

Queensland
Law Reform Commission

**A review of the excuse
of accident and the defence of
provocation**

Report

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To: The Honourable Kerry Shine MP
Attorney-General and Minister for Justice and Minister Assisting the
Premier in Western Queensland

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld),
the Commission is pleased to present its Report on *A review of the excuse of
accident and the defence of provocation*.

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Member

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Previous publications in this reference

A review of the excuse of accident, Discussion Paper, WP 62 (June 2008).

A review of the defence of provocation, Discussion Paper, WP 63 (August 2008).

Table of contents

CHAPTER 1	1
INTRODUCTION	1
INTRODUCTION	1
THE REVIEW	1
THE PROVISIONS UNDER REVIEW	3
Accident.....	3
Provocation reducing murder to manslaughter	3
Provocation as a complete defence to an assault	4
BACKGROUND TO THE REVIEW	5
The DJAG audit.....	5
The Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld).....	6
THIS REVIEW	7
Methodology.....	7
Content.....	7
SUBMISSIONS AND CONSULTATIONS	7
STRUCTURE OF THIS REPORT	8
SUMMARY OF THE COMMISSION'S RECOMMENDATIONS	9
The excuse of accident	9
The partial defence of provocation.....	10
The complete defence of provocation to assault	11
CHAPTER 2	12
OVERVIEW OF HOMICIDE	12
INTRODUCTION	12
HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)	12
Causing death	13
<i>Criminal</i> responsibility	13
Murder	14
Manslaughter.....	15
Alternative verdicts.....	15
Statutory alternatives	16
Alternative offences charged on an indictment for murder or manslaughter	17
EXCUSES AND DEFENCES TO HOMICIDE	17
SENTENCING FOR HOMICIDE	18
Sentencing for murder.....	18
Sentencing for manslaughter	19
CHAPTER 3	21
HISTORICAL DEVELOPMENT OF THE DEFENCE OF ACCIDENT	21
THE COMMON LAW AND THE CODE	21
SECTION 23.....	22
THE COMMON LAW AND <i>MENS REA</i>	23
HISTORY OF THE DEFENCE AT COMMON LAW.....	23
MANSLAUGHTER UNDER MODERN AUSTRALIAN COMMON LAW	25
THE DEFENCE UNDER THE CRIMINAL CODE	26
INTERPRETATION OF SECTION 23	27
THE DIRECT AND IMMEDIATE RESULT TEST.....	28

THE REASONABLY FORESEEABLE CONSEQUENCES TEST	29
THE FAULT ELEMENT — AN ALTERNATIVE APPROACH	30
AMENDMENT TO OVERCOME (IN PART) THE DECISION IN <i>VAN DEN BEMD</i>	31
The reason for the amendment of section 23	32
THE CURRENT EFFECT OF SECTION 23(1) AND SECTION 23(1A)	33
CHAPTER 4	35
ACCIDENT: CASE REVIEW	35
INTRODUCTION	35
CASES BEFORE <i>VAN DEN BEMD</i>	37
<i>R v Callaghan</i>	37
<i>R v Vallance</i> (Tasmanian Court of Criminal Appeal)	38
<i>Vallance v R</i> (in the High Court)	41
<i>R v Martyr</i>	42
<i>R v O'Halloran</i>	47
<i>R v Knutsen</i>	48
<i>R v Tralka</i>	50
<i>R v Mamote-Kulang of Tamagot</i>	51
<i>R v Hansen</i>	53
<i>R v Dabelstein</i>	53
<i>Timbu Kolian v R</i>	56
<i>Kaporonovski v R</i>	58
<i>VAN DEN BEMD</i> AND LATER CASES	59
<i>R v Van Den Bemd</i> (Queensland Court of Appeal)	59
<i>Griffiths v R</i>	60
<i>R v Taiters</i>	62
<i>R v West</i>	64
<i>R v Auld</i>	64
<i>R v Camm</i>	65
<i>R v Watt</i>	66
<i>R v Fitzgerald</i>	66
<i>R v Francisco</i>	69
<i>R v Grimley</i>	70
<i>R v Day</i>	70
<i>R v Stott & Van Embden</i>	71
<i>R v Charles</i>	72
<i>R v Seminara</i>	73
<i>R v Reid</i>	74
<i>R v Stevens</i>	76
<i>R v Trieu</i>	78
OBSERVATIONS ABOUT THE CASES AFTER <i>VAN DEN BEMD</i>	79
THE DECISION OF THE HIGH COURT IN <i>R v VAN DEN BEMD</i>	80
<i>Ward v The Queen</i>	85
CHAPTER 5	89
ACCIDENT: JURY DIRECTIONS	89
INTRODUCTION	89
GENERAL DIRECTION ON ACCIDENT	89
DIRECTION FOR OFFENCE INVOLVING A FATAL PUNCH	90
DIRECTION WHERE THERE IS A CONCEALED DEFECT, WEAKNESS OR ABNORMALITY	91
DOES THE BENCHBOOK ACCURATELY STATE THE FORESEEABILITY TEST?	92

CHAPTER 6	94
DJAG DISCUSSION PAPER AND COMMUNITY EXPECTATIONS	94
THE DJAG DISCUSSION PAPER	94
<i>R v Little</i>	95
<i>R v Moody</i>	96
THE CONCLUSIONS OF THE DJAG AUDIT	97
Murder trials	97
Manslaughter trials	98
COMMUNITY EXPECTATIONS	100
CHAPTER 7	104
SUGGESTED NEW OFFENCE: ASSAULT CAUSING DEATH	104
INTRODUCTION	104
CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL 2007	104
Indicting on the proposed new offence	105
Section 576	105
Directions to juries	106
Sentencing issues	107
WESTERN AUSTRALIAN BILL	107
RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF IRELAND	108
CHAPTER 8	110
ACCIDENT IN OTHER JURISDICTIONS	110
INTRODUCTION	110
NEW SOUTH WALES	110
NORTHERN TERRITORY	111
TASMANIA	112
WESTERN AUSTRALIA	113
AUSTRALIAN CAPITAL TERRITORY	117
SOUTH AUSTRALIA AND VICTORIA	117
COMMONWEALTH	118
MODEL CRIMINAL CODE	118
RECENT DEVELOPMENTS IN ENGLAND AND WALES	120
RECENT DEVELOPMENTS IN IRELAND	121
CHAPTER 9	123
ACCIDENT: SUBMISSIONS AND CONSULTATION	123
INTRODUCTION	123
Submissions in response to the DJAG Discussion Paper	124
GENERAL OBSERVATIONS MADE IN SUBMISSIONS	126
General observations made in submissions to the Department	126
The general application of section 23(1)(b)	126
Observations on the results of the DJAG audit	128
General observations made in submissions to the Commission	130
QUESTIONS RAISED IN THE ACCIDENT DISCUSSION PAPER	130
Summary of submissions received	131
Summary of submissions made to the Department	131
Respondents	131
Summary of views	132
Summary of submissions made to the Commission	133
Respondents	133

Summary of views	134
OPTION 1: RETAINING SECTION 23(1)(b) IN ITS PRESENT FORM	135
Accident Discussion Paper	137
Submissions in response to the DJAG Discussion Paper	137
Submissions in response to the Accident Discussion Paper	142
Community expectations.....	146
OPTION 2: CHANGING THE SCOPE OF THE EXCUSE OF ACCIDENT.....	150
Accident Discussion Paper	150
Option 2(a): The direct and immediate result test.....	151
Accident Discussion Paper	151
Submissions in response to the DJAG Discussion Paper	151
Submissions in response to the Accident Discussion Paper	152
Option 2(b): A pure causation test for criminal responsibility.....	154
Submissions in response to the DJAG Discussion Paper	154
Submissions in response to the Accident Discussion Paper	156
Option 2(c): Changing the fault element for manslaughter	156
Accident Discussion Paper	157
Submissions in response to the DJAG Discussion Paper	157
Submissions in response to the Accident Discussion Paper	157
OPTION 3: RETAINING, AMENDING OR REPEALING SECTION 23(1A)	159
Accident Discussion Paper	159
Submissions in response to the DJAG Discussion Paper	160
Submissions in response to the Accident Discussion Paper	166
OPTION 4: CREATING A NEW OFFENCE OR NEW OFFENCES	168
Accident Discussion Paper	168
Option 4(a): Manslaughter based an unlawful and dangerous act	168
Submissions in response to DJAG Discussion Paper	169
Submissions in response to the Accident Discussion Paper	170
Option 4(b): Assault occasioning death	171
Submissions in response to the DJAG Discussion Paper	172
Submissions in response to the Accident Discussion Paper	172
General	172
Assault occasioning death	172
Statutory alternatives to manslaughter	177
Submissions in response to the Accident Discussion Paper	177
THE WORD 'ACCIDENT'	178
THE RESPONSE OF THE COURTS.....	180
CONSULTATION WITH JUDGES	182
CHAPTER 10	183
ACCIDENT: CONCLUSIONS	183
INTRODUCTION	183
RETENTION OF AN EXCUSE OF ACCIDENT	184
THE APPROPRIATE TEST FOR THE EXCUSE OF ACCIDENT	185
Introduction.....	185
The Commission's approach.....	186
The competing principles	188
Technical and practical implications of changing the current accident test	192
The Commission's view	193
THE EVENT TO WHICH FORESIGHT SHOULD RELATE WHERE DEATH HAS OCCURRED.....	194
Introduction.....	194

Competing principles.....	194
Technical and practical implications of changing the event to which foresight relates.....	195
The Commission's view	196
The majority view	196
The minority view	196
Implementation of the minority view	197
SECTION 23(1A): INCONSISTENCY OR AN APPROPRIATE EXCEPTION?	197
Introduction.....	197
The competing principles	197
Technical and practical implications arising from section 23(1A) and its potential repeal	198
The Commission's view	200
WHETHER A NEW OFFENCE OF UNLAWFUL ASSAULT OCCASIONING DEATH SHOULD BE CREATED	200
Introduction.....	200
The competing principles	201
Technical and practical implications of a new offence of unlawful assault occasioning death	202
The Commission's view	204
WHETHER A NEW CATEGORY OF UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER SHOULD BE CREATED	205
Introduction.....	205
The Commission's view	205
STATUTORY ALTERNATIVES.....	206
RECOMMENDATIONS	206
CHAPTER 11	208
PROVOCATION IN QUEENSLAND	208
INTRODUCTION	208
HISTORICAL DEVELOPMENT.....	208
THE PARTIAL DEFENCE OF PROVOCATION IN QUEENSLAND.....	212
SECTION 304 OF THE CRIMINAL CODE (QLD).....	213
PROVOCATION	214
WHAT CONDUCT MAY AMOUNT TO PROVOCATION.....	216
LOSS OF SELF-CONTROL	217
FURTHER ANALYSIS OF THE HYPOTHETICAL ORDINARY PERSON TEST	219
LIMITING RULES.....	221
A RECENT DECISION OF THE QUEENSLAND COURT OF APPEAL.....	222
CHAPTER 12	225
PROVOCATION: DATA ON INTIMATE PARTNER HOMICIDE	225
INTRODUCTION	225
DATA	226
Intimate partner homicides per year	226
Intimate partner homicides as a percentage of all homicides.....	226
Gender of offender	226
History of violence	227
Place at which offence committed	227
Reason for killing.....	227
Alcohol and drugs	227
USE OF THE PROVOCATION DEFENCE	228
Queensland and the DJAG Audit.....	228

New South Wales.....	230
Provocation based on infidelity or the breakdown of a relationship 1990–2004	230
Provocation based on a homosexual advance 1990–2004.....	231
Provocation claimed by women on the basis of a partner's violence	232
Victoria	232
CHAPTER 13	234
QUEENSLAND CASES ON PROVOCATION	234
INTRODUCTION	234
MURDER REDUCED TO MANSLAUGHTER.....	235
<i>R v Auberson</i> (sentenced 15 May 1996)	236
<i>R v Smith</i> (sentenced 23 November 1999).....	237
On appeal: <i>R v Smith</i>	238
<i>R v De Salvo</i> (sentenced 6 September 2001)	238
On appeal: <i>R v De Salvo</i>	239
<i>R v Dhoother</i> (sentenced 22 May 2002)	239
<i>R v Perry</i> (sentenced 6 February 2004).....	240
<i>R v Folland</i> (sentenced 25 February 2004)	241
On appeal: <i>R v Folland</i>	241
<i>R v Schubring</i> (sentenced 17 June 2004).....	242
On appeal: <i>R v Schubring; ex parte Attorney-General (Qld)</i>	243
<i>R v Mirasol</i> (sentenced 1 October 2004)	247
<i>R v Middleton</i> (sentenced 3 December 2004)	248
<i>R v Budd</i> (sentenced 19 October 2006)	249
<i>R v Dunn</i> (sentenced 26 February 2007).....	249
On appeal: <i>R v Dunn</i>	251
<i>R v Sebo</i> (sentenced 30 June 2007)	251
Addresses to the jury	251
The Prosecutor's address.....	251
Defence counsel's address.....	252
The summing up	255
On appeal: <i>R v Sebo; ex parte Attorney-General (Qld)</i>	257
<i>R v Mills</i> (sentenced 29 January 2008).....	258
On appeal: <i>R v Mills</i>	259
OBSERVATIONS	261
CASES IN WHICH PROVOCATION HAS NOT BEEN SUCCESSFUL	262
<i>R v Corcoran</i>	262
<i>R v Poonkamelya</i> (sentenced 16 September 2004)	263
<i>R v Exposito</i> (sentenced 4 July 2006)	264
<i>R v Abusoud</i> (sentenced 17 April 2008)	265
OBSERVATIONS	265
WOMEN CONVICTED OF MANSLAUGHTER OF AN INTIMATE PARTNER.....	265
<i>R v Benstead</i> (offence occurred 29 December 1993)	265
<i>R v Babsek</i> (sentenced 4 June 1999).....	266
<i>R v Bob; ex parte Attorney-General (Qld)</i> (Appeal heard 21 March 2003).....	269
<i>R v Brown</i> (sentenced 10 September 2003).....	270
On appeal: <i>R v Brown</i>	271
<i>R v Saltner</i> (sentenced 28 October 2004)	272
<i>R v Griffin</i> (sentenced 13 May 2005)	272
<i>R v Pivar</i> (sentenced 26 June 2006).....	273
<i>R v Knox</i> (sentenced 31 July 2006)	275
OBSERVATIONS	275

MANSLAUGHTER VERDICTS NOT BASED ON PROVOCATION	276
<i>R v Whiting</i> (sentenced July 1994)	277
<i>R v Green</i>	277
<i>R v Miguel</i> (sentenced August 1994)	278
CHAPTER 14	280
PROVOCATION IN OTHER JURISDICTIONS	280
INTRODUCTION	280
AUSTRALIAN CAPITAL TERRITORY, NEW SOUTH WALES AND THE NORTHERN TERRITORY	280
TASMANIA AND VICTORIA	283
WESTERN AUSTRALIA	284
SOUTH AUSTRALIA	288
THE MODEL CRIMINAL CODE AND THE COMMONWEALTH	289
RECENT DEVELOPMENTS IN NEW ZEALAND	290
RECENT DEVELOPMENTS IN ENGLAND AND WALES	291
RECENT DEVELOPMENTS IN IRELAND	295
CHAPTER 15	297
BATTERED WOMEN WHO KILL	297
TERMINOLOGY	297
CHAPTER OUTLINE	298
THE CASE OF ROBYN BELLA KINA	299
BATTERED WOMEN WHO KILL AFTER A LAPSE OF TIME	304
<i>R v R</i>	304
<i>R v Bradley</i>	309
AMENDING THE DEFENCE TO MEET REALITY	314
<i>R v Chhay</i>	314
REPORT OF THE TASKFORCE ON WOMEN AND THE CRIMINAL CODE	320
FLEXIBILITY IN THE EXISTING COMMON LAW	324
PROVOCATION AT COMMON LAW	329
THE MODEL DIRECTION	330
CHAPTER 16	331
PROVOCATION: LITERATURE REVIEW	331
INTRODUCTION	331
SUBSTANTIVE GENDER EQUALITY	331
GENERAL ARGUMENTS FOR ABOLISHING THE DEFENCE	333
ARGUMENTS IN FAVOUR OF RETAINING THE DEFENCE	334
GENDER INEQUALITY ARGUMENTS	337
'Differences and similarities among the three countries'	338
United States provocation law	339
Traditional provocation	339
Extreme emotional disturbance	340
Canadian provocation law	341
<i>R v Thibert</i>	342
Australian provocation law	347
THE AMERICAN 'EXTREME EMOTIONAL DISTURBANCE' DEFENCE	348
FINDINGS FROM NON-LEGAL LITERATURE	349
'The defence is flawed'	350
Analysis of non-legal literature	351

<i>R v Ramage</i>	351
Other commentary on <i>R v Ramage</i>	352
<i>R v Butay</i>	352
‘Asymmetrical killings’	353
Key predictors of men killing women	354
Prior violence	354
Separation and stalking	361
<i>R v Denney</i>	362
‘Honour’	364
‘Judicial attitudes’	364
<i>R v Yasso</i>	365
<i>R v Khan</i>	369
<i>R v King</i>	372
<i>R v Mankotia</i>	374
<i>R v Conway</i>	375
Consideration of those cases by Coss	377
‘Trying to understand the cases’	378
Coss’s final argument	379
SHOULD WE ACCEPT THAT THE ORDINARY PERSON MAY INTENTIONALLY KILL?	380
CHAPTER 17	381
JURY DIRECTIONS: THE PARTIAL DEFENCE OF PROVOCATION	381
INTRODUCTION	381
THE MODEL DIRECTION ON PROVOCATION	381
DISCUSSION	386
CHAPTER 18	387
THE ONUS OF PROOF OF PROVOCATION	387
INTRODUCTION	387
SIGNIFICANT CASES	388
<i>Woolmington v DPP</i>	388
<i>Johnson v The Queen</i>	389
<i>Moffa v The Queen</i>	390
DISCUSSION	390
CHAPTER 19	393
PROVOCATION IN MURDER: ANALYSIS	393
INTRODUCTION	393
CLAIMS UPON WHICH THE PARTIAL DEFENCE MAY BE BASED	393
RESEARCH FINDINGS AND LITERATURE	394
FURTHER ANALYSIS OF THE GROUPS	395
MODIFICATION OF THE LAW TO OBTAIN SUBSTANTIVE GENDER EQUALITY	397
GENERAL ISSUES IN REFORMING PROVOCATION	397
THE LIMITING RULES	398
CHAPTER 20	400
THE PARTIAL DEFENCE OF PROVOCATION: SUBMISSIONS AND CONSULTATION	400
INTRODUCTION	400
Submissions in response to the DJAG Discussion Paper	401
SUBMISSIONS	402

Respondents to the DJAG Discussion Paper	402
Respondents to the Provocation Discussion Paper.....	403
GENERAL OBSERVATIONS MADE IN SUBMISSIONS	404
General observations made in submissions to the Department	404
General observations made in submissions to the Commission	410
Submissions in favour of retention.....	410
Submissions in favour of abolition	412
Observations and criticisms	413
MANDATORY LIFE IMPRISONMENT.....	418
Submissions in response to the DJAG Discussion Paper	418
Submissions in favour of the status quo	418
Submissions arguing for the abolition of mandatory life imprisonment	419
Submission in favour of retaining mandatory life for murder and abolishing the partial defence of provocation.....	421
Submissions in response to the Provocation Discussion Paper.....	421
Submissions in support of mandatory life for murder	421
Submissions arguing for the abolition of mandatory life imprisonment	422
OPTION 1: ABOLITION OF THE PARTIAL DEFENCE OF PROVOCATION.....	424
Submissions in response to the DJAG Discussion Paper	424
Submissions in favour of retaining the partial defence	424
Submission arguing for abolition of the partial defence.....	425
Submissions in response to the Provocation Discussion Paper.....	426
Submissions in favour of retaining the partial defence	426
Submissions arguing for abolition of the partial defence	427
OPTION 2: RECASTING THE PARTIAL DEFENCE OF PROVOCATION	429
Introduction.....	429
Redefining the conduct that may amount to provocation.....	429
Submissions in response to the DJAG Discussion Paper	431
Submission in favour of no change.....	431
Submissions suggesting excluding certain conduct from the defence	432
Submission suggesting reframing the partial defence	432
Submissions in response to the Provocation Discussion Paper.....	433
The Queensland Police Service	434
Office of the Director of Public Prosecutions	435
Legal Aid Queensland.....	437
Academics and lawyers	438
Submission from Commission for Children and Young People and Child Guardian	442
Consultation meeting with Justices of the Supreme Court of Queensland	445
Seminar at Legal Aid Queensland	445
Removal of the requirements of ‘suddenness’ from section 304 of the Code	445
Submissions in response to the DJAG Discussion Paper	446
Submissions in response to the Provocation Discussion Paper.....	447
Submissions opposing removal of the requirement of suddenness.....	447
Submissions supporting removal of the requirement of suddenness.....	448
Reform of the objective test	451
Submissions in response to the DJAG Discussion Paper	453
Submission supporting no change to the ‘ordinary person’ test.....	453
Submissions critical of the ‘ordinary person’ test.....	453
Submissions in response to the Provocation Discussion Paper.....	455
Submission supporting no change to the ‘ordinary person’ test.....	455
Submissions discussing the ‘reasonable person’ tests	455
Submission from the ODPP suggesting modification of the objective test.....	456

OPTION 3: CHANGE TO THE ONUS OF PROOF.....	457
Submissions to the DJAG Discussion Paper.....	457
Submissions to the Provocation Discussion Paper	458
Submissions opposed to reversing the onus of proof	458
Submissions in favour of reversing the onus of proof	459
THE BATTERED PERSON WHO KILLS HIS OR HER ABUSER	461
CHAPTER 21	465
THE PARTIAL DEFENCE OF PROVOCATION: CONCLUSIONS	465
INTRODUCTION	465
TERMS OF REFERENCE.....	468
THE PARTIAL DEFENCE OF PROVOCATION	468
ABOLITION OF PROVOCATION?.....	469
Philosophical arguments for abolishing provocation.....	469
The Commission's view	471
Arguments for abolition because of flaws and bias.....	471
The Commission's view	474
RECASTING THE DEFENCE	474
Limiting provocation to serious wrongs.....	474
Conduct that is 'not unlawful'	475
The Commission's view	476
Words.....	476
The Commission's view	479
The deceased who asserts a right to personal or sexual autonomy.....	479
The Commission's view	481
The non-violent sexual advance	481
The Commission's view	483
Removing the requirements of suddenness from section 304.....	483
The Commission's view	485
Defining 'provocation'	485
The Commission's view	485
The ordinary person test	485
The Commission's view	489
The position of the battered person	489
The Commission's view	491
The onus of proof	491
The Commission's view	497
MANDATORY LIFE IMPRISONMENT FOR MURDER	497
The Commission's view	500
RECOMMENDATIONS	500
CHAPTER 22	502
ASSAULT PROVOCATION: CRIMINAL CODE (QLD) SECTIONS 268, 269	502
INTRODUCTION	502
THE POSITION IN OTHER JURISDICTIONS	504
THE UNDERLYING RATIONALE	505
ELEMENTS OF PROVOCATION (SECTION 268).....	506
PROVOCATION AS A DEFENCE TO ASSAULT	507
THE REFERENCE	507
JURY DIRECTIONS.....	508
The opening direction.....	508
Whether there has been a wrongful act or insult	508

The ordinary person test	509
Whether the defendant was induced by the wrongful act or insult	509
Whether the defendant lost self-control	510
DISCUSSION	510
KEY QUESTIONS	511
SUBMISSIONS.....	511
Submissions in support of no change	512
Submissions in favour of expansion of the application of the defence	513
Submissions in favour of abolition	515
Submission in favour of abolition where victim was a child	516
OBSERVATIONS	517
THE COMMISSION'S VIEW	519
THE WORDING OF SECTIONS 268 AND 269	519
Submissions	519
The Commission's view	520
RECOMMENDATIONS	520
APPENDIX 1	521
TERMS OF REFERENCE	521
APPENDIX 2	523
RESPONDENTS TO THE ACCIDENT DISCUSSION PAPER	523
APPENDIX 3	524
RESPONDENTS TO THE PROVOCATION DISCUSSION PAPER.....	524

Chapter 1

Introduction

INTRODUCTION	1
THE REVIEW	1
THE PROVISIONS UNDER REVIEW	3
Accident.....	3
Provocation reducing murder to manslaughter	3
Provocation as a complete defence to an assault	4
BACKGROUND TO THE REVIEW	5
The DJAG audit.....	5
The Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld).....	6
THIS REVIEW	7
Methodology.....	7
Content.....	7
SUBMISSIONS AND CONSULTATIONS	7
STRUCTURE OF THIS REPORT	8
SUMMARY OF THE COMMISSION'S RECOMMENDATIONS	9
The excuse of accident	9
The partial defence of provocation.....	10
The complete defence of provocation to assault	11

INTRODUCTION

1.1 This Report concludes the Queensland Law Reform Commission's review of the excuse of accident and the defences of provocation, both as a partial defence to a charge of murder and as a complete defence to any charge involving assault, under the Criminal Code (Qld).

THE REVIEW

1.2 In 2 April 2008, the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, the Honourable Kerry Shine, asked the Commission to review the following provisions of the Criminal Code of Queensland:¹

- Section 23(1)(b) — the excuse of accident;
- Section 304 — the partial defence of provocation, which reduces murder to manslaughter; and

¹ The terms of reference are contained in Appendix 1 to this Report.

- Sections 268 and 269 — the complete defence of provocation to an assault.

1.3 In undertaking this review, the Commission was required to have particular regard to:

- the results of the Attorney-General's audit in mid-2007 of homicide trials on the nature and frequency of the use of the excuse of accident and the partial defence to murder of provocation;
- whether the current excuse of accident, including current case law, reflects community expectations;
- whether the partial defence of provocation should be abolished, or recast to reflect community expectations;
- whether the current provisions are readily understood by a jury and the community;
- whether the complete defence of provocation should be abolished, or recast to reflect community expectations;
- the use of alternative counts to charges of manslaughter (for example, assault or grievous bodily harm), including whether section 576 of the Criminal Code (Qld) should be redrafted;
- whether there is a need for new offences, for example assault occasioning grievous bodily harm or assault causing death (to apply where accident would otherwise be a complete defence to a murder or manslaughter charge); and
- recent developments and research in other Australian and overseas jurisdictions, including reviews of the law of accident and provocation undertaken in other jurisdictions.

1.4 In referring the review to the Commission, the Attorney-General took into account various matters, including:

- the need for the Criminal Code (Qld) to reflect community standards;
- the need for the Criminal Code (Qld) to provide coherent and clear offences that protect individuals and society;
- the need for concepts of criminal responsibility to be readily understood by the community;
- the need for the criminal law to provide appropriate offences and penalties for violent conduct; and to provide appropriate and fair excuses and defences for murder, manslaughter and assault offences; and

- the mandatory life sentence for murder, which the State Government does not intend to change.

1.5 The Commission was to provide this Report by 25 September 2008.

THE PROVISIONS UNDER REVIEW

1.6 The Commission was required to review three of the excuses and defences to offences provided by the Criminal Code (Qld): the excuse of accident under section 23(1)(b) (which, subject to limited exceptions, applies to all offences); the partial defence of provocation under section 304 (which reduces murder to manslaughter); and the complete defence of provocation to an assault under sections 268 and 269.

Accident

1.7 Section 23(1)(b) of the Code applies to all persons charged with any criminal offence against the statute law of Queensland, and it provides that a person is not criminally responsible for an 'event' that occurs 'by accident':

23 Intention — Motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

...

(b) an event that occurs by accident.

1.8 Currently, the law requires the finder of fact² to consider whether the 'event' was a consequence that was not intended or foreseen by the defendant, and that an ordinary person in the defendant's position would not have reasonably foreseen.

1.9 The operation of section 23(1)(b) is limited by section 23(1A):

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

Provocation reducing murder to manslaughter

1.10 Section 304 provides a partial defence of provocation in murder cases. If accepted by a jury, the defence reduces murder to manslaughter:

²

Where the defendant is charged with manslaughter, the finder of fact at trial will be a jury.

304 Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

Provocation as a complete defence to an assault

1.11 Provocation under sections 268 and 269 is different from provocation under section 304. The definition of 'provocation' in section 304 is drawn from the common law and not from the Criminal Code (Qld), and applies only to murder. The 'other' provocation is defined by section 268 of the Criminal Code, and applies to offences that contain assault as an element (for example, assault, assault occasioning bodily harm):

268 Provocation

(1) In this section—

provocation, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control and to induce the person to assault the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

269 Defence of provocation

(1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the

provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

- (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.³

BACKGROUND TO THE REVIEW

1.12 The use and operation of these provisions prompted debate in the community in the wake of three homicide trials in 2007: *R v Little*, *R v Moody* and *R v Sebo*.⁴

1.13 Little was charged with murder. Moody was charged with manslaughter. In each case, the victim's death followed a punch. The excuse of accident was raised in each case. Each defendant was acquitted.

1.14 Sebo was charged with murder. He committed a violent assault upon his ex-girlfriend, which killed her. He was convicted of manslaughter on the basis of provocation.

1.15 The publicity surrounding these cases led the Attorney-General to order an audit of homicide trials. It also resulted in a legislative proposal, through a private member's Bill, to introduce a new offence of 'assault causing death' into the Criminal Code (Qld). These matters are briefly discussed in the following sections. The cases of *Little* and *Moody* are considered in detail in Chapter 6. *R v Sebo* is considered in detail in Chapter 13.

The DJAG audit

1.16 In May 2007, the Attorney-General commissioned an audit of homicide trials to establish the nature and frequency of the reliance on the excuse of accident and the partial defence of provocation.⁵ The audit, conducted by the

³ Questions of fact are questions for the finder of fact: the Magistrate in summary matters and a jury in trials on indictment.

⁴ See, for example, Kay Dibben, 'Accident "defence" reviewed', *The Courier-Mail Online*, 20 May 2007; Amanda Watt, 'Acquittal "says killing ok" — Family devastated as man admits unprovoked bashing death but walks free', *The Courier-Mail*, 2 April 2007, 12; Amanda Watt, 'Getting away with murder', *The Courier-Mail*, 14 April 2007, 49; Leanne Edmestone and Jodie Munro O'Brien, 'Families robbed — Voice of the victim "lost" in legal system', *The Courier-Mail*, 2 May 2007, 16; Amanda Watt, 'Verdict a painful blow', *The Courier-Mail*, 13 August 2007, 10; 'Victim's family protests Qld "accident" defence', *ABC News Online*, 13 August 2007.

⁵ Hon Kerry Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, 'Audit of "Accident" Defence Cases in Queensland', *Ministerial Media Statement*, 20 May 2007.

Department of Justice and Attorney-General, examined a selection of murder and manslaughter trials finalised between July 2002 and March 2007.⁶

1.17 In October 2007, the Department of Justice and Attorney-General released the results of the audit in a Discussion Paper, *Audit on Defences to Homicide: Accident and Provocation* (the 'DJAG Discussion Paper').⁷ As well as outlining the results of the audit, the Discussion Paper provided general information about the excuse of accident and the partial defence of provocation, the role of the jury, and sentencing for homicide offences. It invited public comment about the current operation and use of the excuse of accident and the partial defence of provocation.

1.18 The Department of Justice and Attorney-General received a number of submissions in response to the DJAG Discussion Paper. The Attorney-General sought the consent of the authors of those submissions to their use by the Commission in its review. If the author's consent was given, a copy of the submission was sent to the Commission. The Commission considered those submissions it received as a result as well as all other submissions received in response to the two Discussion Papers in the consultation phase of its review.

The Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld)

1.19 On 9 August 2007, the Shadow Attorney-General and Shadow Minister for Justice, Mr Mark McArdle MP, introduced a private member's Bill, the Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld), into the Queensland Legislative Assembly. The Bill proposed a new offence, 'unlawful assault causing death', which would apply where death followed an assault but where the elements of murder or manslaughter could not be established.⁸

1.20 In introducing the Bill, Mr McArdle referred to the cases of *R v Little* and *R v Moody* and explained that the Bill sought to respond to 'community concern' in relation to 'one punch' cases.⁹

1.21 The Bill failed on 13 February 2008. The Bill is discussed in more detail in Chapter 7 of this Report.

⁶ The audit examined 80 murder trials and 20 manslaughter trials over the nominated period. The audit only considered homicide cases where a jury was required to determine the guilt or otherwise of the accused; it did not consider matters which were resolved by a plea of guilty in the absence of a trial: Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 29.

⁷ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007).

⁸ Explanatory Notes, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) 3.

⁹ Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld): *Queensland Parliamentary Debates*, 9 August 2007, 2465 (Mr Mark McArdle, Shadow Attorney-General and Shadow Minister for Justice). Mr McArdle also noted that the Coalition had considered amending s 23 of the *Criminal Code* (Qld) to limit its application to special circumstances but it was recognised that this could cause 'legislative uncertainty'.

THIS REVIEW

Methodology

1.22 In order to expedite the preparation of this report and to facilitate public consultation and submissions, the Commission separated the two distinct parts of this review and produced a Discussion Paper in relation to each part. The first Discussion Paper was published in June 2008 and considered the excuse of accident.¹⁰ The second Discussion Paper was published in August 2008 and considered the defence of provocation.¹¹

1.23 Each Discussion Paper provided information about the current law relating to accident and provocation, and raised specific issues for consideration. The Commission invited readers to make submissions on the issues raised in each Discussion Paper, or in relation to any other issues relevant to the review.

Content

1.24 The terms of reference for this review required the Commission to consider issues additional to those raised in the audit commissioned by the Attorney-General. In particular, the Commission's terms of reference specifically directed it to review a number of matters that were not addressed in the DJAG Discussion Paper:

- the complete defence of provocation for assault offences under sections 268 and 269 of the Criminal Code (Qld);
- the use of alternative counts to charges of manslaughter;
- whether there is a need for new offences, for example, assault occasioning grievous bodily harm or assault causing death; and
- whether the current provisions dealing with the excuse of accident and the complete and partial defences of provocation are readily understood by a jury and the community.

SUBMISSIONS AND CONSULTATIONS

1.25 The Commission received a total of 57 submissions during the course of this review. Of the 57 submissions, 26 were copies of the 34 submissions made to the Department of Justice and Attorney-General in the course of its

¹⁰ Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008).

¹¹ Queensland Law Reform Commission, *A review of the excuse of provocation*, Discussion Paper, WP 63 (August 2008).

audit in mid-2007; the Commission did not receive copies of the remaining eight submissions as the Department did not receive permission from those authors to pass on copies of those submissions to the Commission.

1.26 In addition, the Commission received 18 submissions in response to its Discussion Paper on accident and 13 in response to its Discussion Paper on provocation. The individuals and organisations who provided submissions in response to these Discussion Papers are listed in Appendix 2 and Appendix 3 to this Report.

1.27 The Commission held a number of face-to-face consultations with the Director of Public Prosecutions, Mr Tony Moynihan SC and Mr Ross Martin SC, a Consultant Crown Prosecutor; the Public Defender, currently, his Honour Acting Judge Brian Devereaux SC; and Ms Anne Gummow of the Women's Legal Service. The Commission conducted a seminar at Legal Aid Queensland on 5 August 2008, which was attended by staff of Legal Aid Queensland and private practitioners. On 2 and 4 September 2008, the Commission held consultation meetings with Justices of the Supreme Court of Queensland.

1.28 The Commission wishes to record its appreciation of the effort made by each person and organisation that responded to its requests for submissions. All of them are useful and important in framing the Commission's recommendations, especially in the very short time-frame of this inquiry.

1.29 The submissions and consultations are discussed in detail in Chapters 9 and 20 of this Report.

STRUCTURE OF THIS REPORT

1.30 This report has three parts.

- The first, consisting of this and the following chapter, discusses the overall parameters and structure of the Commission's review, and the principal issues that prompted it.
- The second part (Chapters 3 to 10) deals with the excuse of accident. The Commission's recommendations concerning accident are found in Chapter 10.
- The third part deals with the partial defence of provocation to murder (Chapters 11 to 21) and the complete defence of provocation to assault (Chapter 22). The Commission's recommendations on provocation are found in Chapters 21 and 22 respectively.

SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

1.31 The Commission makes the recommendations set out below. The terms of reference for this review did not request the Commission to prepare draft legislation and, in any event, the time frame for this review would not have permitted it to do so. However, in view of the fact that implementation of its recommendations will require legislative amendment, the Commission considers it essential that it be closely consulted on the drafting of any legislation that is prepared to give effect to its recommendations.

The excuse of accident

1.32 The Commission makes the following recommendations about the excuse of accident in section 23 of the Criminal Code (Qld):

10-1 Section 23(1)(b) of the Criminal Code (Qld) should continue to excuse a person from criminal responsibility for an event that occurs by accident.

10-2 A majority of the Commission recommends that, in its application to manslaughter, the 'event', for the purpose of section 23(1)(b) of the Criminal Code (Qld), should continue to mean the death of the deceased.

10-3 A minority of the Commission recommends that, in its application to manslaughter, the 'event', for the purpose of section 23(1)(b) of the Criminal Code (Qld), should mean the death of the deceased or the doing of grievous bodily harm to the deceased.

10-4 A majority of the Commission recommends that the Criminal Code (Qld) should retain a provision to the general effect of section 23(1A).

10-5 A minority of the Commission recommends that section 23(1A) of the Criminal Code (Qld) should be repealed.

10-6 The Commission recommends that, if section 23(1A) of the Criminal Code (Qld) is retained, it should be amended to confine its application to unlawful acts.

10-7 The Criminal Code (Qld) should not be amended to include a new offence of unlawful assault occasioning death.

10-8 The Criminal Code (Qld) should not be amended to include a new offence of unlawful and dangerous act manslaughter.

10-9 The Criminal Code (Qld) should not be amended to provide that:

- (a) grievous bodily harm;**
- (b) assault;**
- (c) assault occasioning bodily harm; or**
- (d) any new offence of unlawful assault occasioning death (if, contrary Recommendation 10-7, such an offence were created);**

is a statutory alternative to manslaughter.

The partial defence of provocation

1.33 The Commission makes the following recommendations about the partial defence of provocation in section 304 of the Criminal Code (Qld):

21-1 Given the constraint of the Government's stated intention to make no change to the existing penalty of mandatory life imprisonment for murder, the Commission recommends that the partial defence of provocation to murder contained in section 304 of the Criminal Code (Qld) remain, but recommends amendments to it.

21-2 Section 304 of the Criminal Code (Qld) should be amended to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the partial defence of provocation cannot be based on words alone or conduct that consists substantially of words.

21-3 Section 304 of the Criminal Code (Qld) should be amended to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship.

21-4 Additionally, the Commission recommends that consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.¹²

21-5 Section 304 of the Criminal Code (Qld) should be amended by adding a provision to the effect that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities.

The complete defence of provocation to assault

1.34 The Commission makes the following recommendations about the complete defence of provocation in section 268 and 269 of the Criminal Code (Qld):

22-1 The complete defence of provocation to an assault contained in sections 268 and 269 of the Criminal Code (Qld) should remain.

22-2 The opening phrase of section 268 of the Code ('In this section') should be removed.

¹²

See the discussion of this recommendation at [21.137]–[21.138] below.

Chapter 2

Overview of homicide

INTRODUCTION	12
HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)	12
Causing death	13
<i>Criminal</i> responsibility	13
Murder	14
Manslaughter.....	15
Alternative verdicts.....	15
Statutory alternatives	16
Alternative offences charged on an indictment for murder or manslaughter	17
EXCUSES AND DEFENCES TO HOMICIDE	17
SENTENCING FOR HOMICIDE	18
Sentencing for murder.....	18
Sentencing for manslaughter	19

INTRODUCTION

2.1 This chapter contains a general overview of the homicide provisions in the Criminal Code (Qld). It considers the offences of murder and manslaughter, and alternative verdicts for those offences. This chapter also briefly examines the excuse of accident as it applies to homicide offences and the provisions providing for the punishment of murder or manslaughter.

HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)¹³

2.2 Homicide includes murder and manslaughter.

2.3 Under the Criminal Code (Qld), any person who unlawfully kills another is guilty of murder or manslaughter, depending on the circumstances of the case.¹⁴

2.4 A person is taken to have killed another if they cause death directly or indirectly, by any means whatever.¹⁵

13 In Queensland, the source of the criminal law is the Criminal Code of Queensland. The differences between common law and codified law, and the position of the criminal law in other jurisdictions, are discussed in Chapter 3.

14 Criminal Code (Qld) ss 300, 302, 303. Note the Criminal Code (Qld) also provides for other offences arising from the death of a person, for example, s 328A (Dangerous driving causing death) and s 313 (Killing an unborn child).

15 Criminal Code (Qld) s 293.

2.5 A killing is unlawful unless it is authorised, justified or excused by law.¹⁶

Causing death

2.6 Often, the question whether a defendant's act (or omission) has caused death is simple. Occasionally, though, it is complex. For example, in *Royall v R*,¹⁷ the evidence suggested that the deceased had jumped from a window to her death to avoid the defendant's violent assault.¹⁸

2.7 In Queensland,¹⁹ a person causes the death of another if their conduct is a substantial or significant cause of death, or substantially contributes to death. It need not be the sole, direct or immediate cause of death.²⁰

2.8 That question is not a philosophical or scientific one, but a question to be determined by the jury applying their common sense to the facts as they find them, at the same time appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.²¹

Criminal responsibility

2.9 The distinction between civil responsibility and criminal responsibility is a distinction between a person's responsibility for harm caused to another individual (for which a civil remedy may be sought through the courts), and a person's responsibility to the state or the community broadly. A crime often causes harm to a private individual, but it also offends against the order, peace and well being of society as a whole, and is punishable by the state. A crime is an offence, or conduct regarded by the state as sufficiently harmful to warrant punishment. 'Criminal responsibility' is defined in section 1 of the Criminal Code (Qld) to mean 'liability to punishment as for an offence.'

¹⁶ Criminal Code (Qld) s 291. See, for example, Criminal Code (Qld) ss 23 (Intention-motive), 27 (Insanity), 271 (Self-defence against unprovoked assault), 272 (Self-defence against provoked assault).

¹⁷ (1991) 172 CLR 378.

¹⁸ Royall was convicted of murder, and ultimately appealed to the High Court against his conviction, arguing that the trial judge's directions about his responsibility for the death of the deceased were incorrect.

Essentially, the High Court said that the question for the jury was:

- whether it was a 'natural' consequence of the defendant's conduct that the deceased would seek to escape (per Mason CJ, Deane and Dawson JJ);
- whether it was a 'foreseeable' consequence of the defendant's conduct that the deceased would seek to escape (per Brennan and McHugh JJ); or
- whether the deceased's attempt to escape was a 'not disproportionate or unreasonable reaction to' the defendant's violent conduct (per Toohey and Gaudron JJ).

The trial judge's directions on the point contained no error, the appeal was dismissed and the conviction sustained.

¹⁹ Following *Royall v R* (1991) 172 CLR 378.

²⁰ *Royall v R* (1991) 172 CLR 378, 387 (Mason CJ), 398–9 (Brennan J), 411 (Deane and Dawson JJ), 423 (Toohey and Gaudron JJ), 441 (McHugh J); *R v Sherrington* [2001] QCA 105, [41] (McPherson JA).

²¹ *R v Sherrington* [2001] QCA 105, [4] (McPherson JA).

2.10 Breaking a contract may cause detriment to another person, but it is not a crime against the state. Burglary causes loss to an individual, and is also a crime: conduct that the state will punish with penal sanctions. The civil courts provide remedies for detriment or harm. The criminal courts impose punishment.

2.11 In a criminal trial by jury, a defendant may only be convicted of an offence if the jury is satisfied beyond reasonable doubt that the Crown (the Prosecution) has proved every element of the offence, and negated, or overcome, any excuse or defence raised beyond reasonable doubt.

Murder

2.12 The offence of murder, which is the most serious of the homicide offences, is defined in section 302 of the Criminal Code (Qld). Section 302 sets out a number of different circumstances in which a person is guilty of murder:

302 Definition of *murder*

- (1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—
 - (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
 - (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
 - (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
 - (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);
 - (e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of *murder*.

- (2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.
- (3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

- (4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

2.13 Most commonly, a charge of murder is based on section 302(1)(a), alleging that the defendant killed another intending to kill them, or at least intending to do them grievous bodily harm.²² It is immaterial that the offender did not intend to hurt the particular person who was killed²³ or did not intend to hurt the particular person who was killed.²⁴

Manslaughter

2.14 The offence of manslaughter is defined in section 303 of the Criminal Code:

303 Definition of *manslaughter*

A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of *manslaughter*.

2.15 For example, the crime of manslaughter is committed where the offender has killed another without an intention to kill them or to do them grievous bodily harm. Particular examples include killing by criminal negligence, or killing by a punch intended only to hurt but not to seriously harm. It is to this second example that the excuse of accident is relevant.

Alternative verdicts

2.16 Once a person has been committed for trial, the Office of the Director of Public Prosecutions (ODPP) is responsible for the presentation of the indictment, which is a document charging the defendant with one or more offences.²⁵ On a plea of not guilty to a charge on an indictment, guilt is determined by a jury.

2.17 A Crown Prosecutor from the ODPP makes a decision about which offences to charge on indictment having regard to the available evidence, the

²² 'Grievous bodily harm' is defined in s 1 of the Criminal Code (Qld) to mean:

- (a) the loss of a distinct part or an organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.

²³ Criminal Code (Qld) s 302(2).

²⁴ Criminal Code (Qld) s 302(1)(a).

²⁵ An indictment is a written charge against an accused person in order to commence the person's trial before the court: Criminal Code (Qld) s 1 (definition of 'indictment').

law, the Director's Prosecution Guidelines²⁶ and the way it wishes to prosecute the case — for example, attempted murder as a single count on an indictment, or with an alternative count of assault occasioning bodily harm. Charging in the alternative usually reflects the state of the evidence available to the Prosecution.

2.18 Where an indictment contains offences in the alternative, a jury may find the defendant guilty of the first offence on the indictment if satisfied that the Prosecution has proved that offence beyond reasonable doubt, in which case there is no need for them to go on to consider the alternative offence. If the jury are not satisfied beyond reasonable doubt that the Prosecution has proved the first offence, they are required to return a verdict of 'not guilty' and to go on to consider the alternative offence.

2.19 If the jury are satisfied beyond reasonable doubt that the Prosecution has proved the alternative offence, they are required to return a verdict of 'guilty' of the alternative offence. If the jury are not satisfied that the alternative offence has been proven beyond reasonable doubt, they are required to return a verdict of 'not guilty' of the alternative offence.

2.20 The Prosecution is not limited (other than by common sense and the evidence) in the charges it sets out as alternatives.

Statutory alternatives

2.21 For some offences, the Criminal Code (Qld) itself provides alternatives, which are referred to in this Report as 'statutory alternatives'. Most of these statutory alternatives are contained in Chapter 61 of the Criminal Code.²⁷

2.22 If the evidence at trial raises the possibility of conviction of a statutory alternative, then the trial judge must inform the jury of that alternative, *whether or not it has been included on the indictment by the Prosecution*, and the defendant may be convicted of that alternative offence.

2.23 The Criminal Code provides a number of statutory alternatives to homicide. The starting point is section 576:

576 Indictment containing count of murder or manslaughter

- (1) Upon an indictment against a person containing a count of the crime of murder, the person may be convicted on that count of the crime of manslaughter if that crime is established by the evidence but not on that count of any other offence than that with which the person is charged except as otherwise expressly provided.

²⁶ As the Guidelines explain, they are not directions but guidelines 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.'

²⁷ The Guidelines may be viewed at: <<http://www.justice.qld.gov.au/files/CourtsAndTribunals/guidelines.pdf>>.

Some are found elsewhere in the Criminal Code (Qld), for example ss 328B, 568.

- (2) Upon an indictment against a person containing a count of the crime of manslaughter the person can not on that count be convicted of any other offence except as otherwise expressly provided.

2.24 The alternatives ‘expressly provided’ by the Criminal Code on a charge of murder are manslaughter, attempted murder, killing an unborn child, concealing the birth of a child and dangerous driving.²⁸ The statutory alternative verdicts available for manslaughter are killing an unborn child, concealing the birth of a child and dangerous driving.²⁹

Alternative offences charged on an indictment for murder or manslaughter

2.25 Under section 576(1), a person charged with murder or manslaughter cannot be convicted of another less serious offence (for example, grievous bodily harm, wounding or assault) unless the Prosecution specifically charges that offence as an alternative count on the indictment.

2.26 The DJAG Discussion Paper notes that the Prosecution may decide not to charge alternative verdicts on an indictment for ‘tactical reasons’.³⁰ The Chief Justice of the Supreme Court of Queensland, the Honourable Paul de Jersey, made a similar observation in an article published in *The Courier-Mail*, extracts of which appear later in this Report.³¹ The Chief Justice noted that, on a charge of manslaughter, the Crown could charge grievous bodily harm, but generally does not do so ‘presumably to avoid offering the jury what might be considered a “soft option” to compel the jury to confront the more serious charge head-on’.

EXCUSES AND DEFENCES TO HOMICIDE

2.27 The Criminal Code (Qld) provides for a number of excuses and defences to homicide. This section briefly considers the available verdicts in homicide cases where the excuse of accident or the partial defence of provocation has been successfully raised.

2.28 As noted in Chapter 1, section 23(1)(b) of the Code excuses a person from criminal responsibility for an event that occurs by accident. Accordingly, if the excuse of accident is fairly raised on the evidence³² at trial and not excluded

²⁸ Criminal Code (Qld) ss 576, 577, 583. See the following offences in the Criminal Code (Qld): Manslaughter (s 303), attempted murder (s 306), Killing an unborn child (s 313), Concealing the birth of a child (s 314), Dangerous driving (s 328B).

²⁹ Criminal Code (Qld) ss 577, 583. See the following offences in the Criminal Code (Qld): Killing an unborn child (s 313), Concealing the birth of a child (s 314), Dangerous driving (s 328B).

³⁰ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007). The Discussion Paper noted that one of the reasons that the prosecution may not charge alternative verdicts on an indictment is that it may encourage the jury to return a ‘compromise verdict’.

³¹ de Jersey CJ, ‘A fair balance of law’, *The Courier-Mail*, 5 May 2007, 70, discussed in Chapter 9 of this Report.

³² And where s 23(1A) does not apply. Section 23(1A) is discussed in detail in Chapter 3.

beyond reasonable doubt by the Prosecution, the jury must acquit the defendant: in the language of the Code, the defendant is excused from criminal responsibility.

2.29 Where the Prosecution has satisfied the jury beyond reasonable doubt that an unlawful killing amounts to murder³³ but is unable to exclude beyond reasonable doubt that the act that caused death was done in the heat of passion, caused by sudden provocation, and before there was time for the defendant's passion to cool, under section 304 the defendant is guilty of manslaughter only. Section 304 provides what is known as a 'partial defence', which reduces murder to manslaughter.

SENTENCING FOR HOMICIDE

2.30 Generally, under the Criminal Code (Qld) a person convicted of murder must be sentenced to life imprisonment ('mandatory life imprisonment').³⁴ Mandatory life imprisonment is the most serious penalty available under the Criminal Code (Qld).

2.31 A person convicted of manslaughter may be sentenced to punishment up to a maximum of life imprisonment, at the discretion of the sentencing judge.³⁵

Sentencing for murder

2.32 Section 305(1) of the Criminal Code (Qld) provides that a person convicted of murder must be sentenced to life imprisonment or to an 'indefinite sentence' under Part 10 of the *Penalties and Sentences Act 1992* (Qld):

305 Punishment of murder

- (1) Any person who commits the crime of murder is liable to imprisonment for life, which can not be mitigated or varied under this Code or any other law or is liable to an indefinite sentence under part 10 of the *Penalties and Sentences Act 1992*.
- (2) If the person is being sentenced—
 - (a) on more than 1 conviction of murder; or
 - (b) on 1 conviction of murder and another offence of murder is taken into account; or

33

In the circumstances set out in s 302(1) of the Criminal Code (Qld); for example, where the defendant intends to cause the death of the person killed or some other person or if the defendant intends to do grievous bodily harm to the person killed or some other person.

34

Criminal Code (Qld) s 305(1).

35

Criminal Code (Qld) s 310.

- (c) on a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder;

the court sentencing the person must make an order that the person not be released from imprisonment until the person has served a minimum of 20 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.

- (3) Subsection (2)(c) applies whether the crime for which the person is being sentenced was committed before or after the conviction for the other offence of murder mentioned in this paragraph.

