanation" is preferable because it avoids having to conduct a formal causal inquiry. On this point, the Royal College of Psychiatrists, while not objecting to a causal requirement as such, warned against creating a situation where experts might be called on to "demonstrate" causation on a scientific basis.[60]

III. Concluding Summary

The English *Coroners and Justice Act* has made several major changes to the defences of provocation and diminished responsibility under English law. Our lawmakers, be they judges or legislators, could learn much from studying these changes because they by and large improve the law by adding clarity and precision, and updating it to accord with societal standards and scientific thinking. Although the Act abolishes the common law defence of provocation and replaces it with a defence of loss of self-control, the new defence contains an improved version of the "reasonable person" test. A significant problem with that test at common law was the controversy over which of the accused's personal characteristics or circumstances could be attributed to the reasonable person. The new defence settles this controversy in two ways. First, it does so by describing the type of permissible provocative conduct as constituting "circumstances of an extremely grave character, which caused the accused to have a justifiable sense of being seriously wronged". As a direct consequence of this description, only those personal characteristics or circumstances of the accused which caused him or her to have such a sense of wrongness will be material. Second, the new defence adopts the latest English judicial pronouncement on the accused's personal characteristics which are permitted to affect the power of self-control expected of the reasonable person. It does so by providing that "a person of D's [the accused's] sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D". This comment has argued against recognising the accused's sex as affecting the normal degree of tolerance and self-restraint. Apart from this, there is much to be said for incorporating the English provision's rendition of the reasonable person test into Exception 1. Certainly, there have been occasions when our courts have made pronouncements which are the same or closely similar to these features of the new English defence. But it would be infinitely better for these judicial pronouncements to take on statutory form within the *Penal Code*. Additionally, Exception 1 could follow the new English defence in not insisting that the loss of self-control and the occurrence of the provocative conduct have to be sudden.

As for the defence of diminished responsibility, the whole of the revised English provision could replace the current Exception 7. All the changes to the former defence

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[59] The closest that the Singapore Court of Appeal has come to pronouncing a test appears to have been made in *G. Krishnasamy*, *supra* note 55 at para. 8 where it said that the requirement of a substantial impairment of mental responsibility would very likely be made out where the abnormality of mind "had a close … connection" between the accused's conduct and the victim's death.

[60] The Murder Report, *supra* note 5 at para. 5.123. See further Mackay, *supra* note 46 at 298–300.

are decided improvements which bring the law up-to-date with scientific thinking about abnormal mental malfunctioning, as well as clarifies the causal element in the defence. To ensure that the ultimate issue is not commented upon by the expert witnesses, the revised English defence could have included a further subsection making such opinions inadmissible. Exception 7 would likewise benefit by having such a clause.