2.33 Under section 305, if an offender is being sentenced for more than one conviction for murder, or for one conviction of murder with another offence of murder taken into account,³⁶ or the offender has been previously convicted of murder, the sentencing judge must order that the offender not be released from imprisonment until the offender has served a minimum of 20 or more specified years.³⁷

2.34 Offenders sentenced to mandatory life imprisonment are not eligible to apply for release on parole until they have served 15 years' imprisonment.³⁸

2.35 The court cannot order that an offender be eligible for parole at a date earlier than that set by the provisions of the *Corrective Services Act 2006* (Qld), but may order that an offender not be eligible for parole until a later date.³⁹

2.36 As explained in the DJAG Discussion Paper, parole will not necessarily be granted: a prisoner has to apply for release on parole. If a prisoner serving a sentence of life imprisonment is released on parole, the prisoner is subject to parole for the rest of their life, and may be returned to prison to serve out the sentence if the parole is breached.⁴⁰

Sentencing for manslaughter

2.37 Under section 310 of the Criminal Code (Qld), a person convicted of manslaughter is liable to punishment up to life imprisonment.

2.38 A manslaughter conviction may arise in a wide variety of circumstances, from a negligent killing, to an intentional killing under provocation. As a consequence of such variation, it is difficult to identify a

³⁶ Under *Penalties and Sentences Act 1992* (Qld) s 189.

³⁷ *Corrective Services Act 2006* (Qld) s 194(1)(a) provides for exceptional circumstances parole.

³⁸ *Corrective Services Act 2006* (Qld) s 181(3).

³⁹ *Penalties and Sentences Act 1992* (Qld) s 160A(5)(b).

⁴⁰ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007), 8.

sentencing pattern in manslaughter cases.⁴¹ The DJAG Discussion Paper referred to the decision of the Court of Appeal in *R v Whiting, Ex parte Attorney-General*⁴² in which it was observed that ‘manslaughter is, above all, an offence in which particular circumstances vary so much that it is difficult, and perhaps undesirable, to try to generalise in advance about the appropriate sentence to be imposed’.

2.39 An additional consideration in sentencing for manslaughter is whether the sentencing court ought to make a declaration that the defendant has been convicted of a ‘serious violent offence’.

2.40 Under Part 9A of the *Penalties and Sentences Act 1992* (Qld), an offender is deemed to have committed a serious violent offence if they are convicted of an offence mentioned in the schedule,⁴³ and sentenced to imprisonment for 10 years or more.

2.41 Additionally, if a court sentences an offender to between five and 10 years’ imprisonment for an offence in the schedule, the court may declare that the offender has been convicted of a serious violent offence.

2.42 The effect of a declaration that an offender has been convicted of a serious violent offence is that the offender must serve 80 per cent of the sentence or 15 years’ imprisonment (whichever is the shorter period) before being eligible to apply for parole.⁴⁴

41 See *R v Auberson* [1996] QCA 321.

42 [1995] 2 Qd R 199.

43 The schedule of the *Penalties and Sentences Act 1992* (Qld) lists certain offences, including manslaughter.

44 See *R v Sebo; ex parte A-G (Qld)* [2007] QCA 426.

Chapter 3

Historical development of the defence of accident

THE COMMON LAW AND THE CODE	21
SECTION 23.....	22
THE COMMON LAW AND <i>MENS REA</i>	23
HISTORY OF THE DEFENCE AT COMMON LAW.....	23
MANSLAUGHTER UNDER MODERN AUSTRALIAN COMMON LAW	25
THE DEFENCE UNDER THE CRIMINAL CODE	26
INTERPRETATION OF SECTION 23.....	27
THE DIRECT AND IMMEDIATE RESULT TEST.....	28
THE REASONABLY FORESEEABLE CONSEQUENCES TEST	29
THE FAULT ELEMENT — AN ALTERNATIVE APPROACH	30
AMENDMENT TO OVERCOME (IN PART) THE DECISION IN <i>VAN DEN BEMD</i>	31
The reason for the amendment of section 23	32
THE CURRENT EFFECT OF SECTION 23(1) AND SECTION 23(1A)	33

THE COMMON LAW AND THE CODE

3.1 The common law is law created and defined by the courts. The source of the common law is the reasons for decisions in cases, and the legal rules and principles extracted from them. Those principles are applied in accordance with the doctrine of precedent, under which every court must follow the decision of a court superior to it.⁴⁵ The common law evolves over time.⁴⁶

3.2 In New South Wales, Victoria and South Australia, the criminal law is a composite of common law and statute law. In Queensland, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory, the criminal law has been codified completely.

3.3 In 1899, Queensland passed the *Criminal Code Act*, which included as a schedule to it: the Criminal Code. The Criminal Code was essentially the work of Sir Samuel Griffith, who was then the Chief Justice of Queensland and

45 *Lipohar v The Queen* (1999) 200 CLR 485, quoted in David Ross QC, *Crime* (2002) 209.

46 In *Breen v Williams* (1996) 186 CLR 71, Gaudron and McHugh JJ commented (at 115):

In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the 'new' rule or principle that has been created has been derived logically or analogically from other legal principles.

who later became the first Chief Justice of the High Court of Australia. Sir Samuel Griffith prepared a draft Criminal Code to replace the common law and Imperial statutes that had previously provided the criminal law of Queensland.

3.4 The draft was considered by a Royal Commission consisting of judges, Crown Prosecutors and the Crown Solicitor before it was introduced into the Queensland Parliament in 1899.⁴⁷

3.5 Where a statute such as the Criminal Code is the source of the law, the words of the statute itself govern its interpretation and application.

SECTION 23

3.6 Section 23, as originally enacted, stated:

23. Intention: Motive Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

Unless an intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

3.7 In his letter to the Attorney-General enclosing the draft Criminal Code, Sir Samuel Griffith said:⁴⁸

I have throughout the Code intentionally avoided the use of the terms 'malice' and 'maliciously', which have come to acquire a technical meaning, quite different from that which they bear in ordinary language, and of which the use is, I think, as unnecessary as under these circumstances, is misleading. I will refer later to the use of the term 'malice' in connection with homicide. When used with respect to injury to the person or property it means no more than that the offender did the act in question voluntarily (that is, not accidentally) and knowing what he was doing. The general rules of criminal responsibility set out in s 25 [s 23 of the Code as enacted] render it unnecessary to express these elements in the definition of an offence. In the case of injuries to the person, unless an intention to cause a specific result is expressly made an element of the offence, actual knowledge of the probable effect of the act is immaterial.

⁴⁷ RG Kenny, *An Introduction to the Criminal Law in Queensland and Western Australia* (6th ed, 2004) [1.14].

⁴⁸ MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (LexisNexis online service) [s 23.1] (at 23 June 2008).

THE COMMON LAW AND *MENS REA*

3.8 The historical development of section 23 is covered by several of the cases discussed below in the case review contained in Chapter 4 of this Report. The Commission has drawn upon those cases for this part of the discussion.

3.9 The starting point is the history of the defence at common law. At common law, a person cannot be convicted of an offence unless he or she has voluntarily committed an overt act prohibited by law, or made a default in doing some act that he or she was legally obliged to do. Generally, it is also necessary that the act or default is associated with a legally blameworthy condition of mind. This principle is traditionally addressed in the maxim *actus non facit reum nisi mens sit rea*,⁴⁹ or '*mens rea*'. Loosely translated, *mens rea* means a 'guilty mind'.

HISTORY OF THE DEFENCE AT COMMON LAW

3.10 Philp J explained the history of the defence at common law, and the common law position prior to the enactment of the Criminal Code (Qld), in *R v Callaghan*:⁵⁰

In England the effect of accident in homicide is a matter of history and not of logic. In early times, if A caused the death of B, by pure accident or involuntarily in self-defence, he was nevertheless guilty and became liable to forfeiture of his goods. Pardon was his only means of escaping punishment.

It became the practice of the judges to get a special verdict of a killing *per infortunium* or *se defendendo*, and upon payment for their issue a pardon and writ of restitution was granted. In order to avoid this expense it later became the practice of the judges to direct the jury to acquit if, in its opinion, the killing were *per infortunium* or *se defendendo*, and this practice was legalised by Statutes (see Russell on Crime, 9th ed., vol 1 p 504), the last of which in Queensland was *The Offences Against the Person Act of 1865*, s 6 (in England 24 and 25 Vic, c 100, s 7), which provided as follows:

'No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence or in any other manner without felony.'

In England, if death by accident supervene upon a felonious act — at least when that act is likely to endanger life, it is the felony of murder, if upon an unlawful act not felonious it is the felony of manslaughter, if upon a lawful act it is homicide *per infortunium*.

It is to this last type of homicide that the section mentioned relates. It did not alter the law that death supervening by accident on an unlawful act was at least the felony of manslaughter; such killing was not 'by misfortune' nor was it 'without felony'.

49 *Halsbury's Laws of England* (4th ed) vol 11(1), 'Criminal Law, Evidence and Procedure' [4].

50 [1942] St R Qd 40, 49–50.

What, then, in Queensland, is the effect of accident in homicide? It is interesting to note that in the draft Code Sir Samuel Griffith gave the sources⁵¹ of s 23 as being the common law and the section of *The Offences Against the Person Act* referred to. He may have mistaken the effect of that section, which is hardly likely, but in any event all we can do is to interpret the Code as we find it, without any supposition that it was intended merely to codify the common law or earlier statute law.

3.11 Philp J also noted in *R v Martyr*⁵² that the marginal notes in the draft Criminal Code (referring to the sources of section 23) were of nothing but historical significance. What Sir Samuel Griffith thought was the law on the subject when the Code was enacted was irrelevant: it was what the legislature finally enacted that mattered.⁵³

[T]he Queensland Criminal Code is no mere codification of the criminal law as it stood in 1899. Many parts of that Code designedly make fundamental changes in the law. Thus the concept of malice aforethought⁵⁴ in relation to murder has no place in Queensland law and there are many other obvious alterations of the former law ...

More particularly as Griffith CJ judicially determined in *Widgee Shire Council v Bonney* ((1907) 4 CLR 977, at p 981), the controversial doctrine of *mens rea* is no part of our law.

The fundamental concept of the common law is that all common law crimes require *mens rea* and that where death accidentally occurs as the result of or in the course of doing an unlawful act the *mens rea* involved in the unlawful act extends to the accidental death. In construing the words of the Code there can be no resort to this ancient doctrine ...

3.12 There was further elaboration on the common law position by Windey J in *Mamote-Kulang v R*.⁵⁵

[T]he common law left the matter beyond doubt. *Hale*⁵⁶ put it in these words: 'He that voluntarily and knowingly intends hurt to the person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least; as if A intends to beat B, but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen: *Pleas of the Crown* p 472. That passage states the common law as it still is. If death is a consequence, direct and not remote, of an unlawful act done with intent to do grievous bodily harm, it is murder. If it is a consequence, direct not remote, of an unlawful act done with intent to hurt, but not to do grievous bodily harm, it is manslaughter. To prevent misunderstanding, I should add at this point that, whatever may have been the

51 In the margin of the draft Criminal Code, Sir Samuel Griffith made short notes about the sections proposed.

52 [1962] Qd R 398, 410–11.

53 Ibid 413. See also *Brennan v R* (1936) 55 CLR 253.

54 'Malice aforethought' is an intention to kill or do grievous bodily harm: *R v Vickers* [1957] 2 All ER 741, 743, cited in JB Saunders, *Words and Phrases Legally Defined* (2nd ed, 1969).

55 (1964) 111 CLR 62, 79–80.

56 *Hale's Pleas of the Crown*.

position in earlier times, it is not now enough to constitute manslaughter at common law that a man is killed in the course of an unlawful act of any kind. To make an unintended and unexpected killing a crime at common law, it must now be, generally speaking, the result of an unlawful and dangerous act, or of reckless negligence. There is, however, no doubt that at common law a man is guilty of manslaughter if he kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm. It does not avail an accused charged with manslaughter in such a case to say that death was unexpected and that it was only because the person struck was in ill-health or had some unsuspected weakness that the blow proved fatal. That does not make homicide excusable. A killing is not the less a crime because the victim was frail and easily killed.

... If death should unintentionally and unexpectedly occur from a lawful blow, no offence is committed. That is a clear case of homicide excused by law. Homicide unintentionally caused by an unlawful blow is manslaughter. Homicide unintentionally caused by a lawful blow is not. This common law distinction does not arise from any doctrine of constructive illegality. It is not that an antecedent illegality makes its unintended results unlawful. It is that at common law, and by the Code, all homicide is unlawful unless justified or excused by law, and a homicide that was the unintended and unexpected consequence of a lawful act done in a careful manner was always excusable. (note added)

MANSLAUGHTER UNDER MODERN AUSTRALIAN COMMON LAW

3.13 The common law offence of manslaughter covers all forms of culpable homicide that do not amount to murder, just as it does under the Criminal Code (Qld).

3.14 The common law draws a distinction between voluntary and involuntary manslaughter. The crime of murder may be reduced to voluntary manslaughter because of partial defences like provocation or diminished responsibility. The crime of involuntary manslaughter is committed where there is a killing without the fault element for murder; for example, without an intention to kill.

3.15 Modern common law identifies two categories of involuntary manslaughter: (1) manslaughter by gross negligence and (2) manslaughter by an unlawful and dangerous act. The second category is particularly relevant to this review of the law of accident.

3.16 Manslaughter by criminal negligence is committed where the act that caused death was done by the defendant consciously and voluntarily without any intention of causing death or grievous bodily harm, but in circumstances that involved such a great falling short of the standard of care that a reasonable person would have exercised, and that involved such a high risk that death or grievous bodily harm would follow, that the doing of the act merits criminal punishment.⁵⁷

57

R v Mydam [1977] VR 430, as cited in David Ross QC, *Crime* (2002).

3.17 A defendant will be guilty of manslaughter by an unlawful and dangerous act where the circumstances are such that a reasonable person in the defendant's position, performing the act, would have realised that they were exposing another to an appreciable risk of *serious* injury. It is not sufficient that there was a risk of *some* harm resulting, albeit not serious harm.⁵⁸ (emphasis added)

3.18 A third category, battery manslaughter, was abolished by the High Court in *Wilson v R*.⁵⁹ Battery manslaughter occurred where a defendant intentionally and unlawfully applied force that resulted in death if the force was applied with the intention of doing some physical injury of a minor character: something less than grievous bodily harm, but not merely trivial or negligible.⁶⁰

3.19 In *Wilson*, the High Court determined that this third category was unnecessary. Mason CJ, Toohey, Gaudron and McHugh JJ explained that cases of death caused by a serious assault, previously covered by battery manslaughter, would thereafter be covered by manslaughter by an unlawful and dangerous act. Cases in which death arose unexpectedly from a comparatively minor assault, previously covered by battery manslaughter, would thereafter be covered by the law as to assault.⁶¹ Brennan, Deane and Dawson JJ similarly concluded that any offence of battery manslaughter would be subsumed in the crime of manslaughter by an unlawful and dangerous act.⁶²

THE DEFENCE UNDER THE CRIMINAL CODE

3.20 The Criminal Code of Queensland was intended to replace the common law. Its interpretation is based on the construction of its language according to its natural meaning, and without any presumption that it was intended to do no more than restate the existing law.⁶³ Criminal responsibility under the Code does not depend on *mens rea*. It depends on the provisions of the Code, particularly those contained in Chapter 5 ('Criminal Responsibility'), which includes section 23 ('Intention — Motive'). Under the Code, a person cannot be guilty of a defined offence unless the Crown has negated the operation of any excuse contained in Chapter 5, where such an excuse is raised on the evidence.

3.21 The original form of section 23 is set out above at paragraph [3.6] above.

58 *Wilson v R* (1992) 174 CLR 313.

59 (1992) 174 CLR 313.

60 Stanley Yeo, *Fault in Homicide* (1997) 197.

61 (1992) 174 CLR 313, 332–4.

62 *Ibid* 342.

63 *Bank of England v Vagliano Brothers* [1981] AC 107, 144–5; *Brennan v R* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

3.22 The opening phrase — ‘Subject to the express provisions of this Code relating to negligent acts and omissions’ — means that a person charged with an offence on the basis of criminal negligence cannot be excused from criminal responsibility under section 23. Nothing more needs to be said about that qualification for the purposes of this present discussion.

3.23 The balance of the first sentence contains what were commonly referred to as the first and second ‘limbs’ of section 23. Under the first limb, a person is not criminally responsible for an act or omission that occurs independently of the exercise of their will. Under the second limb, a person is not criminally responsible for an event that occurs by accident.

3.24 Like the other provisions of Chapter 5,⁶⁴ section 23 excuses a person from criminal responsibility, and in that sense creates a limit to it. The effect of the provision, of course, depends on the meanings given to ‘act’, ‘event’ and ‘an event that occurs by accident’.

INTERPRETATION OF SECTION 23

3.25 In the early cases, judicial opinion about the meaning of the word ‘act’ in the first limb of section 23 differed. The issue was whether the ‘act’ was the physical act of the defendant (the narrow view) or the physical act and its consequences (the wide view). The view that was adopted affected the scope of criminal responsibility.

3.26 For the purposes of this Discussion Paper, it is enough to say that there was disagreement between members of the High Court about the meaning of the word ‘act’ in the section. The disagreement was resolved in *Kaporonovski v R*,⁶⁵ in which it was determined that ‘act’ meant the physical act of the defendant, in the context of the surrounding circumstances, but not its consequences. Its consequences were the ‘event’.

3.27 Thus, if the facts under analysis involved death caused by a gunshot, the act was pulling the trigger of a gun while it was pointed at another person — but not the injury that resulted. The ‘act’ is limited to the willed pulling of the trigger. Accordingly, a defendant is not excused from criminal responsibility under the first limb of section 23 because the resulting injury was unwilled (or unintended). A defendant may, however, be excused from criminal responsibility for the consequence of his or her willed act under the second limb of section 23 if the consequence is an event that occurred ‘by accident’.

3.28 Over the years, different tests of whether an event has occurred ‘by accident’, and whether, accordingly, a person is criminally responsible for it or

⁶⁴ See, for example, s 25, which excuses a person from criminal responsibility for an act or omission done or made in circumstances of extraordinary emergency.

⁶⁵ (1973) 133 CLR 209.

not, have been applied. The case review in Chapter 4 discusses these tests and their application in more detail. The two tests of significance to this discussion may be referred to in a shorthand way as:

- the 'direct and immediate result' test; and
- the 'reasonably foreseeable consequence' test.

3.29 Expressed in this way, they are tests of criminal responsibility rather than tests of accident.

THE DIRECT AND IMMEDIATE RESULT TEST

3.30 Philp J expressed the 'direct and immediate result' test, with reference to the facts in *R v Martyr*, in this way:⁶⁶

If a non-fatal blow be struck and there supervenes upon the blow an unforeseeable happening, whereby the actual fatal force is applied to the body of the victim, his resultant death occurs by accident. But that is not the case here since the death was the immediate — the direct result of the willed act. What I have said does not only apply to homicide.

3.31 In the same case, Townley J expressed the test in this way:⁶⁷

If a person kills or injures another by a 'willed' blow with his fist, although the death or particular injury is not reasonably foreseeable, the death or injury is not an event which occurs by accident. The event occurs by reason of something which is intended and not merely accidental. It is the direct and immediate result of an intentional act.

3.32 In *Martyr*, the deceased had an inherent weakness in his brain, which was unknown to the defendant and which made him more susceptible to death after a punch.

3.33 The direct and immediate result test arising out of *Martyr* has been interpreted in one of three ways:

- as a test to be confined to the situation where a victim has an unusual, unknown weakness because of which the harm was caused;
- as a broad test of criminal responsibility under which a person is criminally responsible for the consequences of their willed act, whatever the state of health of the victim, and whether reasonably foreseeable or not; and

⁶⁶ [1962] Qd R 398, 415. See also [4.36] below.

⁶⁷ *Ibid* 417.

- as an exception to the foreseeable consequences test in circumstances where the willed act causes the fatal trauma *directly*; for example, where the impact of a punch to the head causes brain injury and death.

3.34 Each of these applications provides an approach for consideration in this review.

THE REASONABLY FORESEEABLE CONSEQUENCES TEST

3.35 *Martyr* was overruled by the Queensland Court of Appeal in *R v Van Den Bemd*.⁶⁸ The Court approved the reasonably foreseeable consequences test, and expressed it in this way:⁶⁹

The test of criminal responsibility under s 23 is not whether the death is an ‘immediate and direct’ consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act that an ordinary person would not reasonably have foreseen it.

3.36 This was not a new test. It had been applied, for example, in *R v O’Halloran*,⁷⁰ *R v Knutsen*,⁷¹ *R v Tralka*,⁷² *R v Dabelstein*,⁷³ and *Kapronovski v R*.⁷⁴

3.37 The Crown sought special leave to appeal to the High Court against the decision of the Queensland Court of Appeal in *R v Van Den Bemd*.⁷⁵ By majority, special leave was refused. In a short judgment, the majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) explained that special leave was only granted to the Crown in ‘exceptional circumstances’.⁷⁶ The outcome of the case depended on the application and interpretation of the words ‘an event that occurs by accident’ — a question of statutory construction, which did not depend upon an important question of principle, and which did not warrant a grant of special leave. The majority concluded that the words of the section were:⁷⁷

⁶⁸ [1995] 1 Qd R 401 (judgment delivered 30 October 1992); special leave refused (1994) 179 CLR 137, discussed at [4.120] below.

⁶⁹ Ibid 405.

⁷⁰ [1967] Qd R 1, which is discussed at [4.61] below.

⁷¹ [1963] Qd R 157, which is discussed at [4.65] below.

⁷² [1965] Qd R 225, which is discussed at [4.75] below.

⁷³ [1966] Qd R 411, which is discussed at [4.92] below.

⁷⁴ (1973) 133 CLR 209, which is discussed at [4.113] below.

⁷⁵ (1994) 179 CLR 137.

⁷⁶ Ibid 139, citing *R v Lee* (1950) 82 CLR 133; and *R v Benz* (1989) 168 CLR 110.

⁷⁷ Ibid 139.

inherently susceptible of bearing the meaning placed on them by the Court of Appeal of Queensland. The interpretation given to the section by the Courts is one which favours the individual and reflects accepted notions of criminal conduct. Moreover, it is an interpretation which derives support from comments made in some judgments of this Court, particularly Gibbs J (with whom Stephen J agreed) in *Kaporonovski v The Queen*.⁷⁸

3.38 Brennan J was strong in his dissent. His Honour's judgment is considered in detail in Chapter 4. His Honour and McHugh J would have granted special leave to appeal.

3.39 More recently, in *R v Taiters* the test was expressed in terms of the Crown's obligation to negative the excuse:⁷⁹

The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the events as a possible outcome.

3.40 The model direction in the Benchbook⁸⁰ reflects this judgment:⁸¹

It is settled law that an event occurs by accident within the meaning of [section 23] if it was a consequence which was not in fact intended or foreseen by the defendant and would not reasonably have been foreseen by an ordinary person.⁸² The prosecution must prove that [the defendant] intended that the event⁸³ in question should occur, or foresaw it as possible outcome or that an ordinary person in the position of the defendant would reasonably have foreseen it as a possible outcome.⁸⁴ In considering the possibility of an outcome, you should exclude possibilities that are no more than remote and speculative.

THE FAULT ELEMENT — AN ALTERNATIVE APPROACH

3.41 The common law offence of involuntary manslaughter based on an unlawful and dangerous act (most commonly, an unlawful assault), to which the excuse of accident does not apply, provides an alternative approach for consideration. As the common law developed, the unlawful and dangerous act

78 (1973) 133 CLR 209.

79 [1997] 1 Qd R 333, which is discussed at [4.139] below.

80 *Supreme and District Court Benchbook*, Accident s 23(1)(b), [75.1] <<http://www.courts.qld.gov.au/Benchbook/SD-75-Accident.pdf>> (16 September 2008).

81 Benchbook — Accident s 23(1)(b): No 75.1, 75.2. Footnotes as they appear in the Benchbook, re-numbered in accordance with their position in this Discussion Paper.

82 *Kaporonovski v R* (1973) 133 CLR 209, 231 (Gibbs J).

83 In *Stuart v R* [2005] QCA 138 this direction was approved at [18] and [19].

84 In *Murray v R* (2002) 198 ALR 40 the appellant succeeded because the trial judge had not separated the concept of a willed act in 'discharging the gun' from the concept of doing so with the intent to kill a person or do that person grievous bodily harm. Hence the necessity for the separation of the concepts in the direction. Further, Kirby J (at [94]–[102]), Callinan J (at [103]–[155]), and Gaudron J (at [1]–[24]) concluded that a direction on s 23 was required in a trial on a charge of murder even where intention was the major issue on the trial where the evidence raised its application.

was considered, in theory, to be sufficient fault to support a conviction for manslaughter. By contrast, the fault element under section 23 that is required to support a conviction for manslaughter (where there has been an unlawful assault) is foreseeability of death as a reasonable possibility, either subjectively or objectively.

AMENDMENT TO OVERCOME (IN PART) THE DECISION IN *VAN DEN BEMD*

3.42 The effect of the decision in *Van Den Bemd* was partly reversed by an amendment to section 23 of the Criminal Code (Qld), which became operational on 1 July 1997. The amendment was recommended by the Criminal Code Advisory Working Group ('AWG'), which provided its report in July 1996.⁸⁵ Prior to its amendment,⁸⁶ the section was re-formatted by breaking the first and second limbs referred to above into separate numbered subsections.⁸⁷ The amendment appears as section 23(1A). The current form of section 23 of the Criminal Code (Qld) provides.

23 Intention—motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
 - (a) an act or omission that occurs independently of the exercise of the person's will; or
 - (b) an event that occurs by accident.
- (1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.
- (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

⁸⁵ *Report of the Criminal Code Advisory Working Group to the Attorney-General, July 1996.*

⁸⁶ *Criminal Law Amendment Act 1997 (Qld)* s 10.

⁸⁷ See *Reprints Act 1992 (Qld)*.

The reason for the amendment of section 23

3.43 The AWG's reason for recommending the amendment was explained in its report:⁸⁸

The intention is to amend section 23 so as to reverse the decision of the High Court in *Van den Bemd* (1994) 119 ALR 385 in which special leave to appeal from the decision in that case of the Court of Appeal was refused by a majority, it being said by the Court that the consequence of that decision would be that the law as laid down by the Court of Appeal would be the law for Queensland. Shortly, the question is whether a person should be criminally responsible for an event (the result or consequence of a willed act) which is due to an unknown weakness or defect in the victim which is neither intended nor foreseeable.

Section 23 is perhaps the most important single provision in the Criminal Code. It replaces the common law concept of mens rea (guilty state of mind). Uncertainty about the meaning of section 23 was finally set to rest by the judgment of Gibbs J, as he then was, in *Kapronowski*⁸⁹ ... It is important that the principles established for general application by that decision not be disturbed ... The notion of an event not involving criminal responsibility if it was unintended, unforeseen and unforeseeable is a fundamental and essentially just provision of the criminal law and many lawyers were nervous at the prospect of a modification of the principle of which section 23 and in particular the second limb thereof was an expression. Nothing, in our opinion, should be done by well intentioned legislation which puts this aspect of the principle in doubt. The question then is whether this proposal has that effect. The AWG have considered this problem with great care and in the final analysis the AWG are of the opinion that, provided it is confined to the precise problem to which reference has been made, it does not. The question of whether an event is unforeseeable is, at the end of the day, one of fact. A jury is perfectly entitled to say that the event under consideration, namely the death of the victim, was foreseeable, although the precise mechanism was not known to the offender. Indeed trial judges are finding that juries not infrequently convict, although the possibility of accident is strongly urged on them in address.

It must be remembered that while human anatomy is remarkably uniform, it obviously cannot be assumed that all human beings and their bodily parts and functions are of the same health and strength. Quite apart from congenital defects, the aging process and the vicissitudes of life make it inevitable that some people will have or develop defects not all of which will be visible and obvious. This is a fact of human existence known to all. It follows that the possibility of a defect making some person more vulnerable than others cannot be said to be unforeseeable for the purposes of the criminal law. It is no doubt with that human common sense that juries are reluctant to find accident in such cases.

Accordingly, the AWG propose the following additional paragraph for insertion in section 23 which is plainly concerned only with the case of the especially vulnerable victim. Being formulated as a proviso, it will leave the interpretation of the two limbs of section 23 undisturbed and give effect to what would seem to be the general understanding of the community. In particular, it will not

⁸⁸ *Report of the Criminal Code Advisory Working group to the Attorney-General, July 1996, 19–20.*

⁸⁹ This was the spelling of the appellant's name when this case was reported in the Australian Law Reports: see (1973) 1 ALR 296. It was revised as 'Kapronovski' when it was later reported in the Commonwealth Law Reports: see (1973) 133 CLR 209.

remove the possibility of accident in cases even of homicide where, for example, the presence of the victim was unknown and unforeseeable as in *Timbu-Kolian* (1968) 119 CLR 47, or where the fatal event occurred due to an unknown and unforeseeable malfunction of equipment. It is unnecessary to multiply instances in which this type of defence must be available. (note added)

3.44 The AWG proposed the following amendment:⁹⁰

23. Intention: Motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of ~~the person's~~ his will, or for an event which occurs by accident, provided that if a person who is unlawfully assaulted suffers death or injury by reason of a defect or weakness or abnormality in such person, the offender is criminally liable for such death or injury, whether or not he intended or foresaw or could reasonably have foreseen such death or injury. (strikethrough and shading in original)

3.45 Section 23(1A) is not in the form recommended by the AWG, in which it was plainly a proviso to the excuse of accident.

3.46 The proposed amendment was limited to unlawful assaults. It would not therefore have applied where death or injury was brought about by something other than an unlawful assault. It would not have applied, for example, where a disease was transmitted during consensual sexual intercourse because the deceased had a rare weakness that made the deceased unusually susceptible to the disease.⁹¹ That limitation does not appear in the amendment as enacted.

THE CURRENT EFFECT OF SECTION 23(1) AND SECTION 23(1A)

3.47 The current effect of section 23(1A) upon section 23(1)(b) produces results that may be thought anomalous.

3.48 Assume the following:

- A throws a moderate punch that lands on B's head;
- B dies;
- A did not intend to kill B. Nor did A foresee that death might result from the punch;

⁹⁰ Report of the Criminal Code Advisory Working Group to the Attorney-General, July 1996, 20.

⁹¹ Cf *R v Reid* [2006] QCA 202.

- A knows nothing about B's health.

3.49 Section 23 as presently drafted has the following effect upon the criminal responsibility of A for the harm caused by the punch:

- If there is no suggestion that B died because of an inherent weakness, then A's criminal responsibility depends on whether B's death was reasonably foreseeable by an ordinary person.
- But, if B died because of an inherent weakness, then A is criminally responsible for B's death, regardless of whether B's death was reasonably foreseeable by an ordinary person.

3.50 The test of A's criminal responsibility for the consequences of his punch depends on the state of health of his victim. If the victim is particularly vulnerable, then A may not rely upon the excuse of accident. If the victim is not particularly vulnerable, then A may rely on the excuse.

3.51 Whether A's reliance upon the excuse in fact results in an acquittal is, of course, a matter for a jury at trial. But the issue raised is whether there is any justifiable reason for imposing a stricter test of criminal responsibility for the same willed act because the victim had a particular hidden vulnerability.

Chapter 4

Accident: case review

INTRODUCTION	35
CASES BEFORE <i>VAN DEN BEMD</i>	37
<i>R v Callaghan</i>	37
<i>R v Vallance</i> (Tasmanian Court of Criminal Appeal)	38
<i>Vallance v R</i> (in the High Court).....	41
<i>R v Martyr</i>	42
<i>R v O'Halloran</i>	47
<i>R v Knutsen</i>	48
<i>R v Tralka</i>	50
<i>R v Mamote-Kulang of Tamagot</i>	51
<i>R v Hansen</i>	53
<i>R v Dabelstein</i>	53
<i>Timbu Kolian v R</i>	56
<i>Kaporonovski v R</i>	58
<i>VAN DEN BEMD</i> AND LATER CASES	59
<i>R v Van Den Bemd</i> (Queensland Court of Appeal)	59
<i>Griffiths v R</i>	60
<i>R v Taiters</i>	62
<i>R v West</i>	64
<i>R v Auld</i>	64
<i>R v Camm</i>	65
<i>R v Watt</i>	66
<i>R v Fitzgerald</i>	66
<i>R v Francisco</i>	69
<i>R v Grimley</i>	70
<i>R v Day</i>	70
<i>R v Stott & Van Embden</i>	71
<i>R v Charles</i>	72
<i>R v Seminara</i>	73
<i>R v Reid</i>	74
<i>R v Stevens</i>	76
<i>R v Trieu</i>	78
OBSERVATIONS ABOUT THE CASES AFTER <i>VAN DEN BEMD</i>	79
THE DECISION OF THE HIGH COURT IN <i>R v VAN DEN BEMD</i>	80
<i>Ward v The Queen</i>	85

INTRODUCTION

4.1 The terms of reference required the Commission to consider whether the current excuse of accident reflects community expectations. The issue is essentially whether the apparently successful application of the excuse produces results that are considered just or acceptable by the community.

4.2 A fair interpretation of the DJAG audit results, in which 100 trials were reviewed, is that accident was rarely the crucial consideration in murder trials (if it was raised at all), and that no conclusions could be drawn about the success of accident as a defence in manslaughter trials. Jury deliberations are confidential. If more than one defence is raised, as regularly occurs, it may not always be possible to determine the basis of the jury's verdict. The results of the DJAG audit are discussed in Chapter 6 of this Report.

4.3 Because it is often difficult to know the basis of a jury's verdict, the Commission has approached the matter from another perspective. The Commission has set out chronologically some cases in which appellate Courts, including the High Court, have considered the excuse. These decisions provide authoritative guidance for trial judges at first instance. Directions to juries about the excuse are derived from these decisions.

4.4 Generally, these cases are appeals from conviction by defendants who argue, for example, that the excuse should have been left for the jury's consideration but was not, or that their conviction was unreasonable having regard to the accident excuse. The Commission's review of the excuse of accident was not limited to homicide cases and, accordingly, the cases that follow are not only homicide cases.

4.5 One of the Commission's purposes in presenting this chronology is to provide information about the way in which the excuse is intended or permitted to operate. The criminal justice system operates, as it must, on the assumption that juries reach a verdict in accordance with the directions given to them by trial judges. The cases in this chronology illustrate the test that the jury is asked to apply, and include cases in which a defendant has been denied the defence. The Commission trusts that it will provide a reference against which community expectations may be judged.

4.6 As observed in the DJAG Discussion Paper, the accident excuse has not been the subject of any sustained challenge until recently. The facts of many of the cases included here are not dissimilar to more recent cases that have attracted public comment. One of the purposes in discussing these cases chronologically is to examine whether there has been, over time, any change in outcome where the excuse has been raised in similar circumstances, which may reflect a change in community attitudes, as expressed in jury verdicts.

4.7 The more recent cases covered by the DJAG Discussion Paper are discussed later in this chapter.

4.8 The judgments in the early cases concentrate on the meaning to be given to section 23(1)(b) or its equivalent. The conclusions reached, which were not consistent, reflected the different attitudes of the judges to the appropriate and just limits of criminal responsibility. The cases after *Van Den*

*Bemd*⁹² concern primarily the application of settled law⁹³ to particular facts, and the trends observed in those cases are of most relevance to this discussion.

CASES BEFORE *VAN DEN BEMD*

*R v Callaghan*⁹⁴

4.9 This was an application to the Court of Criminal Appeal for an extension of time within which to appeal a conviction for wilful murder.

4.10 Callaghan told police that on 8 November 1940, after a 'wordy exchange'⁹⁵ with the deceased (Groves), Groves made a punch at him with his left fist. Callaghan swung at Groves with his left fist, hitting Groves on the right side of the jaw and knocking him down. Groves' head hit an anvil,⁹⁶ and he died within 20 minutes. Callaghan panicked, and burnt the body. There was evidence that Callaghan owed Groves a considerable sum for wages and that Callaghan was in a bad way financially.

4.11 The trial judge told the jury that he could not see that there was any possible defence of accident. His Honour referred to section 23, and told the jury that a blow that is deliberately aimed at another, and that has the effect, though not the intended effect, that the other is killed, was not an accident within the meaning of the Criminal Code.

4.12 Callaghan appealed against his conviction, arguing that the jury had been misdirected on section 23.

4.13 Webb CJ was not prepared to differ from the trial judge as to the effect of section 23, but in any case could not see that a miscarriage of justice arose from that direction. The jury's verdict would have been the same even if they had been directed that accident was open. Their verdict of guilty of wilful murder indicated that they were satisfied that Callaghan had killed the deceased intending to kill him. A direction that accident was open would not have changed that belief.

4.14 EA Douglas J similarly took the jury's verdict to mean that Callaghan's blow was one that was intended to kill the deceased. His Honour said:⁹⁷

92 (1994) 179 CLR 137.

93 That is, the law as settled by *Van Den Bemd*.

94 [1942] St R Qd 40.

95 Ibid 42 (Webb CJ).

96 A heavy iron block used in blacksmithing as a surface upon which metal can be struck and shaped.

97 [1942] St R Qd 40, 46.

In the present case, as the appellant struck the deceased with intent to kill, death must fairly and reasonably be considered a consequence of his act if the deceased actually died by reason of a fracture of the skull caused by his falling onto the anvil or onto the ground ...

4.15 Philp J took a different view. His Honour did not agree:⁹⁸

if A [intentionally⁹⁹] strike B a light blow but by accident grievous bodily harm result, the blow is not an incident which occurs by accident, but the grievous bodily harm is a result which occurs by accident. That under those circumstances A should escape liability for the grievous bodily harm while being liable for the assault, is quite consistent with one's notion of justice. Why, then, should not the section have a similar application when the accidental result of the blow, intended merely as a light blow, is death?

...

... if the blow was not intended to do grievous bodily harm or kill, but was intended as a blow, and in the result the man at whom the blow was directed is in fact killed ... the killing under those circumstances could not be manslaughter

...

4.16 However, despite Philp J's disagreement with the directions given, his Honour was satisfied that on the whole there had not been a substantial miscarriage of justice. The jury must have been satisfied that Callaghan acted with intent to kill.

4.17 Philp J suggested, in effect, that criminal responsibility for the consequences of an act should be based upon the nature of the act itself (for example, that it was a light blow) and not the unintended consequences of the act. His Honour found this approach consistent with 'one's notion of justice'.¹⁰⁰

R v Vallance (Tasmanian Court of Criminal Appeal)¹⁰¹

4.18 Vallance was 17 years old. On 14 February 1960, he was at home alone at his parents' house in Hobart. There was a scrap yard next door. Four young children aged 6, 6, 7 and 8 were playing in the scrap yard. They were banging galvanised iron tanks with pieces of wood. This annoyed Vallance. He told them to 'clear out'. In reply, they threw rocks over the fence and on to his house. Vallance threw stones back. Then he went inside and got his father's air rifle. He fired it over the fence into the scrap yard. A pellet struck the chest of the 7-year-old girl, wounding her.

98 [1942] St R Qd 40, 50, 51.

99 The word 'unintentionally' appears in the report. Philp J plainly meant 'intentionally', as his Honour explained in *R v Martyr* [1962] Qd R 398, 413.

100 Ibid 50.

101 [1960] Tas SR 51.

4.19 Vallance was charged under the Tasmanian Criminal Code with (1) committing an unlawful act intending to cause bodily harm and (2) wounding.

4.20 He gave evidence at trial that he did not fire at the girl but fired towards the ground. His purpose was to scare the children out of the yard. He did not intend to hurt them.

4.21 The defence at trial also sought to rely on section 13(1) of the Tasmanian Criminal Code, which is expressed differently to section 23. Rather than excusing an event that occurs by accident, it excuses an event that occurs 'by chance'.

13. Intention and motive

- (1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.
- (2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.
- (3) Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission some other offence, shall, except as otherwise provided, incur the same criminal responsibility as if he had effected his original purpose.
- (4) Except where it is otherwise expressly provided, the motive by which a person is induced to do any act or make any omission is immaterial. (emphasis added)

4.22 The trial judge's directions about this section were confusing:¹⁰²

But I also tell you that even though he now says to you — and he says that he told the police at the time — that he did not intend to wound Pauline at all, you are nevertheless entitled to find by inference that he did intend to wound her if you find as a fact that the reasonable and probable consequences of what he did — the reasonable and probable consequences which a reasonable man would expect from what he did — would be that the girl would be wounded. It is a question of fact for you and even if you did think that the reasonable and probable consequences of what he did would be that the girl would be wounded you don't have to draw the inference that he intended that consequence. It is a matter for you ... if it is a reasonable and probable consequence it does not follow as a matter of law that he intended it.

4.23 Vallance was acquitted of both offences. The Crown appealed against his acquittal on count 2,¹⁰³ arguing, among other grounds, that:¹⁰⁴

102 Ibid 58–9.

103 Such an appeal by the Crown is no longer available.

104 [1960] Tas SR 51, 59.

- An intent on the part of the respondent to wound Pauline Latham was not a necessary ingredient of the charge [of wounding];
- It was sufficient for the Crown to prove on the part of the respondent a voluntary and intentional but unlawful act causing a wound to Pauline Latham, the wound not being an event occurring by chance.
- The wound would *not* have occurred by chance if it was an event which a reasonable man would have been expected to foresee and guard against.

4.24 The Crown was successful on grounds (a) and (b) above (and on another ground not relevant to this discussion). The Court ordered a re-trial on the charge of wounding.

4.25 Burbury CJ considered in detail the common law before reaching this conclusion:¹⁰⁵

It must steadily be borne in mind that whether the event occurs by accident is a *test of the accused's criminal responsibility*. The issue is I think whether the event occurs by chance *vis à vis* the accused. Judicial definition of the synonym 'accident' in other contexts must be invoked with caution, but having said that, I feel that Lord *M'Naughten's* classic definition of 'accident' ... is apt: 'An unlooked-for mishap or an untoward event which is not expected or designed'.

...

I have said that the issue is whether the event occurs by chance *vis à vis* the accused. That means that a subjective element is involved. The basic question as I see it is, Did the accused in fact foresee that wounding the girl was the possible or probable consequence of his conduct? The question is not *Ought* he to have adverted to the consequences? but, *Did* he? If he contemplated the wounding of the girl as a possible or probable consequence of his conduct the wounding is not an 'unlooked-for mishap', nor is it an event 'which is not expected'. If a man in fact foresees the actual consequences of his action as possible or probable then he cannot be heard to say that the consequences have occurred by chance. Neither at common law nor under s 13(1) of the Code would the 'defence' of accident be open. But as a matter of interpretation of s 13(1) it is impossible I think to go further and say that the test of foresight is not whether the accused foresaw the consequences but whether a man of reasonable prudence would have foreseen them.

4.26 Crisp J referred to the definition of 'chance' in the Oxford English Dictionary and concluded that an accident or a chance result was one that happened without foresight or expectation. The test was a subjective one, requiring actual foresight in the actor, and excusing him from results not in fact foreseen or contemplated by him as possible consequences.¹⁰⁶ Crawford J

105 [1960] Tas SR 51, 75.

106 Ibid 98.

reached the same conclusion: an 'event by chance' was one that was unintentional and not adverted to as a possibility (a subjective test).¹⁰⁷

4.27 This case illustrates the most generous approach to criminal responsibility, the Court basing it on the actual intentions of the defendant, and making a defendant liable only for what the defendant actually intended or foresaw as a possible consequence of their actions. This approach has not been followed, and is not considered further in this Report.

Vallance v R (in the High Court)¹⁰⁸

4.28 Vallance sought special leave to appeal to the High Court against the decision of the Tasmanian Court of Criminal Appeal. Special leave was refused.

4.29 Dixon CJ concluded that the direction given by the trial judge was too favourable to Vallance, but his Honour did not think it was appropriate that Vallance be tried again. Of section 13(1) and the expression 'an event which occurs by chance', Dixon CJ said:¹⁰⁹

this somewhat difficult phrase covers events which the person who might otherwise be criminally responsible neither intended nor foresaw as possible results of his conduct: they must too be fortuitous in the sense that no one would reasonably expect them to occur as a consequence of that conduct.

4.30 Kitto J observed that the Court of Criminal Appeal had to choose between a subjective and objective test of 'an event which occurs by chance', and that the Court of Criminal Appeal chose a subjective test. His Honour agreed that an event actually foreseen as a possibility by the actor could not be described as event that happened by chance; but it did not follow that every unforeseen event occurred by chance:¹¹⁰

In addition to having been unforeseen by him it must, I think, have been so unlikely to result from the act that no ordinary person similarly circumstanced could fairly have been expected to take it into account. In a provision relative to a consequence of an act voluntarily and intentionally done, and denying criminal responsibility for that consequence if it has occurred by chance, it seems to me that 'by chance' is an expression which, Janus-like, faces both inwards and outwards, describing an event as having been both unexpected by the doer of the act and not reasonably to be expected by any ordinary person, so that it was at once a surprise to the doer and in itself a surprising thing.

107 Ibid 114.

108 (1961) 108 CLR 56.

109 Ibid 61.

110 Ibid 65.

4.31 His Honour considered that the verdict of acquittal may well have been because of the erroneous direction. Whether Vallance was to be retried or not was a matter for the Executive.¹¹¹

4.32 Taylor J considered that, in the circumstances of the case, the application of section 13(1) meant that it was necessary only to show that the wounding was the result of acts that were voluntary and intentional, and that were done with reckless and wanton indifference to their result foreseen as a not unlikely consequence.¹¹²

4.33 Menzies J interpreted 'by chance' as referring to an event that the doer of the act did not foresee as a possible consequence.¹¹³

4.34 Windeyer J observed that the idea that wholly accidental and unintended harm was not culpable was an idea deeply imbedded in the law — whether section 13(1) had been enacted or not.¹¹⁴ In determining the meaning of 'by chance' his Honour said:¹¹⁵

Section 13(1) is an exonerating and exculpatory provision ... It does not say that a person is responsible for what does not occur by chance: all that it says is that a person is not responsible for what does. This purpose, and past history, combine to show what is meant here by a chance occurrence; for a man who intended to do a wrong is not to escape the consequences by saying that only by luck did he succeed in his purpose. If, for example, he, being a poor shot with a rifle, were to fire at another person a thousand yards away and hit him, it might be said to be a chance that he did so; but that would not exonerate him. If he had aimed badly, yet the bullet had struck a rock and ricocheted and wounded the intended victim, again it would not avail the shooter that only by that chance had he effected his design. The statutory provision only operates in cases where the event was not foreseen by the actor, and would not have been expected by reasonable men as an outcome of his actions.

4.35 His Honour did not consider that the trial judge's error was so serious as to warrant a re-trial. His Honour would have given leave and allowed the appeal — but agreed with the course proposed by the Chief Justice.

R v Martyr¹¹⁶

4.36 Martyr was convicted of unlawfully killing Alexander Scott. Scott and two other people (Edna Casey and Roley Wilder) were standing outside a café in South Townsville. Martyr, who had been inside the café, went outside. He

111 *Ibid* 66.

112 *Ibid* 69.

113 *Ibid* 73.

114 *Ibid* 77.

115 *Ibid* 80.

116 [1962] Qd R 398.

told Casey and Wilder that he was going to ‘bust’ them up. A scuffle started between Martyr and Scott. Wilder did not see Scott punch Martyr, but he saw him grab Martyr around the waist. He saw Martyr hit Scott twice in the chest and twice in the face. Scott went on to the window and slid down it. Wilder caught him, and eased him down to the ground. His head did not hit the ground. An ambulance was called, and Scott was taken to hospital. He died shortly after admission.

4.37 On external examination post mortem, Scott had an abrasion to his right frontal region, a small bruise to the right of the point of the chin and an abrasion on the back of the right arm. Internally, Scott had a large collection of blood behind the tentorium.¹¹⁷ His death was probably due to a haemorrhage on the base of the brain. A punch on the jaw could have caused that haemorrhage. It was not usual that a punch on the chin would cause that injury. The injury could have indicated some peculiar weakness in the deceased.

4.38 The trial judge did not direct the jury that a defence of accident was available to Martyr. Martyr appealed against his conviction to the Court of Criminal Appeal. The trial judge’s failure to so direct the jury was one of his grounds of appeal.

4.39 To decide this ground of appeal, the Court of Criminal Appeal had to construe the expression ‘event which occurs by accident’. Mansfield CJ said:¹¹⁸

The words ‘which occurs by’ imply the notion of causation, and the latter part of the section in my view covers the case where in consequence of an intentional act by A (whether lawful or unlawful) an unintended and unforeseen happening occurs which is the proximate cause of an injury resulting in death.

In such a case although the act of A is *sine qua non*¹¹⁹ the death of B, it is not the *causa causans*,¹²⁰ and A is protected by the section.

‘Accident’ therefore, in my view does not include an existing physical condition or an inherent weakness or defect of a person, such as an egg-shell skull, or as in this case, a possible inherent weakness in the brain.

4.40 The proximate cause of death was Martyr’s unlawful assault upon Scott, and there was no evidence that raised accident.

4.41 Philp J took the same view:¹²¹

117 The membrane across the inside of the skull which divides the brain into upper and lower portions.

118 [1962] Qd R 398, 406–7.

119 Latin: ‘without which nothing’ or ‘without which it could not be’.

120 Latin: the primary cause.

121 Ibid 414–15.

I will assume that Scott's death would not have resulted from the blows if he had not been suffering from some invisible and highly unusual weakness or constitutional abnormality. Now the appellant was charged with killing ... Scott — and the fact that Scott had a constitutional abnormality did not in my view make his death an 'accident' as that word is used in the section. If a haemophilic bleed to death from a small cut, his death cannot be said to be an accidental outcome of the cut.

The words under discussion I think have operation in the following circumstances. If a non-fatal blow be struck and there supervenes upon the blow an unforeseeable happening, whereby the actually fatal force is applied to the body of the victim, his resultant death occurs by accident. But that is not the case here, since the death was the immediate — the direct result of the willed act. What I have said does not only apply to homicide. If a man not knowing whether a vase is fragile or not, deliberately taps it and it thereupon shatters, the shattering, in my view, is not an event which occurs by accident.

In this case I hold that s 23 had no operation ...

4.42 Townley J similarly concluded:¹²²

if a person kills or injures another by a 'willed' blow with his fist, although the death or particular injury is not reasonably foreseeable, the death or injury is not an event which occurs by accident. The event occurs by reason of something which is intended and is not merely accidental. It is the direct and immediate result of an intentional act.

4.43 In this case, the immediate cause of death was one of Martyr's blows: it was the impact of the blow itself upon a uniquely weak brain that caused the haemorrhage that led to death. The judgments in this case reflect a distinction between fatal harm caused in this direct manner and fatal harm caused by something other than the blow itself.

4.44 Mansfield CJ expressed the distinction as one between (a) an intentional act that was the primary cause of death, and (b) an intentional act that was not the primary (or proximate) cause of death but without which death would not have occurred. The accident excuse (based on foreseeability) did not protect a defendant whose act was the primary cause of death.

4.45 Philp J spoke of unforeseeable happenings supervening upon a blow, and producing unintended consequences, in which case the accident excuse would apply. But in *Martyr's* case, death was the direct result of the willed act, and the excuse did not apply.

4.46 Thus, this Court applied a different test of criminal responsibility upon a defendant whose act was *of itself* fatal.

4.47 Although the deceased in *Martyr* had a peculiar weakness, confining the test in *Martyr* to instances where a blow causes death because of an uncommon fragility in the deceased gives rise to difficulty. The direct impact of

122

Ibid 417.

a moderate blow might unforeseeably cause the death of a person who was without any peculiar weakness (because, for example, the blow happened to land on a particularly vulnerable part of the body). Assume the facts of *Martyr* without the deceased's peculiar weakness. In that case, Martyr's criminal responsibility would then be determined by reference to whether death was a foreseeable consequence of the punch.

4.48 Section 23(1A) as presently drafted has the same result, as explained at [3.42]–[3.51] above.

4.49 Instead of confining *Martyr* to its facts, it may be interpreted as drawing a distinction between a blow which *itself* causes death (a 'fatal blow') and a blow which is followed by another (supervening) occurrence which causes death (for example, where the person punched falls to the ground and suffers a fatal injury upon impact).

4.50 Applying that interpretation, the fragility or otherwise of the deceased is not relevant to the criminal responsibility of a defendant who causes death by a fatal blow. Such a defendant is unable to rely upon the excuse of accident, whether or not the deceased had a particular fragility, because their blow was the direct and immediate cause of death.

4.51 But this distinction causes difficulty too, which is best illustrated by the following example.

If:

- A throws a moderate punch that lands on B's head; and
- the impact of the punch causes brain damage and death,

then the excuse of accident is not available to A because it was the impact of his blow that caused death.

But if:

- A throws a moderate punch that lands on B's head;
- it knocks B off balance and he falls onto the ground; and
- the impact of B's head hitting the ground causes brain damage and death,

then the excuse of accident is available to A because it was not the impact of his punch upon B's head that inflicted fatal trauma, but rather B's impact with the ground that caused his death.

4.52 On this approach, B's fall and impact with the road is treated as a supervening occurrence. B would not have fallen had he not been punched¹²³ but the punch itself did not inflict the fatal injury.¹²⁴

4.53 It may be considered artificial to describe the fall that followed the punch as a 'supervening occurrence', but the real issue is whether there is any rational basis for denying the excuse to A in the first example but allowing him to rely upon it in the second. Is not the fall and the injury sustained thereby as much a consequence of the punch as (say) the bruise left by the impact of the punch itself?

4.54 It may be argued that a fall following a punch to the head is inevitably foreseeable as a possible outcome of the punch. Every fall carries with it a risk of fatal impact with the ground. And the expectation is that a jury would not acquit on the basis of accident in the second example. But take the example one step further:

If:

- A throws a moderate punch that lands on B's head;
- it knocks B off balance; and
- B stumbles onto the road into the path of an oncoming car and is killed,

has there by now been a supervening occurrence? Or is B's collision with the car still to be considered a consequence of A's punch?

4.55 Assume B does not die in the collision, but requires hospitalisation and dies as a result of an infection that sweeps the hospital. Is B's death still a consequence of A's moderate punch for which A is criminally responsible? At what point is the line to be drawn for the purposes of the criminal law?

4.56 Consider the application of the reasonably foreseeable consequence test to the same facts. If a defendant throws a fatal blow, their criminal responsibility depends on whether death was a reasonably foreseeable consequence of the punch. The answer depends on an assessment by the jury of all the circumstances, including, for example, the force with which the punch was delivered, the site to which the punch was directed, and the relative sizes of the defendant and the deceased.

4.57 If a moderate blow causes the deceased to fall and upon falling the deceased sustains a fatal injury, then criminal responsibility would depend on whether the fatal fall was a reasonably foreseeable consequence of the punch.

¹²³ The *sine qua non*, as per Mansfield CJ.

¹²⁴ It was not the *causa causans*, as per Mansfield CJ.

The answer depends on an assessment by the jury of all the circumstances including, for example, the location at which the punch was thrown. If the punch was thrown while the defendant and the deceased were standing on a road, then a fatal fall may be considered reasonably foreseeable. If the punch was thrown while both were in a carpeted room, then a fatal fall might not be considered reasonably foreseeable.

4.58 If a moderate blow caused the deceased to stumble into the path of an oncoming car, then criminal responsibility would depend on whether the deceased's being hit by a car was a reasonably foreseeable consequence of the punch, taking into account all the circumstances, including the location at which the punch was thrown, and the traffic conditions at the time.

4.59 Where the deceased died because of infection acquired during hospitalisation, then criminal responsibility depends on whether the series of events, from impact with the car to infection and death, were reasonably foreseeable.

4.60 These examples raise the issues of the validity of the distinction between the criminal responsibility of a defendant whose blow itself causes death, and a defendant whose blow has been followed by another occurrence that causes death, and whether the concept of reasonable foreseeability should operate to determine criminal responsibility.

R v O'Halloran¹²⁵

4.61 O'Halloran was a 13-year-old boy who was convicted of the murder of his father. He shot his father in the back as his father was walking from their caravan to a hall. O'Halloran told another boy earlier that day that he was going to kill his father because his father had been cruel to him. In a written statement, O'Halloran said his father 'went up to open the door [of the hall] and I closed my eyes and pulled the trigger'. In evidence, he said that he put the rifle to his shoulder, aimed it at a point close to his father, shut his eyes and pulled the trigger. He said he was shaking and only intended to scare his father.

4.62 He appealed against his conviction to the Court of Criminal Appeal, arguing, among other things, that the jury had not been properly directed on accident. The trial judge read section 23 to the jury. The trial judge said he did not think the facts supported accident, but he left the matter to the jury.

4.63 Of the section 23 direction, Philp J said:¹²⁶

¹²⁵ [1967] Qd R 1. Although this decision is reported in the 1967 volume of the Queensland Reports, it was delivered on 25 September 1962.

¹²⁶ Ibid 2.

Before it is necessary for the judge to direct on accident there must be evidence from which accident can be deduced. Accepting the appellant's story it amounts to this. He deliberately aimed the rifle at a spot close to his father who was only a few feet away, closed his eyes and pulled the trigger. That act admittedly did not occur independently of the operation of his will and it is quite impossible to hold that the event of the bullet striking the father occurred by accident. The foreseeability of that event was beyond question. In my view it is very doubtful whether accident should have been left to the jury but in any event the judge did leave it with a sufficient direction.

4.64 Mack J was of the same view, but the appeal was allowed on another ground relating to the directions on criminal negligence. The verdict of murder was set aside, and a verdict of manslaughter substituted for it.

R v Knutsen¹²⁷

4.65 Knutsen met a woman named Frandl. They went to dinner together and both consumed 'a good deal of liquor'.¹²⁸ Knutsen said Frandl invited him to spend the night with her. They got into a cab together and travelled to her flat at Sandgate. When they arrived, she told Knutsen he could not come in. They argued. Knutsen pulled Frandl out of the cab and hit her on the face. He told police he hit her with backhanded blows that were 'pretty lethal on a girl like her'. Frandl fell to the ground in the middle of the road. The cab driver saw Knutsen kick her. Knutsen claimed she was conscious and abusing him. There was other evidence that she was unconscious.

4.66 An oncoming motorist, who was intoxicated, ran over her. She suffered serious injuries, including brain damage. She was permanently disabled and unable to give evidence.

4.67 The trial judge told the jury that they could convict Knutsen of unlawfully doing grievous bodily harm if they were satisfied that he in fact foresaw, as a likely outcome of his leaving Frandl on the road, that she would be struck by a vehicle, or if Frandl's being struck by the vehicle was something an ordinary person in the circumstances would reasonably have foreseen. (The trial judge's direction was to the same effect as the current direction.)

4.68 Knutsen was convicted of unlawfully doing grievous bodily harm (the brain damage). He appealed against his conviction. He argued that, under section 23, a person was criminally responsible for a physical act that he 'willed' but was not so responsible for even the foreseeable consequences of that act unless he willed those consequences. Alternatively, he argued that a person was criminally responsible for the consequences of his physical act only in so far as he in fact foresaw those consequences.

127 [1963] Qd R 157.

128 Ibid 160 (Philp J).

4.69 His argument about the interpretation of section 23 was not successful, but his appeal against conviction was allowed (by majority) on the basis that Frandl's injuries were not reasonably foreseeable.

4.70 Philp J said that the test for liability of a willed act was an objective one. The question was whether an ordinary man would reasonably foresee the consequence that did in fact occur.¹²⁹ If the jury accepted the prosecution's version of the facts, namely, that Knutsen left Frandl unconscious on the road, then it was open to them to be satisfied that an ordinary man would foresee the likelihood of an unconscious woman lying in the roadway being struck by a car. His Honour added:¹³⁰

If she had been injured by a helicopter striking her that injury would have been an event which occurred by accident — an unforeseeable consequence — and the appellant would not have been responsible.

4.71 But his Honour was in the minority. Stanley J applied the same test but arrived at a different conclusion: Frandl's injuries were not reasonably foreseeable. Unconsciousness may be of short duration. It was impossible for a jury to say that an ordinary man in Knutsen's position at the time would reasonably have foreseen that Frandl would probably be unconscious when a motor vehicle came along. There was no basis upon which an ordinary man could form an opinion about the probable period of unconsciousness and the probable length of time before a car arrived. There was no reason why the car ran over her. The driver saw her, and he had time, space and opportunity to avoid her: 'a clear line can be drawn between [the driver's] negligent driving and Knutsen's violence'.¹³¹

4.72 Similarly, Mack J was influenced by the details of the width of the roadway, traffic conditions and visibility and concluded that it was unlikely that any vehicle would run over Frandl. Accordingly, Knutsen was not criminally responsible for the grievous bodily harm that she suffered.

4.73 Knutsen's conviction for unlawfully doing grievous bodily harm was quashed, and a conviction for assault occasioning bodily harm (based on his punches) was substituted.

4.74 This case was decided in December 1962, and the conclusion of the majority about what was foreseeable may be surprising to those with experience of life in 2008. Philp J's conclusion accords with modern sensibility. It may be suggested that a jury today would find Knutsen criminally responsible for grievous bodily harm, applying the test of reasonable foreseeability. It is more difficult to see how Knutsen would bear criminal responsibility for causing grievous bodily harm under the direct and immediate test.

129 Ibid 165.

130 Ibid 166.

131 [1963] Qd R 157, 170.

R v Tralka¹³²

4.75 Tralka was convicted of unlawfully wounding Buddy Facer. On 29 September 1962, John Facer drove three men (Buschell, Bill Facer, Buddy Facer) in his truck to Tralka's house. Buschell, John Facer and Bill Facer got out of the truck. Buddy remained in the truck. Buschell and Tralka had a conversation about Buschell's claim for wages. Tralka ordered the Facers to leave. John Facer made an obscene remark and got into the truck. Tralka went into his house and got an axe. John Facer was reversing the truck out onto the roadway. Tralka threw the axe at John Facer. The axe broke the windscreen and struck Buddy, who was sitting between John and Bill in the front seat. It caused a four inch laceration on Buddy's right shoulder. Tralka threw the axe intending to hurt John Facer — not Buddy.

4.76 The trial judge ruled that it was not open to the jury to consider the defence of accident because Buddy's wound was the direct, although unintended, result of Tralka's willed act.

4.77 Tralka appealed against his conviction to the Court of Criminal Appeal, arguing that the excuse of accident ought to have been left to the jury. The Court of Criminal Appeal agreed, and his conviction was quashed. No re-trial was ordered having regard to the modest sentence imposed at first instance (a bond).

4.78 Mansfield CJ adhered to his view in *R v Martyr*¹³³ that the correct test was one of reasonable foreseeability. The jury ought to have been directed on accident. The willed unlawful act was the throwing of the axe. Hitting and wounding Buddy was not part of the willed act. If hitting Buddy was not a foreseeable consequence of the willed act, it was an accident, and the wounding was an event that occurred by accident. The other members of the Court agreed. They distinguished *Martyr* on the basis that it was concerned with force deliberately applied to the body of the victim.¹³⁴

4.79 Gibbs J said that:¹³⁵

having regard to the evidence as to the distance over which the axe was thrown and to the fact that John Facer quite unexpectedly stopped his vehicle instead of continuing to reverse it, it was quite open to the jury to find that the appellant did not foresee that the axe would strike Buddy ... and that a reasonable man in the circumstances would not have foreseen that the axe would strike him.

132 [1965] Qd R 225.

133 [1962] Qd R 398.

134 [1965] Qd R 225, 232 (Gibbs J).

135 Ibid 232.

R v Mamote-Kulang of Tamagot¹³⁶

4.80 The facts are recited succinctly in the judgment of Taylor and Owen JJ:¹³⁷

In a fit of temper the appellant, a native of New Guinea, intentionally struck his wife a strong back-hand blow with his fist, hitting her in the stomach. The blow ruptured her spleen which was abnormally large and, in consequence, she died. The appellant intended the blow to cause pain to his wife but he did not intend to kill her or to do her grievous bodily harm, and, had her spleen been of a normal size, it was unlikely that it would have been ruptured by the blow. It was not proved that the appellant foresaw, or that a person unaware of the deceased's abnormality would reasonably have foreseen, that death might follow as a consequence of the blow. He was indicted upon a charge of manslaughter and was convicted and from that conviction this appeal is brought.

4.81 The trial judge held that a defence of accident was not available to Mamote-Kulang. Mamote-Kulang argued on appeal that it was. He argued that on a charge of manslaughter, where there was no intention to kill or do grievous bodily harm, criminal responsibility would not attach if death as a direct consequence of his actions was not reasonably foreseeable by a person unaware of some physical weakness of the deceased. His argument was unsuccessful in the High Court.

4.82 McTiernan J said:¹³⁸

What is missing is proof of an accidental cause of death. Certainly the blow was not an accidental occurrence; nor was the disease to her spleen such an occurrence. The defence of accident must fail because the deceased struck the blow intentionally and it directly and immediately caused the injury to Donate-Silu from which she died. The blow was the sole cause of her death.

4.83 Taylor and Owen JJ said:¹³⁹

If, as here, death is the immediate and direct result of an intentional blow, the fact that the person struck has some constitutional defect, be it an enlarged spleen or an egg-shell skull, unknown to the person striking the blow and which makes the recipient of the blow more susceptible to death than would be a person in normal health does not enable an accused to assert that he is being sought to be made criminally liable for an 'event' occurring by accident.

4.84 Windeyer J considered that section 23 did not depart from common law principles. The blow to the deceased was not an accident. The fact that she had an enlarged spleen was not an accident. No accidental occurrence

136 (1964) 111 CLR 62.

137 Ibid 64.

138 Ibid.

139 Ibid 70.

intervened between the blow and the death. Mamote-Kulang was guilty of manslaughter:¹⁴⁰

The act and the intent that together make up manslaughter in a case such as this are an act which, without justification or excuse, was done with an intent to inflict some bodily harm, but not fatal harm, but which in fact cause death. If the accused did not in the exercise of his will do such an act with such an intent he is not criminally responsible. If, although he did intend to hurt, death was caused by some agency unexpectedly intervening, then again he is not criminally responsible; for in that case the death is not a consequence, in the legal sense, of his conduct. Whether that was so or not is a question of causation as a determinant of legal responsibility. It is whether there was a break in the chain of causation, and a new cause. It is a matter of remoteness of consequence ... But in the present case there was no intervening happening. Nothing other than the blow that the accused delivered was in any relevant sense the act which caused the death.

4.85 Menzies J, in dissent, took a different view. His Honour saw no reason to confine what is now section 23(1)(b) to a case where there is an intervening accidental event between the act and its consequences. In his Honour's view, an event is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary intelligence ought under the circumstances in which it is done to take reasonable precautions against it. In the present case, the deceased's death was the unusual event of the blow, and her killing was excused under section 23:¹⁴¹

Death due to an accidental blow is an event occurring by accident and so it seems to me is death from an intentional blow which was not intended to harm and was apparently unlikely to harm — such, for instance, as a friendly slap on the back or a fair blow in a boxing contest. Football too provides many occasions for heavy physical contact with the intention of stopping an opposing player. Where a blow, a tackle or a bump causes death because of an idiosyncrasy of the deceased, it is not the idiosyncrasy which is the accident; it is the surprising consequence of slapping, striking, tackling or bumping someone with an unknown idiosyncrasy ...

4.86 This dissenting view accords with the current, post-*Van Den Bermd*, approach to the application of the excuse (subject to section 23(1A)), and avoids the need to determine whether the consequence of an act is a 'supervening' or 'intervening' accidental event.

4.87 From the point of view of the majority, accident was not available as an excuse because the blow struck was fatal — not because the deceased had a particular weakness.

140 Ibid 83.

141 Ibid 72.

R v Hansen¹⁴²

4.88 Hansen was convicted of the murder of Rose Clark. He entered her house, intending to steal from it. He carried a loaded rifle with which he intended to shoot wallabies. He found money in a purse. He put the money in his pocket. He heard the deceased say 'Who's there?' At trial, he said he did not know what happened, but that the next minute blood was coming out of the deceased's chest — the gun just went off. He said that he had no intention to shoot, kill or hurt the deceased in any way.

4.89 The deceased had been shot in the back. There was evidence that the rifle would go off easily, including by banging the butt on the floor or by being hit on the butt.

4.90 Hansen appealed against his conviction. At his trial, Philp J directed the jury that, if Hansen's story were true, then it would be death by accident¹⁴³ or, at the most, manslaughter due to his criminal negligence in having a loaded rifle in his hand in such a way that it could injure the deceased. On appeal, Hansen argued that this direction did not deal with unwilled acts¹⁴⁴ and inadequately dealt with events occurring by accident.

4.91 Jeffriess and Wanstall JJ agreed with Hart J that, in the light of *Martyr*, the excuse of accident was not relevant in this case at all. Hart J said, 'If Mrs Clark was killed at all by the appellant, it was by the direct result of his actions, there was no supervening event and there is no room for the application of the second part of the section'.¹⁴⁵

R v Dabelstein¹⁴⁶

4.92 Dabelstein inserted a sharp pencil into the vagina of his partner. He said it was an act done on the spur of the moment. His intention was to allow her to achieve sexual satisfaction. The pencil lacerated her vaginal wall, and she bled to death.

4.93 The trial judge told the jury that, if the deceased died as a result of what Dabelstein had done, then he had killed her and, unless that killing was authorised, justified or excused in some way, the killing would be manslaughter. His Honour told the jury that it was not authorised or justified, nor was it an accident in any way. Dabelstein was convicted of manslaughter.

142 [1964] Qd R 404.

143 Philp J's approach in this case, and in the cases of *Knutsen* and *O'Halloran*, suggests that his Honour was intending to confine *Martyr* to its facts.

144 That is, s 23(1)(a).

145 [1964] Qd R 404, 413.

146 [1966] Qd R 411.

4.94 Dabelstein appealed against his conviction, arguing, among other things, that he was entitled to have the excuse of accident left to the jury.

4.95 Hanger J considered in detail the High Court decisions *Vallance v The Queen*¹⁴⁷ and *Mamote-Kulang of Tamagot v The Queen*¹⁴⁸ but found himself unable to obtain any authoritative test from them about the application of section 23. His Honour felt that the decision in *Mamote-Kulang* must be confined to its particular facts. His Honour considered the meaning of section 23 (and therefore its application) unsettled.¹⁴⁹ In reaching a conclusion about the interpretation of section 23, Hanger J made the following comment:¹⁵⁰

The common law made a man who caused only a bruise by a wrongful punch guilty of common assault, but him whose victim had something the matter with his brain and died from a similar punch, guilty of manslaughter, liable to imprisonment for life. Such a distinction in a civilised criminal code is ludicrous;

...

4.96 And later:¹⁵¹

Why is it necessary that there should be some agency supervening between a willed blow and a death to constitute the death an event which occurs by accident? The event is *ex hypothesi* the result of the blow in the circumstances; the blow being given, death follows because (a) the victim had an enlarged spleen; (b) the victim had a weak heart; (c) the victim was pushed by the blow onto a haystack which contained an upturned pitchfork; (d) the victim was pushed by the blow into the path of an oncoming car which rounded the corner of a road in the country; (e) the victim was pushed by the accused so that he staggered into the path of falling debris from building operations. What is the basic difference between these cases which makes one an occurrence by accident and not another? That in one case something was in fact moving, and in another case it was not, does not seem to me to matter. A set of circumstances existed in each case: the blow or push operated in those circumstances and produced the result. Effect followed cause as it always does. A motor car coming round a corner, falling debris, and an enlarged spleen or an eggshell skull are each of them equally part of the circumstances in which a blow or a push operates. There is no reason for distinguishing amongst them; to make a distinction for purposes of the criminal law has no justification.

4.97 In his Honour's opinion, a defence based on section 23 was open to Dabelstein. It was not put to the jury and the verdict of manslaughter could not stand. His Honour's view reflects the current law (subject to section 23(1A)). However, his Honour was in the minority in the result.

147 (1961) 108 CLR 56.

148 (1964) 111 CLR 62.

149 [1964] Qd R 404, 422–3.

150 *Ibid* 424.

151 *Ibid* 427–8.

4.98 On the section 23 argument, Wanstall J adopted the foreseeability test: the application of accident depended on whether the fatal penetration of the vaginal wall was unforeseen and could not reasonably have been foreseen. His Honour noted that the trial judge did not direct the jury to that aspect of section 23 but, in his Honour's opinion:¹⁵²

it was not open to the jury to take any other view than that a person of ordinary intelligence ought to have foreseen that a sharpened pencil thrust into the vagina of the deceased in the way described and demonstrated by the appellant, would probably penetrate the vaginal wall and its blood vessels, and that death would probably result from that bodily injury unless prevented by proper care and treatment. The appellant had not suggested the contrary, but in raising [the] excuse had confined himself to the question whether the deceased's consent (if she did consent) would have excused his act — an untenable argument. The non-direction is therefore immaterial and the learned judge was right in telling the jury in effect that there was no justification or excuse open on the facts.

4.99 Wanstall J was satisfied that there had been no miscarriage of justice. Stable J reached a similar conclusion without discussing section 23, and the appeal was dismissed.

4.100 Hanger J was of the view that criminal responsibility ought to depend on the nature of the act, and any distinction based on unforeseeable consequences was 'ludicrous'.¹⁵³ Philp J in *Callaghan* similarly considered that basing criminal responsibility on the nature of the blow, not its unintended consequences, was 'quite consistent with one's notion of justice'.¹⁵⁴

4.101 The issue is perhaps complicated by considering it in the context of death which has followed a punch because a punch is an unlawful act, and carries with it an assumption of a blameworthy defendant. It must be remembered that any change to the availability of the excuse of accident will affect a person whose willed act is lawful, friendly or playful.

4.102 Consider the case where the willed act is not unlawful, but where death is the immediate and direct result of a lawful act. Menzies J gives examples in *Mamote-Kulang* such as a friendly slap on the back, a fair blow in a boxing contest or a fair tackle in a football match. If an ordinary person would not reasonably have foreseen death as a possible outcome of that sort of lawful act, should the actor be held criminally responsible for death through a conviction for manslaughter followed by penal sanctions? Under the current law, they would not be criminally responsible. Under a 'direct and immediate' test of criminal responsibility, they would be.

152 Ibid 429.

153 Ibid 424.

154 [1942] St R Qd 40, 50.

4.103 It may be suggested that any perceived harshness in the outcome of a direct and immediate test of criminal responsibility could be redressed by an appropriately lenient sentence where the willed act was lawful, and the tragic consequences unexpected. As against that argument, it may be suggested that the fact of conviction for manslaughter per se, and the stigma attaching to it, must not be trivialised, whatever the sentence ultimately imposed.

Timbu Kolian v R¹⁵⁵

4.104 Timbu Kolian had been arguing with his wife. Tired of the argument, he went outside in the dark some distance from their house. His wife followed him to continue the argument. It was so dark that he could not see her but he could judge from the sound of her voice where she was. He could stand no more of what, to him, was her 'nagging'¹⁵⁶ and he decided to physically chastise or beat her.

4.105 He picked up a stick, which was not heavy, and aimed a blow at her. Had Timbu Kolian's blow struck her, it would have hurt her but would not have done her serious physical harm. Unknown to Timbu Kolian, she was carrying in her arms their five-month-old son. The blow landed on the baby and killed him. Timbu Kolian was convicted of the manslaughter of his son.

4.106 The trial judge (who sat alone without a jury) considered that, in accordance with *Mamote-Kulang v R*,¹⁵⁷ he could not accept the submission that the baby's death was an event that occurred by accident.

4.107 Timbu Kolian appealed against his conviction on several grounds, including that the event — the death of the infant — occurred by accident. Neither Timbu Kolian nor a reasonable man placed as he was did or could have foreseen that the blow aimed at his wife would kill his son.

4.108 His appeal to the High Court was successful. Barwick CJ and McTiernan J allowed the appeal on the basis that the striking of the child on the head was the relevant act for the purposes of section 23(1)(a). That act was not his willed act, and he was not therefore criminally responsible for it. Menzies J and Owen J (with whom Kitto J agreed) allowed the appeal on the basis that the baby's death was an event that occurred by accident. Timbu Kolian's conviction for manslaughter was quashed.

4.109 Windeyer J's discussion of criminal responsibility is particularly apposite to the issues raised in this reference. His Honour said:¹⁵⁸

155 (1968) 119 CLR 47.

156 Ibid 48 (Barwick CJ).

157 (1964) 111 CLR 62.

158 (1968) 119 CLR 47, 63.

In general, criminal responsibility is today attached to moral blame. And according to deep rooted beliefs blameworthiness does not depend simply on what a man did, or on the results his actions caused. It depends upon his knowledge and his intentions when he acted — or upon his advertence to the possible outcomes of what he was doing or was about to do, or his careless ignoring of them. That of course is trite. The doctrines of mens rea in the common law and of *dole* in the law of Scotland express this element in guilt. I see no reason for thinking that s 23 demands any departure from this basic concept or that it at all attenuates it ...

4.110 His Honour had no hesitation in concluding that the striking of the child causing death was an event that occurred by accident within the meaning of section 23:¹⁵⁹

An event in s 23 clearly means a happening for which an accused person would be criminally responsible if it did not occur by accident and he was not otherwise exonerated. Therefore an event in this context refers to the outcome of some action or conduct of the accused, for a man cannot be responsible for an event in which he had no part at all; and it would be unnecessary to say so.

As to accident, for centuries courts and the great writers on the criminal law have spoken of misadventure or accident as, by the common law, excusing a homicide. There is no reason ... to seek for any new meaning for an old word now appearing in the Code and expressing an old idea. The only change which the Code has made is that whereas by the common law misadventure excused only a homicide which was not associated with an unlawful act, the Code provides that an accidental event is never of itself punishable, and it is immaterial whether it arose out of the doing of an unlawful act or of a lawful act. The only question then is, was the killing of the child 'an event which occurred by accident'?

... In the light of the decision in *Vallance's* case, it can now be said that an event occurs by accident if it was not intended, not foreseen, and unlikely, that is not reasonably to be foreseen as a consequence of a man's conduct.

In the present case the striking of the child causing his death seems to me to answer the description of an event which occurred by accident.

4.111 Owen J arrived at his conclusion by reasoning that Timbu Kolian's aiming the blow at his wife was intentional but before it reached its target a wholly unexpected and unforeseeable event intervened. The child's head intercepted the blow aimed at his wife. The fact that the blow struck the child was held to be an event that occurred by accident.

4.112 A modern fact finder, applying the reasonably foreseeable consequence test, might reach a different conclusion about whether it was reasonably foreseeable that a mother might be holding her infant child in her arms who might be struck by a blow intended for the mother, and who would be more susceptible to serious harm from that blow. A foreseeability test allows changing community perceptions to be taken into account in decisions about criminal responsibility.

159

Ibid 66–7.

Kaporonovski v R¹⁶⁰

4.113 Kaporonovski was charged with unlawfully doing grievous bodily harm to Bajric. He was convicted. The trial judge had not directed the jury on accident. After his conviction, the trial judge stated a case for the Court of Criminal Appeal,¹⁶¹ asking two questions: one about accident and the other about provocation. The accident question was whether the defence was available on the evidence in this case. The Court of Criminal Appeal said it was not. Kaporonovski sought special leave to appeal from that decision to the High Court.

4.114 Bajric wrongfully insulted Kaporonovski. Kaporonovski said that he became very upset and struck Bajric. He took hold of Bajric's wrist and pushed against Bajric's hand. Bajric pushed back with his hand. Bajric was holding a glass of beer. Kaporonovski pushed Bajric's hand back towards Bajric's face. The glass broke against Bajric's eye. Bajric suffered a laceration and serious eye injury, amounting to grievous bodily harm.

4.115 McTiernan ACJ and Menzies J said:¹⁶²

Here the event for the purposes of the section is the grievous bodily harm suffered by Bajric. The act, for the purposes of the section, is the forcing of the glass against and into Bajric's face.

That event did not happen by accident. It was the obvious, natural and probable consequence of the act. That act did not occur independently of the exercise of the will of the applicant. What he did was done deliberately.

...

The Court of Criminal Appeal were correct in deciding that the ... question should be answered 'No'.

4.116 Walsh J also found that section 23 did not apply.

4.117 After reviewing the authorities, Gibbs J said:¹⁶³

It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person: See *Vallance v The Queen*, *Mamote-Kulang v The Queen*, *Timbu-Kolian v The Queen*, and *Reg v Tralka*. It is impossible to say that the grievous bodily harm was so unlikely a consequence of pushing a glass forcibly towards his face that no ordinary person would reasonably have foreseen it — indeed no very strong argument was advanced to the contrary. (notes omitted)

160 (1973) 133 CLR 209.

161 Under s 668B of the Criminal Code (Qld).

162 (1973) 133 CLR 209, 215.

163 *Ibid* 231.

4.118 His Honour concluded that section 23 did not apply, and that the question was answered correctly by the Court of Criminal Appeal.

4.119 His Honour's definition of an event that occurs by accident set out above was followed in *R v Van Den Bemd*¹⁶⁴ and is the source of part of the general directions on accident contained in the model Benchbook directions.

VAN DEN BEMD AND LATER CASES

***R v Van Den Bemd* (Queensland Court of Appeal)¹⁶⁵**

4.120 The decision of the Court of Appeal and the High Court's refusal of special leave from it are central to this discussion. The Court of Appeals' decision only will be discussed within this chronology. The High Court decision is discussed separately below.

4.121 Van Den Bemd was convicted of unlawfully killing Alan Bankier. They got into a fight at a public bar at a hotel in Toowoomba. Eye witnesses saw Van Den Bemd strike the deceased at most two blows about the face. However, a post mortem examination revealed subcutaneous bruising within the neck muscles. Death was the result of subarachnoid haemorrhage associated with the impact that caused the bruising within the neck muscles. The guilty verdict was explicable on the basis that, despite what eye witnesses had seen, Van Den Bemd struck the deceased on the side of the neck rather than on the face.

4.122 At the trial, defence counsel asked the trial judge to instruct the jury on accident. The trial judge refused to do so, holding that section 23 had no application where the blow struck by the offender was a willed act, and the death was a direct result of it. That ruling was consistent with *R v Martyr*. The correctness of *Martyr* was challenged on appeal.

4.123 The Court of Appeal considered *Martyr*, *Mamote-Kulang*, *Hansen*, *Tralka*, *Knutsen*, *Timbu-Kolian*, and *Ward v R*¹⁶⁶ (a Western Australian case). Those cases were not easy to reconcile, and the Court considered them 'in disarray'.¹⁶⁷

4.124 However, *Kapronovski v R*¹⁶⁸ was a decision of the High Court after those decisions. Four of the five judges of the High Court in *Kapronovski* held that, for the purposes of section 23, the 'act' was pushing the glass into Bajric's face and the 'event' was the grievous bodily harm that ensued as a

¹⁶⁴ [1995] 1 Qd R 401.

¹⁶⁵ *Ibid.*

¹⁶⁶ [1972] WAR 36.

¹⁶⁷ [1995] 1 Qd R 401, 403.

¹⁶⁸ (1973) 133 CLR 209.

consequence. Section 23 did not provide Kaporonovski with a defence because the act was willed and the event was a reasonably foreseeable consequence of the act.

4.125 The Court of Appeal concluded that the test under section 23 was one of the foreseeability of the consequence as a matter of probability or likelihood. In the face of the reasoning in *Kaporonovski, Martyr* was no longer good authority:¹⁶⁹

The test of criminal responsibility under s 23 is not whether the death is an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person would not reasonably have foreseen it.

4.126 To establish guilt, the Prosecution had to negative, or overcome, the defence. The jury should have been asked to consider whether they were satisfied beyond reasonable doubt that death was not such an unlikely consequence of the punches that an ordinary person in the position of the accused could not reasonably have foreseen it. The appeal was allowed, Van Den Bemd's conviction was quashed, and a re-trial was ordered.

4.127 Van Den Bemd was re-tried and acquitted in September 1994. At least at face value, it is possible to say that accident made the difference in this case.

Griffiths v R¹⁷⁰

4.128 Griffiths was convicted of manslaughter. He unsuccessfully appealed against his conviction to the Court of Appeal. By special leave, he appealed to the High Court.

4.129 Griffiths and John Apps (the deceased) were 16 years old. They were best friends in the same class at high school. Apps went missing on 28 November 1989. He had been living with his father in a caravan park at Caboolture. In November 1990, his remains were found in the Glasshouse Mountains, not far from his home. There was a bullet hole in the back of his skull. It was probably from a .22 calibre rifle. It was possible that it was fired from his father's rifle, which went missing at the time of his disappearance. No rifle was found. His bicycle and backpack were found near his body.

4.130 Griffiths was charged with his manslaughter. The evidence against him came from two girls, Jodie Parker and Leeanne Clack. Parker gave evidence that after the deceased's body was found Griffiths had said to her, 'I know whose body is up in the mountains. I know whose it is and I was the one that killed him. If you tell anybody, I'll do the same to you. Clack said that Griffiths,

¹⁶⁹ [1995] 1 Qd R 401, 405.

¹⁷⁰ (1994) 125 ALR 545.

her friend, told her, 'I shot [or I killed] John. It was an accident. I didn't mean to do it.'

4.131 The trial judge left the case to the jury on the simple basis that, if they were satisfied beyond reasonable doubt that Griffiths' admissions to Parker and Clack were truthful, they should convict. His Honour told the jury:¹⁷¹

The Crown does not contend that the accused killed the deceased for any particular reason or with any particular intention or whatever. It does not have to do that and it does not do that and you should be very clear about that. Any killing of the deceased could, for argument's sake, have arisen through the careless handling of a rifle. You might think that if the accused did kill the deceased, then that is the most likely explanation, but you need not and really should not wonder about those things, because it involves entering into a field of speculation.

4.132 His Honour also told the jury that the evidence did not raise matters of authorisation, justification or excuse. His Honour accordingly withdrew from the jury any issue arising under section 23 or section 289.

4.133 The main argument before the Court of Appeal was whether the evidence was sufficient to establish that Griffiths had killed the deceased. Section 23 was raised as a subsidiary point. Fitzgerald P thought that the evidence was insufficient to sustain the verdict. The majority (Pincus and Davies JJA) disagreed. Their Honours also said that a bald statement that the death was an accident was not enough to throw upon the Crown the burden of excluding section 23.

4.134 In the High Court, Brennan, Dawson and Gaudron JJ observed in relation to accident that the onus of negating section 23 rested on the Crown. If Griffiths in fact fired the bullet that entered the deceased, his criminal responsibility for manslaughter depended on proof that (i) the act of firing the bullet was willed or voluntary and (ii) that the death of the deceased did not occur by accident: it was a foreseen or foreseeable result of that act; or alternatively, that the deceased was killed by criminal negligence.

4.135 The plea of not guilty put all elements of the crime charged in dispute. The trial judge erroneously withdrew the crucial issues from the jury.

4.136 Brennan, Dawson and Gaudron JJ said:¹⁷²

In the present case, on the view of the evidence adopted by the majority, two schoolboys, best friends without any evidence of hostility between them, were out in the mountains together with a gun; the gun went off and killed one boy and the other went away and tried to lay a false trail about the incident but, when acknowledging that he shot or killed the other, said it was an accident. On that evidence, the possibility that death was due to 'accident' — stumbling when the gun was cocked and loaded or some other kind of accident — was

171 Ibid 546.

172 Ibid 550.

clearly raised. Evidence that the appellant gave false or different stories about his contacts with John Apps did not disprove that John's death was caused by 'accident' ... The burden of disproof that rested on the Crown was substantial, not merely formal. To establish that the appellant was the person who had the gun when the fatal shot was fired, the Crown relied, inter alia, on the admission he made to Leeanne Clack. The Crown had to take that statement as a whole so that the version of facts that it contained at once implicated and tended to exculpate the appellant. The evidence clearly raised the issues to which s 23(1) relates.

4.137 The trial had miscarried. The appeal was allowed and the conviction was quashed. The Crown did not seek a re-trial. Their Honours also referred to the following statement of the majority of the Court of Appeal about the Crown's onus of excluding the application of section 23:¹⁷³

Since there was no possible means of telling how the bullet came to be discharged, it is impossible to see how the Crown could have discharged such an onus and, if the jury took a direction placing the onus as to accident on the Crown seriously, the result must have been an acquittal.

4.138 Deane and Toohey JJ agreed that the directions to the jury were inadequate, and that the appeal should be allowed, but their Honours took a more serious view of the facts and concluded that the killing was at the very least the result of criminal negligence.

R v Taiters¹⁷⁴

4.139 This was a reference by the Attorney-General under section 669A(2) of the Criminal Code (Qld). The Attorney-General sought the Court of Appeal's consideration of and opinion on the following questions:¹⁷⁵

1 Whether when a person is charged with manslaughter it is necessary for the Crown to prove beyond reasonable doubt that an ordinary person in the position of the accused could have foreseen that death was a probable or likely consequence of his or her actions?

2 Whether when a person is charged with manslaughter it is a correct direction of law that an accused is not responsible for a death which follows from his or her actions if death was such an unlikely consequence of his or her actions that an ordinary person could not reasonably have foreseen it?

4.140 On Christmas Eve 1993, Taiters and Cooper got into a fight in the street. Taiters struck Cooper. He fell heavily and struck his head on the cement footpath. Cooper was taken to hospital but he was allowed to leave. Certain symptoms persisted and, upon his return to hospital, it was discovered that his skull had been fractured. Despite treatment, he died on 3 January 1994.

173 Ibid 551.

174 [1997] 1 Qd R 333.

175 Ibid 333–4.

4.141 Taiters was charged with manslaughter. After the prosecution had led its evidence, the trial judge said that he would direct the jury that Taiters should be acquitted on the basis that it was not open to them to be satisfied beyond reasonable doubt that the accused was guilty of manslaughter. At that indication, the Crown sought a return of the indictment, entered a *nolle prosequi* and referred the questions above to the Court of Appeal.

4.142 It was suggested at the reference that trial judges experienced difficulty giving correct and clear directions to juries about accident. The Court (Macrossan CJ, Pincus JA and Lee J) reviewed the relevant authorities, and the history of the section and said:¹⁷⁶

It has to be said that an event cannot qualify as an accident within the meaning of s 23 simply because a reasonable person, although regarding the consequences as being a likely outcome, would have thought it more probable that it would not happen than that it would ... The discussion may be carried further and instances at either end of the spectrum looked at. If the outcome of some action is regarded as certain or even more probable than not it cannot legitimately be called accidental. Even if there is a substantial likelihood although something less than a preponderance of probability that a particular outcome will occur and the risk of the outcome is voluntarily accepted by the one acting, it should not, if it results, be called accidental. On the other hand, something which a reasonable man might think of as no more than a remote possibility which does not call to be taken into account and guarded against can when it happens, be fairly described as accidental.

The references which have been made in the cases to 'reasonably' and 'ordinary person' in the context under discussion, give an emphasis to the fact that the relevant test calls for a practical approach and is not concerned with theoretical remote possibilities. It directs inquiry to what would be present in the mind of an ordinary person acting in the circumstances with the usual limited time for assessing probabilities, this being a factor which is applicable to a great deal of human activity. However, it should not be accepted that some real risk of an outcome which an ordinary person in the circumstances would have been conscious of, can be disregarded by the doer of the action, yet still, if it eventuates, be called accidental within the meaning of the section. In the subjective part of the expression ... ('an event which occurs by accident') ie when it is necessary to consider 'foreseen' by the accused, the same degrees of likelihood will be regarded as those discussed in connection with the objective test.

4.143 In summary, the Court held that the applicable onus would be sufficiently stated if the jury were told that:¹⁷⁷

The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.

176 Ibid 338.

177 Ibid.

4.144 The questions were answered 1 'No'; and 2 'Yes'. Accordingly, to be guilty of manslaughter, the jury did not have to be satisfied beyond reasonable doubt that Cooper's death was a *probable or likely* consequence of Taiters' blow — just that his death was reasonably foreseeable as a *possible outcome* of the blow.

4.145 Taiters pleaded guilty to assault occasioning bodily harm on 19 June 1997 before Cullinane J. By inference, the Crown must have accepted that it could not exclude accident, that in the circumstances the death of the deceased was such an unlikely consequence of the punch that an ordinary person could not reasonably have foreseen it.

R v West¹⁷⁸

4.146 West was convicted of doing grievous bodily harm. He pushed the female complainant to the footpath outside a nightclub. The complainant gave evidence that West pulled her to him, then pushed her, causing her to fall backwards onto the footpath. She saw his right foot being lifted as if to kick her in the face. She put her right arm up to protect her face, and his leg hit her right arm, fracturing it. Such an injury amounts to grievous bodily harm.

4.147 He appealed against his conviction to the Court of Appeal, arguing that the trial judge should have directed the jury on accident, in accordance with *Taiters*.

4.148 Pincus JA and Lee J concluded that nothing sensible could have been said by the trial judge about foreseeability. West aimed a very hard kick at the complainant's head. The kick was hard enough to caused fractures to her arm. The result was foreseeable. Fryberg J agreed. Section 23 was not raised on the facts.

R v Auld¹⁷⁹

4.149 Auld was convicted of unlawful wounding. The facts are summarised succinctly in the judgment of McPherson JA:¹⁸⁰

[U]sing a Wiltshire Staysharp knife, the appellant inflicted a cut (which required suturing) on the calf of the complainant's right leg. Before doing that, he had said he was going to kill her, and had drawn the knife across her throat, but without breaking the skin, and threatened to cut off her fingers.

At the time of the offence, the complainant was sitting down. The appellant was standing in front of her. He turned around, she said, and faced away from her. As he did so, she lifted her right leg up and crossed it over her left leg. He then

178 [1996] QCA 472.

179 [1997] QCA 202.

180 *Ibid* 1.

turned back again and, bringing his hand down, struck her with the knife in the leg causing the wound complained of. Before he did that, the knife, she said, was in his hand held up near his head. He brought it down upon her in what she described as 'one motion'. Her detailed testimony about how the knife struck her was not contradicted by the appellant, whose evidence was that he was absent when she was cut.

According to the complainant's account, when the appellant saw what he had done, he said 'I didn't mean to do it' ...

4.150 Auld appealed against his conviction to the Court of Appeal, complaining that the trial judge failed to direct the jury on accident.

4.151 McPherson JA considered that it may have been better had the trial judge directed the jury on accident, but the omission to do so could not be said to have deprived the appellant of a fair chance of acquittal. No ordinary person in Auld's position could possibly have been left in any doubt that wounding the complainant was a reasonably foreseeable outcome of bringing the knife down in her direction, seated as she was right in front of him. Her crossing her legs did not perceptively alter the risk that he would strike her when he turned around. It was not so unlikely a movement that an ordinary person would not have foreseen it. Accident was not fairly raised by the evidence at trial. The appeal was dismissed. The other members of the Court concurred.

R v Camm¹⁸¹

4.152 Camm was convicted of doing grievous bodily harm to Ronald Nethercott. Nethercott was employed by Camm as a caretaker on a grazing property. He had the right to live in a house on the property with his wife and daughter.

4.153 Nethercott and his family left the property for a couple of weeks in January 1997. When they returned on 25 January 1997, he found that someone had used the house and left it dirty and untidy. His daughter's bed had been slept in, his food had been eaten, and dirty utensils were in the kitchen sink. Camm was asleep in his lounge chair, with his boots on the coffee table. Another of Camm's employees was asleep on the lounge room floor.

4.154 Nethercott went over to Camm. They had a heated argument. At one stage, Nethercott was standing in a doorway that led outside from the lounge room. There were steep steps down to the ground about a metre below and a concrete pathway at the foot of the steps.

4.155 They argued again. Camm placed one hand on Nethercott's left shoulder and another on his left hip. He lifted him and threw him out the door. Nethercott landed on the concrete driveway. Nethercott's daughter gave evidence that he was pushed down the stairs. Nethercott fractured his left hip

181

[1999] QCA 101.

in the fall. As at June 1997, he had a 20 per cent reduction in the range of movement of his left hip.

4.156 Camm appealed against his conviction to the Court of Appeal, arguing that the trial judge should have directed the jury to consider whether the broken hip was an event that occurred by accident.

4.157 Fryberg and Muir JJ found that the test from *Van Den Bemd*¹⁸² admitted of only one answer. Nethercott was thrown or pushed with force from a doorway a metre off the ground. There were steep steps outside the doorway and a concrete path below. The possibility of a broken hip was something that an ordinary person would reasonably foresee — it was far from an unlikely consequence of Camm's acts. The trial judge did not err in failing to leave accident to the jury. The appeal was dismissed. McMurdo P agreed with their Honours. Her Honour said, 'any issue about foreseeability was only theoretical and not real. In those circumstances, the trial judge was not obliged to direct upon it'.¹⁸³

R v Watt¹⁸⁴

4.158 Watt was convicted of doing grievous bodily harm to his 3-year-old step-son. The child suffered a serious head injury, which caused internal bleeding, and which must have been the result of a very severe blow to the little boy's skull. At trial, Watt denied having applied any force at all to the child.

4.159 He appealed against his conviction, arguing that accident ought to have been left to the jury. He was unsuccessful. The force necessary to cause that injury excluded any possibility that the injury suffered by the child would not have been a reasonably foreseeable consequence of the use of that force. The circumstances did not raise a defence that, if Watt did the act, its consequences could be accidental.

4.160 This case simply illustrates that the excuse of accident will not be available where it is absurd to suggest that the outcome of a willed act was not foreseeable.

R v Fitzgerald¹⁸⁵

4.161 Fitzgerald was convicted of murder after a trial. He had pleaded guilty to burglary and armed robbery in company with personal violence.

¹⁸² Whether grievous bodily harm was such an unlikely consequence that an ordinary person could not reasonably have foreseen it.

¹⁸³ [1999] QCA 101, [4].

¹⁸⁴ CA No 490 of 1998, 4 June 1999.

¹⁸⁵ [1999] QCA 109.

4.162 Larry Street, Michael Turner and Alexandra Doran were living at a house at East Brisbane. At about 11 pm on 25 January 1997, Fitzgerald came to their front door and demanded to be let in. He was with two others. He demanded marijuana. He forced his way into the house carrying a sawn-off shotgun which was loaded and ready to fire.

4.163 There was shouting and confusion, and Fitzgerald ordered Street, Turner and Doran to lie on the floor. He pulled Street to his feet and forced him into the dining room. He repeatedly struck him about the head with the butt of the gun while screaming, 'Where is it? Where is it? Where are the drugs? Where is the money? Where is it? I want it now'. Street produced some money and cannabis. Then Fitzgerald clubbed him with the gun until he was knocked unconscious.

4.164 Meanwhile, Turner and Doran were on the floor of the lounge room. Doran was holding her dog, which was barking. One of the intruders said 'Shut the dog up, or we will shoot it'. Fitzgerald approached Doran and said 'See this' — indicating his shot gun. She gave him the finger and told him to 'fuck off'. Fitzgerald poked the gun at the left side of Doran's head. It suddenly went off and she was killed by a single shot that destroyed her head.

4.165 Fitzgerald told police that he was the one who fired the shot. He said he did not mean it — the gun just went off — he was not a killer. He said he had only intended to scare Doran. He admitted that the gun was loaded and ready to fire, and that his finger was on the trigger when he put the gun to Doran's head. He did not remember pulling the trigger.

4.166 Fitzgerald appealed against his conviction for murder, arguing that the summing up contained misdirections, including misdirections on accident.

4.167 Fitzgerald may have been convicted of murder under section 302(1)(a) of the Criminal Code (Qld) — killing, intending to kill or do some grievous bodily harm to another — or under section 302(1)(b) of the Code — death caused by an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life.

4.168 McPherson JA, with whom Davies JA and White J agreed, explained that, on a charge of murder under section 302(1)(a), the Prosecution had to prove the requisite intention, and that accident was of no relevance to a charge of murder in this form. A death cannot be regarded as an event that occurs by accident if death or grievous bodily harm was intended by the offender.¹⁸⁶

It is true that, after the incident, the appellant said he did not mean to kill Ms Doran and that his doing so was an accident. There was also evidence from Mr Turner, who saw what happened, that the shooting appeared to him to be an accident. But that, as Latham CJ explained in *R v Mullen* (1938) 59 CLR 124, 128–129, did not raise a claim to exemption from criminal responsibility based

186

Ibid [10]–[11].

on ‘accident’ within the meaning of s 23(1)(b). Speaking of s 23 (as it then was) his Honour said (at 128–129):

‘In some case this section may operate so as to provide an excuse for an act which would otherwise be criminal, but it is unnecessary to have recourse to the section in the case of wilful murder, where by the statutory definition itself, intention is expressly made a necessary element in the offence ... It is sufficient to ask what rule is to be applied when a defence of accident is raised to a charge of murder. A defence of accident in a murder case is really a contention that the Crown has not proved the essential element of intention of the crime charged.’

...

The appellant’s claim that the firearm discharged, and that Ms Doran was killed ‘by accident’, was in relation to the charge of murder under s 302(1)(a), therefore not something that raised a claim to be excused under s 23(1)(b) of the Code. His statement that what had happened was accidental nevertheless amounted to evidence for the jury to consider in deciding whether the Crown had succeeded in proving beyond doubt that the appellant had intended to cause death or grievous bodily harm to the victim.

4.169 His Honour explained that, if the jury were not satisfied beyond reasonable doubt that there was such an intention, then they had to consider murder under section 302(1)(b). There was no doubt that Fitzgerald was ‘in the prosecution of an unlawful purpose’ (armed robbery) when Doran was killed. What remained to be proved was that her death was caused by means of an act of such a nature as to be likely to endanger human life. The relevant act was Fitzgerald’s presenting the loaded firearm with his finger on the trigger to Doran’s head. Section 23(1)(a) fell to be considered in relation to that act — but there was no evidence that suggested that that act was something that occurred independently of the exercise of Fitzgerald’s will.

4.170 His Honour then considered the application of section 23(1)(b) to murder under section 302(1)(b):¹⁸⁷

For my part, I have some difficulty in seeing how s 23(1)(b) and s 302(1)(b) can be read in conjunction in a case like this. The intention of s 302(1)(b) seems rather to be that, once it is established that an act was done of such a nature as to be likely to endanger human life, then the offender is guilty of murder if death is caused ‘by means of’ that act, irrespective of whether or not the ensuing event or result (ie the death) occurs by accident, subject always to proof of the element that the act was done in the prosecution of an unlawful purpose. My impression of what was said by Pincus JA in *Hind & Harwood*¹⁸⁸ is that he adopted the same view of the matter in saying, as he did there, that it would have been perverse of the jury, once satisfied that Hind’s act of pointing the loaded firearm was of a nature likely to endanger human life, to find that the ensuing death was nevertheless so unlikely a consequence that an ordinary person could not reasonably have foreseen it. Once the firearm (for whatever

187 [1999] QCA 109, [17].

188 (1995) 80 A Crim R 104.

reason) discharged, it was, at that range, practically inevitable that death would be caused to the person to whom it was pointed. There was therefore very little room for the application of s 23(1)(b) to the facts of the present case. On any view of it, death was a foreseeable outcome, which, briefly stated, is the test that is now to be applied in relation to 'accident' under s 23(1)(b).

There is, however, binding authority to the effect that s 23(1)(b) is capable of operating in conjunction with s 302(1)(b). ...

... it remained a matter that it was for the jury to determine ...

4.171 The jury had to consider whether the death that resulted from the discharge of the firearm was an event that occurred 'by accident' on an objective assessment of the likely danger to human life of presenting a loaded firearm, with the safety catch off and a finger on the trigger, to the head of another person, and from only a short distance away. His Honour said, 'The event in this instance was the death of Ms Doran. To my mind, there could have been only one answer to that question'.¹⁸⁹ The verdict was inevitable and the appeal was dismissed.

R v Francisco¹⁹⁰

4.172 Francisco was convicted of doing grievous bodily harm. He was a bouncer at the nightclub of the Mooloolaba Hotel. The complainant was a drunk patron. He had previously been evicted and was attempting to re-enter the nightclub.

4.173 The hotel entry was a fairly wide opening with two brick steps leading from the footpath to an open foyer. Francisco was approached from behind by the complainant. He said that out of the corner of his eye he saw the complainant approach him in an intimidating manner. He said that he just flung his arm back at the complainant. It connected and the complainant was propelled backwards. The back of his head hit the footpath and he suffered an extra-dural haematoma, which amounted to grievous bodily harm.

4.174 At trial, Francisco relied upon self-defence, not accident. He appealed to the Court of Appeal against his conviction, arguing that the trial judge should have left the accident defence to the jury. His appeal was not successful.

4.175 The Court said that the issue of accident does not properly arise for a jury's consideration if there is nothing in the evidence to suggest that there was a reasonable possibility that the event occurred by accident. Francisco's blow was a willed act. Plainly an ordinary person in his position must have been reasonably able to foresee as a possible outcome that a deliberate blow to the head, with sufficient force to propel the complainant from the raised level onto

189 Ibid [28].

190 [1999] QCA 212.

the footpath, might result in the complainant falling backwards down the stairs and suffering an injury like the one he received.¹⁹¹

R v Grimley¹⁹²

4.176 Grimley was convicted of doing grievous bodily harm. The prosecution's case was that, for no good reason, Grimley punched the complainant Zidar in the jaw, breaking it. Zidar said the blow was forceful enough to knock him down and break his jaw in two places. The prosecution led evidence that Grimley told police that he hit Zidar once. At trial, Grimley's instructions, revealed by the cross-examination of the complainant, were that he had not punched Zidar at all.

4.177 Grimley appealed against his conviction, arguing that the defence of accident should have been left for the jury. Pincus and Davies JJA said that, if the jury accepted that Grimley struck Zidar on the jaw with a blow hard enough to break it, then the hypothesis that the injury was caused by accident was fanciful. The judge was right in not directing the jury about it, and the appeal against conviction was dismissed.

4.178 McPherson JA said:¹⁹³

It is, with respect, absurd to suggest that breaking the complainant's jaw was not a foreseeable consequence of punching him, or that it was in any sense an 'accident' in terms of s 23(1)(b). The foreseeability of that consequence was perhaps one that should, and no doubt would, have been left to the jury if it had been raised in that form at the trial; but there is only one answer that could have been, or can be returned to it. As is shown by the fact in *R v Taiters*,¹⁹⁴ s 23(1)(b) does not require a minute analysis of the precise extent of the consequence, or of the exact chain of circumstances that produces the 'event' or result giving rise to the offence charged. Here there was, objectively speaking, an obvious risk that punching the complainant might break his jaw or inflict some other form of grievous bodily harm on him.

R v Day¹⁹⁵

4.179 Day was a prisoner. He and two other prisoners entered the cell of the deceased, Topping. Paper was placed over the cell window. A cord was pulled from the television set. It was used to garrotte Topping, who died in the presence of his attackers. Day and the two other prisoners were tried for murder. Day was convicted of murder. The other two were acquitted.

191 Ibid [10].

192 [2000] QCA 64.

193 Ibid [17].

194 [1997] 1 Qd R 333.

195 [2000] QCA 313.

4.180 Day gave evidence at his trial that he went to Topping's cell to sort out the 'friction' between them. He said, essentially, that he put the cord around Topping's neck to threaten him. The issue of accident was left to the jury.

4.181 Day appealed against his conviction. In one of his grounds of appeal, he suggested that the case was a finely balanced one because there was a serious issue whether the Crown had negated accident.

4.182 Thomas JA, with whom Pincus and Davies JJA agreed, said that the trial judge erred in favour of Day in leaving accident to the jury. Any ordinary person in Day's position must have been reasonably able to foresee death as a possible outcome of his violent activity. At best, Day's evidence implied that he did not intend to kill Topping. It did not come close to the area of reasonable foreseeability. No question of accident arose.

R v Stott & Van Embden¹⁹⁶

4.183 Stott and Van Embden were tried for murder, but convicted of the manslaughter, of Jason Bettridge.

4.184 Bettridge was 27 years old. He flew from Clermont to Brisbane on 1 February 1999 for an appearance at the Mental Health Review Tribunal ('MHRT') the next day. He did not attend the MHRT. His body was found in the Brisbane River below a bridge near Fernvale at 10 am on 3 February 1999. The post-mortem examination showed that Bettridge died of a heroin overdose. On each of his arms was a recent puncture mark.

4.185 He had travelled from the airport to Stott and Van Embden's flat at Ipswich. People were there using drugs. Bettridge said that he wanted to score some heroin. He complained that the heroin he had already used was having no effect and that he wanted more.

4.186 Without going into the detail of the evidence, on the prosecution's case Stott and Van Embden were guilty of manslaughter because they (a) injected Bettridge with the heroin that killed him, or (b) supplied him with the heroin with which he injected himself.

4.187 In relation to the first basis upon which the jury could find the defendants guilty of manslaughter, the trial judge directed the jury that a hypodermic syringe containing a strong dose of heroin was a dangerous thing within the meaning of section 289 of the Criminal Code (Qld). If the appellants caused Bettridge's death by using the syringe to inject heroin into his bloodstream, they could be found guilty of manslaughter under section 289.¹⁹⁷

¹⁹⁶ [2002] 2 Qd R 313.

¹⁹⁷ Criminal Code (Qld) s 289 (Duty of Persons in charge of dangerous things).

4.188 The trial judge directed the jury in accordance with appropriate authority¹⁹⁸ that criminal responsibility attached only if there was ‘criminal’ or ‘gross negligence’. The trial judge’s directions to the jury about section 289 were not challenged on appeal.

4.189 The trial judge’s directions about the second basis of liability for manslaughter were criticised on appeal. The trial judge told the jury that the Crown would be obliged to establish that the person who supplied the heroin foresaw the deceased’s death as a possible outcome of his action, or that an ordinary person in the position of the person who supplied the heroin would reasonably have foreseen his death as a possible outcome. It was argued that section 289 also applied to the second basis of liability and that the trial judge erred in leaving the Crown case of manslaughter on a basis other than criminal negligence.

4.190 This argument was not successful. McPherson JA, with whom Muir J agreed, Atkinson J concurring in the order made, said:¹⁹⁹

In the present case ... it was the provisions of s 23(1)(b), and not of s 289, that applied to the second basis for a manslaughter conviction ... It predicated that the appellants had given the syringe filled with heroin to Bettridge, rather than that they had themselves injected the heroin. Once the syringe was delivered to him for his use, they no longer had the charge or control of it, and the issue of criminal responsibility for the ensuing death of Bettridge was governed not by s 289 but by s 23(1)(b) of the Code.

4.191 The directions to the jury were therefore correct.

R v Charles²⁰⁰

4.192 Charles was convicted of unlawfully doing grievous bodily harm to the complainant. Charles owned the nightclub at which the offence occurred. He wanted to eject the complainant (a former employee of his) from the nightclub. He pushed her into a wall and into fire doors. Charles appealed against his conviction. There was an issue about whether the injury suffered by the complainant was grievous bodily harm. Charles also argued that accident should have been left to the jury.

4.193 The Court of Appeal held that accident was not raised on the evidence:²⁰¹

198 *Callaghan v R* (1952) 87 CLR 115.

199 [2002] 2 Qd R 313, 321.

200 (2001) 123 A Crim R 253.

201 *Ibid* 255–6.

If the jury concluded that the appellant forcibly pushed the complainant on several occasions into a wall so that her upper back, neck and head came into contact with the wall, the only question would have been whether or not that conduct caused the grievous bodily harm. It could hardly be contended that a reasonable person in the position of the accused would not reasonably have foreseen an injury to the upper spine as a possible outcome of such conduct.

4.194 Because of the state of the evidence about the injury, the verdict of grievous bodily harm was quashed and a verdict of guilty of assault occasioning bodily harm was substituted for it.

R v Seminara²⁰²

4.195 This case was described by McPherson JA as ‘more than usually tragic’.²⁰³ Seminara and the deceased had been drinking at a surf club on the Gold Coast. The deceased was drunk. He argued with bar staff and offered gratuitous insults to a group of people, including Seminara. He was told to leave but no action was taken to make him go. Seminara decided to remove him. He took the deceased from the bar entrance to a short flight of steps close to the entrance and pushed him down them. The step was 1.2 metres above ground. The steps were 2.2 metres long. The deceased hit his head on the tiled floor at the bottom of the stairs. He sustained a skull fracture and a subdural haemorrhage that resulted in his death. Seminara was convicted of manslaughter.

4.196 Seminara appealed against his conviction. One of his arguments concerned the trial judge’s directions to the jury on accident. During those directions, the trial judge had used the expression ‘you or me’, and this was the subject of complaint:²⁰⁴

[Y]ou’d have to ask whether an ordinary person in the position of this accused would reasonably have foreseen the death as a possible outcome or result of what he did. And in relation to that issue, you’d have regard to ... the dimensions and make-up of the stair case; the steepness ... the hard surface of the edge of the steps; carpet elsewhere; the hard surface at the foot of the steps; the distance covered by the body; the apparent state of intoxication of the deceased; and your view on the evidence of the degree of force with which the deceased was propelled to the bottom. Now, you look at those sorts of issues — you may look at those sort of issues in your assessment of whether an ordinary person — you or me — in the position of the accused that night looking at this situation would see, reasonably in advance, as it were, would reasonably foresee the death as a possible outcome or a result of what he did.

202 [2002] QCA 131.

203 Ibid [1].

204 Ibid, as extracted from the trial transcript at [8].

4.197 Later, the trial judge directed the jury in the following terms, which were complained of because it invited the jury to apply the ordinary man test in an artificial way:²⁰⁵

So, put yourself in the position of the accused at the top of the staircase that night. You're about to push the deceased down the staircase. You pause and ask yourself being reasonable about this, what could happen? It is reasonably possible that Mr Smith [the deceased] could fracture his skull in this serious way, imperilling his brain and his life?

4.198 Both of these criticisms were rejected. McPherson JA, with whom Byrne and Philippides JJ agreed, said:²⁰⁶

The question for the jury was not whether the reasonable man of the civil law of negligence would have done what the appellant did, but whether, in pushing the deceased down the stairs, an ordinary person would reasonably have foreseen the possibility that the death of the deceased might result from doing so. Because capacity to foresee depends on an individual's personal knowledge and experience, it will no doubt vary to some extent from one individual to another; but it is precisely because such variations do exist that 12 jurors randomly drawn from different walks of life are invited to use their common knowledge and experience in deciding questions of fact like that in issue here. All knowledge is empirical, and, apart from their own individual knowledge and experience, jurors have no source or standard of reference by which to divine what an ordinary person would foresee as a possible consequence of conduct like that of the appellant in the present case.

It was therefore legitimate for his Honour to direct the jury to test foreseeability by reference to an ordinary person 'like you and me' ...

4.199 Of the approach said to be artificial, his Honour said:²⁰⁷

His Honour was plainly not suggesting to the jury that the ordinary person would or should in fact pause and ask himself the questions suggested. It was simply a means and perhaps the only feasible means, of focusing the jury precisely on the legal point at issue, which was ... whether an ordinary person in the position of the appellant would reasonably have foreseen the possibility of death from his act of pushing the deceased down the stairs ...

4.200 The appeal against conviction was dismissed.

R v Reid²⁰⁸

4.201 Reid was convicted of an offence under section 317(b) of the Criminal Code (Qld) that between 1 January 2003 and 4 March 2003, with intent to transmit a serious disease to the complainant, he transmitted a serious disease to the complainant. The serious disease was HIV infection. If left untreated, it

205 Ibid [15].

206 [2002] QCA 131, [14], [15].

207 Ibid [16].

208 [2006] QCA 202.

leads to AIDS and to death within about eight years. If prescribed medication taken regularly, the progress of HIV infection can be controlled. Otherwise, it is fatal.

4.202 From about 16 January 2003, Reid and the (male) complainant had anal sexual intercourse three or four times a week. They did not use condoms. The complainant gave evidence that Reid assured him that he was not HIV-positive. Reid knew that this was false. The complainant would not have had sexual intercourse with Reid had he known that he was HIV-positive.

4.203 Reid appealed against his conviction. His main arguments concerned the directions to the jury about whether he had *intentionally* transmitted the HIV infection to the complainant. He argued that he might have been ‘completely irresponsible’ or ‘stupid in the extreme’ in deceiving the complainant about his HIV-status, but there was no evidence of his ill-will towards the complainant, and no evidential basis upon which the jury could have concluded that he was motivated by a desire to transmit the disease to him. Keane JA, with whom Chesterman J agreed, rejected that argument. Intent must not be confused with motive or desire. What Reid did was apt to achieve the result that the complainant would become infected. He appreciated the lethal risk of having unprotected sex with the complainant — and when he engaged in unprotected sex with the complainant, he intended the risk to come home.²⁰⁹

4.204 McPherson JA dissented. His Honour did not think the jury were properly directed about the meaning of ‘with intent to transmit’ in section 317(b). His Honour considered that Reid’s conviction ought to be quashed and a re-trial ordered. Reid had been charged in the alternative with doing grievous bodily harm. His Honour considered that alternative charge and section 23’s application to it.²¹⁰ His Honour illustrated the way in which the excuse might apply in these circumstances: section 23(1)(b) would not operate to exempt the defendant from criminal responsibility for passing on HIV if an ordinary person in his position would have realised that that result, consequence or outcome might possibly ensue.²¹¹

4.205 The reasonably foreseeable consequence test is flexible in the sense that it enables the finder of fact to take into account the state of knowledge of the community at the relevant time. Consider this case: the possibility of HIV transmission through unprotected sexual intercourse was unknown 50 years ago, but is well known now. To take another example: the possibility of dangerous behaviour under the influence of the drug Stilnox was unknown two years ago, but *may* be considered now a reasonably foreseeable outcome or consequence of the administration of that drug. The reasonably foreseeable consequence test allows finders of fact to determine foreseeability by reference

209 Ibid [55].

210 Sexual intercourse with the complainant was clearly a willed act, and s 23(1)(a) had no application.

211 [2006] QCA 202, [16].

to the understanding of the ordinary person in the community as understanding changes over time.

R v Stevens²¹²

4.206 Stevens was tried for the murder of his friend and business partner, Murray Brockhurst. At his first trial, the jury were unable to agree.²¹³ He was convicted at his second trial.

4.207 Brockhurst was killed by a gunshot to the head fired from a rifle when the muzzle of it was in partial contact with his forehead. The rifle was owned by Stevens, but Brockhurst had access to it. Only Stevens and the deceased were present in the deceased's office when the shot was fired. Immediately after the shooting, Stevens called an ambulance. He said that a man had been shot in the head. When asked what happened, he said he was 'going to call it an accident for the moment'.

4.208 There was evidence that on the day of his death that the deceased was planning to tell Stevens that he wished to end their business relationship. Stevens had arranged to meet the deceased in the deceased's office. Stevens said that when he arrived the deceased was behind his desk holding the rifle. Stevens said the deceased had his eyes closed as if he was sort of 'clinging'. Stevens took that as a signal to grab the gun. He said he lunged forward across the desk, whacked in to the gun and tried to grab it. The gun went off and the deceased was killed. Stevens said essentially that he was trying to stop the deceased from killing himself. There was evidence of a defect in the rifle's firing system: it had a propensity to discharge if it was hit.

4.209 The case was presented to the jury as one of murder or nothing. The trial judge did not direct the jury on accident. His Honour considered that those directions were subsumed into his directions on intention, and the case was presented to the jury as one in which either Stevens intended to kill the deceased or he did not. Stevens unsuccessfully appealed against his conviction to the Court of Appeal (2:1). From that decision, he was granted special leave to appeal to the High Court. That appeal was successful (3:2). His conviction was quashed, and a re-trial was ordered.

4.210 The majority of the High Court considered that the separate defence of accident ought to have been left to the jury. Callinan J set out what the trial judge might have said to the jury.²¹⁴ McHugh and Kirby JJ, the other members

212 (2005) 227 CLR 319.

213 Ibid 371 (Callinan J).

214 Ibid 370.

of the majority, generally agreed with it.²¹⁵ The direction follows:²¹⁶

Another possible way of viewing Mr Brockhurst's death is as an event that occurred by accident. 'Accident' does have a particular meaning however in the criminal law of this State. An event, here the death of Mr Brockhurst, could only be regarded as an accident if the accused neither intended it to happen nor foresaw that it could happen, and if an ordinary person in his position at the time would not reasonably have foreseen that it could happen. There is evidence before you which raises the possibility of accident you may think raises accident as a reasonable explanation of Mr Brockhurst's death. The accused's account of what happened, which involved little or no time for him to act other than instinctively and suddenly, his description of the events as an accident to the ambulance officer, Dr Vallati's evidence that the rifle could discharge in certain circumstances of which these could be an instance, and the evidence that the trigger was worn and, because of that could more readily operate, constitute part of that evidence. It also included the accused's statement to the ambulance service that he was 'going to call it an accident for the moment'; the expert evidence that striking the rifle in a 'karate-chop style' caused it to discharge once in five times; the expert evidence that 'energy applied to one end of the rifle could transfer to the other end through vibration, allowing the sear to disengage and the gun to discharge, and the friendly relationship between the two men.' That evidence may also raise the possibility that neither the accused nor an ordinary person could reasonably have foreseen that the fatal rifle shot would not have occurred in the circumstances. Even if you reject the accused's accounts that he gave to the police and in the witness box, you could find that these additional matters made accident a reasonable explanation of the death.

This should also be said. The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident. That is, not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseeable by an ordinary person in his position.

Remember too, that although you cannot engage in groundless speculation, it is not necessary for an accused in order to be acquitted, to establish any facts, matters or inferences from them. You must acquit him if you think that, on the evidence as a whole, accident in the sense I have explained is a reasonable explanation for the death of Mr Brockhurst. As I told you earlier, you must be satisfied beyond reasonable doubt that the evidence is inconsistent with any rational conclusion other than the guilt of the accused. And you could not be satisfied beyond reasonable doubt of his guilt if you think that the evidence on the whole does not negate beyond reasonable doubt accident as a reasonable explanation for Mr Brockhurst's death.

4.211 Stevens was acquitted at his retrial on 27 July 2006.

²¹⁵ Ibid 332 (McHugh J, who agreed with the direction but thought that it should include a direction on manslaughter); 346 (Kirby J, who considered that the substance of the direction was required).

²¹⁶ Ibid 370–1.

R v Trieu²¹⁷

4.212 Trieu was convicted of unlawfully doing grievous bodily harm to Anthony Seeto. He appealed against that conviction. His main complaints concerned self-defence. Section 23 was not the subject of any of his written grounds of appeal but it was raised at the hearing.

4.213 Trieu and Seeto lived in adjoining, separate rooms in a boarding house. On the prosecution's case, Seeto heard an argument involving his friend Kennedy, and he went downstairs to investigate. Trieu was there and Seeto asked him what the problem was. Trieu punched Seeto in the chin. Seeto returned one punch.

4.214 Trieu went into the kitchen. He came out with a meat cleaver raised above his head. He swung it downwards towards the complainant, who put up his left arm to protect himself. His arm was cut with the cleaver. Seeto restrained Trieu in a bear hug. They fell through a doorway onto a patio and rolled out onto a grassed area. Trieu was on top of Seeto, threatening to kill him. Seeto called for help, and Kennedy hit Trieu with the mop (and perhaps threatened him with a chair). Trieu withdrew.

4.215 Trieu's account was that Kennedy swore at him and assaulted him. He went inside the boarding house only to be confronted by Seeto, who punched him. Trieu returned the punch, then went and got the knife. He told Seeto to back off. Seeto must have been cut while they were on the grass. Trieu believed that Kennedy and Seeto were armed with a stick and a chair; he had the knife to protect himself.

4.216 de Jersey CJ considered whether section 23(1)(b) arose on the facts:²¹⁸

Taking the best position for the defence, that is, the position which arose on the appellant's own evidence, the appellant was lying on his back on the ground, in the dark, waving a meat cleaver about in the course of a continuing scuffle, where the appellant [*sic, queerer* complainant] was 'almost in front' of him ...

The question to be addressed under s 23 is would an ordinary person in the position of the appellant have reasonably foreseen the suffering of this grievous bodily harm (the 'event') as a possible outcome of the circumstances briefly summarized in the last paragraph — that is, something which could happen, excluding remote or speculative possibilities ... The answer would necessarily have been 'yes', so that s 23 did not arise.

217 [2008] QCA 28.

218 Ibid [31]–[32].

4.217 For the same reasons, McMurdo P concluded that section 23(1)(b) did not arise on the evidence taken at its most favourable to Trieu.²¹⁹ Fryberg J said that, had he been the trial judge, he might have left section 23(1)(b) to the jury. His Honour considered the circumstances in which the event occurred in some detail (on Trieu's version²²⁰) and commented:²²¹

There is a degree of vagueness in his description of the struggle, but the picture which emerges is one of the complainant and the appellant wrestling on the ground in the darkness, with the appellant waving the cleaver in an attempt to scare the complainant and Mr Kennedy.

4.218 Fryberg J concluded (after some uncertainty) that the jury would necessarily have decided that an ordinary person in Trieu's position would reasonably have foreseen the infliction of grievous bodily harm on Seeto as a possible outcome of waving the cleaver. No direction on section 23 was required.²²²

OBSERVATIONS ABOUT THE CASES AFTER *VAN DEN BEMD*

4.219 Generally, the following observations may be made about the cases after *Van Den Bemd*.

4.220 Courts robustly reject suggestions that the accident defence is applicable in circumstances where it is fanciful to suggest that the outcome was unforeseen, or where the outcome is the inevitable consequence of a willed act: *West, Auld, Camm, Watt, Francisco, Grimley, Day, Charles and Trieu*.²²³

4.221 It is only in rare cases that a person who fires a weapon can raise accident: *Fitzgerald*, and see also the pre-*Van Den Bemd* cases of *O'Halloran* and *Hansen*. *Stevens* appears to be such a rare case.

219 Ibid [50].

220 Ibid [82].

221 Ibid [83].

222 Ibid [84]–[85].

223 Other examples of this robust, or common sense, approach may be found in the following cases:

- *R v Bojovic* [2000] 2 Qd R 183, where the defendant delivered five heavy blows to the face which killed the deceased;
- *R v Skerritt* [2001] QCA 31, in which it was considered 'absurd' to suggest that someone who applied a high degree of force to the deceased's abdomen with a kick would not reasonably have foreseen death as a possible outcome;
- *R v Katsidis* [2003] QCA 82, where Katsidis, a professional boxer, punched the complainant in the face, causing double fractures of his jaw (grievous bodily harm);
- *R v Jasser* [2004] QCA 14, in which it was said to be 'inconceivable' that an ordinary person could not reasonably have foreseen that to swing an arm, the hand of which contained a glass, at another's face would not wound him.

4.222 Where the deceased or victim is thrown from a height and death or injury is a result of their impact with the ground, a jury convicted (and rejected the defence) (*Seminara*) and the Court of Appeal concluded the defence was not available (*Camm*), which may suggest that the excuse of accident would not be available in those circumstances.

4.223 These are the only trends observed. The cases otherwise provide illustrations of the application, or refusal of the application, of the excuse.

4.224 *Van Den Bemd* provides an example of different verdicts achieved on the same facts under different tests of criminal responsibility. In *Van Den Bemd*, the impact of the punch itself led to death. A jury asked to consider whether death was the immediate and direct consequence of the punch convicted the defendant. On re-trial, a jury asked to consider whether death was reasonably foreseeable by an ordinary person acquitted the defendant.

4.225 In *Taiters* the Crown accepted a plea to assault occasioning bodily harm after the trial judge indicated that he would direct the jury to acquit on the basis that death was unforeseeable. In this case the deceased died from injuries sustained when he fell, not from injuries caused directly by the punch.

4.226 In a circumstantial case, it may not be possible for the Crown to negative accident.²²⁴

THE DECISION OF THE HIGH COURT IN *R v VAN DEN BEMD*²²⁵

4.227 The facts of this matter appear above.²²⁶ The Crown sought special leave to appeal to the High Court from the decision of the Court of Appeal. By majority, special leave was refused. The majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that the words of section 23 (as then drafted) were inherently susceptible of the meaning placed upon them by the Court of Appeal. Their Honours added:²²⁷

The interpretation given to that section by that Court is one which favours the individual and reflects accepted notions of culpability for criminal conduct. Moreover, it is an interpretation which derives support from comments made in some judgments of this Court, particularly Gibbs J (with whom Stephen J agreed) in *Kapronovski v R*.

4.228 Brennan and McHugh JJ dissented. Brennan J said:²²⁸

²²⁴ *Griffiths v R* (1994) 125 ALR 545.

²²⁵ (1994) 179 CLR 137.

²²⁶ See [4.120] above.

²²⁷ (1994) 179 CLR 137, 139.

²²⁸ *Ibid* 142.

Death as an 'event' for the purposes of s 23

The present case does not raise the problem of classifying the accused's conduct. The relevant act was the delivery of the blow to the left side of the deceased's neck. The relevant 'event' was the death of the deceased. The blow caused the death, but the accused would not be criminally responsible for the death (and hence would not be liable to conviction for manslaughter) if the death occurred 'by accident'. The relevant question is whether the evidence, in particular the evidence of a pre-disposition of the deceased to suffering his fatal subarachnoid haemorrhage, raised an issue of accident which ought to have been submitted to the jury. In my opinion, that question was authoritatively decided against the accused by *Mamote-Kulang v The Queen*. That case confirmed the earlier decision of the Queensland Court of Appeal in *Reg v Martyr*, a case hardly to be distinguished from the present. (notes omitted)

4.229 His Honour considered *Mamote-Kulang*, *Martyr*, *Timbu Kolian* and *Kaporonovski* in detail. Of *Kaporonovski*, his Honour said:²²⁹

With respect, *Kaporonovski* has nothing to do with the problem in the present case. In *Kaporonovski* there was no occasion to consider the physiological or pathological relationship between the trauma inflicted by the offender and the bodily harm suffered by the victim. Therefore where a physiological reaction (such as vagal reflex) or a pathological condition (such as a ruptured aneurism) is triggered by trauma and produces death, *Kaporonovski* affords no legal guidance. In such a case, the relevant points of reference are *Mamote-Kulang* or *Martyr*. To the extent that the judgment of Gibbs J in *Kaporonovski* throws any light on the problem in the present case, it affirms the approach taken in *Martyr* and *Mamote-Kulang*. Leaving aside the judgment of Menzies J in *Mamote-Kulang*, each of the passages cited by Gibbs J to support the *Vallance* criterion of an event which occurred by accident shows that the cited Judge accepted (in the passage cited or in the passage immediately following) the correctness either of the decision in *Martyr* or of the decision in *Mamote-Kulang*.

The propositions advanced by the majority in *Mamote-Kulang*, by Windeyer J in *Timbu Kolian* and by the Court of Criminal Appeal in *Martyr* are inconsistent with the decision of the Court of Appeal in this case. It has never been thought hitherto that, under the Code, a death which is caused by the deliberate (or 'willed') infliction of a fatal blow is 'accidental' merely because the death was not foreseen or intended and was not reasonably foreseeable by an accused or a lay bystander. A deceased whose death is facilitated or accelerated by some bodily infirmity not known to the accused or to such a bystander has not been thought to have died accidentally. It has been said both in the United Kingdom and in Canada that offenders 'must take their victims as they find them'. Nor has the chain of causation between the blow and the death been regarded as severed for the purposes of criminal responsibility.

That is the only practical approach to the operation of the criminal law. It would be absurd to invite a jury either to assume the knowledge of a physiologist or a pathologist in determining whether the chain or causation between trauma to and the death of the victim was reasonably foreseeable, or to assume ignorance of specialist knowledge in determining the question. If, as a matter of fact, the trauma inflicted by an accused does cause the death of the victim and

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(1994) 179 CLR 137, 147–9.

nothing has intervened between the trauma and the death, there is no factor that warrants the treating of the death as accidental.

The Court of Appeal, in my respectful opinion, misunderstood the cases to which they referred. Their conclusion that the victim's death might be an accidental event if it were the uninterrupted result of trauma deliberately inflicted is inconsistent with the judgment of this Court in *Mamote-Kulang*. Their Honours correctly perceived that the *Vallance* test of accident is generally relevant to events which follow upon an accused's willed act, but, in my respectful opinion, they failed to see that the test is not satisfied merely because an accused, ignorant of the physiological or pathological relationship between the trauma and the death, does not foresee and a reasonable bystander, equally ignorant of that relationship, would not foresee the death. This misconception was contributed to by their Honours' reliance on a dissenting judgment in the Court of Criminal Appeal²³⁰ which ran counter to what had been said in this Court in *Mamote-Kulang*. Their Honours did not distinguish between the applicability of the second limb of s 23 to events which occur between the doing of an act and the infliction of fatal trauma and the inapplicability of that provision to a death following without interruption and caused by trauma deliberately inflicted.²³¹ This is the distinction which is critical in this case. The interpretation of s 23 is not in issue so much as its application to the results of trauma deliberately inflicted. (some notes in original omitted)

4.230 Brennan J considered that the refusal of special leave threw the law into confusion. The conflict between *Mamote-Kulang* and the judgment of the Court of Appeal should have been resolved by the High Court. His Honour would have granted special leave.

4.231 McHugh J, also in dissent, would have granted special leave to appeal. His Honour considered that the Court of Appeal had seriously erred in holding that it was open to the jury to find that the deceased had died 'by accident'. His Honour said:²³²

While the statement by Gibbs J in *Kaporonovski* as to the effect of the second limb of s 23 of *The Criminal Code* is an extremely helpful guide as to whether or not an event occurs by accident, the decision in *Mamote-Kulang* shows it cannot be regarded as an exhaustive definition of the term 'accident'. If a person intentionally punches another person and kills him or her, it would not be in accordance with ordinary speech to describe the death as an accident even if the death would not have occurred but for some weakness in the physical condition of the deceased.

4.232 The significance of Brennan J's dissent is that it nominates as the matter crucial to the determination of criminal responsibility the distinction between death following trauma without interruption and death which results because an event occurs between the trauma and death. In his Honour's view, section 23 only applies where an event occurs between the willed or intentional

²³⁰ Namely, Hanger J's judgment in *R v Dabelstein* [1966] Qd R 411.

²³¹ His Honour inserted a footnote at this point, observing that the distinction had been appreciated by the Court of Criminal Appeal of Western Australia in *Ward v The Queen* [1972] WAR 36.

²³² *Ibid* 153.

act and the infliction of fatal trauma. In his Honour's view, section 23 does not apply to a death that follows without interruption upon a trauma deliberately inflicted.

4.233 McHugh J drew the same distinction. The Commission has considered this distinction in its discussion of *Martyr* above.²³³

4.234 Although it is not as clear as it could be, it does not appear that their Honours considered the unusual fragility of the victim to have any bearing on the inapplicability of the excuse. The excuse is inapplicable where death follows trauma, uninterrupted. If this interpretation of the judgments is right, then the exception created by section 23(1A) does not achieve the position endorsed by the dissenting judges, and it did not reverse *Van Den Bemd* as intended.

4.235 In *R v Moody* and *R v Little*, two of the three cases that prompted the DJAG Discussion Paper, there was no interruption between the punch thrown and death. In *Moody*, one of the punches delivered by the defendant broke the deceased's nasal bridge and rendered him unconscious. He died from the aspiration of blood from the nasal injury. On Brennan J's approach, accident would not be available to excuse Moody of criminal responsibility *if* the aspiration were not considered an intervening occurrence.

4.236 Similarly, in *R v Little* the fatal blow was a punch that caused a rupture of the left vertebral artery. It was inflicted with moderate force. Little was charged with murder. On Brennan J's approach, accident would not have been available to the defendant.

4.237 Brennan J supported his statement that in the United Kingdom and Canada offenders 'must take their victims as they find them' with reference to two cases: *R v Blaue*²³⁴ and *Smithers v R*.²³⁵ Those cases are worth considering in detail.

4.238 The issue in *Blaue* was causation, not accident. Blaue stabbed a young woman. The knife penetrated her lung. She required surgery and a blood transfusion to save her life. In accordance with her religious beliefs, she refused that treatment and died. In refusing an appeal against a conviction for manslaughter, the Court of Appeal observed that it had long been the policy of the law that those who use violence on other people must take their victims as they find them: this means the whole person, not just the physical person, and includes the victim's religious beliefs.²³⁶ The physical cause of death was the bleeding into the pleural cavity from the penetration of the lung. The fact that

233 See [3.30] above.

234 [1975] 1 WLR 1411.

235 1977 N R LEXIS 1072, Supreme Court of Canada, 17 May 1977.

236 [1975] 1 WLR 1411, 1415.

the victim refused treatment that would have saved her life did not break the causal connection between the act and death.

4.239 Under current Queensland law, accident would not apply to the facts in *Blaue*.

4.240 The issue in *Smithers* was primarily causation. Smithers was 16 years old. The deceased (Cobby) was 17. They were each the best players in their opposing hockey teams. 'The game was rough, the players were aggressive and feelings ran high'.²³⁷ Cobby and other members of his team subjected Smithers to racial insults. Cobby and Smithers exchanged profanities and were ejected from the game. Smithers threatened to 'get' Cobby. Cobby was scared. Smithers challenged him to a fight as he left the arena at the end of the game. Cobby did not take up the challenge. He hurried to a waiting car. Smithers caught up with him and punched Cobby to the head. Some of Cobby's team mates restrained Smithers. Cobby doubled up. Smithers delivered a kick to his stomach area. Cobby groaned, staggered, fell to the ground on his back, and gasped for air. Within five minutes he appeared to stop breathing. He was dead on arrival at hospital.

4.241 Cobby died from the aspiration of his stomach contents. Normally, when a person vomits the epiglottis folds over to prevent the regurgitated stomach contents from entering the air passage. Cobby's protective mechanism failed.

4.242 The Crown case was that the kick caused the vomiting (or perhaps the kick in combination with Cobby's fear of Smithers caused the vomiting). The defence suggested that Cobby may have spontaneously aspirated. The three doctors who gave evidence agreed that the kick probably caused the vomiting, but they could not *positively* state that it did. Spontaneous aspiration was a rare and unusual cause of death in a healthy teenager.

4.243 Smithers was convicted of manslaughter. He unsuccessfully appealed against his conviction to the Court of Appeal for Ontario. He then appealed to the Supreme Court of Canada, arguing that there was no basis upon which the jury could find beyond a reasonable doubt that the kick caused death.

4.244 Dickson J delivered the judgment of the Supreme Court, dismissing the appeal. In response to this argument, his Honour said:²³⁸

[T]here was a very substantial body of evidence, both expert and lay, before the jury indicating that the kick was at least a contributing cause of death, outside the de minimis range, and that is all that the Crown was required to establish. It is immaterial that the death was in part caused by a malfunctioning epiglottis to which malfunction the appellant may, or may not, have contributed. No question of remoteness or incorrect treatment arises in this case.

237 1977 N R LEXIS 1072, [2].

238 Ibid [16]–[17].

...

The Crown was under no burden of proving intention to cause death or injury. The only intention necessary was that of delivering the kick to Cobby. Nor was foreseeability in issue. It is no defence to a manslaughter charge that the fatality was not anticipated or that death ordinarily would not result from the unlawful act.

4.245 Smithers also argued that there was no evidence upon which the jury could conclude beyond reasonable doubt that the kick caused the vomiting *and* the aggravated condition of aspiration. His Honour said:²³⁹

A person commits homicide, according to s 205(1) of the Code, when directly or indirectly, by any means, he causes the death of a human being. Once evidence had been led concerning the relationship between the kick and the vomiting, leading to aspiration of stomach contents and asphyxia, the contributing condition of a malfunctioning epiglottis would not prevent conviction for manslaughter. Death may have been unexpected, and the physical reactions of the victim unforeseen, but that does not relieve the appellant.

4.246 Dickson J referred to the 'well-known principle' that one who assaults another must take his victim as he finds him, and gave *Blaue* as an extreme example.

4.247 On this approach, the issue is whether the blow contributed, in something more than a minimal way, to death, even if the blow alone would not have caused death.

4.248 Under current Queensland law, accident would not apply to these facts. Whether death was or was not such an unlikely consequence of the kick that an ordinary person in the position of the defendant would not have foreseen it, section 23(1A) would not allow Smithers to rely upon accident (taking the malfunctioning epiglottis as the defect). Nor would accident apply on Brennan J's approach in *Van Den Bemd* because death followed trauma without interruption.

Ward v The Queen

4.249 In his Honour's decision in *Van Den Bemd*,²⁴⁰ Brennan J referred in a footnote to *Ward v The Queen*,²⁴¹ a decision of the Court of Criminal Appeal of Western Australia, as a case in which the Court appreciated the distinction between a death that follows a deliberately inflicted trauma without interruption and an event that intervenes between an act and the infliction of fatal trauma.

239 Ibid [19].

240 (1994) 179 CLR 137, 149.

241 [1972] WAR 36.

4.250 Ward was convicted of manslaughter. The deceased (Lindsay) had been in the company of Ward and his wife as they travelled to various towns in Western Australia. Lindsay died from a cerebral infarction, which was the result of a skull fracture he suffered when he fell onto a concrete floor at a roadhouse at which the group stopped to re-fuel.

4.251 On the prosecution's case, Ward punched Lindsay, intending to do him some harm. The punch caused Lindsay to fall. He fractured his skull on the concrete and died. Ward gave evidence to the effect that Lindsay threw a punch at him. He bent his elbow to deflect the blow, and Lindsay fell onto the concrete.

4.252 Ward's counsel at trial sought a direction on accident. He asked the trial judge to direct the jury that, even if they were satisfied that Ward's blow to Lindsay was intentional, he was not criminally liable for manslaughter unless he could have reasonably foreseen that Lindsay was likely to fall to the ground and fracture his skull. The trial judge refused to give such a direction.

4.253 Virtue SPJ delivered the judgment of the Court of Criminal Appeal. His Honour reviewed the Queensland authorities *R v Callaghan*,²⁴² *R v Martyr*,²⁴³ *R v Knutsen*,²⁴⁴ *R v Tralka*²⁴⁵ and *R v Dabelstein*,²⁴⁶ and the decisions of the High Court in *R v Mamote-Kulang*²⁴⁷ and *Timbu Kolian v R*.²⁴⁸ His Honour said:²⁴⁹

In the light of the authorities mentioned it would appear that the trend of authority is in favour of the conclusion that in cases under the Code in Queensland or Western Australia where following on an act intended to cause some bodily harm to another some unexpected occurrence supervenes which is the immediate cause of injury to the person struck from which he dies, then if that occurrence was not intended or foreseen and was unlikely the death of such person would not be an accident within the meaning of s 23 and the act in question would not amount to manslaughter.

As I have already said where the injury is the direct and immediate result of a blow intending to cause harm it is immaterial from the point of view of criminal responsibility that death only results because of some constitutional defect unknown to the person responsible for the blow.

242 [1942] St R Qd 40.

243 [1962] Qd R 398.

244 [1963] Qd R 157.

245 [1965] Qd R 225.

246 [1966] Qd R 411.

247 (1964) 111 CLR 62.

248 (1969) 119 CLR 47.

249 *Ward v The Queen* [1972] WAR 36, 46–7.

But if there is in fact some supervening occurrence between the striking of the blow and the deceased sustaining the injury causing the death, the jury, as well as being directed that they must be satisfied that the infliction of the blow caused the death, must be directed that they should acquit unless they are satisfied that the death was not an event occurring by accident in accordance with the provisions of s 23.

And they should be directed that the death would be an accident if it was not intended by the accused, was not foreseen by him nor reasonably to be foreseen as a consequence of a man's conduct.

4.254 The Court concluded that the trial judge was in error in not acceding to the request of counsel to put the question of accident to the jury. The conviction was quashed and a new trial ordered.

4.255 On the approach in *Ward*, where the impact of the blow causes death, it cannot be said that some unexpected occurrence has supervened, and accordingly accident does not arise for consideration. There is no reference to the deceased's defect, weakness or abnormality. This approach treats the fall as a supervening occurrence between the blow and death (or injury).

4.256 It may be that the intention of the amendment of section 23 by the insertion of section 23(1A) was to achieve this distinction between the situation where a blow (or other act of a defendant) was the immediate cause of death or injury and the situation where there was a supervening event that was the immediate cause of death or injury. However, the amended section as it now stands does not make such a distinction. Instead it distinguishes liability on the basis of the health of the victim. It may have been thought that where death occurs as the result of a blow, the deceased inevitably has a defect, weakness or abnormality. But that is not always the case. There are many situations where a moderate blow has caused death in a deceased without defect, weakness or abnormality. The cases of *Moody* and *Little* are obvious examples.

4.257 The section in its present form, with its focus on the health of the victim, may lead to some awkward results. For example, it does not explain the extent to which the defect, weakness or abnormality must contribute to death or grievous bodily harm before the excuse becomes unavailable.

4.258 A defendant's moderate punch might cause a person to stumble and fall onto a hard surface. The injury sustained in the fall, in combination with a certain weakness of the deceased, might be the cause of death as revealed upon post-mortem examination. On one view, accident would not be available to such a defendant because death 'resulted', at least in part, 'because' of the deceased's weakness. However, death may have been the inevitable result of the injury itself. The injury was non-survivable, but in the circumstances of the particular case the weakness in fact also contributed. It is not clear whether the excuse of accident is available in these circumstances or not. Accident would be available to a defendant who threw the same punch causing the same

consequence (that is, a non-survivable injury) in a person with no weakness, defect or abnormality.

Chapter 5

Accident: jury directions

INTRODUCTION	89
GENERAL DIRECTION ON ACCIDENT	89
DIRECTION FOR OFFENCE INVOLVING A FATAL PUNCH	90
DIRECTION WHERE THERE IS A CONCEALED DEFECT, WEAKNESS OR ABNORMALITY	91
DOES THE BENCHBOOK ACCURATELY STATE THE FORESEEABILITY TEST?.....	92

INTRODUCTION

5.1 The Supreme and District Court Benchbook for Queensland sets out a model direction to be given to the jury during the judge's summing up when the defence of accident has been raised. The model directions contain footnotes which, generally, provide an explanation of, or a reference to the source of, a particular part of the direction. Those footnotes have been repeated here but re-numbered in accordance with their position in this Report.

GENERAL DIRECTION ON ACCIDENT

5.2 The model direction begins with the trial judge reading the section to the jury. That is followed by a general direction on the defence:²⁵⁰

An event can only be regarded as an accident if the defendant neither intended it to happen nor foresaw that it could happen, and if an ordinary person in the defendant's position at the time would not reasonably have foreseen that it could happen.

It is settled law that an event occurs by accident within the meaning of that section if it was a consequence which was not in fact intended or foreseen by the defendant and would not reasonably have been foreseen by an ordinary person.²⁵¹ The prosecution must prove that he intended that the event²⁵² in question should occur or foresaw it as a possible outcome or that an ordinary person in the position of the defendant would reasonably have foreseen the

250 *Supreme and District Court Benchbook*, Accident s 23(1)(b), [75.1].

251 *Kaporonovski v R* (1973) 133 CLR 209, 231 (Gibbs J).

252 In *R v Stuart* [2005] QCA 138 this direction was approved at [18] and [19].

event as a possible outcome.²⁵³ In considering the possibility of an outcome, you should exclude possibilities that are no more than remote and speculative.

5.3 After providing for the judge to refer to the relevant evidence in the particular case, the model direction continues:²⁵⁴

That evidence raises for your consideration the possibility that neither the defendant nor an ordinary person could reasonably have foreseen that (the event) would occur.

If the defendant did not intend or foresee the [serious injury,²⁵⁵ bodily harm, etc] of [the complainant] as a possible outcome of his actions [eg kicking him, hitting him with a bat], and if an ordinary person in the position of the defendant would not have foreseen that as a possible outcome of those actions, then the defendant would be excused by law, and you would have to find him not guilty. It is not for the defendant to prove anything. Unless the prosecution proves beyond reasonable doubt that an ordinary person in the position of the defendant would reasonably have foreseen [serious injury, etc,] as a possible outcome of his actions, or that the defendant intended or foresaw that, you must find him not guilty.

Even if you reject the defendant's account of what happened, you must consider the possibility of an event which occurred by accident. The defendant is under no obligation to prove any matters, and before you can convict him you must be satisfied by the prosecution, beyond reasonable doubt, that the [death, grievous bodily harm, unlawful wounding, etc,] was not an accident, that is, not an event which was unintended and unforeseen by the defendant, and that it would not have been reasonably foreseen by an ordinary person in the defendant's position.²⁵⁶

DIRECTION FOR OFFENCE INVOLVING A FATAL PUNCH

5.4 The Benchbook contains the following suggested direction for an offence of murder or manslaughter involving a fatal punch:²⁵⁷

On the evidence, you may decide that Ben Brown punched John Smith in the head in the course of argument between them in the street; that Ben Brown fell back and hit his head on the kerb; that he was taken to hospital and received treatment there; but that he died some 36 hours later.

253

In *Murray v R* (2002) 198 ALR 40 the appellant succeeded because the trial judge had not separated the concept of a willed act in 'discharging the gun' from the concept of doing so with the intent to kill a person or do that person grievous bodily harm. Hence the necessity for the separation of the concepts in the direction. Further, Kirby J (at [94]–[102]), Callinan J (at [103]–[155]), and Gaudron J (at [1]–[24]) concluded that a direction on s 23 was required in a trial on a charge of murder even where intention was the major issue on the trial where the evidence raised its application.

254

Supreme and District Court Benchbook, Accident s 23(1)(b), [75.2].

255

The effect of the decision in *R v Stuart* is that the Crown does not need to prove that an ordinary person would have foreseen the exact nature of the injury or the mechanics involved in its causation. The prosecution must prove that an ordinary person in the position of the defendant would have reasonably foreseen the serious degree of injury which constitutes grievous bodily harm.

256

These directions are taken in part from the direction suggested by Callinan J in *R v Stevens* (2006) 22 ALR 40 at 81; McHugh J agreed with those.

257

Supreme and District Court Benchbook, Accident s 23(1)(b), [75.3]–[75.4].

If you are satisfied beyond reasonable doubt that when he punched Smith, Ben Brown intended to cause his death or do him grievous bodily harm, then you may find Brown guilty of murdering Smith. For that purpose, the question is not whether Brown meant to punch Smith — you may think he certainly did — but whether in punching him he intended²⁵⁸ to kill him.

If you are not satisfied Brown had such an intention so as to make him guilty of murder, then you must go on to consider whether or not he is guilty of manslaughter. Manslaughter in circumstances like these is killing another human being but without having the intention to kill or having any excuse in law for doing so.²⁵⁹

In law a killing is excused if an ordinary person in the position of the accused Brown in this case would not have foreseen the death²⁶⁰ of Smith as a possible outcome²⁶¹ or result of his punching him in the head. In order to convict the Crown must satisfy you beyond reasonable doubt that an ordinary person in the defendant's position would reasonably have foreseen (Smith's) death as a possible outcome of punching him in the way he did. Unless the Crown so satisfies you, you must find the defendant not guilty of manslaughter.

DIRECTION WHERE THERE IS A CONCEALED DEFECT, WEAKNESS OR ABNORMALITY

5.5 The Benchbook also provides a suggested direction in the case of a concealed defect, weakness or abnormality.²⁶²

The present case is, however, complicated by the medical evidence we have heard at this trial. Dr Tong, who examined Smith's body after death, said he found that what, in his opinion, had caused death was the rupturing or bursting of an aneurism, which is like a bubble on a blood vessel in the brain. He told us here that it was likely that the aneurism burst when Smith's head struck the kerb. He also said that Brown, or anyone else, could not have known that Smith had such an aneurism or bubble in his brain. Indeed, even the victim Smith himself would not have known that he suffered from such a condition.

That might well lead you to think that no reasonable person would have foreseen the possibility that Smith would die as a result of being punched in the way he was.

258 The onus of excluding s 23(1)(a) rests on the prosecution: *Taiters, ex parte A-G* [1997] 1 Qd R 333, 336. The 'event' in s 23(1)(b) refers to the consequences of the act, and not to the physical action itself: *Taiters*, 335. See standard direction in this Benchbook on s 23(1)(a), (Automatism) notes 1 and 2.

259 Authority and justification are not relevant here.

260 In this instance, the death is the 'event', result or consequence of the punch, which is the act and not the event or result: *Van Den Bermd affg* [1995] 1 Qd R 401; *Taiters*, 337. Note that 'accident' under s 23(1)(b) is not relevant to an offence of which intention to cause a particular result (eg death or grievous bodily harm in the case of murder) is an element: *Taiters*, 336; *Mullen* (1938) 59 CLR 124, 128. See also notes 1 and 2 to standard direction on s 23(1)(a). See also, on s 23(1)(b), *Fitzgerald* (1999) 106 A Crim R 215.

261 *Taiters* 338.

262 *Supreme and District Court Benchbook, Accident* s 23(1)(b), [75.4].

However, I am bound to tell you that in law this may not matter in this instance. That is so because under our law a person is not excused of manslaughter if the death of the victim is the result of a defect, weakness or abnormality from which the victim suffered.²⁶³ If, therefore, you are satisfied beyond reasonable doubt that the aneurism of which Dr Tong told you was a 'defect, weakness or abnormality' from which Smith suffered, and also that Smith's death resulted because of it, then it is open to you as the jury to find Brown guilty of unlawfully killing Smith, even though no reasonable person would or could have foreseen his death as a possible result of the punch delivered by Brown. In that event, you may return against Brown a verdict of manslaughter.

5.6 The model directions contained in the Benchbook are not intended to limit the way in which a trial judge sums up a case to the jury. Ideally, the model directions would be adapted to the facts of a particular trial, and elaborated upon where necessary.

DOES THE BENCHBOOK ACCURATELY STATE THE FORESEEABILITY TEST?

5.7 Gibbs J, in *Kapronovski v R*,²⁶⁴ citing *Vallance v R*,²⁶⁵ *Mamote-Kulang v R*,²⁶⁶ *Timbu Kolian v R*,²⁶⁷ and *R v Tralka*²⁶⁸ held:²⁶⁹

It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.

5.8 Within the criminal trial the Prosecution carries the onus of negating any claim of accident raised. Stating the test for the jury literally involves the use of a double negative. For example, the Court of Appeal in *R v Van Den Bemd*²⁷⁰ stated the question for the jury in the following words:

In the present context that means that the relevant question was whether the jury were satisfied beyond reasonable doubt that Bankier's death was not such an unlikely consequence of the punches delivered by the accused that it could not have been foreseen by an ordinary person in the position of the accused.

²⁶³ See s 23(1)(a) [sic — *quaere* s 23(1A)]. This subsection is apparently intended in effect to reinstate the decision in *Martyr* [1962] Qd R 398 as regards cases falling within its scope.

²⁶⁴ (1973) 133 CLR 209.

²⁶⁵ (1961) 108 CLR 56.

²⁶⁶ (1964) 111 CLR 62.

²⁶⁷ (1968) 119 CLR 47.

²⁶⁸ [1965] Qd R 225.

²⁶⁹ (1973) 133 CLR 209, 231.

²⁷⁰ [1995] 1 Qd R 401.

5.9 In order to simplify the direction, the Court of Appeal in *R v Taiters, ex-parte Attorney-General* recast the test in positive terms:²⁷¹

By way of summary and looking at the matter from the point of view of the prosecution, it can be said that if the circumstances of the case call for the s 23 defence of accident, ie that based on the words 'an event which occurs by accident', to be excluded, the applicable onus will be sufficiently stated if the jury is told that:

'The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.'

As explained above, this formulation of the test is the basis of the model directions in the Benchbook.

5.10 The transition is from a direction that the jury must be satisfied that the event is *not* one that could *not* reasonably have been foreseen by an ordinary person in the position of the defendant, to a direction that the jury must be satisfied an ordinary person in the position of the accused *would* reasonably have foreseen the event as a possible outcome. There are contexts in which a change from a double negative to a positive statement is associated with a shift in meaning. The question should therefore be asked whether the transition in stating the test has resulted in any change in meaning.

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[1997] 1 Qd R 333, 338.

Chapter 6

DJAG Discussion Paper and community expectations

THE DJAG DISCUSSION PAPER	94
<i>R v Little</i>	95
<i>R v Moody</i>	96
THE CONCLUSIONS OF THE DJAG AUDIT	97
Murder trials	97
Manslaughter trials	98
COMMUNITY EXPECTATIONS	100

THE DJAG DISCUSSION PAPER

6.1 The terms of reference required the Commission ‘to have particular regard to the results of the Attorney-General’s audit of homicide trials on the nature and frequency of the use of the excuse of accident and the partial defence to murder of provocation’ in conducting its review.²⁷²

6.2 The review of cases by the Commission has been limited to appellate decisions concerning (in all but two cases) defendants who had been convicted. Generally, the defendants were complaining that the defence of accident had not been left to the jury, or that the jury had been inadequately directed on it. The Attorney-General’s audit reviewed *trials* in which the accident excuse was raised. The Commission has the benefit of the DJAG Discussion Paper, which contains the audit results.

6.3 The DJAG Discussion Paper contains the results of the Department of Justice and Attorney-General’s audit of homicide trials, which sought to ‘ascertain the nature and frequency of the reliance on the excuse of accident ... and the partial defence to murder of provocation’.²⁷³

6.4 The DJAG Discussion Paper explains that the audit was:²⁷⁴

272 The terms of reference are set out in Appendix 1 to this Discussion Paper.

273 Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 1.

274 *Ibid* 1.

precipitated by three recent cases — Jonathan James Little, who was acquitted of murder in relation to the death of David Stevens; Ryan William Moody, who was acquitted of the death of Nigel Lee; and Damien Karl Sebo, who was acquitted of murder, but convicted of manslaughter, in relation to the death of Taryn Hunt.

6.5 It explains that its purpose was:²⁷⁵

to provide information about the nature and frequency of the use of [accident and provocation], as well as some broader contextual information, in order to provide an opportunity for stakeholders to comment on the operation and use of these defences.

6.6 The Commission's review is broader than that undertaken by the Department of Justice and Attorney-General, as reflected in its terms of reference.²⁷⁶

6.7 The Department of Justice and Attorney-General received 34 written submissions in response to its Discussion Paper. The Department sought the consent of the author of each submission to its use by the Commission for the purposes of this review. If consent has been given for a particular submission, then the Commission has received a copy of it. In all, the Commission received 26 of these submissions.

6.8 During the consultation part of this review, the Commission considered the submissions to the Department that have been provided to it with consent. Submissions from other sources in response to the issues raised in the Commission's two Discussion Papers were also considered.

6.9 The Department's audit was conducted by way of a review of a selection of murder and manslaughter trials conducted during the period between July 2002 and March 2007. Of the 131 defendants charged with murder in that period, 101 were tried by jury. The audit team analysed 80 of those trials. Of the 116 defendants charged with manslaughter during that period, 32 were tried by jury. The audit team analysed 20 of those 32 trials. The trials analysed included those of *Little*, *Moody* and *Sebo*. *Little* and *Moody* are discussed in detail below. *Sebo* is considered in Chapter 13 of this Report.

R v Little²⁷⁷

6.10 Little was charged on indictment with the murder of David Stevens. Little was walking in the Valley Mall in the early hours of a Sunday morning, arguing with his girlfriend on his mobile phone. Stevens approached him. Eyewitness accounts vary. One witness said that Little and Stevens were

275 Ibid 1.

276 See Appendix 1.

277 The facts of these matters are taken from the DJAG Discussion Paper.

pushing each other. Another witness said that Stevens confronted Little, was 'in his face' and blocking his path.

6.11 Little assaulted Stevens. He punched him in the head, which caused him to drop to the ground. When Stevens was down, Little kicked him in the back of the head. Stevens died two or three days later from a subarachnoid haemorrhage that occurred as a consequence of a traumatic rupture of the left vertebral artery. The post-mortem examination revealed that the deceased had had a very high blood alcohol concentration.²⁷⁸

6.12 It was more likely that the fatal blow was the punch rather than the kick. The artery tore because it was overstretched. Overstretching occurs only in an intoxicated victim. On the medical evidence, the punch was thrown with moderate force.

6.13 In relation to murder, the defence argued that the prosecution had not proved beyond reasonable doubt that Little intended to kill Stevens or to do him grievous bodily harm. In relation to manslaughter, the defence argued that the prosecution could not negative or overcome accident: that an ordinary person in Little's position could not reasonably have foreseen death as a consequence of a single moderate punch.

6.14 The jury were also directed on self-defence,²⁷⁹ section 304 provocation and intoxication.

6.15 The jury returned a verdict of not guilty of murder or manslaughter.

R v Moody

6.16 Moody was charged on indictment with the manslaughter of Nigel Lee.

6.17 Lee and his friends were waiting in a cab queue in the early hours of the morning. A cab pulled up at the back of the queue and Moody, his brother and two friends began to get into it. Others in the queue accused Moody and his companions of queue-jumping.

6.18 Moody was in the front of the cab. A female friend was in the back. His brother was standing at the rear passenger door when he was approached by Lee and two other males. There was a fight between Lee and Moody's brother. The evidence was not clear as to who threw the first punch. Moody pushed into the group and a general melee broke out. Two males were fighting in the back of the cab. Moody's brother was fighting someone between the cab and the footpath, and Moody and Lee were fighting next to the cab.

²⁷⁸ The deceased's blood alcohol concentration was 0.277 per cent. The pathologist called by the prosecution at trial gave evidence that this level of intoxication contributed to death: the rupture injury is associated with heavy intoxication.

²⁷⁹ This defence was based on a comment made by Little to police in his interview in which he alleged that he had been hit by the deceased. The deceased had previous convictions for offences of violence.

6.19 Moody and Lee's fight moved out onto the road. They were both throwing punches. At some point, Moody karate-kicked Lee. Then he threw a punch to his face. That punch broke Lee's nasal bridge and caused immediate unconsciousness. Lee aspirated blood from the nasal injury and died.

6.20 Post-mortem examination of the deceased revealed that he had had a high blood alcohol level.²⁸⁰ His intoxication may have contributed to his death by impairing or hindering the reflexes that would have protected him from aspiration.

6.21 The audit team observed that self-defence was an 'equally important issue' for the jury's determination.²⁸¹

6.22 The jury returned a verdict of not-guilty of manslaughter.

6.23 The audit team noted that this was the second time Moody had been on trial for this offence. At his first trial, the jury were unable to reach a verdict, and were discharged.

THE CONCLUSIONS OF THE DJAG AUDIT

6.24 The conclusions of the review team drawn from the audit were as follows:

Murder trials

- In the 80 murder trials reviewed, section 23 (either or both limbs) was raised in 18.
- In 14 of those 18 trials, other defences were also raised.
- In the other four of those 18 trials, section 23 was the only defence considered by the jury (section 23(1)(b) in three trials, and section 23(1)(a) in the other trial).
- In those four trials:
 - one defendant was acquitted of murder and manslaughter;
 - one defendant was acquitted of murder, but convicted of manslaughter; and
 - two defendants were convicted of murder.

280 The deceased's blood alcohol concentration was 0.196 per cent.

281 Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 5.

- In the trial that led to a complete acquittal, the real issue was the identity of the killer.
- In the trial in which the defendant was acquitted of murder, but convicted of manslaughter, the real issue was the liability of the defendant as a party to the offence. The defendant's conviction of manslaughter indicated that the jury rejected accident as a defence.
- It appeared to the audit team that the accident excuse (section 23(1)(b)) was not the conclusive issue in these four trials.
- In the remaining 14 cases, four accused were acquitted but, as a number of other defences were raised, the audit team could draw no firm conclusions as to the success or otherwise of the accident defence.
- The DJAG Discussion Paper states that 'the only case in which the foreseeability of death assumed such significance was the case of Little'.²⁸²

6.25 Generally, it appeared to the audit team that, in the four murder trials in which accident was the only defence raised, it was not the conclusive issue, although the audit team felt unable to make that observation with any certainty because of the confidentiality of jury deliberations.²⁸³

6.26 In the 14 murder trials in which accident was one of several defences left to the jury, it was of significance in only one.²⁸⁴

Manslaughter trials

- 20 manslaughter trials were reviewed.
- Section 23 was raised in 14 of those trials.
- Section 23 was the only defence left in four of those 14 cases.
- In those four trials, two defendants were acquitted and two were convicted.
- In one of the two trials that led to an acquittal, the issue was whether the defendant was a party to the offence.
- In the other trial that led to an acquittal, the issue was who caused the fatal injury, and the audit team concluded that accident was not the deciding factor.

282 Ibid 35.

283 Ibid 33.

284 Ibid 35.

- In the remaining 10 cases, accident and a number of other defences were raised.
- In those 10 cases, 8 defendants were acquitted.
- The audit team could draw no conclusions about the success or otherwise of the accident defence.

6.27 As the audit team explained, the review had its limitations. Only a small number of manslaughter trials could be reviewed. Where more than one defence was raised, as in the 10 cases referred to, no certain conclusions could be drawn about whether a particular defence was successful or not. Because jury deliberations are confidential, it is not possible to know the issues that the jury in each case regarded as significant.²⁸⁵

6.28 Generally, in the four manslaughter trials in which accident was the only defence raised, it did not appear that it was the factor that led to the two acquittals.

6.29 In the 10 manslaughter trials in which accident was one of several defences left to the jury, accident was a significant issue in Moody's case and in seven other cases. Of these eight cases in which the audit team considered accident significant, five defendants were acquitted.

6.30 The audit team made the point that the same combination of defences might result in an acquittal in one case, and a conviction in another. The success or otherwise of a defence or combination of defences depended upon the jury's view of the facts.²⁸⁶

6.31 The facts of the manslaughter trials (other than Moody's trial) in which foreseeability of death 'appeared to be a significant issue' were considered by the audit team.²⁸⁷ The following cases (adopting the audit team's numbering) resulted in a verdict of not guilty of manslaughter:

- MA11: The deceased was punched in a scuffle by someone other than the defendant. He was involved in another scuffle and punched once by the defendant. He fell to the ground and lost consciousness. He was conscious when the ambulance arrived to take him to hospital. He declined medical treatment and discharged himself against medical advice. He was readmitted to hospital six days later, and died. The cause of death was a closed head injury, causing bleeding and brain swelling.

285 Ibid 33.

286 Ibid 38.

287 Ibid.

- MA12: The deceased was struck once in the head and died from a subarachnoid haemorrhage. Self-defence was an issue at trial. The foreseeability of death was also a significant issue at trial.
- MA22: During an argument between the defendant and the deceased, the deceased hit the defendant with a chain and threatened to hit him again. The defendant struck the deceased's arm with a knife. An artery was severed and the deceased bled to death.
- MA25: The defendant and the deceased were arguing. The defendant punched the deceased in the head four to seven times. There was conflicting medical evidence about the cause of death. Either it was caused by a blow which caused a subdural haemorrhage, or it was possible that the deceased had a pre-existing aneurism and that the altercation could have caused a rise in blood pressure sufficient to burst it. Causation was a significant issue at trial. The jury were directed that, if they were satisfied of causation, to consider the foreseeability of death given the weakness of the blows.
- MA32: The defendant punched the deceased once, claiming that the deceased threatened to hit him first. The deceased fell over. He suffered an injury to the back of his head. Causation was an issue, the defence arguing that other, later falls and manhandling by others may have caused the fatal injury. The punch was not particularly forceful, and the jury were asked to also consider the foreseeability of death.

6.32 The following cases (adopting the audit team's numbering) resulted in a verdict of guilty of manslaughter:

- MA14: The defendant punched the deceased. He fell and fractured his skull. He died in hospital 20 hours later. The defendant claimed to be acting in defence of his brother.
- MA20: The defendant and the deceased were arguing, and pushing and shoving each other. The defendant gave one big push, which caused the deceased to fall over and hit the back of his head. He suffered a subdural haemorrhage and died.

COMMUNITY EXPECTATIONS

6.33 The terms of reference required the Commission to consider whether the current excuse of accident reflects community expectations. The Commission received some submissions from members of the community who discussed their expectations about the operation of the excuse of accident (and provocation). Other respondents, who were members of the profession, professional bodies or academics, expressed their own views about community expectations, which did not always accord with the views expressed in submissions from members of the community.

6.34 The Commission considered the argument that jury verdicts in the cases that prompted the review reflected the community's 'expectation' about the operation of the defences of accident and provocation. However, the Commission's view is that, while the verdicts do reflect community views, they must be seen in the context of the directions on the law given to them by the trial judge.

6.35 The Commission appreciates that sometimes juries sometimes return 'merciful' verdicts as that term is used in the authorities and these verdicts are generally accepted as a valid exercise of a jury's function. See, for example, the joint judgment in *Mackenzie v R*,²⁸⁸ which quoted from *R v Kirkman*:²⁸⁹

Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law

...

6.36 The outcome in a criminal trial may often leave one side disappointed. In the case of an acquittal, it is not unexpected that the family of the victim or deceased may feel let down by the system and, at least in a high profile case, it is expected that their disappointment, sense of injustice and anger will be reported in the media. But the extent to which an outcome genuinely provokes outrage or concern in the wider community about the state of the law is very difficult to judge. It depends in the first instance on the amount of media coverage a case receives. It also depends on the accuracy of the media coverage.

6.37 Some research in a related area was done in England and Wales by Mitchell.²⁹⁰ Mitchell conducted a public opinion survey in which 822 respondents were asked to rank eight homicide scenarios in order of severity, using a scale of 1 to 20 where 20 stood for the worst possible scenario.²⁹¹ The respondents ranked the scenarios in the following order of severity:

- *A killing in the course of a burglary*: A burglar was disturbed by the owner of the house, a 25-year-old woman. He panicked and hit her over the head with an ashtray, killing her.
- *A duress killing*: A group of terrorists threatened a man with his own life if he did not agree to kill a local businessman within a week. He was told that he would be shot if he went to the police. Scared for his own life, he could see no alternative, and killed the businessman.

²⁸⁸ (1997) 190 CLR 348, 367 (Gaudron, Gummow and Kirby JJ).

²⁸⁹ (1987) 44 SASR 591, 593 (King CJ giving the judgment of the Court).

²⁹⁰ And is referred to at some length in the report of the Law Reform Commission of Ireland: *Homicide: Murder and Involuntary Manslaughter*, published in January 2008.

²⁹¹ B Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 *British Journal of Criminology* 453.

- *Making no attempt to save a drowning woman:* A young woman slipped and fell into a lake. A passer-by saw her drowning. He could swim but, instead of trying to save her, he walked on and she drowned.
- *A killing in self-defence:* Two men were arguing at work. A fight developed. One picked up a screwdriver and lunged at the other. Fearing that he would otherwise be stabbed, the other grabbed a spanner and in self-defence hit the other man over the head, killing him.
- *A battered spouse killing:* A woman was physically and sexually abused by her husband for three years. He came home one night and started hitting her again. She felt she could not stand it any more. She waited until he was sleeping, then hit him over the head with a saucepan, killing him.
- *A 'thin skull' scenario:* A man gently pushed a woman in the course of an argument about who was first in a supermarket queue. She tripped unexpectedly and bumped her head against a wall. Because of her unusually thin skull, she died from her injuries.
- *A necessity killing:* Two mountain climbers were roped together. One of them slipped and fell. The other tried to hold on to the rocks but he knew that, if he did not cut the rope, they would both die. He cut the rope and the other climber fell to his death.
- *A mercy killing:* A terminally ill woman in great pain begged her husband to 'put her out of her misery' for months. Eventually he gave in and suffocated her as she slept.

6.38 The thin skull scenario was ranked sixth in order of gravity. The respondents viewed it of relatively low severity because 'the death was accidental, there was no fault on the part of the killer, no intent to kill — the killer could not have foreseen the consequences of his actions'. More than 60 per cent of the respondents considered that the killer bore no fault. Fifty-eight per cent of respondents gave this scenario no more than 5 out of 20 in terms of severity and some respondents gave it 1 out of 10.

6.39 Killing in the course of a burglary was considered the most severe: 69 per cent of the respondents scored it at 15 out of 20 or more. Mercy killings were considered the least severe, and 77.8 per cent of respondents scored this scenario at 4 out of 20 or less.

6.40 This summary of the results of Mitchell's research is necessarily brief. The results of the survey were subjected to detailed and careful analysis, beyond the scope of this reference. Mitchell's observations about the thin skull scenario are of some relevance to this review.²⁹²

The thin skull scenario ... also received a 1 rating from a number of respondents, and this represents the kind of homicide which the Law Commission (1996) recently recommended should cease to be treated as meriting a conviction for manslaughter, largely on the ground that the killer lacks sufficient moral culpability. This type of homicide was rated generally slightly higher than the mercy killings scenario, and was scored very similarly to the case of the mountain climbers ... where the essential issue was whether the circumstances adequately justified or excused the killing. Bearing in mind that there was then a gap to the ratings of the next group of scenarios — [drowning woman, battered spouse and self-defence] — it may be that respondents would not regard the thin skulls' and mountain climbers' homicides as crimes but would regard higher rated scenarios as offences. Obviously, though, this is a matter which requires further examination.

Chapter 7

Suggested new offence: assault causing death

INTRODUCTION	104
CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL 2007	104
Indicting on the proposed new offence	105
Section 576	105
Directions to juries.....	106
Sentencing issues	107
WESTERN AUSTRALIAN BILL	107
RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF IRELAND.....	108

INTRODUCTION

7.1 The most significant recent development in Queensland was a proposal to introduce a new offence into the Criminal Code entitled 'assault causing death', an offence to which the excuse of accident would not apply.

7.2 A Bill providing for a similar offence was introduced in Western Australia and received Royal Assent on 27 June 2008²⁹³ The Law Reform Commission of Ireland also recommended the introduction of a similar offence, although, as discussed below,²⁹⁴ in Ireland such an offence would operate as an alternative to manslaughter by unlawful and dangerous act.

CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL 2007

7.3 On 9 August 2007, the Shadow Attorney-General and Shadow Minister for Justice, Mr Mark McArdle MP, introduced into the Queensland Legislative Assembly, as a private member's Bill, the Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld). The Bill proposed that a new provision for the offence of 'unlawful assault causing death' be inserted into the Criminal Code (Qld) in these terms:

341 Unlawful assault causing death

- (1) Any person who unlawfully assaults another causing the death of the other person is guilty of a crime, and is liable to imprisonment for 7 years.

293 See [8.16]–[8.28] below.

294 See [8.52]–[8.53] below.

- (2) The person is not excused from criminal responsibility for the death of the other person because the offender does not intend or foresee or can not reasonably foresee the death.

7.4 The Explanatory Notes to the Bill explained that the purpose of the proposed new offence was to provide an alternative to murder or manslaughter charges where an unlawful assault causes death but the elements of the more serious charge cannot be established.²⁹⁵

7.5 In introducing the Bill, Mr McArdle referred to the cases of *R v Little* and *R v Moody* and explained that the Bill sought to respond to ‘community concern’ in relation to ‘one punch’ cases.²⁹⁶

7.6 The Queensland Bill failed on 13 February 2008. In the Second Reading debate on the Bill, the Attorney-General outlined the Government’s reasons for opposing the new offence of assault causing death:²⁹⁷

[F]irstly, it adds nothing to the existing range of offences — to which significant penalties apply — able to be charged as alternatives to murder and manslaughter; secondly, the attempt to modify the accident defence may have an unintended effect on the availability of other defences; and, thirdly, it is premature to create a new offence or to consider any other changes to existing laws given that I am already reviewing the accident defence in homicide cases and am consulting on this issue.

Indicting on the proposed new offence

7.7 The Queensland Bill did not propose the introduction of the new offence as a statutory alternative to murder or manslaughter. Therefore, whether it would be included as an alternative charge on an indictment for murder or manslaughter would be a matter for the discretion of the Director of Public Prosecutions (DPP). Presumably, the tactical considerations that inform the decision to proceed to trial on murder or manslaughter only (and to provide for no alternative verdict of assault) would similarly inform the decision to indict on this charge in the alternative or not.

Section 576

7.8 One question that arises at this point is whether section 576 of the Code should be amended to allow a jury to return a verdict on any appropriate alternative charge when considering a murder or manslaughter charge.

²⁹⁵ Explanatory Notes, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) 3.

²⁹⁶ Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld): *Queensland Parliamentary Debates*, 9 August 2007, 2465 (Mr Mark McArdle, Shadow Attorney-General and Shadow Minister for Justice). Mr McArdle also noted that the Coalition had considered amending s 23 of the Criminal Code (Qld) to limit its application to special circumstances but recognised that this could cause legislative uncertainty.

²⁹⁷ Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld): *Queensland Parliamentary Debates*, 14 November 2007, 4311 (Hon Kerry Shine, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland).

7.9 Section 576 provides:

576 Indictment containing count of murder or manslaughter

- (1) Upon an indictment against a person containing a count of the crime of murder, the person may be convicted on that count of the crime of manslaughter if that crime is established by the evidence but not on that count of any other offence than that with which the person is charged except as otherwise expressly provided.
- (2) Upon an indictment against a person containing a count of the crime of manslaughter the person can not on that count be convicted of any other offence except as otherwise expressly provided.

7.10 The question in practical terms is whether grievous bodily harm and assault (or any other offence, such as assault causing death) should be available for consideration by a jury as statutory alternatives on a charge of murder or manslaughter.

7.11 The question of alternative verdicts is has practical importance to both prosecutors and defenders. On the one hand, there is the idea that if an alternative verdict is left open to the jury, it may place the jury under pressure to compromise. On the other hand, another risk identified is that a jury, faced with a choice between convicting a defendant:²⁹⁸

whose behaviour was on any view utterly deplorable, and acquitting him altogether, the jury may unconsciously, but wrongly, allow its decision to be influenced by considerations extraneous to the evidence and convict of the more serious charge rather than acquit altogether. In such circumstances to omit directions about a possible lesser alternative verdict may therefore work to the defendant's disadvantage.'

7.12 Accordingly, if an alternative verdict is fairly open on the evidence, it is the duty of the trial judge to tell the jury about it and to equip them with appropriate directions to consider the alternative verdict. A failure to do so may result in a successful appeal.²⁹⁹

Directions to juries

7.13 A trial on an indictment charging murder with assault causing death as an alternative would involve complicated directions to the jury. Consider the circumstances of *Little*. For the charge of murder, a jury would receive directions about provocation under section 304, self-defence and intoxication. For the statutory alternative of manslaughter, a jury would receive directions about accident (which is not excluded by the new provision on a charge of murder) and self-defence. For the indictment alternative of assault causing death, a jury would receive directions about self-defence and provocation under

²⁹⁸ *R v Foster* (2007) EWCA Crim 2869, 614.

²⁹⁹ *R v Coutts* [2006] 1 WLR 2154.

sections 268 and 269 (with provocation here being defined differently from provocation under section 304).

Sentencing issues

7.14 The family of the deceased may achieve some solace in a defendant's conviction for the proposed offence because by its terms it contains an acknowledgment of the defendant's contribution to the deceased's death.

7.15 The maximum penalty for the proposed new Queensland offence of assault causing death was no higher than the current maximum penalties for wounding or assault occasioning bodily harm (each offence carrying a maximum penalty of seven years' imprisonment), and lower than the maximum penalties available for assault occasioning bodily harm while armed or in company (10 years' imprisonment), or grievous bodily harm (14 years' imprisonment).

WESTERN AUSTRALIAN BILL

7.16 On 19 March 2008, the Criminal Law Amendment (Homicide) Bill 2008 (WA) was introduced, similarly proposing a new offence of assault causing death. As noted above, it received Royal Assent on 27 June 2008. The changes it proposed took effect on 1 August 2008, which include the insertion of a new section 281 (unlawful assault causing death) into the Criminal Code (WA). The offence is intended to deal with 'one punch' cases.³⁰⁰ Under section 281, a person is liable to imprisonment for 10 years:

281. Unlawful assault causing death

- (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

7.17 In the second reading speech of the Bill, the Attorney-General, Mr James McGinty, stated:³⁰¹

This new offence reinforces community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour.

300 Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12. Also see Attorney General, James McGinty, 'New laws to deal with "one punch" deaths' (Media Statement, 15 March 2008).

301 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210 (Mr James McGinty, Attorney General).

7.18 Although the Bill implements a number of changes recommended by the Law Reform Commission of Western Australia in its recent report, *Review of the Law of Homicide*, the new offence was not one of the Commission's recommendations.³⁰²

RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF IRELAND

7.19 The Law Reform Commission of Ireland (LRCI) has recently reviewed the law of homicide and considered the introduction of a similar new offence at length in its final report, which was published on 29 January 2008.³⁰³ Their review covers and enlarges upon many of the issues raised in this Report. Their discussion is thought provoking, and paragraphs of it follow:³⁰⁴

[T]he Commission is still of the opinion that the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim. The Commission thinks that minor acts of deliberate violence (such as the 'shove in the supermarket queue' scenario) which unforeseeably result in fatalities should be removed from the scope of unlawful and dangerous act manslaughter because where deliberate wrongdoing is concerned they are truly at the low end of the scale. In many 'single punch' type cases there would be no prosecution for assault had a fatality not occurred; prosecution for manslaughter following a minor assault hinges on an 'accident' — the chance outcome — of death.

The Commission does, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct and should, therefore, be marked accordingly. It might well be traumatic for the families of victims who died as a result of deliberate assaults, albeit those which were minor in nature, if the perpetrator of the assault were only charged with, convicted of and sentenced for assault, rather than the more serious sounding offence of manslaughter. Thus, the Commission believes that rather than prosecuting such defendants with assault, as was the provisional recommendation in the *Consultation Paper*, it would be more appropriate to enact a new offence such as 'assault causing death' which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of death in the offence label.

... It would make more sense to treat this offence as a distinct new homicide offence below manslaughter. The fact of death should be captured within the label, as is the case in the road traffic offence of 'dangerous driving causing death'. The offence should only be prosecuted on indictment and have a higher sentencing maximum than for assault *simpliciter*. The Commission does not believe that the occurrence of death necessarily increases the culpability of the accused, but a fatality does undoubtedly give a much more serious dimension to the offence. Consequences matter. Accordingly, judges should be able to

302 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (Project 97, September 2007).

303 Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) Chapter 5 *Involuntary Manslaughter: Options for Reform* [5.03]–[5.36].

304 Ibid [5.39]–[5.43].

take into account the fact that a death (rather than merely a cut lip) was caused by a punch when imposing sentence.

... it must be established that death was a wholly unforeseeable consequence of the accused's assault. If a reasonable person would think that death was a likely consequence of the particular assault, then unlawful and dangerous act manslaughter should be charged and not this lesser offence.

For the new offence to come into play the culpability of the accused should be at the lowest end of the scale where deliberate wrongdoing is concerned. It is vital that a reasonable person in the defendant's shoes would not have foreseen death as a likely outcome of the assault. The main purpose of introducing a new statutory offence of 'assault causing death' would be to mark the fact that death was caused in the context of a minor assault. Recognising the sanctity of life by marking the death may be of benefit to the victim's family in dealing with their grief. (notes omitted)

7.20 The LRCI recommended the following definition of 'assault causing death'.³⁰⁵

Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances.

7.21 Of course, the LRCI was considering this issue in the context of the criminal law of Ireland and manslaughter by unlawful and dangerous act, which has a different fault element from that which applies in Queensland. In that context, the LRCI's focus was on ensuring that those who kill 'accidentally' are justly punished in a way that appropriately marks the severity of the consequences of their actions.

7.22 The LRCI did not recommend that the offence of 'assault causing death' be a statutory alternative to manslaughter (or murder). It recommended that a choice be made by the relevant prosecuting authorities, in accordance with certain guidelines, about the charge upon which a defendant should be indicted.

7.23 As noted above, the LRCI's final report was published in January 2008. Its recommendations have not yet been implemented.

305

Ibid [5.46].

Chapter 8

Accident in other jurisdictions

INTRODUCTION	110
NEW SOUTH WALES	110
NORTHERN TERRITORY	111
TASMANIA	112
WESTERN AUSTRALIA	113
AUSTRALIAN CAPITAL TERRITORY	117
SOUTH AUSTRALIA AND VICTORIA	117
COMMONWEALTH.....	118
MODEL CRIMINAL CODE	118
RECENT DEVELOPMENTS IN ENGLAND AND WALES	120
RECENT DEVELOPMENTS IN IRELAND.....	121

INTRODUCTION

8.1 This chapter outlines the current position in each of the Australian jurisdictions and recent developments in Western Australia. It also includes some discussion of recent developments in England and Wales, and Ireland.

8.2 In New South Wales, the Northern Territory, Tasmania and Western Australia, the relevant legislation includes an excuse of accident.

8.3 In South Australia and Victoria, the common law rules of criminal responsibility apply.

8.4 The Commonwealth legislation provides a limited excuse of accident for manslaughter only (based on a provision of the Model Criminal Code).

8.5 No specific provision is made for an excuse of accident in the ACT legislation.

8.6 The rules of criminal responsibility for homicide have been recently reviewed in several jurisdictions.

NEW SOUTH WALES

8.7 In New South Wales, the offences of murder and manslaughter are defined in section 18 of the *Crimes Act 1900* (NSW), and within that section is a subsection that excuses a defendant from criminal responsibility for murder if

the deceased is killed 'by misfortune only', which reflects the position historically at common law.³⁰⁶

18 Murder and manslaughter defined

- (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
- (b) Every other punishable homicide shall be taken to be manslaughter.
- (2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
- (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

NORTHERN TERRITORY

8.8 Under the Criminal Code of the Northern Territory, murder is defined as conduct causing death done with an intention to cause death or serious harm.³⁰⁷ Manslaughter is defined as conduct causing death where the defendant is reckless or negligent as to causing the death.³⁰⁸ These offence provisions are based on the Model Criminal Code³⁰⁹ offences of murder and manslaughter.

8.9 Section 31 of the Criminal Code (NT) contains a provision equivalent to section 23 of the Criminal Code (Qld):

31 Unwilled act etc. and accident

- (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

306 See [3.10] above.

307 Criminal Code (NT) s 156.

308 Criminal Code (NT) s 160.

309 The Model Criminal Code Officers Committee, established by the Standing Committee of the Attorney-General, has made recommendations for a Model Criminal Code.

- (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

...

8.10 With some exceptions, section 31 appears to be of general application.³¹⁰

8.11 The Criminal Code (NT) was amended in 2005 and 2006 to incorporate the general criminal responsibility provisions and homicide offence provisions, of the Model Criminal Code.³¹¹ Those amendments did not substantially alter section 31.

TASMANIA

8.12 The Criminal Code of Tasmania provides that 'culpable homicide', committed with an intention to cause death or bodily harm 'which the offender knew to be likely to cause death in the circumstances', is murder.³¹² Culpable homicide that does not amount to murder is manslaughter.³¹³

8.13 Section 13 of the Criminal Code (Tas) is similar to section 23 of the Criminal Code (Qld):

13. Intention and motive

- (1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.
- (2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.
- (3) Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission some other offence, shall, except as otherwise provided, incur the same criminal responsibility as if he had effected his original purpose.

310 Criminal Code (NT) ss 22, 31(3) are to the effect that s 31 does not apply to regulatory offences (with some exceptions) or to an offence under s 155 (Failure to rescue, provide help, &c). But see, for example, *Charlie v R* (1999) 162 ALR 463. For a critical discussion of s 31, see S Gray, 'A Class Act, an Omission or a Non-event? Criminal Responsibility Under Section 31 of the Criminal Code (NT)' (2002) 26(3) *Criminal Law Journal* 175.

311 See the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT) and the *Criminal Reform Amendment Act (No 2) 2006* (NT).

312 Criminal Code (Tas) s 157(1)(a), (b). Other circumstances in which culpable homicide is murder are set out in s 157(1)(c)–(f). 'Culpable homicide' is defined in Criminal Code (Tas) s 156(2).

313 Criminal Code (Tas) s 159(1).

- (4) Except where it is otherwise expressly provided, the motive by which a person is induced to do any act or make any omission is immaterial.

8.14 As reflected in the case chronology in Chapter 4, the words ‘by chance’ have the same meaning as the words ‘by accident’ in section 23.³¹⁴ An event occurs by chance if it was neither intended nor foreseen by the defendant (a subjective test) and would not reasonably have been foreseen by an ordinary person (an objective test).³¹⁵

8.15 The precise scope of the exception in section 13(3) appears to be unsettled.³¹⁶ On one view, it operates to ‘transfer malice’ where, through some chance, the intended offence is committed against a different person — for example, where a gun shot misses its intended target and hits a different person. On another view, the exception may also limit a person’s culpability where a different offence to the intended one results. It is unclear whether section 13(3) operates only if the offence is one for which intention is a specific element.

WESTERN AUSTRALIA

8.16 From 1 August 2008, under the Criminal Code (WA), the crime of ‘murder’ includes an intention to cause death or a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person.³¹⁷ Manslaughter is an unlawful killing that does not amount to murder.³¹⁸

8.17 Before 1 August 2008, section 23 of the Criminal Code (WA) included an excuse of ‘accident’ in the same terms as section 23(1)(b) of the Criminal Code (Qld):

23. Accident etc., intention, motive

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

...

314 See generally J Blackwood, ‘Humpty Dumpty Was Pushed Off the Wall, Humpty Dumpty Died From the Fall’ (1996) 15 *University of Tasmania Law Review* 306, 307–9.

315 *Kaporonovski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J). See also *Vallance v The Queen* (1961) 108 CLR 56, 61, 65.

316 See generally J Blackwood, ‘Humpty Dumpty Was Pushed Off the Wall, Humpty Dumpty Died From the Fall’ (1996) 15 *University of Tasmania Law Review* 306, 319–22; and *R v Vallance* [1960] Tas SR 51; *Standish v The Queen* (1991) 60 A Crim R 364.

317 Criminal Code (WA) s 278(1) (a) and (b).

318 Criminal Code (WA) s 280.

8.18 Section 23 applied to all offences against the statute law of Western Australia.³¹⁹

8.19 The case of *Ward v The Queen* referred to above³²⁰ illustrates the way in which the excuse operated in Western Australia prior to the decision of the High Court refusing special leave in *Van Den Bemd*. If the injury or death was the direct and immediate result of a willed act, the excuse of accident did not apply; some intervening occurrence between the defendant's act and the resulting injury or death was required to attract the excuse.³²¹ However, since the High Court decision in *Van Den Bemd*,³²² which removed this distinction, the position in Western Australia has been unclear.

8.20 Before 1 August 2008, the Criminal Code (WA) did not include a provision equivalent to section 23(1A) of the Criminal Code (Qld).

8.21 The Law Reform Commission of Western Australia recently reviewed the law in relation to homicide in that State. It recommended that a new section 23B be included in the Criminal Code (WA) to separate the excuse of accident from the rest of section 23, and to reinstate the 'eggshell skull' rule as an exception to the general test for accident:³²³

The Commission agrees that even if an accused is not aware of a particular weakness or defect it is nevertheless reasonably foreseeable that the physical characteristics of some people will make them more prone to death or injury than others. When an accused directly causes the death of another person by the deliberate infliction of force, it would not be appropriate for the accused to be excused from causing the death solely on the basis that the victim was not as strong or healthy as another person.

8.22 The Law Reform Commission of Western Australia also considered the appropriateness of the excuse of accident on a charge of manslaughter in cases where there is an intervening occurrence between the defendant's conduct and death. It referred, for example, to a case where a victim had been pushed down a flight of stairs and had died as a result of hitting his head on the floor.³²⁴

319 Criminal Code (WA) s 36.

320 See [4.249] above.

321 See *R v Martyr* [1962] Qd R 398; *Mamote-Kulang of Tamagot v The Queen* (1963) 111 CLR 62; *Ward v The Queen* [1972] WAR 36.

322 (1994) 179 CLR 137.

323 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (Project 97, September 2007) 154. Also see 155, 156, 157 rec 21.

324 *R v Seminara* (2002) 128 A Crim R 567.

8.23 The Law Reform Commission of Western Australia considered the excuse of accident appropriate given that death will be reasonably foreseeable in some, but not all, cases involving an intervening occurrence.³²⁵

It is not possible to say that death is reasonably foreseeable in all cases where the victim has fallen over after being assaulted in some way. Because the foreseeability of death will vary significantly depending upon the precise factual circumstances, these cases should be determined on a case-by-case basis. Therefore, the Commission believes that the current law is appropriate: the defence of accident is available, but if a jury decides that an ordinary person in the position of the accused would have reasonably foreseen that death was a possible outcome the accused will be convicted of manslaughter.

8.24 However, the Law Reform Commission of Western Australia also recommended that alternative verdicts to manslaughter should be available where death was not reasonably foreseeable but where there was deliberate application of force. It also considered 'essential' that relevant alternative offences which were not provided by statute were 'charged separately on the indictment'.³²⁶

8.25 A Bill to amend the Criminal Code (WA) in accordance with the recommendations of the Law Reform Commission of Western Australia was introduced into the Western Australian Parliament on 19 March 2008³²⁷ and received Royal Assent on 27 June 2008.³²⁸ The changes proposed in it became law on 1 August 2008.

8.26 The Criminal Code (WA) now includes the following group of provisions about the excuse of accident based on the recommendation of the Law Reform Commission of Western Australia:

23. Intention and motive

- (1) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (2) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

23A. Unwilled acts and omissions

- (1) This section is subject to the provisions in Chapter XXVII relating to negligent acts and omissions.

³²⁵ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (Project 97, September 2007) 156.

³²⁶ *Ibid* 90–1.

³²⁷ See Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209 (Mr James McGinty, Attorney General).

³²⁸ Criminal Law Amendment (Homicide) Bill 2008 (WA) s 4.

- (2) A person is not criminally responsible for an act or omission which occurs independently of the exercise of the person's will.

23B. Accident

- (1) This section is subject to the provisions in Chapter XXVII relating to negligent acts and omissions.
- (2) A person is not criminally responsible for an event which occurs by accident.
- (3) If death or grievous bodily harm —
- (a) is directly caused to a victim by another person's act that involves a deliberate use of force; but
- (b) would not have occurred but for an abnormality, defect or weakness in the victim,
- the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm.
- (4) Subsection (3) applies —
- (a) even if the other person did not intend or foresee the death or grievous bodily harm; and
- (b) even if the death or grievous bodily harm was not reasonably foreseeable.

8.27 The Criminal Law Amendment (Homicide) Bill 2008 (WA) also provided for a new offence of 'unlawful assault causing death', to specifically deal with 'one-punch' cases.³²⁹ Such a new offence of unlawful assault causing death was created in section 281:

281. Unlawful assault causing death

- (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

8.28 The statutory alternatives to murder included manslaughter, the new offence of assault causing death, attempted murder, culpable driving of a conveyance (other than a motor vehicle), killing an unborn child, concealing the

³²⁹

Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12. Also see Attorney General, James McGinty, 'New laws to deal with 'one punch' deaths' (Media Statement, 15 March 2008).

birth of a child and dangerous driving causing death under section 59 of the *Road Traffic Act 1974*.³³⁰

AUSTRALIAN CAPITAL TERRITORY

8.29 In the Australian Capital Territory, the criminal law has been partly codified. As yet, the criminal responsibility provisions of the *Criminal Code 2002* (ACT), based on the Model Criminal Code, do not apply to the offence of murder.³³¹

8.30 The offence of murder is provided under the *Crimes Act 1900* (ACT). It incorporates elements of intention and reckless indifference. A person is criminally responsible for murder if the person causes the death of another person intending to cause a person's death or with reckless indifference to the probability of causing a person's death.³³² An unlawful homicide that is not murder shall be taken to be manslaughter.³³³

8.31 An additional excuse or defence of accident is not included in the legislation.

SOUTH AUSTRALIA AND VICTORIA

8.32 Criminal responsibility for murder and manslaughter in South Australia and Victoria is governed by the common law.³³⁴

8.33 The requisite mental element for murder at common law is intention to cause death or grievous bodily harm, or knowledge that the act will probably cause death or grievous bodily harm ('malice aforethought').³³⁵

8.34 All other unlawful homicides are manslaughter. For example, if homicide is the result of criminal negligence (involving a high risk of death or grievous bodily harm) or an unlawful and dangerous act (carrying with it an appreciable risk of serious injury), it is manslaughter.³³⁶

330 Criminal Code (WA) s 279 (1) contains a list of the statutory alternatives to murder. See also s 10B.

331 Unless the offence provision is omitted and remade, or another Act or subordinate law expressly provides for their application, the criminal responsibility provisions of the *Criminal Code 2002* (ACT) will not apply to the offence of murder, being a pre-2003 offence, until 1 July 2009, or another prescribed date. See *Criminal Code 2002* (ACT) ss 8, 10; *Crimes Act 1900* (ACT) s 7A.

332 *Crimes Act 1900* (ACT) s 12.

333 *Crimes Act 1900* (ACT) s 15.

334 A person convicted of murder or manslaughter is liable to punishment: *Criminal Law Consolidation Act 1995* (SA) ss 11, 13; *Crimes Act 1958* (Vic) ss 3, 5.

335 *R v Crabbe* (1985) 156 CLR 464.

336 *Wilson v The Queen* (1992) 174 CLR 313, 333 (Mason CJ, Toohey, Gaudron and McHugh JJ).

COMMONWEALTH

8.35 Commonwealth criminal law is contained in the Criminal Code (Cth). The Criminal Code (Cth) provides for the offences of murder and manslaughter of an Australian citizen or resident occurring outside Australia.

8.36 The offence of murder requires an intention to cause death, or recklessness as to causing death.³³⁷ The offence of manslaughter requires an intention that conduct will cause serious harm or recklessness as to a risk that conduct will cause serious harm.³³⁸

8.37 One of the physical elements required for manslaughter is that the defendant's conduct causes another person's death. Absolute liability applies to this element.³³⁹ This enlivens the excuse provision contained in section 10.1 of the Criminal Code (Cth).

8.38 Section 10.1 of the Criminal Code (Cth) provides an excuse, in certain circumstances, from criminal responsibility for an 'intervening conduct or event'.

8.39 It provides:

10.1 Intervening conduct or event

A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

- (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
- (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

MODEL CRIMINAL CODE

8.40 The Model Criminal Code Officers Committee, established by the Standing Committee of Attorneys-General, has made recommendations for a Model Criminal Code. In 1992, it made final recommendations on provisions dealing with general criminal responsibility and in 1998 it released draft provisions for fatal offences.³⁴⁰

³³⁷ Criminal Code (Cth) s 115.1(1)(d).

³³⁸ Criminal Code (Cth) s 115.2(1)(d). The general criminal responsibility provisions of the Criminal Code (Cth), taken from the Model Criminal Code, define what is meant by 'intention' and 'recklessness'.

³³⁹ Criminal Code (Cth) s 115.2(1)(b), (2).

³⁴⁰ Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility*, Report (December 1992); Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998).

8.41 The Model Criminal Code Officers Committee has adopted a fault-based approach to homicide offences.³⁴¹

Unlike non-fatal offences, it is not possible to structure fatal offences using the extent of the harm inflicted by the defendant as a basis. This is obviously because in the case of fatal offences, the harm is always the same, namely, death. Rather, it is the defendant's state of mind at the time he or she causes the death that determines the culpability of the defendant. A guilty state of mind is the fundamental criterion of fault that the community understands and accepts as requiring the intervention of the criminal justice system.

8.42 It recommended that the law of homicide should continue to distinguish between murder — where there is intention to cause death or recklessness as to causing death — and lesser unlawful homicide. It recommended that provision should be made for manslaughter where there is intention to cause serious harm, or recklessness as to a risk that serious harm will be caused.³⁴² This approach has been adopted in the Criminal Code (Cth).

8.43 The Model Criminal Code Officers Committee has recommended that both constructive murder and manslaughter by unlawful and dangerous act be abolished.³⁴³ Consistently with its fault-based approach, it considered that truly accidental deaths should not be equated with murder or manslaughter.³⁴⁴ It also noted that where death results but a lesser offence was intended, 'the defendant can be prosecuted for the offence he or she intended to commit'.³⁴⁵

8.44 It recommended a new offence, 'dangerous conduct causing death', for circumstances in which a defendant is negligent about causing death.³⁴⁶

5.1.11 Dangerous conduct causing death

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent about causing the death of that or any other person by that conduct,

³⁴¹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998) 2. See also at 43.

³⁴² Ibid 5, 11, 53, 59, 69. See Model Criminal Code ss 5.1.9, 5.1.10. The general criminal responsibility provisions of the Model Criminal Code define what is meant by 'intention' and 'recklessness'. Intention, with respect to a result, means that the person 'means to bring it about or is aware that it will occur in the ordinary course of events': Model Criminal Code s 5.2(3). Recklessness, with respect to a result, means that the person is aware of a substantial risk that the result will occur and, having regard to the circumstances known to the person, it is unjustifiable to take the risk: Model Criminal Code s 5.4(2).

³⁴³ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998) 65, 149.

³⁴⁴ Ibid 63, 145.

³⁴⁵ Ibid 63.

³⁴⁶ Ibid 155. See Model Criminal Code s 5.1.11.

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

8.45 In such cases, the Model Criminal Code Officers Committee considered the person to be ‘morally culpable, but not for manslaughter’.³⁴⁷

8.46 The Model Criminal Code also includes an excuse from criminal responsibility for strict and absolute liability offences for ‘intervening conduct or event’.³⁴⁸ Section 10.1 of the Criminal Code (Cth) is modelled on this provision.

RECENT DEVELOPMENTS IN ENGLAND AND WALES

8.47 The Law Commission of England and Wales recently reviewed the law of homicide in its jurisdiction. It recommended a new Homicide Act to clearly and comprehensively define offences for homicide and their partial defences. The Law Commission took a ‘ladder’ approach to the structuring of homicide offences and recommended a graduated hierarchy of offences, based on degrees of seriousness of fault and harm, those offences being manslaughter, second-degree murder and first-degree murder.³⁴⁹

8.48 The Law Commission had made recommendations in an earlier Report about the substantive law of involuntary manslaughter.³⁵⁰ In that Report, the Law Commission recommended that, as a matter of principle, a person should be held criminally responsible for unintentionally causing death in certain circumstances only.³⁵¹ It explained:³⁵²

it is not clear *why* a person ought to be held criminally responsible for causing death if death or serious injury were the *unforeseeable* consequences of her conduct, just because she foresaw, or it was foreseeable, that *some* harm would result. Surely a person who, for example, pushes roughly into a queue is morally to blame for the foreseeable consequences of her actions — that a few people might get jostled, possibly even lightly bruised, and that people might get annoyed — but not for causing a death if, quite unexpectedly, she sets in train a series of events which leads to such an outcome. We consider that the criminal law should properly be concerned with questions of moral culpability, and we do not think that an accused who is culpable for causing *some harm* is sufficiently blameworthy to be held liable for the unforeseeable consequence of death.

347 Ibid 147.

348 Model Criminal Code s 10.1. See Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility*, Report (December 1992) 62–3.

349 The Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No 304 (2006) [1.63], [1.64], [3.6]–[3.8].

350 The Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237 (1996).

351 Ibid [4.43].

352 Ibid [4.39].

8.49 The Law Commission therefore recommended that there be a new offence of reckless killing, and a new offence, to replace the existing offence of 'unlawful act manslaughter', of killing by gross carelessness, and that both of these offences should be available as alternative verdicts to murder.³⁵³ These proposed offences have been accepted by the United Kingdom Government.³⁵⁴

8.50 However, the Home Office (United Kingdom) considered that:³⁵⁵

there is an argument that anyone who embarks on a course of illegal violence has to accept the consequences of his act, even if the final consequences are unforeseeable.

8.51 It considered that it may be appropriate to have an additional involuntary homicide offence 'covering those situations where a minor injury is all that was intended but death, which was unforeseeable, occurs'.³⁵⁶

RECENT DEVELOPMENTS IN IRELAND

8.52 As discussed in Chapter 7, the Law Reform Commission of Ireland has also recently reviewed the law of homicide. It recognised that '[a]ssault manslaughter may involve varying degrees of culpability due to the varying degrees of violence which may be employed'.³⁵⁷ It also distinguished between the moral culpability of a person for an accidental homicide resulting from a serious unlawful act on the one hand, and a minor act of violence on the other.³⁵⁸

8.53 The Law Reform Commission of Ireland therefore recommended that minor acts of deliberate violence that unforeseeably result in death should be removed from the scope of the 'unlawful and dangerous act' manslaughter offence. Given the seriousness of death as a consequence of unlawful conduct, it recommended a new offence of 'assault causing death', below involuntary manslaughter.³⁵⁹ This would remove the stigma of attaching the label of 'manslaughter' to cases of accidental homicide involving minor acts of violence, but would allow the seriousness of the consequence of death to be taken into

353 Ibid [5.13], [5.34], [5.55].

354 Home Office (United Kingdom), *Reforming the Law of Involuntary Manslaughter: The Government's Proposals* (May 2000) 9.

355 Ibid [2.10].

356 Ibid 11.

357 Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report No 87 (2008) [4.16].

358 Ibid [5.08]. See also at [4.18]–[4.29].

359 Ibid [5.38]–[5.39], [5.46].

account by providing a higher maximum sentence than that available for simple assault.³⁶⁰

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Ibid [4.19], [5.41].

Chapter 9

Accident: submissions and consultation

INTRODUCTION	123
Submissions in response to the DJAG Discussion Paper	124
GENERAL OBSERVATIONS MADE IN SUBMISSIONS	126
General observations made in submissions to the Department	126
General observations made in submissions to the Commission	130
QUESTIONS RAISED IN THE ACCIDENT DISCUSSION PAPER.....	130
Summary of submissions received	131
OPTION 1: RETAINING SECTION 23(1)(B) IN ITS PRESENT FORM.....	135
Accident Discussion Paper	137
Submissions in response to the DJAG Discussion Paper	137
Submissions in response to the Accident Discussion Paper	142
Community expectations.....	146
OPTION 2: CHANGING THE SCOPE OF THE EXCUSE OF ACCIDENT.....	150
Accident Discussion Paper	150
Option 2(a): The direct and immediate result.....	151
Option 2(b): A pure causation test for criminal responsibility.....	154
Option 2(c): Changing the fault element for manslaughter	156
OPTION 3: RETAINING, AMENDING OR REPEALING SECTION 23(1A)	159
OPTION 4: CREATING A NEW OFFENCE OR NEW OFFENCES	168
Accident Discussion Paper	168
Option 4(a): Manslaughter based on an unlawful and dangerous act	168
Option 4(b): Assault occasioning death	171
Statutory alternatives to manslaughter	177
THE WORD 'ACCIDENT'	178
THE RESPONSE OF THE COURTS.....	180
CONSULTATION WITH JUDGES	182

INTRODUCTION

9.1 In 2007, in two separate homicide trials,³⁶¹ juries returned verdicts of 'not guilty', which were condemned in local media. In each trial, the excuse of accident was one of the issues raised. Against that background, the Commission was asked to review the excuse of accident.

9.2 An essential question for the Commission is whether the current test of accident, which is based, in part, on the reasonable foreseeability of the possibility of an outcome, reflects the community's expectations about criminal responsibility for the unintended consequences of intentional (or willed) acts.

361

R v Little and R v Moody.

9.3 In the Accident Discussion Paper,³⁶² the Commission raised issues about the appropriateness of determining criminal responsibility by reference to the foreseeability of an event, particularly for an event such as death. The Commission discussed other alternatives for attaching criminal responsibility to the unintended outcomes of intentional acts. For example, the Commission considered whether criminal responsibility ought simply to coincide with causation, or whether it ought to attach to the unintended consequences of an intentional act only if that intentional act was unlawful. The Commission also considered whether the test of accident should be excluded where the person killed or harmed has a hidden vulnerability.³⁶³

9.4 At the end of the Accident Discussion Paper, the Commission outlined four 'options' for the future of the excuse of accident, with particular reference to circumstances in which death had resulted from an intentional act:³⁶⁴

- retaining section 23(1)(b) of the Criminal Code (Qld) in its present form;
- changing the scope of the excuse of accident under section 23(1)(b) of the Criminal Code (Qld);
- retaining, amending or repealing section 23(1A) of the Criminal Code (Qld); and
- creating a new offence or new offences.

9.5 Although presented as separate options for ease of consideration, the Accident Discussion Paper explained that these were not mutually exclusive alternatives.³⁶⁵

9.6 The Accident Discussion Paper summarised the arguments for and against each alternative, and posed 'Key Questions' on which the Commission sought submissions.³⁶⁶ This chapter outlines the submissions received by the Commission in response to each of the options.

Submissions in response to the DJAG Discussion Paper

9.7 As well as submissions sent directly to the Commission in response to the Accident Discussion Paper, the Commission had the benefit of most of the submissions sent to the Department of Justice and Attorney-General (the

³⁶² Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008).

³⁶³ Criminal Code (Qld) s 23(1A).

³⁶⁴ Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.4].

³⁶⁵ *Ibid* [11.5].

³⁶⁶ *Ibid* 137.

'Department') in response to the Department's own discussion paper. This chapter considers both sets of submissions.

9.8 As explained in Chapter 1, the results of the audit of homicide offences commissioned by the Attorney-General in May 2007 were published in October 2007 in a Discussion Paper entitled *Audit on Defences to Homicide: Accident and Provocation* (the 'DJAG Discussion Paper').³⁶⁷

9.9 The Attorney-General sought the consent of the authors of submissions sent in response to the DJAG Discussion Paper to their use by the Commission in its review. Where the author's consent was given, the submission was made available to the Commission and has been considered by the Commission as part of this review. Some authors sent supplementary submissions to the Commission. Others were content to rely on the submissions sent to the Department. Most, but not all, of the authors gave their consent to the use of their submission by the Commission.³⁶⁸

9.10 The purpose of the Attorney-General's audit of homicide trials was to 'ascertain the nature and frequency of the reliance on the excuse of accident' (and provocation) in those trials, and the DJAG Discussion Paper sought responses in that context. The DJAG Discussion Paper asked three questions about accident:³⁶⁹

- 1 Does the current law as expressed in section 23(1)(b) (accident) reflect community expectations in relation to criminal responsibility?
- 2 Is the excuse provided by section 23(1)(b) appropriate in a case when death results?
- 3 Is there an inconsistency in the application of section 23 because of the operation of section (1A) (the *Van den Bergh* amendment)?

9.11 The Commission has conducted a thorough review of the excuse and, reflecting the scope of its review, necessarily asked different questions from those asked by the Department. However, there has still been significant overlap and the submissions made in response to the DJAG Discussion Paper have been of considerable value to the Commission.³⁷⁰

³⁶⁷ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007).

³⁶⁸ The Department received 34 submissions. The authors of 26 submissions either consented to their use by the Commission or provided a copy of their submission directly to the Commission. The Commission did not obtain access to the remaining eight submissions.

³⁶⁹ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 45.

³⁷⁰ For example, in its review, the Commission was required to have particular regard to 'whether the current excuse of accident (including current case law) reflects community expectations'. See Appendix 1 to this Report, which contains the terms of reference. This question is similar to questions 1 and 2 of the DJAG Discussion Paper.

9.12 Under each of the headings below, the Commission has set out the views of respondents to the Accident Discussion Paper and the views of respondents to the DJAG Discussion Paper if those respondents expressed views relevant to that option.

GENERAL OBSERVATIONS MADE IN SUBMISSIONS

9.13 Before outlining the submissions about each option, the Commission has considered some general comments made by those who responded to the DJAG Discussion Paper and the Accident Discussion Paper, which are not otherwise dealt with under the options below.

General observations made in submissions to the Department

The general application of section 23(1)(b)

9.14 Some respondents observed that Chapter 5 of the Criminal Code (Qld), and more particularly section 23, applied to all persons charged with any criminal offence against the statute law of Queensland.³⁷¹ It followed that any change to the operation of section 23 would be far-reaching. For example, one respondent (a senior barrister with experience in the criminal law) said:³⁷²

Because Chapter 5 applies³⁷³ to all offences on the statute books of Queensland and because the provisions of Chapter 5 deal with some of the most basic principles of criminal responsibility, it is extremely difficult to gauge the impact of any amendment of a Chapter 5 provision. (note in original)

9.15 Having said that, the same respondent made it plain that he was not suggesting complacency:³⁷⁴

Nothing that I have said ought to be seen to suggest complacency. If s 23(1)(b) no longer reflects modern community standards then it ought to be changed. That obviously is the function of responsible government. However, what I do suggest is that an amendment of a Chapter 5 provision is an extreme step indeed.

9.16 Another senior barrister with experience in the criminal law warned of the consequences of unwarranted amendments to the Code:³⁷⁵

The Code, as a whole, including section 23 ... operates in a way which appropriately balances the rights of individuals and the rule of law.

371 DJAG Submissions 5, 9, 10.

372 DJAG Submission 5.

373 In the absence of statutory exception.

374 DJAG Submission 5.

375 DJAG Submission 9.

As expressed by five justices of the High Court of Australia, when dealing with section 23 as interpreted in *R v Van den Bergh*:³⁷⁶

‘The interpretation given to the section by (the Court of Appeal) is one which favours the individual and reflects accepted notions of culpability and responsibility for criminal conduct.’³⁷⁷

It is only when the essential fabric of the Criminal Code is rent by short-sighted amendment³⁷⁸ that the balance is upset and persons’ rights and concepts of criminal responsibility are skewed ... (notes in original)

9.17 The Bar Association of Queensland, with which the Queensland Law Society agreed,³⁷⁹ contended that amendment of the law of accident would not solve the problem of drunken violence.³⁸⁰ The Bar Association of Queensland commented:³⁸¹

The real issue here is a social one. It is not a legal problem that can be improved by amendments to the Criminal Code. That would solve nothing. Inevitably an amendment to ‘reverse’ the jury decisions in the few tragic cases highlighted in the media will create other problems.

9.18 A similar view was expressed by the Aboriginal and Torres Strait Islander Legal Service (Qld South) Ltd (‘ATSILS’):³⁸²

The [DJAG] Discussion Paper points out that in many of the cases where the Defences have been applied, either the defendant, or both the deceased and the defendant, were young and intoxicated. We endorse the Discussion Paper comments on community education to inform youth on the effects of excessive drinking and what so often can be unfortunate consequences of that drinking.

9.19 Several of the respondents suggested a need for caution in contemplating a change to the law in response to the outcome in one or two cases.³⁸³ One respondent said:³⁸⁴

The defences under consideration here [accident and provocation] should not be abandoned simply because we disagree with the outcome in a few cases without giving proper consideration to their important role in the administration of justice across the board.

376 (1994) 179 CLR 137.

377 Ibid 139 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

378 For example, s 23(1A) introduced by the then Attorney-General, the Honourable D E Beanland.

379 DJAG Submission 23.

380 DJAG Submission 24.

381 Ibid.

382 DJAG Submission 22.

383 DJAG Submissions 1, 10, 16, 22.

384 DJAG Submission 10.

Observations on the results of the DJAG audit

9.20 Several respondents spoke generally about the results of the Attorney-General's audit, observing that the results did not suggest that the availability of the excuse of accident in homicide trials produced intolerable outcomes.³⁸⁵

9.21 The Bar Association of Queensland, with which the Queensland Law Society agreed,³⁸⁶ submitted that the audit demonstrated that acquittals were not based on any unsatisfactory application of the excuse of accident but rather were justified on the evidence for a range of reasons.³⁸⁷ The Bar Association of Queensland considered that the audit demonstrated how effectively the current law operated.³⁸⁸

The thoroughness and transparent objectivity of the [DJAG] Discussion Paper allow an informed reader to appreciate the continuing good sense and practicality of the relevant provisions of the Criminal Code, which strike the right balance between the rights of individuals and the rule of law.

9.22 The President of the Queensland Law Society reinforced the positive opinion expressed by the Bar Association of Queensland about what it considered to be the effectiveness of the current system:³⁸⁹

I would like to emphasize our support for the contention that the current provisions in sections 23 and section 304 fulfil the requirements of being just and fair to the stakeholders in the criminal justice system. The Society urges your Department not to undertake amendments that would [impinge] on legal protections for those circumstances that are genuine accidents.

9.23 Other members of the legal profession also submitted that the audit results did not reveal widespread injustice produced by the application of section 23.³⁹⁰

9.24 In responding to the question whether the current law reflected community expectations, the Bar Association of Queensland again referred to the results of the audit and said:³⁹¹

385 DJAG Submission 5, 6, 10, 25.

386 DJAG Submission 23.

387 DJAG Submission 24.

388 DJAG Submission 24.

389 DJAG Submission 23.

390 DJAG Submissions 5, 9, 10.

391 DJAG Submission 24.

It is also worth remembering that ordinary men and women, as jurors, saw and heard the witnesses in the cases discussed in the [DJAG Discussion] paper and then decided — on all of the evidence — if there was scope for any application of s 23(1)(b). The detailed audit of those cases does not give any reason to doubt that the juries were entitled to make the decisions they made on the evidence in those cases.

9.25 Several respondents suggested that the audit results reflected the effectiveness and benefit of the jury system.³⁹² For example, Legal Aid Queensland said:³⁹³

The audit undertaken by the Department of Justice and Attorney General does not suggest any significant systemic problems with the operation of the available defences in homicide prosecutions in Queensland. In fact, the audit demonstrates that overall, juries use common sense in determining just outcomes in criminal trials. The benefit of the jury system in these types of cases is that it provides an opportunity for community involvement in some of the most important decisions made by our justice system. Jurors apply community standards to the consideration of the facts in each case.

The three recent high profile cases of Little, Moody and Sebo have highlighted a range of issues that can impact on the outcomes of these types of cases, including the deliberations of juries, the efficacy of the defences available, decisions made by the prosecution about whether to charge other offences in the alternative to murder and manslaughter and the effect of excessive alcohol consumption and its relationship to violence. It must also be observed that these three cases, out of a total of 247 homicide prosecutions that have come before the courts in the five years from July 2002, involved extraordinary circumstances.

9.26 Referring also to the strengths of the jury system, one barrister³⁹⁴ commented:³⁹⁵

I am not surprised ... that the audit does not produce clear cut results or patterns. One of the many strengths of the criminal justice system is that a jury trial is a very dynamic exercise. An accused is tried before 12 of his peers under the supervision of a judge and where all issues relevant to guilt or innocence are ventilated by professional advocates in public. Necessarily then, all manner of issues including defences and legal arguments can, and inevitably do, emerge. It is quite unusual, in my experience, to have a 'one issue' case ...

9.27 The respondent considered the results of the audit as presented in Tables 1 to 4 in the DJAG Discussion Paper and concluded that the audit did not reveal unjust outcomes:³⁹⁶

392 DJAG Submissions 5, 23, 24, 25.

393 DJAG Submission 25.

394 Also with extensive experience in criminal law as both prosecutor and defence counsel.

395 DJAG Submission 5.

396 Ibid.

The tables do not suggest though that juries are regularly acquitting accused where death has occurred as a result of a deliberate application of force and where, but for s 23(1)(b) the assault would constitute an unlawful killing. What the tables show is that juries have acquitted in cases where there are multiple issues and on the totality of the evidence, they are not satisfied of guilt beyond reasonable doubt. I respectfully suggest that the tables evidence that the system is working as intended.

General observations made in submissions to the Commission

9.28 ATSILS suggested that the campaign for the change to the law of accident is essentially misplaced and serves only to deflect attention away from dealing with the core issues of justice, crime prevention and rehabilitation.³⁹⁷ ATSILS supported community education on the effect of excessive drinking. In this regard, it is worth noting the role that excessive intoxication played in the incidents concerning both *Little* and *Moody*.

QUESTIONS RAISED IN THE ACCIDENT DISCUSSION PAPER

9.29 The questions posed at the end of Chapter 11 of the Accident Discussion Paper are reproduced below:

Option 1: Retaining section 23(1)(b) in its present form

11-1 Should criminal responsibility for an unforeseen and unforeseeable consequence of a person's actions continue to be governed by section 23(1)(b) of the Criminal Code (Qld)?

Option 2: Changing the scope of the excuse of accident

11-2 Should the test of criminal responsibility under section 23(1)(b) of the Criminal Code (Qld) be changed, so that the excuse of accident does not apply if the event in question (for example, the injury) is the direct and immediate result of the defendant's intentional act?

11-3 Should the test of criminal responsibility under section 23(1)(b) of the Criminal Code (Qld) be changed, so that the excuse of accident does not apply if the defendant's intentional act contributes (not insubstantially) to the event in question (for example, the injury)?

11-4 Should the fault element for manslaughter, where accident is in issue, be widened so that foreseeability of the possibility of death *or serious injury (or grievous bodily harm)* is sufficient?

³⁹⁷

ATSILS (Accident Discussion Paper Submission 9) is funded to provide criminal, civil and family law representation and advice to Aboriginal and Torres Strait Islander people throughout the State. ATSILS is also funded to fulfil a State-wide role in the areas of law and social justice reform and community legal education.

Option 3: Retaining, amending or repealing section 23(1A)

- 11-5 Should section 23(1A) of the Criminal Code (Qld) be retained in its present form, or amended, or repealed? If amended, how should it be amended?

Option 4: Creating a new offence or new offences

- 11-6 Should there be a new category of manslaughter, based on an unlawful and dangerous act, to which accident does not apply?
- 11-7 Should there be a new offence of assault occasioning death, to which accident does not apply?
- 11-8 If a new offence of assault occasioning death is created, should:
- (a) section 576 of the Criminal Code (Qld) be amended to allow the new offence to be considered by a jury as a statutory alternative to manslaughter; or
 - (b) should it be necessary for the Prosecution to charge the offence separately on the indictment?

Community expectations

- 11-9 Will any proposed change to the law enjoy public confidence and reflect contemporary community standards and expectations?

9.30 The balance of this chapter analyses the submissions received by the Commission in terms of the four options raised in the Discussion Paper.

Summary of submissions received

9.31 The patterns that emerged in those submissions received by the Department in response to its DJAG Discussion Paper, and which the Commission considered, were similar to the patterns that emerged in the submissions received by the Commission itself in response to the Accident Discussion Paper.

Summary of submissions made to the Department*Respondents*

9.32 The authors of the 25 responses to the DJAG Discussion Paper that were available to the Commission comprised:

- five professional bodies (the Queensland Bar Association, the Queensland Law Society, the Women's Legal Service Inc, the Aboriginal and Torres Strait Islander Legal Service (Qld South) Ltd and Legal Aid Queensland);
- two private law firms specialising in criminal law work;

- three practising barristers;
- the Honourable JB Thomas AM QC;
- the Honourable WJ Carter QC;
- four law academics (although one provided a submission about provocation only);³⁹⁸
- a law student;
- the Commission for Children and Young People (which provided a submission about provocation only);
- six members of the public (one of whom addressed provocation only); and
- the Queensland Homicide Victims' Support Group ('QHVSG').

9.33 The submission to the Department from QHVSG enclosed over 2000 letters from members of the public. The letters were in one of two standard forms drafted by QHVSG. One letter urged a review of the excuse of accident and of jury directions. The other sought the abolition of the defence of provocation.

Summary of views

9.34 The professional bodies, members of the profession, academics and one of the former Justices supported the existing, foreseeability-based, excuse of accident.³⁹⁹

9.35 Those same respondents were critical of section 23(1A) and recommended its repeal.

9.36 The Hon JB Thomas preferred the 'direct and immediate', pre-*Van Den Bemd* position, but considered section 23(1A) 'to say the least, very unsatisfactory'.⁴⁰⁰

9.37 QHVSG submitted, essentially, that a defendant should be excused from criminal responsibility for the consequences of his or her unwilled acts only. It submitted that criminal responsibility should attach to the unintended

³⁹⁸ One of whom explained that the views expressed in his submission were not just his own academic views, but also included the views of his students: DJAG Submission 20.

³⁹⁹ DJAG Submissions 1, 5, 8, 9, 10, 18, 19, 20, 21, 22, 23, 24, 25.

⁴⁰⁰ DJAG Submission 17.

consequences of a willed act. QHVSG did not make any distinction between a willed act that was lawful and a willed act that was unlawful.⁴⁰¹

9.38 The letters drafted by QHVSG about the excuse of accident urged review but did not expressly suggest reform in any particular manner. However, its dissatisfaction with the current position is implicit in the request for a review. Further, QHVSG appeared to be seeking a causation test of criminal responsibility.

9.39 Of the six members of the public who responded to the DJAG Discussion Paper and who consented to the Commission's consideration of their submissions, three discussed accident.⁴⁰² One argued that the defence of accident should be overturned.⁴⁰³ The second argued in favour of an offence of manslaughter based on an 'unlawful and dangerous act carrying with it an appreciable risk of injury'.⁴⁰⁴ The third was concerned about the removal of the accident excuse when the willed assault was in self-defence, or in response to provocation.⁴⁰⁵

9.40 One of the other three members of the public did not comment on accident.⁴⁰⁶ Another observed that ordinary people have strong views about this difficult area of the criminal law, but expressed no view about accident.⁴⁰⁷ The third complained that the reporting of the trial of *R v Moody* in the DJAG Discussion paper was biased (in Moody's favour) but did not address the issue of accident directly.⁴⁰⁸ It was clear, however, that this respondent was dissatisfied with the outcome of the Moody trial.

Summary of submissions made to the Commission

Respondents

9.41 A total of 18 submissions were received in response to the Commission's Accident Discussion Paper, which were comprised of:

- seven members of the general public;⁴⁰⁹
- two law academics;

401 DJAG Submission 15.

402 DJAG Submissions 4, 6, 11.

403 DJAG Submission 4.

404 DJAG Submission 6.

405 DJAG Submission 11.

406 DJAG Submission 2; apart from suggesting better regulation of taxi queues.

407 DJAG Submission 12.

408 DJAG Submission 3.

409 One of these submissions was made on a confidential basis.

- the Honourable JB Thomas AM QC;⁴¹⁰
- three professional bodies (Legal Aid Queensland, ATSILS, the Bar Association of Queensland);
- Senior Counsel from within the Office of the Director of Public Prosecutions, whose submission was endorsed by the Director of Public Prosecutions, who also made a separate submission.
- one lawyer from outside these groups;
- the Queensland Police Service; and
- a further confidential submission.

Summary of views

9.42 The academic respondents opposed any change to the excuse of accident as it currently operates, as did all of the professional bodies, the lawyer, the respondent from the Director of Public Prosecutions and the Director of Public Prosecutions himself.⁴¹¹

9.43 Most of these respondents considered that section 23(1A) of the Code introduced an inconsistency into the operation of the excuse of accident, and all but the respondent from the Office of the Director of Public Prosecutions and the Director of Public Prosecutions argued for the repeal of section 23(1A).

9.44 The academic respondents, the professional bodies, the lawyer and the Office of the Director of Public Prosecutions all opposed the creation of a new offence of assault causing death.⁴¹² Of these respondents, only the respondent from the Office of the Director of Public Prosecutions favoured a new offence of manslaughter based on an unlawful and dangerous act.⁴¹³

9.45 Of the seven respondents from the general public, one did not express any opinion about any of the options in the Accident Discussion Paper,⁴¹⁴ four supported the creation of an offence of assault causing death⁴¹⁵ and two of those also supported a new manslaughter offence.⁴¹⁶ Three supported the

410 The Hon JB Thomas also made a submission in response to the DJAG Discussion Paper and the Accident Discussion Paper. The submission to the Accident Discussion Paper was intended to replace that earlier submission.

411 Accident Discussion Paper Submissions 6, 7, 8, 9, 10, 11, 12, 14.

412 Ibid.

413 Accident Discussion Paper Submission 10.

414 Accident Discussion Paper Submission 2.

415 Accident Discussion Paper Submissions 3, 4, 5, 18.

416 Accident Discussion Paper Submissions 5, 18.

removal of the excuse of accident⁴¹⁷ and another supported a pure causation test of accident.⁴¹⁸

9.46 The balance of this chapter sets out the various options raised in the Discussion Paper and the submissions received about those options.

OPTION 1: RETAINING SECTION 23(1)(b) IN ITS PRESENT FORM

9.47 As the Commission observed in the Accident Discussion Paper, underpinning most systems of justice is the idea that conduct without moral fault should not be the subject of criminal sanction.⁴¹⁹

9.48 Currently, under the Criminal Code (Qld), the limits of criminal responsibility for the consequences of a person's intentional acts are fixed by section 23(1)(b).

9.49 The broad principle embodied in that section is that a person is not criminally responsible for the 'accidental' consequences of his or her actions. In other words, the Code reflects the idea that moral fault does not attach to the accidental consequences of intentional acts.

9.50 More precisely, the test used in the Queensland courts is that an event occurs by accident if it was not intended or foreseen by the defendant as a possible outcome of the defendant's (intentional) act and would not reasonably have been foreseen as a possible outcome by an ordinary person in the position of the defendant.⁴²⁰ In applying this test, possibilities that are no more than remote and speculative are disregarded.⁴²¹ The test is one that allows shifts in community perceptions and values to be reflected in judgments about foreseeability.

9.51 Where death results from a defendant's intentional act, the reasonable foreseeability of death, by either the defendant or an ordinary person, as a possible outcome of the defendant's act provides the necessary culpability for the offence of manslaughter.⁴²² If death was not foreseen as a possibility by the defendant or foreseeable as a possible outcome by an ordinary person in the position of the defendant, then the defendant is not criminally responsible for it.

417 Accident Discussion Paper Submissions 4, 5, 18.

418 Accident Discussion Paper Submission 3.

419 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.6].

420 *R v Taiters, ex parte Attorney-General* [1997] 1 Qd R 333.

421 *Ibid* 338 (Macrossan CJ, Pincus JA and Lee J).

422 Intention may in practice be disregarded for the offence of manslaughter, as an intentional killing is murder.

9.52 To express it another way: accident cannot operate to excuse a killing if the death was foreseen by the defendant or could reasonably have been foreseen as a possible outcome by an ordinary person in the position of the defendant. Of course, if a person's death was actually intended by the defendant, accident will not apply and, in that circumstance, the defendant will be guilty of murder.⁴²³

9.53 The combined effect of the decisions of the High Court in *R v Van Den Bemd*⁴²⁴ and *Wilson v The Queen*⁴²⁵ brought a broad consistency to the law of manslaughter throughout Australia. Under the Code and at common law, the fault element is based on objective and subjective foreseeability.⁴²⁶

9.54 In *R v Van Den Bemd*,⁴²⁷ the High Court confirmed that foreseeability is the sole test of accident in Queensland; and therefore for manslaughter, foreseeability of death as a possible outcome is required. In *Wilson v The Queen*,⁴²⁸ the Court reset the boundaries of manslaughter at common law by redefining a dangerous act (in involuntary manslaughter by an unlawful and dangerous act) as one that carries an appreciable risk of serious injury; in other words, foreseeability of serious injury is required.⁴²⁹

9.55 In *R v Van Den Bemd*,⁴³⁰ the majority of the High Court, when refusing special leave to appeal, considered that the foreseeability test under the Code 'reflected accepted notions of culpability and responsibility for criminal conduct',⁴³¹ a comment that is thought to relate back to the Court's detailed examination of fault in *Wilson v The Queen*.⁴³²

9.56 The argument outlined in the Accident Discussion Paper for abolishing the excuse of accident, at least in its application to the offence of manslaughter,

423 Under s 302(1)(a) of the Criminal Code (Qld) a person who unlawfully kills another is guilty of murder 'if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm'.

424 (1994) 179 CLR 137.

425 (1992) 174 CLR 313.

426 Note, however, the difference between the two tests in terms of the event to which foresight relates.

427 (1994) 179 CLR 137.

428 (1992) 174 CLR 313.

429 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [4.13]–[4.20].

430 (1994) 179 CLR 137.

431 *Ibid* 139 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

432 (1992) 174 CLR 313. See D Lanham, BF Bartal, RC Evans and D Wood, *Criminal Laws in Australia* (2006) 26 in relation to this suggestion.

was that that the reasonable foreseeability of death was not an appropriate test for determining criminal responsibility for manslaughter.⁴³³

Accident Discussion Paper

9.57 In the Accident Discussion Paper, the Commission sought submissions on whether criminal responsibility for an unforeseen and unforeseeable consequence of a person's actions should continue to be governed by section 23(1)(b) of the Criminal Code (Qld).⁴³⁴

Submissions in response to the DJAG Discussion Paper

9.58 As noted above, submissions to the Department from members of the profession, one of the former Justices, professional bodies and academics supported retention of the excuse of accident based on foreseeability.⁴³⁵

9.59 The Bar Association of Queensland, with which the Queensland Law Society agreed,⁴³⁶ noted the very few cases in which the excuse applied:⁴³⁷

Section 23 does not allow the blameworthy to avoid criminal responsibility. It operates only where the event (here, death or grievous bodily harm) was not in fact intended or foreseen and where it would not have been foreseen by a reasonable person — that is, in a genuine case of accident. That occurs only in a very narrow range of cases; and under our jury system ordinary men and women of our community decide whether this section has any scope for application. (emphasis in original)

9.60 Legal Aid Queensland made a similar point:⁴³⁸

Legal Aid Queensland does not support any amendment to section 23 as an excuse from criminal responsibility where there is an accident ... The outcomes of [the] Moody and Little cases are not representative of the outcomes of these types of cases in our experience.

9.61 Legal Aid Queensland made the same observation as that made by the Chief Justice of the Supreme Court of Queensland⁴³⁹ about the way in which the prosecution has drafted indictments where death has followed a punch — namely that for forensic reasons manslaughter (or occasionally murder) is the

433 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.16].

434 Ibid 137.

435 DJAG Submissions 1, 5, 8, 9, 10, 18, 19, 20, 21, 23, 24, 25.

436 DJAG Submission 23.

437 DJAG Submission 24.

438 DJAG Submission 25.

439 See [9.234]–[9.235] below.

only offence on the indictment, with no alternative, to avoid the risk that a jury might take (in the words of the Chief Justice) ‘the soft option’:⁴⁴⁰

Legal Aid Queensland understands that it is a practice of the Director of Public Prosecutions to indict only on [homicide] in these types of cases. This ‘all or nothing’ approach may result on occasions in defendants being acquitted entirely because the jury are not prepared to convict of either murder or manslaughter in a particular case usually involving an ‘unlucky punch’ ... If the alternative counts of grievous bodily harm or assault occasioning bodily harm were pleaded the prospects of a complete acquittal are substantially reduced.

It is of course a matter for the Crown how it chooses to plead and prosecute criminal cases. Although one punch can kill, ordinary experience is that it doesn’t. So the Crown assumes the risk of a complete acquittal in a case where only murder is pleaded and death would not ordinarily be expected to flow from the act. The legislature should not lightly abandon a statutory defence which has existed since the enactment of the *Criminal Code Act 1899* (Qld) because certain forensic tactical decisions have unpopular outcomes.

9.62 An academic referred to the ‘broad common sense view’ of Gibbs J in *Kaporonovski v R*⁴⁴¹ (ie, the current position):⁴⁴²

[The current test] combines the advantage of a flexible rule to meet what might be termed the ‘moral’ circumstances in which the death of one person is caused by another, with a potential Direction which may be given by a trial judge so as to retain the primary function of a jury, namely that of bringing community values and perceptions to bear on a tragic situation.

In this regard, one can only, with respect, applaud the decision of the unanimous Queensland Court of Appeal in *Seminara* [2002] QCA 131⁴⁴³ to uphold the Direction by the trial judge to the jury to consider the situation which presented itself to the accused in that case on the basis of whether or not an ordinary person ‘like you and me’, would ‘reasonably have realised’ the possibility of the deceased sustaining injuries leading to death. The reason for agreeing with the trial judge’s Direction seems to have been encapsulated in the words of McPherson JA at [14] and [15], to the effect that

... apart from their own individual knowledge and experience, jurors have no source or standard of reference by which to divine what an ordinary person would foresee as a possible consequence of conduct like that of the appellant in the present case. It was therefore legitimate for his Honour to direct the jury to test foreseeability by reference to an ordinary person ‘like you and me’.

The strength of the jury system is its ability to accommodate and harness the everyday experience of members of the community into the criminal justice process, thus ensuring that contemporary societal values are being upheld. This will rapidly cease to be the case if juries are required to make their

440 DJAG Submission 25.

441 (1973) 133 CLR 209, 231.

442 DJAG Submission 20.

443 See [4.195]–[4.200] above.

decisions in the light of some arcane formula which does not reflect moral reality.

Viewed in this light, it is difficult to explain, even less to accommodate, the apparent exception to this general, and sensible, rule which is created by [section] 23(1A) of the Code. If a death results from a relatively minor blow struck by an assailant, pre-weakened by a medical condition, is this not precisely what is being described in *Kaporonovski*, namely an event which could not reasonably have been foreseen by the assailant? (emphasis in original)

9.63 Barristers and solicitors who practised criminal law were also in favour of retaining the excuse:⁴⁴⁴

surely a right thinking member of the community would not expect a fellow citizen to be held criminally responsible for a death which he or she did not foresee as possible and which an ordinary, reasonable person would not have foreseen as a possible outcome. Indeed the very fact that liability is attracted on the basis of possibility rather than probability strikes the balance ... between the rights of the individual and the community.⁴⁴⁵

A single punch manslaughter (or, indeed, grievous bodily harm) would always seem a harsh result to a fair-minded person.⁴⁴⁶

The current law as expressed in section 23(1)(b) does reflect proper and reasonable community expectations that criminal responsibility should, at least, be linked to foreseeability.⁴⁴⁷ (notes omitted; emphasis in original)

9.64 Former Justices of the Supreme Court, the Hon WJ Carter QC and the Hon JB Thomas AM QC, expressed opposing views.⁴⁴⁸

9.65 The Hon WJ Carter considered the current law of accident a 'just rule of good sense'. He said:⁴⁴⁹

one could not sensibly or objectively regard the rule as being so far removed from generally accepted principles of justice and fair play as to offend the public conscience and demand legislative correction.

9.66 He supported the existing law of accident, and the Code as a whole. He described the notion of a 'public uproar' demanding change to section 23 (or the provocation provisions of the Code) as 'fatuous'.⁴⁵⁰

444 DJAG Submissions 1, 5, 8, 9.

445 DJAG Submission 9.

446 DJAG Submission 1.

447 DJAG Submission 9.

448 DJAG Submissions 17, 18.

449 DJAG Submission 18.

450 Ibid.

9.67 Of the Griffith Code, the Hon WJ Carter said:⁴⁵¹

[T]he Griffith Code since its enactment has been the model for criminal law codification not only in this country but also in others. Any person who is thoroughly familiar with it and experienced in its application to real life situations knows well that the Code strikes a superb balance between valid and acceptable principles of criminal responsibility, on the one hand, and due recognition by the criminal law of the inherent weaknesses in the human person, on the other. Matters such as accident, mistake, acting in an extraordinary emergency or under compulsion, intoxication, mental illness or mental infirmity or responding to provocation — are all reflections of human weakness and experience which ought fairly be regarded as relevant to issues of culpability or criminal responsibility in the application of the criminal law.

I have never in 50 years of legal experience at the Bar or as a Judge of the District and Supreme Courts been aware of any concern in legal, academic, law enforcement or relevant social groups of any concern, let alone any 'public uproar', in relation to the application of section 23 of the Code or the provocation provisions in cases of homicide.

This is because the Griffith Code 'got it right'. There is always room for the cliché: 'But times have changed' as justification for a new order. But the persistent recognition of excellence and acceptance in the practical workings of the Criminal Code in both the Courts and in pursuance of public law and order cannot be ignored. Social conditions and the social environment have changed but the inherent weaknesses in the human persona have remained constant ...

9.68 Of section 23 and *Van Den Bemd's* interpretation of it, he said:⁴⁵²

Others might have preferred the minority judgments of Brennan and McHugh JJ in the *Van den Bemd* case which in essence restates the position in *Martyr*. There can be no doubt that the binding authorities favour the Gibbs J construction as set out in *Kaporonovski*. How any jury will deal with a particular case is not the issue. What we are dealing with is simply another case of a rule of the criminal law which was finally decided after considerable judicial debate over a number of years in relation to an important section of the Code. Any further interference with it legislatively should not be considered. That would predictably fail and would most likely be the source of further and even greater uncertainty.

I strongly submit that the issue is best left alone. Dissatisfaction by some court watchers with one or two jury verdicts in particular cases is not a sound basis for legislative intervention. Not that I consider the verdicts in *Moody* and *Little* were not appropriate. The material in the [DJAG Discussion Paper] persuades me that they clearly were.

9.69 The Hon JB Thomas, however, was dissatisfied with the current operation of the law of accident. He considered that the direction about the foreseeability test was complex and difficult to explain to a jury.⁴⁵³

451 Ibid.

452 Ibid.

453 DJAG Submission 17.

I did not much like the directions, but did my best to explain them to juries. However all too often I could see the juries' eyes glazing over when these directions were given.

9.70 He was also dissatisfied with the foreseeability test itself.⁴⁵⁴

The criminal law has to be kept simple so that all citizens know what is expected of them and so that juries are not bamboozled by complex directions. It is all very well for lawyers who have grappled with the concept of reasonable foreseeability in torts cases for years, and who (from familiarity with decided cases) get a feel for consistency of result. But it is otherwise for jurors, most of whom will be dealing with the concept of reasonable foreseeability for the first and only time.

The current law of Queensland ... calls upon juries to apply a complex test. They must consider the degree of force and risk to which the criminal act (eg the punch) might expose the victim, whether the accused would have foreseen the consequence, and whether the ordinary person in the shoes of the accused would have foreseen it. This requires juries to speculate on matters that probably were not present in the accused's mind anyway, and also on matters that probably would not be in the hypothetical 'ordinary person's' mind if he or she were in the shoes of the accused. It will always involve fanciful and dangerous guesswork. I have emphasised this point because it demonstrates how thoroughly unrealistic and impractical the test is. It should have no place in the criminal law in relation to offences of direct personal violence.

9.71 The Hon JB Thomas was of the view that the foreseeability test for the excuse of accident should be abandoned and, in the case of unlawful assaults, criminal responsibility for the consequences of assaults should be extended on the basis of a test of causation (unless the consequence was brought about by an intervening act). Such a proposal requires a restructure of the chapters of the Criminal Code (Qld) concerning offences against the person. This proposal is discussed in more detail at the end of this section.

9.72 QHVSG was also dissatisfied with the operation of the current excuse, It argued that the existing law did not meet community expectations:⁴⁵⁵

and in fact, the current directions given to jurors by judges under section 23(1)(b) give the proverbial 'green light' for jurors to acquit violent offenders.

...

We believe the inclusion of section 23(1)(b) is confusing and points jurors to focus disproportionately on the foreseeability of the outcome, rather than consider the actual action committed by the defendant.

9.73 QHVSG recommended that the excuse of accident apply only where the act is unwilling. It argued that the excuse of accident should be 'considered

454 Ibid.

455 DJAG Submission 15.

against the action only, rather than the outcome'.⁴⁵⁶ QHVSG appeared to support a causation-based test of criminal responsibility.

Submissions in response to the Accident Discussion Paper

9.74 All but one⁴⁵⁷ of the academic and professional respondents to the Commission's Accident Discussion Paper opposed any alteration to the excuse of accident in so far as it is based on foreseeability.⁴⁵⁸

9.75 Although the Queensland Police Service considered that the current operation of section 23(1)(b) did not meet community expectations, it was nevertheless of the view that:⁴⁵⁹

there may be alternative means of bringing the operation of section 23 into line with community expectations other than by direct amendment. For this reason, the Service does not support an amendment to s 23.

9.76 Generally, these respondents accepted that the foreseeability test under the Code reflected accepted notions of culpability for the consequences of willed actions.

9.77 The Queensland Police Service did not accept that the current test of foreseeability allowed the excuse to reflect changing community perceptions and referred to the 'controversy' about the verdicts in *R v Little* and *R v Moody*. However the Service sought changes other than the amendment of section 23.

9.78 In the case of manslaughter, one academic respondent pointed out that to abolish the accident provision:⁴⁶⁰

would mean that any person who caused another's death by means of a willed act could be successfully prosecuted for manslaughter. This is because unlike the common law, the offence of willed act manslaughter under the Criminal Code does not require that the act be unlawful nor does it contain a requirement that the act be dangerous. Therefore consensual acts such as those involved in a sporting context where death results can be the subject of a prosecution, as can medical treatment and consensual sexual activity that results in death. (notes omitted)

9.79 He observed that the abolition of accident could result in convictions where the community would not regard the convicted person as being morally blameworthy.⁴⁶¹

456 Ibid.

457 Accident Discussion Paper Submission 13.

458 Accident Discussion Paper Submissions 6, 7, 8, 9, 10, 11, 12.

459 Accident Discussion Paper Submission 16.

460 Accident Discussion Paper Submission 8.

461 Ibid.

9.80 Another academic respondent observed that section 23(1)(b):⁴⁶²

reflects the basic principle that a person should not be held criminally responsible for the consequences for his or her actions that could not have been reasonably foreseen. This is common sense for how can a person guard against the unforeseeable consequences of their actions?

9.81 ATSILS argued that a return to a no-fault theory of criminal liability, which the respondent said was, in reality, ‘*an-eye-for-an-eye*’ view of justice, was not consistent with the community’s idea of justice.⁴⁶³

9.82 A second argument advanced by a number of respondents was that the Attorney-General’s audit of homicide trials did not support the case for any change to the excuse of accident.⁴⁶⁴

9.83 Legal Aid Queensland commented that the audit and case summaries accorded with its own experience, and said:⁴⁶⁵

experienced in-house counsel from our office confirmed that in general terms the excuse is not regularly relied upon. The main reason for this seems to be directly associated with the limitations placed on its application by the foreseeability test. This demonstrates that the checks and balances already in place prevent the excuse of deplorable or inexcusable behaviour; behaviour that in a civilised society people should be held responsible for and attract penalty.

9.84 One of the academic respondents took up the observation in the Accident Discussion Paper⁴⁶⁶ that the foreseeability test was one that allowed shifts in community perceptions and values to be reflected in judgments about foreseeability:⁴⁶⁷

Therefore it may well be that those campaigning for the abolition of accident will eventually achieve their aim without legislative intervention. As Little’s defence barrister ... told ‘The Australian Story’ by the public becoming more aware that young men can kill by a single punch it will mean that such an event is foreseeable. If that is the case it will mean the defence is less likely to be successful in the future because those accused who claim not to have been aware will be met with greater scepticism by juries.

462 Accident Discussion Paper Submission 7.

463 Accident Discussion Paper Submission 9. ATSILS argued ‘The “an eye for an eye” view of the vigilante pressure group may be acceptable in some societies but it is certainly not the view of objective fair minded Australians.’

464 Accident Discussion Paper Submissions 6, 7, 9, 11, 17.

465 Accident Discussion Paper Submission 6.

466 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper (WP 62, June 2008) [11.7].

467 Accident Discussion Paper Submission 7.

9.85 ATSILS expressed the view that the jury brings the voice of the community to each decision because it allows:⁴⁶⁸

the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters.

9.86 However, three respondent members of the public supported the removal of the excuse of accident.⁴⁶⁹ One wrote that the section was 'weak and did not serve members of the community'.⁴⁷⁰ Another wrote:⁴⁷¹

where assailants are acquitted because they claim (honestly or otherwise) that they did not intend to kill their victims, the failure of the legal system to find them culpable in any way for the deaths, seems to be a miscarriage of justice.

9.87 A respondent member of the public who supported the removal of the excuse of accident also supported:⁴⁷²

- The original recommendation of the Criminal Code Advisory Working Group;⁴⁷³
- The creation of an offence of assault occasioning death;
- The creation of an offence of manslaughter based on criminal negligence;⁴⁷⁴ and
- A new offence of manslaughter based on an unlawful and dangerous act.

9.88 Apart from indicating those preferences, the only argument put by this respondent was a comment that:⁴⁷⁵

in general, if intention to assault results in death, there is no excusing the death as an accident irrespective of the victim's unknown weaknesses or condition.

9.89 This comment was made immediately after a reference to the Discussion Paper in which the observation was made that, in the context of manslaughter, the abolition of the excuse of accident could have the effect that criminal responsibility is imposed in respect of a lawful act that happened to

468 Accident Discussion Paper Submission 9.

469 Accident Discussion Paper Submissions 4, 5, 18.

470 Accident Discussion Paper Submission 4.

471 Accident Discussion Paper Submission 5.

472 Accident Discussion Paper Submission 18.

473 *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996. See [3.43]–[3.44] above.

474 The Criminal Code (Qld) already contains an offence of manslaughter based on criminal negligence.

475 Accident Discussion Paper Submission 18.

result in an unforeseen and unforeseeable death.⁴⁷⁶ The respondent's opinion therefore is that the criminal sanction of manslaughter should apply because one person caused the death of another person (putting aside for the moment any other justification or excuse for the defendant's act).

9.90 Similar comments were made by other respondent members of the public. One wrote, 'the law should not protect violent assailants on the basis they didn't foresee all possible consequences';⁴⁷⁷ and another wrote, 'I fail to see how deliberate violence can ever be viewed as an accident'.⁴⁷⁸

9.91 The Hon JB Thomas, who expressed dissatisfaction with the current law of accident, supported substantial change to the whole law of homicide.

9.92 In his discussion of accident, he argued that a person who assaults another should be criminally responsible for any injury (including death) caused to the victim, whether or not the injury was a foreseeable consequence of the assault. He believed that the test of criminal responsibility should be a causation test. For that reason he argued for a return to the test stated in *Martyr* (which he understands to be a causation test limited only by an intervening act). The *Martyr* test, he believed, embodied the idea that an offender should 'take the victim as he finds him' and accept criminal responsibility for all the consequences of the offender's actions.

9.93 In the case of manslaughter, the fault element on this analysis lies in the assault, or in the intent to assault (or cause harm), but neither the intent to cause the consequence charged as the offence, nor foresight of the consequence charged as a possible outcome of the offender's assault.

9.94 The Hon JB Thomas accepted that a problem with a causation test was that it did not contain a fault element and that adoption of a general test of causation in place of a foreseeability test would result in convictions for manslaughter in a range of situations in which the convicted person would not be regarded as morally blameworthy. To overcome this problem he proposed that all these situations⁴⁷⁹ should be dealt with as categories of criminal negligence.

9.95 As an alternative solution he proposed a more radical reclassification of offences against the person. Under this proposed reclassification offences would be divided into (1) cases where harm is caused with intent to injure and (2) cases where harm is caused without intent to injure.

476 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.14].

477 Accident Discussion Paper Submission 1.

478 Accident Discussion Paper Submission 3.

479 The situations he lists are: (a) a friendly but fatal back slap, (b) rough horseplay, and (c) non-intentional injuries in sporting contests. But the situations are not limited to categories as they must include any act, apart from an unlawful assault, that results in injury to another person.

9.96 In the first category the fault element would be provided by the specified intent, and in the second category the fault element would be provided by requiring proof of criminal negligence. The Hon JB Thomas believed that this characterisation of offences offered a ‘total solution’ to the problems he believes are posed by the excuse of accident.

Community expectations

9.97 The Commission was required to consider whether the current excuse of accident reflected community expectations. A similar question was asked in the DJAG Discussion Paper. Eleven members of the public responded to the DJAG Discussion Paper or the Commission’s Accident Discussion Paper (or to both).⁴⁸⁰ Some of those submissions did not address accident at all. Others did not address the question of community expectations. That there are few responses from members of the public is perhaps hardly surprising as most people in the community do not personally have experience of the criminal justice system unless they have been a witness, victim, defendant, relative or friend of a victim or defendant or member of a jury. Very few have experience of the excuse of accident or the defence of provocation. The Commission particularly values the submissions of the members of the public who shared with us their views and their experiences.

9.98 Some respondents who were members of the legal profession attempted to answer the question about community expectations, although they found it difficult to do so. The Commission is grateful for the views expressed by these respondents, but has treated with some circumspection the views of criminal lawyers about the community’s satisfaction or otherwise with the operation of the current excuse of accident.

9.99 After observing how difficult this question was to answer, one respondent member of the profession said:⁴⁸¹

I find that it is difficult to gauge community expectation and opinion on a legal issue such as this. Different interest groups have different views. No-one, of course, can reasonably expect victims’ families to remain objective. Media reaction is not always an accurate guide to the views of the larger community. Public reaction to media reports of particular cases has to be looked at in the context of the quality and accuracy (or lack thereof) of the media reports.

9.100 Another respondent member of the profession was of the view that the current law (ie the combined effect of section 23(1)(b) and section 23(1A)) was consistent with community expectations.⁴⁸²

480 Although the response to the discussion papers from individual members of the public was low, the Commission notes that the Queensland Homicide Victims’ Support Group response to the Department enclosed 2000 letters from members of the public.

481 DJAG Submission 5.

482 DJAG Submission 1.

On the whole, though, I am of the view that the community[’s] expectations would be more in line with the present law. A fair-minded member of the community would be likely to consider that a ‘one punch’ manslaughter or grievous bodily harm would still be an unacceptably harsh result (or, at least, such a possible offence should ... be left to the jury) and that the egg shell skull distinction, while anomalous, is simply a case of, where someone has to bear responsibility for the unknown weakness in the victim, it should be the offender rather than the victim.

9.101 Similarly, a respondent law firm considered that the community was satisfied with the current law (again, meaning the combined effect of section 23(1)(b) and section 23(1A)):⁴⁸³

The community does not wish to see persons held to be criminally responsible for accidents. Foreseeability is an appropriate test and in line with the ordinary understanding of an accident. The community, through the jury system, determines what is foreseeable in a particular case. The apparent inconsistency caused by the 1997 amendments strikes the right balance between protecting the community and defending the rights of the individual.

9.102 An academic considered the question ‘ironic’:⁴⁸⁴

It is ironic to ask whether [the excuse of accident] reflects community expectations given that the test is that the event (eg death) was unintentional and unforeseen by the accused but most importantly unforeseen by the ordinary person. Given that we have maintained the jury system in Queensland for criminal trials theoretically the test is being interpreted and applied by ordinary people — members of the jury.

9.103 One member of the public supported the current operation of the law because it protected a person acting, for example, in self-defence, from criminal responsibility for the unintended consequences of his or her justifiable actions:⁴⁸⁵

The majority of the community do not want an innocent person to go to jail or be punished for an act made in self-defence. That person/s may have used the provocation/accident defence to be acquitted. Even though the community may be outraged in some cases, it does not make it necessary to remove the defence that innocent people may use.

An alleged offender should not be convicted for murder or manslaughter if the incident was an accident or as a result of physical provocation. The incident cannot even be called an offence if the alleged offender was merely protecting himself.

483 DJAG Submission 10.

484 DJAG Submission 19.

485 DJAG Submission 11.

9.104 However, three members of the public were not satisfied with the current state of the law of accident.⁴⁸⁶ One considered the existence of the defence a ‘travesty’:⁴⁸⁷

An ASSAULT IS: an attack ... an unlawful physical attack upon another to do violence to another.

That it results in death is NOT an accident.

The defence of accidental death from an assault must be urgently reviewed and overturned. To see the smirk on the young person’s face last night on TV and the grieving parents and family of the murdered son. It is a travesty that we have such defence. (emphasis in original)

9.105 QHVSG referred to the ‘very public outcry from the community at large’ about ‘a devastating string of unbelievable outcomes’ (referring to the cases of *R v Little*, *R v Moody* and *R v Sebo*) and continued:⁴⁸⁸

In response to the absolute devastation this caused the families concerned, other ‘victims’ of homicide, and the very public outcry from the community at large, QHVSG embarked on an educational campaign designed to provoke debate in the community regarding the purpose of justice and our legal system, and in particular to urge the community to consider that One Punch Can Kill™.

The sentiments contained within [the enclosed submission] capture the concerns of members of the public. The average man and woman who resides in Queensland, who have a vested interest in the integrity and success of our judiciary.

9.106 QHVSG reported its experience of the community’s response to the high profile cases:⁴⁸⁹

Following the acquittals of both Jonathon Little and Ryan Moody, our organization received a number of phone calls from members of the community expressing outrage at this outcome.

The bulk of this outrage was directed towards jurors with sentiments like ‘how could they get it so wrong?’ ...

A number of local and state media outlets ... focused on these outcomes and the conflict they had with contemporary community standards. This was then followed up by national ABC program *Australian Story*, whose guestbook received a number of comments expressing confusion and anger towards Queensland’s justice system.

In response to this, the QHVSG developed a standard letter for concerned members of the public to sign, showing their support for a review of both the Accident and Provocation defences.

486 DJAG Submissions 4, 6.

487 DJAG Submission 4.

488 DJAG Submission 15.

489 Ibid.

In less than twelve months, with very little publicity and encouragement from the QHVSG, over two thousand letters have been received ... We believe that both the media frenzy which followed, and the follow through of letters of support, demonstrate that the current law as expressed in section 23(1)(b) does not meet community expectations.

9.107 The letter prepared by QHVSG and given to members of the public to sign suggested that killers in significant numbers were 'granted absolute freedom'⁴⁹⁰ because of the excuse of accident. However, it appears from the audit commissioned by the Attorney-General that the excuse of accident explained the acquittal in only one case, that of *R v Little*.⁴⁹¹

9.108 One respondent member of the public⁴⁹² expressed her dissatisfaction with the current test forcefully, while acknowledging the results of the audit:⁴⁹³

There has been significant public outrage in response to recent cases in which killers have been acquitted. While accident and provocation have not always been the sole defences used to gain acquittals, it is clear that our community does not accept these defences as appropriate in circumstances which allow killers to walk free. There is an acute sense of injustice as we see these attackers walk free from court to get on with their lives, with no jail terms, no fines, no compensation to the families of their victims, no awareness even of the pain and suffering of the families and friends of the victim, and sometimes no apparent remorse. For the victims' family and friends there is disbelief, anger, a sense of having been betrayed and let down by the State's legal system, and the feeling that their loved one's life has been devalued by the court process. We need to see that our law upholds *the sanctity of human life*. At present, in Queensland, this does not appear to be so. (emphasis in original)

9.109 The same respondent was critical of what she considered was the 'imbalance' that favoured the accused over the victim. She also observed that she did not think that the public would respond to the DJAG Discussion Paper because 'in order to be thorough, it had to be complex and rather daunting'.⁴⁹⁴

9.110 Another respondent, who sat through the committal and both trials in *R v Moody*, complained that the DJAG Discussion Paper reported the case incorrectly, selectively, unfairly and with bias.⁴⁹⁵ The respondent made the same complaint about the Commission's reporting of *R v Moody*.⁴⁹⁶ The Commission and the audit team each relied on the transcript of evidence from

490 Ibid.

491 The Commission is not suggesting that change ought not to be considered because only one case may be referred to in support of it. The Commission acknowledges that arguments can be well made even if there are very few cases to support them.

492 Who may have some connection to the Moody case.

493 DJAG Submission 6.

494 Ibid.

495 DJAG Submission 3.

496 Accident Discussion Paper Submission 4.

the Moody trial in describing the facts of the case and reported the evidence that was consistent with the jury's verdict.

9.111 The Queensland Police Service stated that the current operation of the excuse of accident did not reflect community expectations, although it acknowledged that there was 'difficulty in identifying community expectations with any precision'.⁴⁹⁷

Nevertheless, the Service holds the view that the community has a general expectation that persons involved in unlawful acts will be accountable for the consequences of those acts, whether or not those consequences were intended or foreseen.

The view held by the Service as to community expectations coincides with the common law view expressed in the judgment of Windeyer J in *Mamote-Kulang v The Queen* (1964) 111 CLR 62, 79:

'If death ... is a consequence, direct not remote, of an unlawful act done with intent to hurt but not to do grievous bodily harm, it is manslaughter ... To make an unintended and unexpected killing a crime at common law, it must be, generally speaking, the result of an unlawful and dangerous act, or of reckless negligence. There is, however, no doubt that at common law a man is guilty of manslaughter if he kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm.'

OPTION 2: CHANGING THE SCOPE OF THE EXCUSE OF ACCIDENT

Accident Discussion Paper

9.112 In the Accident Discussion Paper, the Commission raised for consideration three different ways in which the excuse of accident could be changed:⁴⁹⁸

- the reinstatement of the direct and immediate result test, which would change the operation of the excuse of accident for all offences (Option 2(a));
- the enactment of a pure causation test for criminal responsibility, which would also change the operation of the excuse of accident for all offences (Option 2(b)); and
- a change to the operation of the excuse of accident in the case of manslaughter only (Option 2(c)).

⁴⁹⁷ Accident Discussion Paper Submission 16.

⁴⁹⁸ Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.17].

9.113 These possibilities and the reaction of respondents to them are discussed below.

Option 2(a): The direct and immediate result test

9.114 In upholding the foreseeability test for accident in *R v Van Den Bemd*,⁴⁹⁹ both the Queensland Court of Appeal and the High Court, rejected the alternative 'direct and immediate result' test. The term 'direct and immediate' describes the relationship between the assault and the consequences. Under this test, if, for example, death is the 'direct' consequence of an assault, then death has not been caused by accident and the assailant is criminally responsible for it.

9.115 A direct and immediate result test differentiates between death or injury that directly results from an intentional act per se and death or injury that results from a supervening event that follows an intentional act, such as the impact with the ground following a punch. Under the direct and immediate result test, a person is not criminally responsible for death or injury that is the result of an act supervening upon the intentional act.⁵⁰⁰

Accident Discussion Paper

9.116 An option that arose for consideration was whether the direct and immediate result test⁵⁰¹ should be reinstated, so that criminal responsibility for the consequences of an intentional act (lawful or otherwise) does not depend on the reasonable foreseeability of those consequences but rather on whether they were the direct and immediate result of the act.⁵⁰²

Submissions in response to the DJAG Discussion Paper

9.117 The direct and immediate result test was referred to in the DJAG Discussion Paper but its reinstatement was not raised as an option. Only one respondent, the Hon JB Thomas, referred to it expressly.⁵⁰³ He did not favour a direct and immediate test for the reasons given in the Accident Discussion Paper.⁵⁰⁴

499 [1995] 1 Qd R 401 (CA (Qld)); (1994) 179 CLR 137 (HC).

500 See the discussion at [3.30] above.

501 This test is considered at [3.30]–[3.34] and [4.36]–[4.60] above.

502 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) 137.

503 DJAG Submission 17.

504 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.22], [11.25], [11.26].

9.118 It may also be inferred that those respondents with knowledge of Queensland criminal law who were in favour of the existing law (as per *Van Den Bemd*) were not in favour of reinstating the pre-*Van Den Bemd* direct and immediate result test.

9.119 Neither QHVSG nor members of the public who responded to the DJAG Discussion Paper considered this option expressly. However, it may be inferred that QHVSG favoured the extension of criminal responsibility to *at least* the direct and immediate consequences of intentional acts and, in fact, wished it to extend further to all outcomes ‘caused’ by an intentional act.⁵⁰⁵

Submissions in response to the Accident Discussion Paper

9.120 The reinstatement of the direct and immediate result test was supported by several members of the public.⁵⁰⁶ One of these respondents commented:⁵⁰⁷

The direct and immediate result test could be clarified, broadened and strengthened.

...

Criminal responsibility should not be taken lightly. People’s lives are too important.

9.121 Another respondent expressed the following view.⁵⁰⁸

What is the difference between murder and manslaughter? It is the intention to kill. So if manslaughter is the offence of someone not intending to kill, how can ‘accident’ be a consideration for this offence — of course they didn’t intend to kill so they didn’t foresee death as a consequence. But that shouldn’t excuse them from being held responsible for the outcome of their actions.

9.122 All of the academics and professional bodies who considered the option of reinstating the direct and immediate result test were opposed to that option.⁵⁰⁹

9.123 The Bar Association of Queensland supported the current interpretation of section 23(1)(b) and opposed any reinstatement of the direct and immediate result test, primarily on the ground that its effect would be to impose strict liability in respect of a serious offence.⁵¹⁰

⁵⁰⁵ QHVSG did not respond to the Accident Discussion Paper, which discussed this option at some length.

⁵⁰⁶ Accident Discussion Paper Submissions 3, 4, 5.

⁵⁰⁷ Accident Discussion Paper Submission 3.

⁵⁰⁸ Accident Discussion Paper Submission 4.

⁵⁰⁹ Accident Discussion Paper Submissions 6, 8, 10, 12.

⁵¹⁰ Accident Discussion Paper Submission 12.

S 23(1)(b) provides a defence where the 'event' is neither intended nor foreseen by the actor and would not be reasonably foreseen by a reasonable person. Any tendency towards the imposition of strict liability for serious offences, in civilised societies, must be avoided. In this connection, the Association does not support the reinstatement of the so-called 'direct and immediate result' test. ... Not only would there be a discernable shift in the direction of the imposition of strict liability in serious offences such as murder and manslaughter, but also a tendency towards inconsistent outcomes ...

9.124 Legal Aid Queensland opposed this test on the basis that it was unnecessary, would lead to unfairness, and would remove an important decision from the jury:⁵¹¹

Given the limitations already imposed on the second limb of s 23, it is unnecessary to narrow the test of criminal responsibility to exclude instances where the event in question is the direct and immediate result of the defendant's intentional act and it would lead to unfairness.

It would also have the effect of removing a step in the jury's appraisal of the circumstances of the offending and therefore remove an element of community participation in the decision making process regarding criminal responsibility of a citizen.

9.125 A legal academic who commented on this issue regarded the direct and immediate result test as 'particularly problematic':⁵¹²

The exact nature of the test was somewhat unclear with different judges adopting terminology such as direct blows, intentional applications of force, unlawful force and direct and immediate result.

9.126 He also agreed with a comment made by the Commission in the Accident Discussion Paper that this approach had the potential to produce outcomes that were not logical.⁵¹³

9.127 The respondent from the Office of the Director of Public Prosecutions added these observations:⁵¹⁴

Any attempt to enact by statute the direct and immediate result test for limited circumstances has a superficial attraction, but it immediately strikes difficulties. It is likely to add to the burden of jury deliberations, not reduce them. It is likely to attract arguments at the margin about where 'directness' and 'immediacy' end. It is likely to attract difficulty in the cases mentioned above where weapons are used in a fashion that is said to be 'accidental'.

9.128 Although the Queensland Police Service was of the view that section 23(1)(b) should not excuse unlawful acts that cause injury, it did not support a

511 Accident Discussion Paper Submission 6.

512 Accident Discussion Paper Submission 8.

513 Ibid.

514 Accident Discussion Paper Submission 10.

reinstatement of the 'direct and immediate' test.⁵¹⁵

Option 2(b): A pure causation test for criminal responsibility

9.129 Another option considered in the Accident Discussion Paper was criminal responsibility based purely on causation.⁵¹⁶

Submissions in response to the DJAG Discussion Paper

9.130 This was the test preferred by the Hon JB Thomas. He answered the objection that a causation test necessarily catches all the consequences of lawful acts (even lawful acts that could be judged not to be dangerous at the time) by redefining the existing structure of offences so that all other cases are dealt with as forms of criminal negligence. He fundamentally disagreed with the idea that the foreseeability test reflects accepted notions of culpability and responsibility for criminal conduct.

9.131 Although not expressed in these precise terms, the Queensland Homicide Victims' Support Group also supported a causation test of criminal responsibility. In its submission to the Department, QHVSG said.⁵¹⁷

The Queensland Homicide Victims' Support Group recommends that the defence of accident be considered against the action only, rather than the outcome.

We believe that the inclusion of section 23(1)(b) is confusing and points jurors to focus disproportionately on the foreseeability of the outcome, rather than consider the actual action committed by the defendant.

9.132 QHVSG argued that a defendant should only be excused from criminal responsibility for acts that occurred independently of the defendant's will. But otherwise, a defendant should bear criminal responsibility for all consequences of his or her willed acts — whether those consequences were intended or foreseeable or not:⁵¹⁸

the issue is whether the 'action' not the consequence was an accident.

9.133 The letter drafted by QHVSG about accident also appeared to support a pure causation test.⁵¹⁹

515 Accident Discussion Paper Submission 16.

516 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.27]–[11.29].

517 DJAG Submission 15.

518 *Ibid.*

519 The letter refers to s 300 of the Criminal Code (Qld), which states that a person who unlawfully kills another is guilty of murder or manslaughter, depending on the circumstances. The letter states 'juries continue to get this completely wrong', which seems to suggest that a causation test is required.

9.134 The member of the public who expressed dissatisfaction with the current test also appeared to favour a causation test of criminal responsibility.⁵²⁰

9.135 The Bar Association of Queensland, with which the Queensland Law Society agreed,⁵²¹ expressed the opposite view. It did not consider this approach to criminal responsibility appropriate in ‘civilised society’.⁵²²

[S]urely a right thinking member of the community would not expect a fellow citizen to be held criminally responsible for a death which he or she did not foresee as *possible* and which an ordinary, reasonable person would not have foreseen as a *possible* outcome.

The very fact that liability is attracted on the basis of possibility rather than probability strikes the correct balance between the rights of the individual and the legitimate expectations of the community that those to blame for injury and death will be punished.⁵²³

An alternative view — strict liability for injury and death that a citizen causes by any willed act, regardless of whether or not the injury or death results from a genuine accident — is not appropriate for a civilised society. (emphasis in original)

9.136 The same point was made by a barrister.⁵²⁴

Strict liability, that is, liability imposed purely upon proof of causation is surely not acceptable. Brennan J (as his Honour then was) in *He Kaw Teh v The Queen*⁵²⁵ said:

‘The requirement of mens rea avoids what Lord Reid called “the public scandal of convicting on a serious charge persons who are in no way blameworthy”’.⁵²⁶

There must be some exculpatory provisions along the lines of accident. The adoption of the dual subjective and objective tests based on events which are either foreseen or foreseeable⁵²⁷ remains, in my view, the most appropriate measure. (notes in original)

520 DJAG Submission 4.

521 DJAG Submission 23.

522 DJAG Submission 24.

523 By way of contrast, criminal responsibility arises on probable consequences in different parts of the Criminal Code (Qld): eg, s 8.

524 DJAG Submission 5.

525 (1985) 157 CLR 523, 565.

526 His Honour’s reference to Lord Reid was a reference to Lord Reid’s speech in *Sweet v Parsley* [1970] AC 132, 150.

527 See *R v Taiters; ex parte Attorney-General* [1997] 1 Qd R 333.

Submissions in response to the Accident Discussion Paper

9.137 One respondent member of the public expressed support for a pure causation test of accident.⁵²⁸ The respondent said that the arguments for and against a pure causation test for criminal responsibility and the discussion seemed perfectly reasonable. The respondent's position was that people should be accountable for all the consequences of their actions.

9.138 Three other respondents mentioned the possibility of a causation test of accident.⁵²⁹ Two, an academic and the respondent from the Office of the Director of Public Prosecutions, rejected this possibility summarily, primarily because a test of causation cannot logically determine the excuse of accident. The third, the Queensland Police Service, 'acknowledged' the concerns addressed in the Accident Discussion Paper at [11.18]–[11.23], which included a discussion about causation not being a measure of moral fault, and submitted that:⁵³⁰

A test that attaches significance to causation without reference to context appears ill-equipped to reflect concepts of criminal responsibility.

9.139 The Queensland Police Service adopted the argument made in the Accident Discussion Paper at [11.31] to the effect that such a change would impose criminal responsibility beyond the intention that accompanied the act, which need not even be an unlawful act.⁵³¹ The Service's position was that:⁵³²

criminal responsibility should attach to the unforeseen and direct consequences of intentional acts if those acts were unlawful.

Option 2(c): Changing the fault element for manslaughter

9.140 In the Accident Discussion Paper, the Commission considered alternatives to the current operation of the excuse of accident upon a charge of manslaughter in particular.

9.141 The effect of section 23(1)(b) is that a person is not criminally responsible for an 'event' that occurs by accident. The 'event' on a charge of manslaughter is death and, in accordance with the framework of the Criminal Code, it is foreseeability of death that prevents the excuse of accident from operating.

528 Accident Discussion Paper Submission 3.

529 Accident Discussion Paper Submissions 8, 10, 16.

530 Accident Discussion Paper Submission 16.

531 Ibid.

532 Ibid.

9.142 At common law, the test of a ‘dangerous’ act is whether the act carries an appreciable risk of *serious injury*. In that sense it may be said that, for manslaughter at common law, criminal responsibility depends on foreseeability of (at least) serious injury. Under the Code, criminal responsibility for manslaughter depends on foreseeability of death as a reasonable possibility.

9.143 A question that arises is whether, by analogy with common law concepts, criminal responsibility for manslaughter under the Code ought to depend on foreseeability of serious injury (or, in the language of the Code, grievous bodily harm). To put the question another way: does foreseeability of serious injury provide a sufficient degree of moral culpability to found an offence of manslaughter, bearing in mind that an intention to cause grievous bodily harm is a sufficient intention for a conviction of murder?

9.144 Providing for foreseeability of grievous bodily harm as a possible outcome as an alternative fault element for manslaughter (ie, an alternative to foreseeability of death as a possible outcome) is analogous to the intent sufficient to constitute a killing as ‘murder’ under the Code.⁵³³

Accident Discussion Paper

9.145 In the Discussion Paper, the Commission sought submissions on whether the fault element for manslaughter, where accident is in issue, should be widened so that foreseeability of the possibility of death or serious injury (or grievous bodily harm) is sufficient.⁵³⁴

Submissions in response to the DJAG Discussion Paper

9.146 This issue was not raised in the DJAG Discussion Paper and was not the subject of any submissions to the Department.

Submissions in response to the Accident Discussion Paper

9.147 Several respondents commented on whether, for manslaughter, the fault element should be widened so that foreseeability of the possibility of death or serious injury (or grievous bodily harm) would be sufficient for the purpose of section 23(1)(b).

9.148 A legal academic who addressed this issue considered that this option ‘may substantially address the concerns that the current position does not reflect community expectations’.⁵³⁵ He suggested that, if this option were adopted, it was desirable that ‘the amendment to manslaughter be in accordance with the requirement that foreseeability as to grievous bodily harm

533 That is, an intent to cause death or grievous bodily harm: see Criminal Code (Qld) s 302(1)(a).

534 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) 137.

535 Accident Discussion Paper Submission 8.

should be enacted and not foreseeability as to serious injury'. He gave the following reasons for preferring a reference to grievous bodily harm:⁵³⁶

First it would mean that there would be consistency with the offence of murder. Second the term grievous bodily harm has a well defined and understood meaning. Third it is difficult to imagine how the term serious injury could be defined to include injuries less than grievous bodily harm but more substantial than bodily harm. Indeed the Code's definition of serious disease simply adopts the Code's definition of grievous bodily harm.

9.149 This respondent also suggested that a similar result could be achieved by amending section 320 of the Code so that death is a circumstance of aggravation to the offence of causing grievous bodily harm, and outlined the advantages and disadvantages of this alternative approach.⁵³⁷

The advantage of amending s 320 is that it would maintain consistency between the fault element and the offence charged. The disadvantage is one of labelling. As pointed out in the Law Reform Commission's Discussion Paper there is perhaps a community expectation that a person who kills another is labelled with the offence of murder or manslaughter and not with a lesser offence.

9.150 The respondent from the Office of the Director of Public Prosecutions referred to the advantages of the option of widening the fault element for manslaughter:⁵³⁸

This proposal is likely to do the least violence to the law as it presently stands. This is a substantial virtue — the risk of changes in the law producing unintended consequences is high, particularly in an area (such as this) dealing with bedrock principles. The proposal has an attractive harmony with the law relating to the necessary intention in murder cases.

9.151 This respondent observed, however, that this option, in effect, requires foreseeability of a notional event (grievous bodily harm), rather than a real event (the death that actually occurred), and suggested that this might raise some conceptual and drafting difficulties:⁵³⁹

The potential conflict between *Stuart*⁵⁴⁰ and *Grimley*⁵⁴¹ ... focuses attention on the idea that s 23 requires *the event* to be foreseeable, that is to say, the actual outcome which occurred (to whatever level of detail is necessary, depending on the resolution of arguable conflicts between the two cases mentioned). The proposal to change the fault element in manslaughter requires a change in the law so that only a notional event and not a real event need be foreseeable. This requires extremely careful drafting. Is all that has to be foreseeable some

536 Ibid.

537 Ibid.

538 Accident Discussion Paper Submission 10.

539 Ibid.

540 [2005] QCA 138.

541 [2000] QCA 64.

generic occurrence of GBH? If so, that does not fit well with *Stuart*. Is what has to be foreseen the actual occurrence which took place with the notional subtraction of the fact of death of the victim? The potential for a clash in the directions on foreseeability dealing with both a notional and a real event is manifest. The potential for confusion is high. (notes added)

9.152 The Queensland Police Service, although acknowledging some benefits in this option, was not in favour of it because it might not extend criminal responsibility far enough.⁵⁴²

The Service accepts that an extension of the test of foreseeability to include foreseeability of serious injury would more properly reflect community expectations. However ... the Service does not accept that foreseeability should exclusively determine criminal responsibility for unlawful acts causing death or serious injury. The proposed extension of the foreseeability test may still allow persons causing death by unlawful acts to escape criminal responsibility.

9.153 Legal Aid Queensland was opposed to the option of changing the relevant 'event' for the purpose of manslaughter on the basis that the amendment would compromise the fault element for this form of manslaughter and would lead to convictions for manslaughter when the willed act involved a low level of force and death was unforeseen and unforeseeable. The resulting conviction, the respondent said, is one that would be entirely disproportionate to the defendant's actions.⁵⁴³ Legal Aid Queensland commented:⁵⁴⁴

Arguably if the Crown are of the view that an accused or ordinary person in the accused's position has foreseen serious injury or grievous bodily harm, it would be more appropriate to indict such charges and allow the jury to determine the accused's level of criminal responsibility.

OPTION 3: RETAINING, AMENDING OR REPEALING SECTION 23(1A)

Accident Discussion Paper

9.154 Section 23(1A) of the Criminal Code (Qld) was inserted into section 23 by amendment in 1997.⁵⁴⁵ The amendment reversed the effect of part of the decision in *R v Van Den Bemd*⁵⁴⁶ by removing accident as an excuse when death results from 'a defect, weakness, or abnormality'.

9.155 In the Accident Discussion Paper, the Commission considered whether section 23(1A) should be retained in its present form, amended to overcome

542 Accident Discussion Paper Submission 16.

543 Accident Discussion Paper Submission 6.

544 Ibid.

545 The background to this amendment is considered at [3.42]–[3.51] above.

546 (1994) 179 CLR 137.

some of the practical and analytical difficulties with the provision, or simply repealed.

Submissions in response to the DJAG Discussion Paper

9.156 One respondent, a law firm specialising in criminal work, supported the retention of section 23(1A). It considered it appropriate to give ‘special protection’ to ‘vulnerable members of ... society, and submitted that section 23(1A):⁵⁴⁷

reflects the need to strike a balance between protecting vulnerable victims and protecting defendants from injustice. Citizens should not have to go about their lives concerned that the law will not protect them if they have pre-existing defects unknown to those they encounter. Likewise citizens should not have to be concerned that they will be held criminally responsible for unforeseeable consequences of their actions. The current law strikes the right balance.

9.157 An experienced barrister considered section 23(1A) to be an anomaly but the ‘best solution to hard cases’ in our system of justice which, in the respondent’s view, focussed on the harm to the victim in offences of violence.⁵⁴⁸

9.158 A respondent member of the public spoke in favour of the provision:⁵⁴⁹

[I]n other than highly exceptional circumstances, the offender *takes the victim as he finds him*. (emphasis in original)

9.159 QHVSG made no comment about the inconsistency raised by section 23(1A), but to the extent that it extends criminal responsibility for unforeseeable outcomes, the section is likely to find favour with that organisation.

9.160 The Queensland Police Service was in favour of retaining the provision, although it acknowledged that the section operated ‘inconsistently’:⁵⁵⁰

The Service is of the opinion that the retention of the provision more properly aligns the defence of accident with community expectations, though imperfectly.

9.161 The Service quoted from its submission to the Department (a copy of which was not provided to the Commission):⁵⁵¹

The effect of subsection (1A) of section 23 is to create two standards of liability. Where a victim has a defect, weakness, or abnormality the issues of intent and foreseeability are irrelevant to the criminal liability of the accused. Conversely, where the victim does not suffer from a defect, weakness or abnormality, issues of intention are relevant to the criminal liability of the accused. Thus, on current

547 DJAG Submission 10.

548 DJAG Submission 1.

549 DJAG Submission 6.

550 Accident Discussion Paper Submission 16.

551 Ibid.

standards an accused who kills a healthy person is more likely to be acquitted than an accused who kills a person with a medical problem such as an egg-shell skull.

9.162 The Service nominated two options to overcome the inconsistency: (a) applying section 23(1A) to all victims and (b) repealing section 23(1A):

Applying section 23(1A) to all victims irrespective of whether a victim has a [defect], weakness or abnormality, effectively eliminates the excuse provided by section 23(1)(b). Conversely, to repeal subsection (1A) in the absence of other amendments would return the law to the position in *Van den Bemd's* case thus defeating the purpose of incorporating subsection (1A) into the Criminal Code. However, if Option D as outlined [creating a new offence] ... is adopted then subsection (1A) would no longer hold the relevance for which it was enacted and thus could be repealed.

9.163 The Service did not offer an opinion about section 23(1A) because its view would be dependent on other changes.

9.164 Many submissions discussed the difficulties with, and anomalies produced by, section 23(1A).⁵⁵²

9.165 A submission from a member of the public did not support the application of the provision to cases in which a person was acting lawfully (for example, in self-defence, or in response to provocation).⁵⁵³

9.166 The Hon JB Thomas agreed that section 23(1A) requires the application of mixed inconsistent tests. He did not think it could sensibly be retained. However he argued that, if the foreseeability test were retained, then section 23(1A), despite its difficulties, should also be retained.⁵⁵⁴

9.167 The Hon WJ Carter was also critical of section 23(1A), and argued for its repeal. He submitted that it produced unjust results.⁵⁵⁵

9.168 Two of the respondents to the DJAG Discussion Paper⁵⁵⁶ and the respondent from the Office of the Director of Public Prosecutions who supported the retention of section 23(1A)⁵⁵⁷ referred (expressly or impliedly) to the evidence of a principle of the criminal law that a defendant took their victim as they found them.

552 DJAG Submissions 1, 5, 9, 17, 18, 19, 20, 21, 22, 23, 24, 25.

553 DJAG Submission 11.

554 DJAG Submission 17.

555 DJAG Submission 18.

556 DJAG Submissions 1, 10. See [9.100]–[9.101] above.

557 Accident Discussion Paper Submission 10. See [9.180]–[9.183] below.

9.169 The Hon WJ Carter, however, said that the concept of ‘taking one’s victim as one finds him or her’ is not a principle of criminal law; rather it is a principle of the law of torts.⁵⁵⁸

A concealed pre-existing defect, weakness or abnormality is surely the classic fact which raises the foreseeability question when determining whether an accused should attract criminal liability in a case of manslaughter. In other words, if the High Court ruled that it is just and proper that before criminal liability and its consequences should attach to an accused person, ‘accident’ (and the foreseeability rule) must be excluded beyond reasonable doubt, then it is illogical to exclude as irrelevant concealed defect weakness or abnormality of which the accused had no knowledge or means of knowledge. The effect of the amendment is to convert a just rule into an unjust one, and to deprive an accused person of an ‘excuse’ in circumstances which, in accordance with the High Court ruling in *Kaporonovski*, would provide the classic case for its application.

One can only wonder why the amendment was enacted.

Having read the so called ‘model’ direction in the ‘aneurism’ case referred to in the [DJAG Discussion Paper],⁵⁵⁹ I can only express my sympathy for every jury who hears it and who is expected to comprehend its subtlety.

There is an obvious, relevant and logical connection between a concealed defect, weakness or abnormality in a deceased and the question whether an accused should be criminally responsible for the death which arises on account of that defect and which consequence was neither intended nor foreseen and which would not have been reasonably foreseen by an ordinary person.

Yet the legislature has rendered that defect irrelevant to the question of criminal responsibility. Why?

In considering the issue I have considered whether the ‘eggshell skull’ cases in the civil law have provided the precedent without it being realised that the issue for the criminal law is essentially different.

In *Bourhill v Young* [1943] AC 92 at 109 it was decided that in the law of Torts a wrongdoer must take his victim as he finds him and it is not answer to a claim for damages by the victim for the wrongdoer to say that the victim would have suffered no or less injury if he had not had, for example, an eggshell skull. This defect weakness or abnormality was irrelevant in the assessment of damages otherwise recoverable by the victim in the civil wrong.

This principle of the law of Torts has survived the later decisions of the House of Lords which established foreseeability as the test for determining whether damages are recoverable ... In short, even though loss or damage resulted from the civil wrong as a result of the defect, which was not foreseeable by the wrongdoer, the rights of the victim to recover damages for that loss or damage remained unaffected.

558

DJAG Submission 18.

559

Taken from the Supreme and District Court Benchbook, and set out at [5.5] above.

The 'eggshell skull' case or any analogy is therefore an exceptional rule in the civil law and is relevant only to the question of the extent of the rights of the victim of a tort to recover damages. In short, its effect is to enlarge the rights of the victim to recover damages as the result of a tort.

The [DJAG Discussion Paper] at page 15 refers to the second reading speech on the 1997 amendment and, in this context, to the 'eggshell skull' rule.

In my submission, it is wholly irrelevant to the s 23 defence in cases of homicide. Whilst the High Court and the Court of Appeal interpreted the 'accident' excuse in s 23 as based on a 'foreseeability' principle, the Courts' objective was to define authoritatively not only the extent of the obligations of the Crown in the prosecution of a criminal offence but also the limits of an alleged offender's criminal responsibility in the circumstances of the case for the wrongful act. In short, if the consequence of the act (the death) was not intended nor reasonably foreseeable nor likely to be foreseen by an ordinary person, perhaps because of some inherent defect, then criminal liability for the death should not attach to the wrongdoer.

This is a wholly different and unrelated legal paradigm to the rule in the civil law stated in *Bourhill v Young*, which is concerned to enlarge the rights not of the alleged wrongdoer but of the victim. Why then should that set of legal principles be resorted to for the purpose of restricting the rights of an accused person. The two issues are essentially unrelated. They may appear to be a superficial correlation but in each the relevant principle is essentially different. It is therefore illogical and confusing. That is why the 'model' direction to juries is itself illogical and for the lay mind quite impossible to fully comprehend.

In my view the only sensible and just amendment that might be considered is to amend the section by repealing section 23(1A). That would allow the authoritative ruling on 'accident' as explained by the High Court in *Kaporonovski* and by the Court of Appeal in *Van den Bemd* to provide the basis for a proper direction to the jury in those relatively few cases where, on the evidence, s 23 is seen to be relevant. (emphasis in original)

9.170 The Bar Association of Queensland, with which the Queensland Law Society also agreed,⁵⁶⁰ sought the repeal of section 23(1A).⁵⁶¹

There is an inconsistency in the application of section 23 because of the *Van den Bemd* amendment (ie section 23(1A)). Before that amendment, there were two possible constructions of s 23(1)(b). The first was that the 'event' was not an 'accident' if the 'event' was an 'immediate and direct result' of the act. The second (the *Kaporonovski* approach)⁵⁶² was that the 'event' was an 'accident' even if the 'event' was the 'immediate and direct' result of the act if the 'event' was not intended and was neither foreseen nor reasonably foreseeable.

The *Kaporonovski* approach prevailed. It reflects the sense that people should not be held criminally responsible for events that are not intended, foreseen or reasonably foreseeable.

560 DJAG Submission 23.

561 DJAG Submission 24.

562 *Kaporonovski v The Queen* (1973) 133 CLR 209, 221–32.

The *Van den Bemd* amendment then reintroduced the alternative approach to one class of ‘egg-shell skull’ cases (ie where death or grievous bodily harm resulted to the victim because of a ‘defect weakness or abnormality’).

That was apparently intended to produce different tests, depending on whether or not the case was an ‘egg-shell skull’ case. Such a legal dichotomy is unsound in principle and practice.

The *Van den Bemd* amendment in s 23(1A) seems to produce results which it is hard to accept could be intended by the legislature. If there is a ‘defect, weakness or abnormality’, albeit unknown and, indeed, unknowable in a person’s constitution, then the effect of the section 23(1A) amendment is that section 23 does not apply. This is so even if death was not a foreseeable possibility without such a condition.

...

These inconsistencies should be corrected by the repeal of section 23(1A), leaving section 23 as a sensibly confined provision that operates in the same way in all cases. (emphasis in original; some notes omitted)

9.171 A barrister described the amendment that introduced section 23(1A) as ‘short sighted’, and made similar arguments to those made by the Bar Association of Queensland:⁵⁶³

In inserting this amendment, little thought, with respect, seems to have been given to either the state of the law pre-*Van den Bemd* or the effect of the amendment of criminal responsibility.

Under the then ‘egg-shell skull’ rule and the now section 23(1A) amendment, there was and is an inconsistency in the application of section 23 to situations where there is a pre-existing weakness and to its application to all other scenarios.

9.172 After referring to examples, he continued:⁵⁶⁴

Hence, if there is a ‘defect, weakness or abnormality’, albeit unknown and, indeed, unknowable in a person’s constitution, then section 23 does not apply. This is so even if death was not a foreseeable possibility without such a condition.

The patent injustice in such a route to criminal responsibility is both manifest and obvious. ...

[For example] [t]wo friends are at a backyard barbeque. One has an aneurism on his left lung, but neither is aware of this physical abnormality. He tells a joke, his friend slaps him on the back in mateship, the aneurism bursts and he dies.

Under section 23(1A) the friend of the deceased has no defence to a charge of manslaughter.

563 DJAG Submission 9.

564 Ibid.

9.173 In arguing for the repeal of section 23(1A), one respondent member of the profession, said:⁵⁶⁵

No doubt the policy behind the introduction of s 23(1A) was that criminal responsibility should not be avoided merely because the victim is weaker than the general population. However, such policy is flawed because the liability to punishment ought to be viewed from the point of view of the criminality of the 'act or omission' of the accused. That is consistent with the structure of the Code. If a blow is struck which is a very moderate one and which ought to, in normal circumstances, result in minor discomfort to the victim then surely that is the basis upon which criminal liability should attach. The alternative is that a conviction for manslaughter results where the victim, as a result of some inherent defect, dies in circumstances which are neither foreseen nor reasonably foreseeable by the assailant. This is not appropriate, but it is the law at present.

9.174 In conclusion the respondent said:⁵⁶⁶

The conceptual principle behind section 23(1A) is flawed and is inimical to proper concepts of criminal responsibility. The repeal of the subsection would achieve both consistency and a uniform approach to this important area of the criminal law.

9.175 Respondent academics were also in favour of the repeal of section 23(1A).⁵⁶⁷

9.176 After considering the case of *R v Taiters*⁵⁶⁸ one respondent academic said that 'the people of Queensland were not well served by the statutory overriding' of [*R v Van Den Bemd*⁵⁶⁹] by means of section 23(1A).⁵⁷⁰ This academic discussed the flexibility of the current test, and submitted that the accident excuse should remain but that section 23(1A) should be repealed as being:

counter intuitive to what everyone can appreciate is a flexible test which allows a jury to take into account all the factors in a given case.

9.177 The Women's Legal Service Inc did not consider that it had sufficient experience with section 23 to add to the debate, but noted that section 23(1A) appeared to 'complicate and confuse' the matter:⁵⁷¹

565 DJAG Submission 5.

566 Ibid.

567 DJAG Submissions 19, 20

568 [1997] 1 Qd R 333.

569 (1994) 179 CLR 137.

570 DJAG Submission 20.

571 DJAG Submission 21.

For the death to have to be foreseeable where there is no pre-existing defect, but for it not to matter whether or not the death is foreseeable if there is such a defect, seems unnecessarily obtuse.

Submissions in response to the Accident Discussion Paper

9.178 Almost all of the respondents who commented on this option were of the view that it introduced an inconsistency into the operation of the foreseeability test.⁵⁷² The Commission did not receive any submissions from a member of the public about this option.

9.179 All but one of those who did comment on this option agreed with the analysis in the Accident Discussion Paper that the fundamental problem with section 23(1A) is that it mixes two different types of test into one concept of accident,⁵⁷³ and that the inconsistency that the section creates breaches one of the essential features of formal justice that like cases should be treated equally.⁵⁷⁴

9.180 However, a different view was put by the respondent from the Office of the Director of Public Prosecutions who, in putting the Director of Public Prosecution's position, argued that the rule in section 23(1A) reflected an accepted principle that one should take one's victim as one finds him or her.

9.181 The respondent from the Office of the Director of Public Prosecutions disagreed with the statement in the Accident Discussion Paper that 'where the act and accompanying mental element are the same in two cases, it is difficult to see why the legal rule applicable to both cases should not be the same',⁵⁷⁵ and observed that 'this is an articulation of a theory of extreme subjectivism.'⁵⁷⁶ The respondent also disputed the statement in the Accident Discussion Paper that section 23(1A) mixes two types of tests.⁵⁷⁷ The respondent explained:⁵⁷⁸

Criticism of this provision to the effect that it 'mixes two types of test' [paragraph [11.42] of the Accident Discussion Paper] are misplaced for the reason that the criticism assumes that causation and accident issues are indeed separate. For reasons mentioned above, they are not. And in any event, what does it matter if an issue is sufficiently complex that it requires different sorts of considerations to be brought to bear?

572 Accident Discussion Paper Submissions 6, 7, 8, 10, 11.

573 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.42].

574 Ibid [11.43].

575 Ibid.

576 Accident Discussion Paper Submission 10.

577 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.42].

578 Accident Discussion Paper Submission 10.

9.182 The reference the respondent made to his earlier reasons is a reference to the following passage in his submission.⁵⁷⁹

Much time and effort has been expended in developing the civil law's ideas of causation. The criminal law has, in contrast, taken a robustly pragmatic approach to the question. This is designed to prevent anxious philosophical hand-wringing. It holds that causation is established if the act or conduct is a substantial or significant cause of (the outcome) or substantially contributed to it. (*Sherrington* [2001] QCA 105.) The actions of the accused do not have to be the sole or even the main cause of death.

This approach is strongly *inclusive*; many more matters are captured as culpable by this approach than most people would consider just. Hence the accident excuse, and its focus on foreseeability.

But the questions of accident and causation cannot be readily disentangled. Foreseeability is a pragmatic measure of causal proximity that avoids sophistry of the "for want of a nail" sort and endless debates about determinism. It is possible to imagine a continuum of causal proximity, from the most direct (a deliberate gun shot to the head) through less direct cases (a punch that causes a fall which causes death) to less direct cases still (a punch which causes a fall onto a road which makes the victim vulnerable to being struck by a passing car) to highly indirect (the same facts as the previous example, only the victim is struck by a helicopter). At some point on this continuum (relatively speaking, towards the causally remote end) the *Sherrington* test may be marked. At some other point (less close to the causally remote end) the accident test may be marked. (emphasis in original)

9.183 This respondent also commented that the repeal of section 23(1A) would have a negative effect on the conduct of manslaughter trials, as the medical condition of the deceased would inevitably become a central feature of the trial, as a result of the defence's attempt to establish that the death was not foreseeable and occurred only as a result of some hidden vulnerability.⁵⁸⁰

By way of further example, many people take aspirin for a variety of conditions. If bleeding is involved with the death, it is again not difficult to see a concession by a pathologist that but for the increased risk of bleeding brought about by the aspirin, the victim might not have died, or at least that the possibility of survival cannot be disproved.

With such concessions comes an argument that the Crown can not displace accident, because but for the existence of a defect (hidden and unknowable to the casual observer) the deceased might not have died, and that therefore the death was "unforeseeable".

Another well-known example of this sort of thing is death caused by subarachnoid haemorrhage, caused by a blow to the face of a person who is intoxicated. It seems that the shearing forces set up by such a blow, coupled with the lack of protective reflex caused by the intoxication, can have the effect of tearing small blood vessels in the brain causing subarachnoid bleeding. This in turn causes immediate unconsciousness (people so affected are typically

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Ibid.

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Accident Discussion Paper Submission 10A.

unconscious before they hit the ground) and rapid death. If memory serves, this happens a dozen or so times a year in Queensland.

It is also true, however, that many thousands of punches thrown at drunks do not have that effect. This raises the prospect of a defence argument that, where it does happen, there must be something in the way of a latent defect in the individual to explain why it happened to him and not the majority of intoxicated people struck by blows. Significantly, the argument is not put on the affirmative basis that there was an unidentified latent defect; rather, it is put on the basis that the Crown can't demonstrate beyond reasonable doubt that there was not such a defect.

The argument then leads to the proposition that death cannot be foreseeable in such circumstances because of the possibility of a defect which no-one in the position of an assailant can have foreseen.

Of course, there are many other mechanisms by which death can occur as a result of blows to the head or elsewhere, of which the above are but examples. But each of the many mechanisms can attract similar arguments, so that while in the aggregate it is possible to say that death is a foreseeable consequence of one punch, the process of myopic examination of the minutiae of an individual case allows for a distortion of the principle of foreseeability where there is no rule such as s 23(1A) to prevent it.

What all of this minute focus on the prior existence of defects (going even so far as speculation about them) has to do with the criminality of the conduct of the assailant is impossible to see. No assailant in real life gives the slightest thought to the possibility that his victim might have a latent defect. Yet without s 23(1A), a potential free pass is given to those fortunate enough to have picked on someone who turns out to have been in imperfect health. And this is why the law has insisted on the preservation of the "take the victim as you find him" rule.

OPTION 4: CREATING A NEW OFFENCE OR NEW OFFENCES

Accident Discussion Paper

9.184 In the Accident Discussion Paper, the Commission addressed the possibility of creating a new offence or new offences: (a) manslaughter based on an unlawful and dangerous act; and (b) assault occasioning death.⁵⁸¹

Option 4(a): Manslaughter based an unlawful and dangerous act

9.185 Under section 23(1)(b) of the Code, a person is not criminally responsible for an event that occurs by accident. Although the section is concerned with a person's criminal responsibility for an intentional act, it does not draw a distinction between lawful and unlawful acts.⁵⁸²

581 Ibid [11.45]–[11.57].

582 See *R v Martyr* [1962] Qd R 398, 406 (Mansfield CJ); *Timbu Kolian v The Queen* (1968) 119 CLR 47, 66 (Windeyer J).

9.186 An option for dealing with criminal responsibility in respect of the outcome of an intentional act is to enact a new offence of manslaughter based on an unlawful and dangerous act, to which the defence of accident would not apply.⁵⁸³

9.187 This would result in four forms of manslaughter under the Code:

- (1) Manslaughter by operation of the partial defences of provocation or diminished responsibility;
- (2) Manslaughter based on criminal negligence (a category of manslaughter to which accident does not apply);
- (3) Manslaughter based on an act that is not unlawful or dangerous (to which accident would apply); and
- (4) The new category of manslaughter based on an unlawful and dangerous act (to which accident would not apply).

9.188 This fourth category obviously draws on the common law.

Submissions in response to DJAG Discussion Paper

9.189 Although this alternative was not raised in the DJAG Discussion Paper, two respondents referred to it.⁵⁸⁴

9.190 The first was a member of the public who considered this alternative category of manslaughter appropriate because it 'recognised the deliberate and aggressive nature of the attack, and made the accident defence inapplicable'.⁵⁸⁵

9.191 The second was the Hon JB Thomas, whose reference to the common law offence was by way of a comparative assessment of the position in Queensland, rather than in expressing a preference for it.⁵⁸⁶

Queensland law under *Van den Bermd* is far more favourable to accused persons than the common law which applies in New South Wales, Victoria and South Australia. In itself that is neither a good or a bad thing, but it is worthy of note as it enables a comparative assessment to be made ...

9.192 He commented that the common law offence may be undesirably imprecise and suggested, consistently with his proposal for a restructure of

583 Although a defence of accident would not apply to the offence, the concept of a dangerous act as one that carries an appreciable risk of serious injury involves the use of a foreseeability test.

584 DJAG Submissions 6, 17.

585 DJAG Submission 6.

586 DJAG Submission 17.

offences against the person, that he would prefer an offence based on an unlawful or dangerous act.⁵⁸⁷

Submissions in response to the Accident Discussion Paper

9.193 The possibility of introducing a new form of manslaughter based on an unlawful and dangerous act was supported by the Queensland Police Service⁵⁸⁸ and one respondent from the general public.⁵⁸⁹

9.194 The respondent from the Office of the Director of Public Prosecutions thought that such an offence may address ‘the problem of inconsistent verdicts’.⁵⁹⁰

The proposal for a new offence [of manslaughter by an unlawful and dangerous act] addresses the inconsistent verdicts which presently result by effectively replacing the foreseeability of an event with the concept of the dangerousness of an act. All significant assaults (beyond the technical or trivial) represent a danger to at least health (to adopt notions of danger incorporated in s 288). Danger can inhere in either the assault itself or the circumstances in which it occurs (a push that is not in itself directly dangerous can become so if it propels a person onto a road or causes them to fall).

9.195 The Queensland Police Service considered that this category of manslaughter based on an unlawful and dangerous act most accurately reflected community expectations.⁵⁹¹ In response to the argument that such an offence may result in harsh punishment for those who perpetrate minor assaults that unforeseeably cause death, the Service said.⁵⁹²

Insofar as sentence is concerned, the Service takes the view that this issue can properly be addressed by the sentencing court. Necessarily, a sentencing court will consider the circumstances of the offence when considering an appropriate penalty.

The Service acknowledges that there are other incidents of conviction for manslaughter apart from the formal penalty. No doubt the stigma attaching to a conviction for manslaughter in these circumstances may be great. However, similar stigma attaches to persons convicted of manslaughter on the basis of negligence. The Service does not view the question of penalty, whether the formal penalty or some other penalty upon conviction, as warranting persons to escape the consequences of their unlawful acts.

The [Accident] Discussion Paper [11.49] cites the complaint made by the Law Reform Commission of Ireland ... that ‘in many “single punch” type cases there would be no prosecution for assault had a fatality not occurred.’ This is not a

587 Ibid.

588 Accident Discussion Paper Submission 16.

589 Accident Discussion Paper Submission 3.

590 Accident Discussion Paper Submission 10.

591 Accident Discussion Paper Submission 16.

592 Ibid.

compelling reason to excuse the conduct. The nature of the prosecution will often be directed by the consequences of the act in question. As has already been stressed, the Service is of the view that community expectations require persons engaging in unlawful acts be held accountable for the consequences of those acts.

9.196 Respondents identified a number of difficulties that would arise upon the introduction of this offence into the Code.⁵⁹³ These may be summarised as follows:

- The term ‘unlawfully’ in Chapter 28 (Homicide Offences) of the Criminal Code (Qld) is designed to refer to any killing that is not authorised, justified, or excused (section 291 of the Code). However, the term ‘unlawfully’ in the proposed offence requires the relevant act to be independently unlawful,⁵⁹⁴ an approach that is not consistent with the statutory definition of the term unlawful in Chapter 28 of the Code.⁵⁹⁵
- The requirement of an unlawful act (usually an unlawful assault) would allow issues of assault provocation and consent to creep into homicide trials. Under the Code, assault provocation and consent are presently irrelevant on charges of homicide.
- The question of defining a ‘dangerous act’ is not free of difficulty. Ultimately, this may involve replacing one test of foreseeability with another test of foreseeability as, in Australia, a ‘dangerous act’ means one that carries an appreciable risk of serious injury.⁵⁹⁶

Option 4(b): Assault occasioning death

9.197 The second option considered in the Accident Discussion Paper was the creation of a new offence of assault occasioning death, to which accident would not apply. Since publishing the Accident Discussion Paper, this new offence has been adopted in Western Australia.⁵⁹⁷ It has also been recommended in Ireland.⁵⁹⁸

9.198 An offence of assault occasioning death could be enacted in Queensland. This offence is an assault offence rather than a homicide offence, the essence of it being an unlawful assault. Upon conviction for the offence, death could be taken into account on sentence as a circumstance of

593 Accident Discussion Paper Submissions 8, 10.

594 *Houghton v R* (2004) WASCA 20, [98]–[106].

595 And one respondent suggests that it is not consistent with the current use of the term.

596 *Wilson v The Queen* (1992) 174 CLR 313.

597 Criminal Code (WA) s 281.

598 See [7.19]–[7.23] above.

aggravation. Proof of ‘occasioning death’ would involve a simple causation test⁵⁹⁹ to which accident would not apply.

Submissions in response to the DJAG Discussion Paper

9.199 Although this proposal was not mentioned in the DJAG Discussion Paper, some respondents referred to it.

9.200 One academic expressed ‘considerable misgivings’ about such a new offence, which imposed a ‘pure *actus reus* test’ without reference to the moral fault of the accused.⁶⁰⁰

While the new section may be explained away as a political knee-jerk reaction to public concern over recent acquittals (which is also conceded in the Explanatory Notes to the Bill) it does not accord with my view of justice to the individual, nor that of my colleagues and students. Most jurisdictions in the common law world have some sort of ‘foreseeability’ provision, and removing same from Queensland jurisprudence would, arguably, be a retrograde step.

Submissions in response to the Accident Discussion Paper

General

9.201 A number of respondents said that no case for additional offences (either assault causing death or manslaughter by an unlawful and dangerous act) had been made out.⁶⁰¹

9.202 First, it was said that the result of the DJAG Audit of Homicide Trials⁶⁰² did not generate a need for reform or for the creation of new offences. Secondly, it was said the present range of offences adequately covered the range of criminal conduct, but the fact that prosecutors normally did not charge additional offences on a homicide indictment created an impression that some offenders have avoided any penalty for a violent assault that resulted in death.

Assault occasioning death

9.203 The creation of a new offence of assault occasioning death was supported by three respondents from the general public.⁶⁰³ Their support was based on an apprehension that some persons responsible for assaults that resulted in death, when acquitted of a homicide charge, did not face any legal sanction for the original assault. One respondent was of the view that the disadvantages that had been mentioned in relation to the new offence did not

⁵⁹⁹ The test is whether the assault was, in a practical sense, a substantial cause of the death: *R v Cheshire* [1991] All ER 670.

⁶⁰⁰ DJAG Submission 20.

⁶⁰¹ Accident Discussion Paper Submissions 6, 7, 9, 11.

⁶⁰² See Chapter 6 above.

⁶⁰³ Accident Discussion Paper Submissions 3, 4, 5.

outweigh its advantages, especially when compared with making no change at all to the law.⁶⁰⁴ She responded in the following terms to the criticisms made in the Accident Discussion Paper about this option:⁶⁰⁵

- Firstly, the decision-making processes of the jury are already complicated, and in some instances this alternative may well simplify their deliberations.
- Secondly, if a jury is more likely to convict of the lesser offence, this at least allows for a justified conviction rather than an unjustified acquittal. This outcome then provides the judge with the responsibility for imposing an appropriate sentence.
- Thirdly, sentencing could still be applied to ensure appropriate consequences, even if there had been no early guilty plea to the more serious charge ...

9.204 The Hon JB Thomas supported the creation of a new offence of 'causing death with intent to cause bodily harm'. He considered that this would avoid some of the difficulties with the option for a new offence of assault occasioning death:⁶⁰⁶

The main difficulty that such a measure would introduce is set out in paragraph [8.14] of the Discussion Paper, that is to say inconsistent tests concerning provocation might be necessary when alternative verdicts are to be considered. This problem could be avoided if, instead of defining the offence as 'assault occasioning death' it were defined as 'causing death with intent to cause bodily harm'. This would eliminate the baggage which goes with the law of assault, including the provocation test ... But in any event I do not think that the particular problem is insurmountable, or that it should stand in the way of this particular suggestion or a variation of it. Similarly the arguments mentioned in paragraphs [11.55]–[11.57] of the Discussion Paper are not sufficiently persuasive to require its rejection. They merely recite familiar problems in 'alternative verdict' situations which arise within many other areas of the criminal law. These are matters for the courts to handle, case by case, and in which the Court of Appeal would be expected to lay down principles that would lead to principled practice.

9.205 Another respondent, who is a lawyer, suggested that the possible new offence was 'well considered', although he thought that a wider offence of 'dangerous act causing death' would be preferable as it 'would be able to cover situations other than assaults which cause death'.⁶⁰⁷

9.206 The Queensland Police Service commented that a new offence of assault occasioning death had the advantage of holding offenders accountable for their unlawful actions and had 'a good deal of merit'. However, it considered

604 Accident Discussion Paper Submission 5.

605 Ibid.

606 Accident Discussion Paper Submission 13.

607 Accident Discussion Paper Submission 11.

that such an offence suffered ‘from two distinct disadvantages as against the alternative option’ of unlawful and dangerous act manslaughter.⁶⁰⁸

9.207 The Service made the following points about its two ‘disadvantages’. The first related to the proposed penalty:⁶⁰⁹

The first disadvantage relates to the appropriate penalty for the proposed offence and is alluded to at [8.16] of the [Accident] Discussion Paper.⁶¹⁰ It is reflected in the defeated Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) discussed in Chapter 8 of the [Accident] Discussion Paper. The bill proposed a maximum penalty of 7 years imprisonment. This is the same penalty as an offence under s 339 of the Criminal Code (Qld) ‘assault occasioning bodily harm’. Given that each of the sections effectively creates an aggravated form of assault, it is difficult to understand why assault causing death should not attract a potentially greater penalty than causing bodily harm. Moreover, s 339(3) creates aggravated forms of the bodily harm offence attracting a maximum penalty of 10 years imprisonment. Consequently the perpetrator of an unlawful assault would be subject to a greater penalty when causing bodily harm whilst armed or in company than ... causing death in the same circumstances.

This anomalous situation is not corrected by simply increasing the penalty. It is difficult to see where the new offence provision sits. An offence of ‘grievous bodily harm’ (s 320) attracts a maximum penalty of 14 years imprisonment. Again, it seems incongruous to attribute a lesser penalty to an offence, although possibly committed by ‘accident’, which results in death. If the penalty were to be commensurate with manslaughter, a position which the Service supports, there does not seem any reason to prefer the new offence to the alternative option of a new category of manslaughter.

9.208 The second disadvantage was that the proposed offence increased the possibility of ‘compromise’ verdicts:⁶¹¹

A second and more significant disadvantage of the enactment of a new offence is the possibility of increasing ‘compromise’ verdicts. If the new offence carries a lesser penalty than manslaughter then juries may be inclined to adopt the ‘soft option’. The tactical considerations noted in the [Accident] Discussion Paper ([2.26]⁶¹²) are likely to become relevant. Consequently, it may be that the new offence is rarely charged on an indictment, rendering it impotent. The same considerations do not apply to the new category of manslaughter.

9.209 Nevertheless, the Service considered the enactment of a new offence was preferable to amendment of section 23.

608 Accident Discussion Paper Submission 16.

609 Ibid.

610 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [8.16], where the Commission noted: ‘The maximum penalty for the proposed new Queensland offence of assault causing death was no higher than the current maximum penalties for wounding or assault occasioning bodily harm ... and lower than the maximum penalties available for assault occasioning bodily harm while armed or in company ... or grievous bodily harm.’ See [10.78] below.

611 Accident Discussion Paper Submission 16.

612 Namely, those which cause the Office of the Director of Public Prosecutions to charge homicide only.

9.210 The creation of a new offence of assault occasioning bodily harm was opposed by all the academic and most of the professional respondents, including the Director of Public Prosecutions.⁶¹³

9.211 Legal Aid Queensland, one of the academic respondents and the Bar Association of Queensland referred to the perception that there was not an appropriate offence with which people could be charged where an assault had resulted in death. In their view, this perception has arisen not because there is no appropriate charge, but because of the charging decisions of the prosecution.⁶¹⁴

9.212 A respondent from the Office of the Director of Public Prosecutions referred to the significant problems that would emerge from the introduction of a new offence that has assault as an element — in particular, the introduction of arguments about consent and assault provocation into the trial.⁶¹⁵ He outlined the perceived problems with this offence:⁶¹⁶

The reason assault is not an element of manslaughter, GBH [grievous bodily harm] or wounding is that assault contains an element of absence of consent. The principle is that while one can consent to modest violence (up to bodily harm), it is contrary to the public interest to allow a defence of consent to any more serious violence. The new offence would re-introduce the undesirable excuse of consent in death cases.

By creating an offence which includes an element of assault, one opens a back door to arguments that might otherwise have been developed under the concept of accident. The accused could assert that his blows were modest (an inevitable feature in arguments about accident) as part of an asserted s 24 belief that the victim was taking part in a fight that was consensual.

Similarly, provocation is presently unavailable for the offences of manslaughter and GBH on the principle that these offences are too serious to be excused by mere loss of self-control. (It is reintroduced in murder to avoid injustice that might flow from the mandatory penalty, but that is another issue). But creating an offence which contains an element of assault would undesirably re-introduce the excuse of provocation into a field where (for good reason) it has not operated for decades. By attempting to solve one problem, another one potentially as big is created.

9.213 This respondent also referred to the potential for the ‘manipulation’ of the charges by the Crown:⁶¹⁷

One further consequence is that the suggested offence puts in the hands of the Crown the capacity selectively to exclude one defence or another merely by the device of charge selection. If the defence seem likely to rely on provocation,

613 Accident Discussion Paper Submissions 6, 8, 10, 12, 14, 17.

614 Accident Discussion Paper Submissions 6, 7, 12.

615 Accident Discussion Paper Submission 10.

616 Ibid.

617 Ibid.

the Crown can charge manslaughter; if the defence seems likely to rely on accident, charge assault causing death. While the Crown can be relied upon to act responsibly, it is an unattractive feature of any proposed change of law that it is vulnerable to such manipulation.

9.214 The Director of Public Prosecutions, in a consultation meeting with the Commission, also commented that an offence of unlawful assault occasioning death was conceptually inconsistent with the rest of the Code.⁶¹⁸ He considered that an offence in these terms had the potential to revive issues of consent and assault provocation in a way that was inconsistent with the policy of the Code, under which assault is an element of only the lowest range of offences. A further problem foreseen was that the defence would always argue for conviction for the lesser offence of assault rather than manslaughter in cases where either conviction might be open.

9.215 An academic who described this option as ‘arguably the worst possible option’, also referred to difficulties if issues of consent were introduced into the trial:⁶¹⁹

where a victim dies as a result of an illegal tackle during the course of a sporting contest there are likely to be competing arguments as to whether the participants tacitly consented to such an illegal tackle. Furthermore the introduction of consent as a relevant factor in death cases seems to be at odds with the long standing position that consent is irrelevant when it comes to the homicide offences. Such a change to the law may have unanticipated consequences.

9.216 He also suggested that the offence of assault occasioning death would create an issue relating to intent.⁶²⁰

[I]t would seem desirable that an assault occasioning death offence should only apply where the accused intended to apply force. To ensure that such an outcome is achieved, s 245 of the Code could be amended to include the word ‘intentional’ before the words ‘application of force’.

The problem with such an amendment is that it may well produce undesirable consequences. For example, if the word ‘intent’ was included in the definition of assault, the excuse of intoxication (s 28(3)) would apply to common assault, assault occasioning bodily harm and serious assault. It would seem unlikely that parliament would approve an amendment that would allow an intoxicated person to be acquitted in circumstances where he/she bashed a police officer but due to his/her level of intoxication he/she did not form the intent to apply force.

9.217 One of the academic respondents, the Bar Association of Queensland and the Director of Public Prosecutions suggested that the creation of a new

618 Consultation meeting 4 September 2008.

619 Accident Discussion Paper Submission 8.

620 Ibid.

offence of assault occasioning death would lengthen, or increase the complexity of, jury directions in homicide trials.⁶²¹

9.218 The Director of Public Prosecutions elaborated:⁶²²

I do not support the creation of the proposed new offence of assault occasioning death because it is unnecessary, would engage s 269 of the Code and significantly complicate directions to juries.

Statutory alternatives to manslaughter

9.219 In the Accident Discussion Paper the Commission considered whether the offence of assault occasioning death should be always available on a charge of manslaughter as a statutory alternative to it. If the offence of assault occasioning death were not a statutory alternative to manslaughter, then its inclusion on an indictment as an alternative to manslaughter would be a matter for the discretion of the prosecution.

9.220 As noted previously, this issue was not raised in the DJAG Discussion Paper.

Submissions in response to the Accident Discussion Paper

9.221 Although not supporting any change to section 23 or the proposed offence of assault occasioning death, the Director of Public Prosecutions, submitted that the decision to include or omit alternative counts on the indictment should be left to the discretion of the prosecutor:⁶²³

The discretion to include alternative counts on the indictment should be left to the discretion of the prosecutor. The discretion allows for charges to meet the facts of the individual case and discourages juries from compromising.

9.222 The Queensland Police Service considered that the Office of the Director of Public Prosecutions is in the best position to offer an opinion on this issue.⁶²⁴

9.223 The Bar Association of Queensland,⁶²⁵ Legal Aid Queensland,⁶²⁶ and one of the academic respondents⁶²⁷ argued that the range of existing offences that are statutory alternatives should be increased in order to avoid situations where a defendant who is found not guilty of a homicide charge also avoids

⁶²¹ Accident Discussion Paper Submissions 8, 12, 14.

⁶²² Accident Discussion Paper Submission 14.

⁶²³ Ibid.

⁶²⁴ Accident Discussion Paper Submission 16.

⁶²⁵ Accident Discussion Paper Submission 12.

⁶²⁶ Accident Discussion Paper Submission 6.

⁶²⁷ Accident Discussion Paper Submission 7.

conviction of a lesser offence (for example an unlawful assault) solely because the prosecution elected not to charge the defendant with the lesser offence. This option was argued as a better alternative than the option of creating new offences.

9.224 The Bar Association of Queensland put the argument in the following terms:⁶²⁸

The Association notes that from time to time, media reports of comments attributed to families of victims, where there have been lesser verdicts or acquittals on murder/manslaughter charges, suggest that the accused has '*walked away*' even though he has actually assaulted the victim, who has later died.

There will be cases, though very rarely, where there has been an assault with no provocation or other justification for the assault, in which the victim later died, and in which s 23(1)(b) provides a defence to the charge of murder or manslaughter. In those rare circumstances, the accused may be nevertheless guilty of common assault or assault occasioning bodily harm.

As has been observed in the discussion paper, prosecutors are reluctant to charge such alternative counts in an indictment for tactical reasons. We think that there is some scope to amend the Criminal Code to provide for automatically available alternative verdicts of assault occasioning bodily harm/common assault, in cases where assault is a factual element of a charge for murder or manslaughter.

We frankly acknowledge that the automatic availability of those verdicts (where assault is a factual element of murder or manslaughter) may have the tendency to lengthen the Judge's charge to a jury, and may have the tendency to make available 'compromise' verdicts which are unwanted by both prosecution and defence. However, we submit that this is a better approach than that of creating a new offence of '*assault occasioning death*'.

9.225 However, the Director of Public Prosecutions informed the Commission that he was not in favour of making assault, assault occasioning bodily harm or grievous bodily harm statutory alternatives to manslaughter. He was concerned that this would result in juries reaching compromise verdicts.

THE WORD 'ACCIDENT'

9.226 In the Accident Discussion Paper, the Commission considered whether the word 'accident' was an inappropriate or inadequate explanation of the reason why a person was excused from criminal responsibility for a death that was the ultimate result of an unlawful blow.⁶²⁹

628 Accident Discussion Paper Submission 12.

629 Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [10.12].

9.227 The word ‘accident’ may be thought to convey an occurrence that happens without fault — something tragic brought about by a random unexpected act. Under section 23(1)(b) of the Criminal Code (Qld), the word ‘accident’ has a different meaning (ie, an unintended, unforeseen and unforeseeable event), but that may not make it any easier for some to accept it as an explanation for a death that flows from an assault.

9.228 As the Commission observed in the Accident Discussion Paper, finding a substitute for the shorthand description is not easy.⁶³⁰

9.229 This issue was not raised in the DJAG Discussion Paper, but respondents to that paper mentioned it in a way that suggested they did not consider it an appropriate description.

9.230 One respondent member of the public said:⁶³¹

According to the [Macquarie] Dictionary an accident is an unfortunate happening: or a mishap by chance.

When a person deliberately assaults another it is **NOT** a mishap by chance or an unfortunate happening

An ASSAULT IS: an attack ... an unlawful physical attack upon another to do violence to another

That it results in death is NOT an accident. (emphasis in original)

9.231 Another respondent member of the public said it was insulting to use such a word:⁶³²

To ask the families of homicide victims to accept that their loved ones died accidentally is insulting and distressing, and totally negates the way in which they died. These events do not equate to a simple, even regrettable mistake, or to a brief lapse of concentration such as might cause a fatal car accident. On the contrary, these deaths have been the result of wilful, malicious and aggressive actions taken by their killers ...

9.232 The Director of Public Prosecutions, who argued in support of the existing law, was not in favour of the use of the word ‘accident’ to describe the circumstances in which the excuse operated.⁶³³

The act (pulling the trigger, depressing the accelerator or a punch) is either deliberate or unwilling.

If the act is unwilling then s 23(1)(a) applies to excuse criminal responsibility and the act is truly ‘accidental’.

630 Ibid [10.13].

631 DJAG Submission 4.

632 DJAG Submission 6.

633 Accident Discussion Paper Submission 14.

If the act is deliberate or willed then the issue is whether the 'event' or consequence of the willed act was intended or foreseen by the actor or an ordinary person in the actor's position would reasonably have foreseen the event as a possible outcome.

If the event was foreseen or foreseeable as a possible outcome then s 23(1)(b) is not engaged.

If the event was not intended or reasonably foreseeable as a possible outcome then s 23(1)(b) is engaged to excuse criminal liability for the deliberate act. That is not an accident.

If the defence or excuse under s 23 were properly named in the Code, for example as 'unwilled acts and unforeseeable consequences', much of the perceived problem would be eliminated.

THE RESPONSE OF THE COURTS

9.233 The Commission has also considered the response of the Courts to the media reports of the cases that prompted the Attorney-General's audit.⁶³⁴

9.234 The Chief Justice of the Supreme Court of Queensland, the Honourable Paul de Jersey, responded to the discussion in the media of the cases of *Little* and *Moody* in an article in *The Courier-Mail* in May 2007 entitled '*A Fair Balance of Law*'.⁶³⁵ Parts of his Honour's article have been referred to earlier in this Report.⁶³⁶ For completeness, a longer extract from it follows:

There is ultimate gravity about the loss of any human life. The ramifications are always immense. Where the death results from an act of reckless thuggery, the outrage is especially understandable. Two recent decisions have sparked debate over whether the accident defence should be available in killing cases.

In each, the jury conscientiously followed the trial judge's directions on the law, and we take it those instructions were correct. They were not challenged by prosecution or defence.

Families and friends of those victims probably do consider the outcome was unjust. But the charter of the courts is not to deliver justice of some idiosyncratic or subjective variety. It is to deliver justice according to law. Any critical debate should therefore focus on the law, not the process.

The conscientious discharge of a juror's duty is not necessarily an easy experience. A juror's experience should not be rendered even more difficult by unmeasured criticism, especially if based on an incomplete understanding of the issues.

⁶³⁴ Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [10.14]–[10.15].

⁶³⁵ de Jersey CJ, '*A Fair Balance of Law*', *The Courier-Mail*, 5 May 2007, 70.

⁶³⁶ See [2.26] above.

There should be dispassionate analysis of all aspects of the work of the criminal courts. But criticism of jury verdicts should be circumspect, in part because the jurors have no right of reply. The publication of information about a jury's deliberations is itself a criminal offence.

9.235 His Honour then explained the defence of accident as it evolved historically, and referred to the decision of the High Court in *Van Den Bemd*. His Honour continued:⁶³⁷

The High Court had expressed this proposition: 'It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person'.⁶³⁸

Accordingly, the prosecution from that point on became obliged to exclude accident beyond reasonable doubt in such cases: to prove, in a case of death resulting from a punch, say, that a reasonable person would have foreseen death as a possible outcome. If not, the defence of accident precludes a conviction for manslaughter.

The Crown could charge grievous bodily harm, or another lesser charge, as an alternative count on an indictment for homicide, but generally does not do so.⁶³⁹ That is presumably to avoid offering a jury what might be considered a 'soft option', to compel the jury to confront the serious charge head-on. Yet the result, in cases where accident is the only issue, is that the accused may walk free and unpunished, even though in truth guilty of some other offence.

Although accident is a defence to doing grievous bodily harm, common sense suggests a jury would be less likely to conclude that serious injury was not reasonably foreseeable, even if death was, and convict. If so, there would be some sanction for the conduct.

On the other hand, where self-defence is made out, an accused is entitled to acquittal of homicide or a lesser count on the same indictment.

The essential facts of the Little case should be mentioned. Little punched the deceased who fell, and Little kicked the prone, unconscious victim. The trial judge was obliged to direct the jury on accident, and her direction accorded with the law: that to convict the accused, the prosecution had to establish beyond reasonable doubt that an ordinary person in his position would reasonably have foreseen death as a possible outcome of delivering what turned out to be the fatal blow.

The forensic evidence established the cause of death was a subarachnoid haemorrhage of the brain and that death was most probably caused not by the kick, but by the preceding punch. The issue for the jury was not whether death was a possible outcome of the kick, but whether it was a possible outcome of the punch.

637 de Jersey CJ, 'A Fair Balance of Law', *The Courier-Mail*, 5 May 2007, 70.

638 This is the statement of Gibbs J in *Kaporonovski*, discussed at [5.7] above.

639 See the discussion of alternative verdicts at [2.16]–[2.20] above.

There was other expert evidence that the punch was of moderate force, with the consequent hyperextension of the neck more likely to occur in an intoxicated victim.

Moody was not only an accident case. Accident arose because of the unusual cause of death, aspiration of blood from a smashed nose into the lungs. But self-defence was obviously the major issue. Moody was backing away onto a busy roadway, with the victim approaching him with a raised fist, apparently preparing to punch him. Moody then threw the fatal punch.

Lawmakers strive to secure a reasonable balance between the interests of victims and accused persons.

I acknowledge criticism that the balance tilts unduly in favour of the accused. No amount of comment from me will quell that criticism. Also, judges not infrequently warn of the dangers of alcohol-fuelled violence. The drink-sodden prospective assailant is not going to pause to reflect on a judge's advice.

As one senior judge said last year: 'All judges can do is to deal afterwards, according to law, with the tragic consequences.'

The editorial in Wednesday's *Courier Mail*, quoting those remarks, perceptively acknowledged the courts cannot solve this problem, only the community and the lawmakers. The ultimate challenge is for young adults in particular to refocus on values of moderation and individual responsibility. (notes added)

CONSULTATION WITH JUDGES

9.236 The Commission invited judges of the Supreme and District Courts to a meeting to discuss their response to the Commission's Accident Discussion Paper.⁶⁴⁰

9.237 There appeared to be consensus among the judges who attended that they found it relatively easy to sum up to a jury on the current foreseeability test of accident. However, there was no consensus about whether the present test or the pre-*Van Den Bemd* position is preferable.

9.238 The judges were divided about whether the creation of an offence of assault occasioning death was warranted. Some saw the need for criminal sanction where death was the result of an unlawful assault. Others were concerned at the removal of the excuse of accident from an unlawful killing and the imposition of a criminal sanction without moral fault.

9.239 Some judges acknowledged that the inclusion of assault occasioning death as an alternative to a charge of homicide would complicate a trial. However, at least one judge thought it should be a statutory alternative to manslaughter.

640

Held 2 September 2008.

Chapter 10

Accident: conclusions

INTRODUCTION	183
RETENTION OF AN EXCUSE OF ACCIDENT	184
THE APPROPRIATE TEST FOR THE EXCUSE OF ACCIDENT	185
Introduction.....	185
The Commission's approach.....	186
The competing principles	188
Technical and practical implications of changing the current accident test	192
The Commission's view	193
THE EVENT TO WHICH FORESIGHT SHOULD RELATE WHERE DEATH HAS OCCURRED.....	194
Introduction.....	194
Competing principles.....	194
Technical and practical implications of changing the event to which foresight relates.....	195
The Commission's view	196
SECTION 23(1A): INCONSISTENCY OR AN APPROPRIATE EXCEPTION?.....	197
Introduction.....	197
The competing principles	197
Technical and practical implications arising from section 23(1A) and its potential repeal	198
The Commission's view	200
WHETHER A NEW OFFENCE OF UNLAWFUL ASSAULT OCCASIONING DEATH SHOULD BE CREATED	200
Introduction.....	200
The competing principles	201
Technical and practical implications of a new offence of unlawful assault occasioning death	202
The Commission's view	204
WHETHER A NEW CATEGORY OF UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER SHOULD BE CREATED	205
Introduction.....	205
The Commission's view	205
STATUTORY ALTERNATIVES.....	206
RECOMMENDATIONS.....	206

INTRODUCTION

10.1 The Attorney-General has referred to the Commission a review of the excuse of accident under section 23(1)(b) of the Criminal Code (Qld). That section provides that a person is not responsible for 'an event that occurs by accident'. The terms of reference require the Commission to have particular regard to 'whether the current excuse of accident (including current case law)

reflects community expectations'.⁶⁴¹ Although the terms of reference do not require the Commission to consider whether the excuse of accident should be abolished,⁶⁴² several of the submissions received by the Commission expressed the view that it should be abolished. Accordingly, the Commission has considered, as a threshold issue in this review, whether the Code should continue to include an excuse of accident (either in its current form or in some revised form) or whether the excuse of accident should be abolished by the repeal of section 23(1)(b).

RETENTION OF AN EXCUSE OF ACCIDENT

10.2 The excuse of accident in section 23(1)(b) of the Code is an excuse of general application: that is, it operates, subject to limited exceptions,⁶⁴³ as an excuse in relation to all offences created by the Code, as well as in relation to offences created by other statutes. Accident, in conjunction with a number of other legal excuses in the Code, serves a similar purpose to the concept of *mens rea* (or guilty mind) under the common law.⁶⁴⁴

10.3 Because accident applies generally to criminal offences, and does not simply apply to manslaughter, the repeal of section 23(1)(b) would have far-reaching consequences. Its effect would be to impose criminal responsibility, not just for manslaughter, but also for other offences, where a defendant might not currently be found to be criminally responsible for the particular offence. Significantly, because the offence of manslaughter under the Code does not depend on proof of an *unlawful* act, the abolition of the excuse of accident could have particularly harsh consequences where a person's *lawful* act (such as a lawful tackle in a football match) caused the death of another person. Abolition of the excuse would deprive the person who committed the lawful act of an excuse that would otherwise be available on a charge of manslaughter.

10.4 Although there was some limited support in the submissions received by the Commission for the abolition of the excuse of accident,⁶⁴⁵ the overwhelming majority of respondents (including those who expressed concerns about the operation of the excuse) did not advocate abolition of the excuse.

10.5 The Commission considers the existence of an excuse of accident to be a critical provision of the Code, as it is one of a number of provisions that ensure a correlation between moral culpability for an event and criminal

641 The terms of reference are set out in Appendix 1 to this Report.

642 In contrast, the terms of reference require the Commission to have particular regard to whether the partial defence of provocation in s 304 of the Criminal Code (Qld) should be 'abolished, or recast to reflect community expectations'.

643 This would be the case where an offence was one of strict liability.

644 See [3.9] above.

645 See [9.86], [9.104] above.

responsibility for that event. Accordingly, the Commission recommends that the Code should continue to include an excuse of accident.

THE APPROPRIATE TEST FOR THE EXCUSE OF ACCIDENT

Introduction

10.6 As explained earlier in this Report, the courts have, over the years, applied different tests for determining whether an event qualifies as an accident within the meaning of section 23(1)(b) of the Criminal Code (Qld). The current formulation of the test of accident under that section has a subjective and an objective element that must be satisfied before a defendant will be excused from criminal responsibility for an event on the ground that it occurred 'by accident'. A defendant will not be criminally responsible for an event if he or she did not intend or foresee the event and an ordinary person in the position of the defendant would not reasonably have foreseen the event as a possible outcome.

10.7 If accident is raised on the evidence, the prosecution bears the onus of negating that excuse. To secure a conviction, the prosecution must persuade a jury, beyond reasonable doubt, of at least one of the following matters:

- (1) that the defendant intended the event; or
- (2) that the defendant foresaw the event as a possible outcome of his or her act; or
- (3) that an ordinary person in the position of the defendant would reasonably have foreseen the event as a possible outcome of the defendant's act.

10.8 If a jury that is deliberating on a charge of murder (an unlawful killing with an intention to kill or do grievous bodily harm) decides that it is not satisfied beyond reasonable doubt that the defendant had an intention to kill or do grievous bodily harm, the jury must acquit of murder. The jury must then consider the alternative charge of manslaughter.

10.9 The jury's decision that the defendant did not act with the intention to kill also provides an answer to the first part of the 'test' of accident and it is therefore unnecessary for the jury to consider accident. For this reason, it is commonly said that accident does not apply to murder. This is really a shorthand way of saying that the intent required for a conviction for murder necessarily excludes the operation of accident, and that accident will never excuse an unlawful killing if the elements of murder have been made out.

10.10 So, in real terms, in order to convict a defendant of manslaughter, the jury must be satisfied that:

- (1) the defendant foresaw the death as a possible outcome of his or her act;
or
- (2) an ordinary person in the position of the defendant would reasonably have foreseen the death as a possible outcome.

10.11 If the jury is satisfied of either of these matters, the excuse of accident will not apply and (subject to any other excuses that may arise for consideration) must convict the defendant of manslaughter. One of the cases that gave rise to the Commission's review was that of *Little*, who was charged with murder, and was found not guilty of both murder and the alternative of manslaughter. It is implicit in that verdict that the jury was not satisfied, beyond reasonable doubt, that Little intended to kill or do grievous bodily harm to the deceased. Only at that stage did accident become an issue for the jury in deciding whether to convict Little of manslaughter.

10.12 The jury does not have to be satisfied that the death was a *probable or likely consequence* of the defendant's act — just that it was reasonably foreseeable as a *possible outcome*.⁶⁴⁶ However, the 'jury should exclude possibilities that are no more than remote and speculative'.⁶⁴⁷

10.13 This test has been applied in Queensland since the Court of Appeal decision in *R v Van Den Bemd*.⁶⁴⁸ As explained in Chapter 4 of this Report, the Crown sought special leave to appeal to the High Court from the Court of Appeal's decision, but that application was refused by a majority of the High Court.⁶⁴⁹

The Commission's approach

10.14 The Commission has considered whether the interpretation of section 23(1)(b) that has applied in Queensland since the decision in *R v Van Den Bemd* should be retained or whether a different test would be more appropriate for determining criminal responsibility. In particular, the Commission has considered whether the 'direct and immediate result' test, which arguably applied before the Court of Appeal decision in *R v Van Den Bemd*, should be reinstated. That test differentiates between death or injury that results directly from an intentional act and death or injury that results from a supervening event that follows from an intentional act — for example, an impact with the ground following a punch. Under the direct and immediate result test, a person would be criminally responsible for a death or injury that was the direct and immediate result of an intentional act, but would not be criminally responsible for a death or injury that was the result of an act supervening upon the intentional act.

⁶⁴⁶ *R v Taiters* [1997] 1 Qd R 333, 339.

⁶⁴⁷ *Ibid* 338.

⁶⁴⁸ [1995] 1 Qd R 401. As noted at [3.26] above, this was not a new test.

⁶⁴⁹ *Van Den Bemd v The Queen* (1994) 179 CLR 137.

10.15 In the context of this review, the Commission's focus has necessarily been on the operation of the excuse of accident in homicide cases. However, the Commission is acutely aware that the excuse is one of general application and that, unless there is a modification to the excuse that applies only in relation to the offence of manslaughter, any change to the scope of the excuse will have consequences beyond its operation in homicide trials.

10.16 As a test of general application, the Commission is of the view that the excuse of accident in section 23(1)(b), as presently based on the concept of foreseeability, is an appropriate test for determining criminal responsibility. The Commission considers that the current formulation of the excuse achieves a just result by aligning the criminal responsibility of the defendant with what the Commission regards as the moral culpability of the defendant for the relevant event. If the defendant intended or foresaw the event that occurred, the excuse of accident will not be available. Further, and most importantly, even if the defendant did not intend or foresee the event that occurred, the excuse of accident will not be available if the event was reasonably foreseeable as a possible outcome by an ordinary person in the position of the defendant.

10.17 The issue at the heart of this review is whether this test sets the appropriate limits for criminal responsibility where death is the unintended, unforeseen and unforeseeable event that results from a defendant's intentional act. In considering the appropriateness of the current foreseeability test, the Commission has had regard to the results of the DJAG audit about the extent to which the excuse of accident is successfully raised in homicide trials. As explained earlier in this Report, that audit did not reveal a systemic problem in the use of the excuse of accident in homicide trials.⁶⁵⁰ That result is not entirely surprising, as the community concern that has been expressed about the operation of the excuse of accident has been directed towards a fairly narrow range of cases — primarily, where death has unexpectedly resulted from relatively low level violence, such as a single punch delivered with moderate force. As the respondent from the Office of the Director of Public Prosecutions commented:⁶⁵¹

Cases where more excessive violence is used such as those involving weapons ... or involving more severe violence tend to be less problematic, because the outcome is readily foreseeable.

10.18 Although the number of cases about which concern has been raised is very small, the Commission's approach has nevertheless been to examine the principles underlying the range of legitimate views that have been expressed to the Commission about this difficult issue, together with any technical and practical implications arising out of the possible approaches for dealing with this issue.

650 See [6.24]–[6.26] above.

651 Accident Discussion Paper Submission 10.

The competing principles

10.19 It is commonly said that the excuse of accident in section 23(1)(b) of the Code (in conjunction with the other excuses in Chapter 5 of the Code) performs a similar role to the concept of *mens rea* at common law.⁶⁵² In *He Kaw Teh v The Queen*,⁶⁵³ Brennan J commented on the different states of mind to which the concept of *mens rea* can apply.⁶⁵⁴

It is one thing to say that *mens rea* is an element of an offence; it is another thing to say precisely what is the state of mind that is required. It is the 'beginning of wisdom', as Lord Hailsham of St Marylebone said in *Reg v Morgan*,⁶⁵⁵ to see 'that "mens rea" means a number of quite different things in relation to different crimes'. Indeed, it may connote different states of mind in relation to the several external elements of the same crime. If A strikes B and causes him bodily harm, A's moral blameworthiness may depend on whether A moved accidentally, or whether he was unaware that B or anybody else was there, or whether he did not mean to cause bodily harm and could not and did not foresee that he would cause bodily harm. The particular mental states that apply to the several external elements of an offence must be distinguished, not only as a matter of legal analysis, but in order to maintain tolerable harmony between the criminal law and human experience.

10.20 These different views about *mens rea* have been reflected in the range of submissions received by the Commission in this review. It is fair to say that the submissions almost universally suggested that criminal consequences should attach only where there is moral culpability. Where the submissions diverged was in the way in which respondents conceptualised or formulated the appropriate basis of culpability for manslaughter.

10.21 At one end of the spectrum was the view that a 'single-punch manslaughter ... would always seem a harsh result to a fair-minded person'.⁶⁵⁶ At the other end was the view that accident should not operate as an excuse in relation to manslaughter if death has resulted from an intentional act: people should be responsible for the outcomes of their intentional acts.⁶⁵⁷

10.22 The policy choice for the Commission is whether the imposition of criminal responsibility for manslaughter should be based on:

652 The argument is that, in the absence of an excuse to the offence, the requirement for a mental fault element is satisfied.

653 (1985) 157 CLR 523. This was not a homicide case. It concerned the presumption of a requirement of *mens rea* in relation to offences of drug importation and possession under the *Customs Act 1901* (Cth).

654 (1985) 157 CLR 523, 568.

655 [1976] AC 182, 213.

656 DJAG Submission 1.

657 Accident Discussion Paper Submissions 4, 16.

- the fact that the death (or at least grievous bodily harm⁶⁵⁸) was foreseeable (either by the defendant or by an ordinary person in the position of the defendant); or
- the fact that death resulted directly from an intentional act.

10.23 The Criminal Code (Qld) codifies the criminal law in Queensland and the excuse of accident forms an integral part of the Code. Although the issue under review is a contentious one, it is not a novel one, and the Commission has found it useful to analyse the dichotomy of views expressed by the High Court in *Wilson v The Queen*⁶⁵⁹ about the required degree of culpability for manslaughter at common law.

10.24 In that case, the appellant had punched the deceased causing him to fall and hit his head on the ground. He was charged with murder, but was acquitted of that charge and was instead convicted of manslaughter. It was against this background that the High Court examined the common law crime of manslaughter by reason of an unlawful and dangerous act, and held that the so-called concept of battery manslaughter is not an offence known to the common law in Australia. Battery manslaughter was described as an intentional and unlawful application of physical force resulting in death, where the force is applied with the intention of doing some physical injury that may be of a minor character, although not merely trivial or negligible injury.⁶⁶⁰

10.25 The majority of the High Court — Mason CJ, Toohey, Gaudron and McHugh JJ — outlined the historical development of the offence of manslaughter and referred to the rule applied by English courts in the nineteenth century ‘that, if a death occurred in the course of an unlawful act not amounting to a felony, the killing should be treated as manslaughter’.⁶⁶¹ Their Honours considered this rule to be harsh and lacking in principle:⁶⁶²

As thus expressed, the rule was harsh because it involved liability for manslaughter in the case of an unlawful act which was not dangerous. In other words, causing death in the course of performing a mere unlawful act does not supply the level of culpability appropriate to manslaughter as an instance of culpable homicide.

658 This issue is considered further below.

659 (1992) 174 CLR 313.

660 Ibid 326 (Brennan, Deane and Dawson JJ). See also at 337 where their Honours stated that battery manslaughter appeared ‘in its modern setting to be a peculiarly Australian conception, stemming largely, if not wholly, from the view expressed by Windeyer J’ in *Mamote-Kulang v The Queen* (1964) 111 CLR 62 and *Timbu Kolian v The Queen* (1968) 119 CLR 47, 68.

661 (1992) 174 CLR 313, 323 (Mason CJ, Toohey, Gaudron and McHugh JJ).

662 Ibid.

10.26 In the case before them, their Honours were of the view that the jury must be taken to have convicted the appellant of manslaughter by reason of an unlawful and dangerous act causing death,⁶⁶³ and held that the appellant's punch must be treated as an unlawful act.⁶⁶⁴

10.27 The question to be resolved by the High Court was whether the appellant's punch, which was an unlawful act, was also a dangerous act, with the result that the appellant was guilty of manslaughter. At the time, the prevailing view, as articulated in *R v Holzer*,⁶⁶⁵ was that, for manslaughter by an unlawful and dangerous act, an act was unlawful if it carried with it an appreciable risk of 'really serious injury'. The issue before the High Court in *Wilson*, which can be conceptualised as one concerned with the required degree of moral culpability for the offence of manslaughter, was framed in this way.⁶⁶⁶

was the act of the appellant in punching the deceased dangerous? That question in turn gives rise to another: was it enough that the appellant (that is, a reasonable person in his position) appreciated the risk of *some injury* to the deceased from the act or did the jury have to be satisfied that he appreciated the risk of *really serious injury*? (emphasis added)

10.28 Mason CJ, Toohey, Gaudron and McHugh JJ rejected any category of 'battery manslaughter', and commented on the lack of culpability involved in the notion of battery manslaughter, particularly when compared with manslaughter by an unlawful and dangerous act:⁶⁶⁷

The notion of manslaughter by the intentional infliction of some harm carries with it the consequence that a person may be convicted of manslaughter for an act which was neither intended nor likely to cause death. ... But it is appropriate to observe that in such a case a person may be held guilty of manslaughter for a death that was quite unexpected, whether the test applied in that respect is subjective or objective. It may be said that the same is true of unlawful and dangerous act manslaughter. But the criticism loses its force if the test in *Holzer* is applied so that, before a conviction may ensue, a reasonable person would have realised that he or she was exposing another to an appreciable risk of really serious injury.

10.29 The majority went on to hold that the appropriate test for manslaughter by an unlawful and dangerous act was an appreciable of risk of serious harm, rather than really serious harm:⁶⁶⁸

663 Ibid 326.

664 Ibid 327.

665 [1968] VR 481.

666 (1992) 174 CLR 313, 327.

667 Ibid 332–3.

668 Ibid 333.

'Serious' and 'really serious' may have quite different connotations in some situations ... While the *Holzer* direction does not seem to have given rise to difficulties in this regard, the emphasis on really serious injury brings manslaughter perilously close to murder in this respect. ... It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of serious injury.

10.30 Their Honours were generally of the view that a person should not be guilty of manslaughter by an unlawful and dangerous act in circumstances where the deceased's death was unexpected. In their view, the requirement of an appreciable risk of serious injury reflected an appropriate degree of culpability for the offence of manslaughter, unlike the test espoused for the rejected concept of battery manslaughter.⁶⁶⁹

A direction in those terms [an unlawful and dangerous act carrying with it an appreciable risk of serious injury] gives adequate recognition to the seriousness of manslaughter and to respect for human life, while preserving a clear distinction from murder. The approach in *Holzer* takes away the idea of unexpectedness to a large extent. It does not remove it entirely but then we are not in the area of murder (and its relevant intent) but in the area of manslaughter.

Manslaughter by an unlawful and dangerous act (in the *Holzer* sense) is a relevant and appropriate category of manslaughter. Manslaughter by the intentional infliction of some harm answers neither description. It continues the rigour of the early common law and ought to play no part in contemporary law.

10.31 Mason CJ, Toohey, Gaudron and McHugh JJ considered that the requirement of a dangerous act carrying with it an appreciable risk of serious injury resulted in a close correlation between moral culpability and criminal responsibility for the death that had occurred. In addition, their Honours were of the view that this requirement, in combination with the abolition of battery manslaughter as a separate category of manslaughter, did not create a gap in the law.⁶⁷⁰

Adoption of the test in *Holzer* as to the level of danger applying to manslaughter by an unlawful and dangerous act and abolition of battery manslaughter do not create a gap in the law. Cases of death resulting from a serious assault, which would have fallen within battery manslaughter, will be covered by manslaughter by an unlawful and dangerous act. Cases of death resulting unexpectedly from a comparatively minor assault, which also would have fallen within battery manslaughter, will be covered by the law as to assault. A conviction for manslaughter in such a situation does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility, and is therefore inappropriate.

10.32 Brennan, Deane and Dawson JJ, in their minority judgment, also rejected the concept of battery manslaughter. However, their Honours did so for quite a different reason. They held, in dissent, that the test of a 'dangerous

669 Ibid.

670 Ibid 334.

act' for the purpose of manslaughter by an unlawful and dangerous act was that there was 'a likelihood or risk of injury',⁶⁷¹ rather than an appreciable risk of serious injury. As a result, Brennan, Deane and Dawson JJ considered that there was no function served by the doctrine of battery manslaughter:⁶⁷²

Once it is accepted that the test in a case of manslaughter by an unlawful and dangerous act is that of the existence, objectively determined, of a likelihood or risk of injury such that it can be said that the act in question was dangerous, there is no function for the so-called battery manslaughter doctrine.

10.33 However, in their Honours' view, if the test for a dangerous act were set at a higher level (specifically, an appreciable risk of really serious injury), there would be a need for a category of battery manslaughter, as there would otherwise be a gap in the law:⁶⁷³

If the test were to be set at the higher level suggested by Smith J in *Holzer*, then there would be a gap in the law which could be filled only by some such doctrine. One principle which stands higher than all others in the criminal law is the sanctity of human life. If manslaughter by an unlawful and dangerous act were limited to cases where the act in question exposed another or others to grievous bodily harm, there would be a need for the law to hold at the same time that, where a person deliberately and without lawful justification or excuse causes injury to another which is not trivial or negligible and that other dies as a result, the crime of manslaughter is committed.

10.34 In effect, the minority judgment reflects the view that, if death results from the commission of an unlawful act that carries with it a likelihood or risk of injury (a test that sets the bar in terms of foreseeability at a very low level), the commission of that act provides the required degree of culpability for the crime of manslaughter. In contrast, the majority judgment reflects the view that appreciation of a considerably higher risk of injury is required to provide culpability for manslaughter.

Technical and practical implications of changing the current accident test

10.35 The current foreseeability test for accident is a product of the interpretation by the courts of the expression 'an event that occurs by accident', which occurs in section 23(1)(b) of the Code. In order to change the test of accident under that section, for example, to ensure that an event that is a direct and immediate result of a defendant's act does not qualify as an event that occurs by accident, it would be necessary to include a new legislative provision to set out any new formulation of the test. While that is not an impediment to reform, it would have the effect that the courts would lose the flexibility to further refine the current test, as necessary.

671 Ibid 341.

672 Ibid.

673 Ibid.

The Commission's view

10.36 The Commission appreciates that the appropriate test for accident in effectively defining criminal responsibility for manslaughter is an issue about which people hold strong and divergent views. During the course of this review, and particularly through the Commission's consultation, it has become apparent that there is no single test that will be satisfactory to all the individuals and organisations who have made submissions to the Commission.

10.37 However, the Commission has identified three guiding principles that have assisted it in reaching its conclusion about the appropriate test for accident in the case of homicide. The first, which is one of policy, is that, in imposing criminal responsibility for manslaughter, the law should require a high degree of moral culpability. The second recognises the sanctity that the criminal law attaches to human life, and the third, which is a pragmatic one, is that the test of accident needs to be flexible to accommodate the wide range of circumstances in which killings occur.

10.38 In the Commission's view, the test of foreseeability, as currently embodied in section 23(1)(b) of the Code, best meets these requirements. The direct and immediate result test does not provide a consistent correlation between moral culpability for a killing and criminal responsibility. In some circumstances, it has the potential to impose criminal responsibility where neither the defendant nor an ordinary person in the defendant's position would have foreseen death as a possibility. In other circumstances, it fails to impose criminal responsibility for the reason that the death was not the immediate result of the defendant's act. The first of these difficulties also applies to a pure causation test.⁶⁷⁴

10.39 In contrast, the test of accident under section 23(1)(b) has both a subjective and an objective element. The objective element in the test reposes confidence in the jury to make an assessment about foreseeability having regard to all the facts and circumstances of the particular case. In the Commission's view, this is the best approach for determining criminal responsibility for an event, including what the Commission acknowledges to be the very difficult category of 'one punch' cases.

10.40 Because the test of foreseeability under section 23(1)(b) has subjective and objective elements, it has the flexibility to adapt to the increasing knowledge within the community about the risks associated with a single punch. The Commission notes, in this regard, that the Queensland Police Service is undertaking a 'One Punch Can Kill Campaign', a program 'aimed at preventing senseless violence among young people', including educating them about the risk of death as a result of violence.⁶⁷⁵ Educational programs of this type have

674 See Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.27]–[11.31].

675 See <<http://www.police.qld.gov.au/programs/personalSafety/situationalAdvice/onePunch.htm>> (22 September 2008).

the potential to affect the way in which the foreseeability test will be applied by juries in the future, although it is not possible to predict when this might occur or the saturation level that the campaign would require in order to have this effect.

THE EVENT TO WHICH FORESIGHT SHOULD RELATE WHERE DEATH HAS OCCURRED

Introduction

10.41 As explained at [10.29] above, the moral culpability for common law manslaughter by an unlawful and dangerous act is reflected in the requirement of a dangerous act that carries with it an appreciable risk of serious injury. However, it is not necessary that the death that occurred was foreseen by the defendant or was reasonably foreseeable by an ordinary person in the position of the defendant. In this respect, the effect of the excuse of accident under section 23(1)(b) of the Criminal Code (Qld) reflects a different test of moral culpability. Because there are two different variables in each test — *appreciable risk of serious injury* (at common law) and foresight, as a *possible outcome of death* (under the Code) — it is difficult to say whether manslaughter at common law or under the Code requires a higher degree of moral culpability.

10.42 In the Accident Discussion Paper, the Commission raised as an option whether, in the case of manslaughter, foreseeability of serious injury or grievous bodily harm as a possible outcome should provide an additional basis for the imposition of criminal responsibility.⁶⁷⁶

10.43 The term ‘grievous bodily harm’ is defined in section 1 of the Criminal Code (Qld) as follows:

grievous bodily harm means—

- (a) the loss of a distinct part or an organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.

Competing principles

10.44 In the Accident Discussion Paper, the Commission stated that changing the event to which foresight relates to include serious injury (or grievous bodily harm) would create greater consistency with the test of a

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Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) [11.32]–[11.36].

dangerous act for the purpose of manslaughter under the common law. It also suggested that this change would create a greater alignment with the offence of murder under the Code. In that respect, the Commission noted that, under this option, foresight of death or serious injury (or grievous bodily harm) would constitute manslaughter, which would mirror the fact that intent to kill or to do grievous bodily harm constitutes murder under section 302(1)(a) of the Code.⁶⁷⁷

10.45 On the other hand, if the view is taken that section 23(1)(b) of the Code, in excusing criminal responsibility for an event that occurs by accident, provides the closest correlation between moral culpability and criminal responsibility, it would be inconsistent to impose criminal responsibility for manslaughter if death, as the event that occurred, was not foreseeable by the defendant and was not reasonably foreseeable by an ordinary person in the position of the defendant.

Technical and practical implications of changing the event to which foresight relates

10.46 In Chapter 9 of this Report, the Commission referred to some technical issues raised about this option by the respondent from the Office of the Director of Public Prosecutions.⁶⁷⁸ He queried whether the proposal to extend the basis of criminal responsibility for manslaughter to include foresight of serious harm or grievous bodily harm would simply require foresight of some generic occurrence of grievous bodily harm or whether it would require foresight of the actual occurrence that took place with the notional subtraction of the fact of death of the victim. In his view, this would create a real risk of confusion in the directions on foreseeability dealing with both a notional and a real event.

10.47 It should be noted that, in the absence of enacting a new offence of manslaughter by an unlawful and dangerous act, providing that foreseeability of serious injury or grievous bodily harm as a possible outcome is to be an additional basis for the imposition of criminal responsibility will not bring about complete consistency with manslaughter at common law. At common law, manslaughter by an unlawful and dangerous act requires the commission of an act that is 'contrary to the criminal law'.⁶⁷⁹ In contrast, manslaughter under section 302 of the Code does not depend on proof of an unlawful act. Further, manslaughter at common law requires *an appreciable risk* of serious injury, while the Code imposes criminal responsibility for manslaughter where the defendant, or an ordinary person in the defendant's position, would foresee the relevant event as *a possible outcome*.

677 Ibid [11.35].

678 See [9.151] above.

679 *Wilson v The Queen* (1992) 174 CLR 313, 335 (Brennan, Deane and Dawson JJ).

The Commission's view

The majority view

10.48 The Commission, by majority, is of the view that, in the application of section 23(1)(b) of the Code to manslaughter, the 'event' should continue to mean the death of the deceased. As this is the current law, this view does not require any legislative amendment of the Code.

10.49 As a matter of principle, the majority considers that criminal responsibility for manslaughter should be imposed only if the defendant foresaw death as a possible outcome of his or her act, or if an ordinary person in the position of the defendant would reasonably have foreseen that outcome. In the view of the majority, foresight of grievous bodily harm does not provide a sufficiently high degree of moral culpability to impose criminal responsibility for manslaughter. In this regard, the majority notes that 'grievous bodily harm'⁶⁸⁰ covers a wide range of injuries, not all of which are life-endangering, and that foresight of grievous bodily harm as a *possible outcome* of the defendant's act (the Code requirement) is arguably a lower standard than the common law requirement of *an appreciable risk*. In the majority view, foresight of grievous bodily harm (in the absence of foresight of death) does not provide a sufficient basis on which to impose criminal responsibility for manslaughter.

10.50 Further, the majority is persuaded by the submission received from the respondent from the Office of the Director of Public Prosecutions that such a change would mean that a jury would be faced with a very difficult test to apply.

The minority view

10.51 However, a minority of the Commission, comprised of the Chairperson, Justice Atkinson, and Ms Treston, is of the view that the basis for imposing criminal responsibility for manslaughter should be extended, so that it would be sufficient if the defendant foresaw grievous bodily harm as a possible outcome or if an ordinary person in the position of the defendant would have foreseen grievous bodily harm as a foreseeable outcome. It should not be necessary, as is presently the case, for the defendant or the ordinary person to foresee *death* as a possible outcome, although, obviously, foresight of death (by either the defendant or the ordinary person) would still result in a conviction for manslaughter.

10.52 In the view of the minority, this extension of the basis for criminal responsibility should be made because the current operation of the law does not sufficiently recognise the significance of the fact that someone's death was caused by the defendant. The minority view is that the extension would better reflect the sanctity that the criminal law places on human life. Moreover, if such an extension were made, the events to which foresight relates for manslaughter

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The definition of 'grievous bodily harm' is set out at [10.43] above.

would mirror the intention that is relevant for murder. The effect of this view is that foresight of death or grievous bodily harm would exclude the operation of the excuse of accident and provide the basis for a conviction for manslaughter, while intention to kill or do grievous bodily harm would provide the basis for a conviction for murder.

Implementation of the minority view

10.53 Although it is only a minority of the Commission that is of the view that the basis for imposing criminal responsibility for manslaughter should be extended, the Commission is unanimous in its view about how the Code would need to be amended to give effect to that view (if the minority view were to be implemented).

10.54 That view can be implemented by amending the Code to provide that, in its application to a charge of manslaughter, the event for section 23(1)(b) is a reference to the death of the deceased or the doing of grievous bodily harm to the deceased.

SECTION 23(1A): INCONSISTENCY OR AN APPROPRIATE EXCEPTION?

Introduction

10.55 In Chapter 3 of this Report, the Commission outlined the background to the insertion of section 23(1A) of the Code, which creates an exception to the decision in *R v Van Den Bemd*. Section 23(1A) provides:

- (1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

10.56 The submissions received by the Commission expressed contradictory views about whether it is a principle of the criminal law that one must take one's victim as one finds him or her. It is not necessary for the Commission to resolve that issue. Whether that should be the principle is subsumed by the larger issue of whether the principle of foreseeability embodied in section 23(1)(b) is regarded as a paramount principle, with which section 23(1A) is inconsistent and should therefore give way, or whether section 23(1)(b) represents merely a broad approach for determining criminal responsibility to which appropriate exceptions may be made.

The competing principles

10.57 If the starting point is that the governing principle for imposing criminal responsibility for manslaughter should be that the death was foreseeable (either by the defendant or by an ordinary person in the position of the defendant), then

section 23(1A) is inconsistent with that principle, as it has the potential to impose criminal responsibility for manslaughter in respect of a death that was neither subjectively nor objectively foreseeable. It is also said to offend the principle that like cases (in terms of a defendant's conduct) should be treated equally.

10.58 On the other hand, the argument may be made that the exception to the principle of foreseeability itself reflects a greater principle of equality before the law. Although the provision cannot protect people with hidden vulnerabilities from assault, it ensures that death or injury caused to a person who suffers from a hidden vulnerability does not go without a criminal sanction merely because the person's particular vulnerability was not apparent to the defendant. In a society where the human rights of people with disabilities are promoted and participation in community life is encouraged and, indeed, to be expected, it is arguable that section 23(1A) represents a higher principle than foreseeability.

10.59 In its recent review of homicide, the Law Reform Commission of Western Australia recommended the introduction of a provision similar to section 23(1A) of the Criminal Code (Qld). It recognised an argument that, 'where death only results because of a constitutional weakness or defect the death was not reasonably foreseeable because the accused was not aware of the existence of the weakness or defect'.⁶⁸¹ However, it considered that, in these circumstances, it would not be appropriate to excuse criminal responsibility for the death.⁶⁸²

Technical and practical implications arising from section 23(1A) and its potential repeal

10.60 The Director of Public Prosecutions, in a consultation meeting with the Commission, expressed the view that, if section 23(1A) were repealed it would have a negative effect on the way in which trials are conducted. It was suggested that, because criminal responsibility would then be determined solely by foreseeability, the defence case in a manslaughter trial would inevitably focus on the medical condition of the deceased, in an attempt to establish that it was something unusual about the deceased's medical condition that made the death an unforeseeable event. The Director of Public Prosecutions considered that the retention of section 23(1A) prevents trials from being distorted by ensuring that the focus is on the conduct of the defendant, rather than on the medical condition of the deceased.

10.61 Section 23(1A) has, however, been criticised on the ground of its breadth. Although the amendment originally proposed by the Criminal Code Advisory Working Group was framed in terms of 'a person who is unlawfully

681 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (September 2007) 154.

682 Ibid.

assaulted' and 'suffers death or injury by reason of a defect or weakness or abnormality',⁶⁸³ the current provision would apply to a lawful act that causes a person's death.

10.62 In reviewing this provision, the Law Reform Commission of Western Australia recommended that the new provision it proposed should not follow section 23(1A) precisely.⁶⁸⁴

The Queensland provision could be interpreted so that the defence of accident is automatically precluded in any case where the death of the victim was caused or partly caused by a defect, weakness or abnormality in the victim. There may be cases where there is a deliberate application of force, but death is caused partly by the existence of a weakness or defect and partly by an intervening event.

10.63 Accordingly, the Western Australian Commission recommended that:⁶⁸⁵

a person is not excused from criminal responsibility where death or injury is *directly* caused by the deliberate application of force in circumstances where the death or injury would not have occurred but for the presence of a defect, weakness or abnormality in the victim.

10.64 That recommendation has been implemented by section 23B of the Criminal Code (WA), which provides:

23B. Accident

- (1) This section is subject to the provisions in Chapter XXVII relating to negligent acts and omissions.
- (2) A person is not criminally responsible for an event which occurs by accident.
- (3) If death or grievous bodily harm—
 - (a) is directly caused to a victim by another person's act that involves a deliberate use of force; but
 - (b) would not have occurred but for an abnormality, defect or weakness in the victim,

the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm.
- (4) Subsection (3) applies—

683 See [3.44] above.

684 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (September 2007) 155.

685 *Ibid.*

- (a) even if the other person did not intend or foresee the death or grievous bodily harm; and
- (b) even if the death or grievous bodily harm was not reasonably foreseeable.

The Commission's view

10.65 The Commission members were evenly divided about whether section 23(1A) of the Code should be retained or repealed.

10.66 Three members of the Commission (Justice Atkinson, Mr Davis and Ms Treston) are of the view that the Code should continue to include a provision to the general effect of 23(1A). However, they consider that section 23(1A) is presently too wide in its application and should be amended so that it is limited to unlawful acts. These members are of the view that this approach ensures that a person who does an unlawful act that results in the death of a person does not go without the sanction of a conviction for manslaughter merely because the deceased had a hidden vulnerability and it was not foreseeable that the act would result in the person's death. They are also of the view that the retention of a provision to this effect avoids the situation where the trial descends into a dispute about the medical condition of the deceased in an attempt by the defence to establish that death was not foreseeable.

10.67 The other three members of the Commission (Mr Bond SC, Mr Herd and Dr White) have formed a different view and consider that section 23(1A) should be repealed. In their view, manslaughter is an extremely serious offence and it is not just to impose criminal responsibility for that offence if the deceased's death was not foreseen by the defendant and could not reasonably have been foreseen as a possible outcome by an ordinary person in the position of the defendant. However, these members are also of the view that section 23(1A) is too widely framed. In their view, if the section is retained, it should be limited to unlawful acts. In this respect, they agree with the other members of the Commission.

10.68 In view of this even division of opinion about whether section 23(1A) should be retained or repealed, the Chairperson, Justice Atkinson, has exercised her casting vote under section 12(7) of the *Law Reform Act 1968* (Qld) in favour of the option to retain section 23(1A), subject to the amendment of that section to confine its application to unlawful acts.

WHETHER A NEW OFFENCE OF UNLAWFUL ASSAULT OCCASIONING DEATH SHOULD BE CREATED

Introduction

10.69 The Commission has given detailed consideration to whether a new offence of unlawful assault occasioning death should be created to fill any

perceived gap in the law where death results from a defendant's unlawful assault, but the operation of the excuse of accident has the effect that the defendant is not guilty of manslaughter.⁶⁸⁶

10.70 A private member's Bill proposing an offence in these terms was introduced into the Queensland Parliament in 2007,⁶⁸⁷ but was defeated in February 2008. In Western Australia, a new offence of unlawful assault causing death came into force on 1 August 2008.⁶⁸⁸

The competing principles

10.71 The Commission notes that the submissions from several members of the public supported the creation of a new offence of assault occasioning death.⁶⁸⁹ These respondents considered that a conviction for this offence was preferable to an acquittal on a manslaughter charge. In some respects, the submissions echoed the view expressed by the minority of the High Court in *Wilson v The Queen*⁶⁹⁰ that, if an unlawful and deliberate act, committed without lawful justification or excuse, does not constitute manslaughter, there is a gap in the law that can be filled only by some other doctrine.⁶⁹¹

10.72 The obvious attraction of a new offence of unlawful assault occasioning death is that the very label of the offence recognises that a death has occurred. This was a persuasive reason for the Irish Law Reform Commission in recommending an offence of assault causing death. Although it recommended the new offence because it considered involuntary manslaughter to be too serious an offence where the death from an unlawful and dangerous act was not foreseeable, it nevertheless came to the conclusion that, in that situation, assault causing death, rather than assault, was the appropriate offence.⁶⁹²

For the new offence to come into play the culpability of the accused should be at the lowest end of the scale where deliberate wrongdoing is concerned. It is vital that a reasonable person in the defendant's shoes would not have foreseen death as a likely outcome of the assault. The main purpose of introducing a new statutory offence of 'assault causing death' would be to mark the fact that death was caused in the context of a minor assault. Recognising the sanctity of life by marking the death may be of benefit to the victim's relatives in dealing with their grief.

686 This would be the case where the death was neither intended nor foreseen by the defendant and was not reasonably foreseeable as a possible outcome by an ordinary person in the position of the defendant.

687 See [7.3]–[7.6] above.

688 Criminal Code (WA) s 281, which is set out at [7.16] above.

689 See [9.200]–[9.203] above.

690 (1992) 174 CLR 313, 341 (Brennan, Deane and Dawson JJ).

691 See [10.33] above

692 Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report No 87 (2008) [5.43].

10.73 The Commission notes that, although an offence of unlawful assault causing death has recently been enacted in Western Australia, that provision was not recommended by the Law Reform Commission in its recent homicide review. On the contrary, the Western Australian Commission concluded, subject to one qualification, that the current foreseeability test that underpins the excuse of accident is appropriate. It did not propose any new offence:⁶⁹³

Despite the difference between the Code and the common law in this context, the Commission has concluded that the current test for the defence of accident provides the appropriate minimum requirement for this category of manslaughter. The requirement that death was objectively reasonably foreseeable ensures that there is a degree of correspondence between the blameworthy conduct of the accused and the resulting harm. If death was not reasonably foreseeable the accused could still be held criminally liable for any harm caused that was reasonably foreseeable. (original emphasis; note omitted)

10.74 The Western Australian Commission's recommendation seems to suggest that if, for example, bodily harm was foreseeable, but death was not, then assault occasioning bodily harm would be the appropriate charge.⁶⁹⁴

10.75 A contrary view to that expressed by the Irish Law Commission is the view that, if the deceased's death was not foreseeable, the offence of unlawful assault occasioning death does not have a sufficient reference to the moral fault of the accused.

Technical and practical implications of a new offence of unlawful assault occasioning death

10.76 The insertion of a new offence in the Code requires a consideration of the purpose to be served by such a provision (apart from the very real consideration of marking the occurrence of death) and of its relationship with the overall structure and policy of the Code. It also entails an examination of any negative consequences that might result from the creation of the new offence.

10.77 This may be best illustrated by a consideration of the offence of 'Assault causing death', which was proposed last year as a new section 341 of the Code, and its relationship to other offences in the Code. The proposed new section 341 would have been inserted in Chapter 30 of the Code (Assaults). The other important Chapters, for present purposes, are Chapter 28 (Homicide—suicide—concealment of birth) and Chapter 29 (Offences endangering life or health).

⁶⁹³ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (September 2007) 90.

⁶⁹⁴ That would be consistent with its approach in relation to murder that there should be close proximity between the mental element for the offence and the harm done: see Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (September 2007) 90 n 34.

10.78 Set out below is a brief summary of the key provisions (for present purposes) found in each chapter and their respective penalties or maximum penalties, to illustrate the relationship with the proposed new section 341.

Chapter		Offence	Penalty
Chapter 28 Homicide—suicide—concealment of birth	302	Murder	Mandatory life imprisonment (s 305)
	303	Manslaughter	Liable to a maximum sentence of life imprisonment (s 310)
Chapter 29 Offences endangering life or health	320	Grievous bodily harm	Liable to imprisonment for a maximum of 14 years
Chapter 30 Assaults	335	Common assault	Liable to imprisonment for a maximum of 3 years
	339(1)	Unlawful assault occasioning bodily harm	Liable to imprisonment for a maximum of 7 years
	339(3)	Unlawful assault occasioning bodily harm while armed, or pretending to be armed, with any dangerous or offensive weapon or instrument or in company with one or more other persons	Liable to imprisonment for a maximum of 10 years
	Proposed new 341	Unlawful assault causing death	Liable to imprisonment for a maximum of 7 years

10.79 As mentioned in Chapter 9 of this Report, a number of respondents raised concerns about a new offence of assault occasioning death.

10.80 The respondent from the Office of the Director of Public Prosecutions observed that the reason assault is not an element of manslaughter or grievous bodily harm is that ‘assault contains an element of absence of consent’.⁶⁹⁵ The principle reflected in the Code is that:⁶⁹⁶

while one can consent to modest violence (up to bodily harm), it is contrary to the public interest to allow a defence of consent to any more serious violence. The new offence would re-introduce the undesirable excuse of consent in death cases.

10.81 This respondent observed that an offence of unlawful assault occasioning death would also have the undesirable consequence of bringing section 269, which provides a complete defence to assault, into operation.⁶⁹⁷ The Director of Public Prosecutions was also opposed to a new offence of this

⁶⁹⁵ Accident Discussion Paper Submission 10.

⁶⁹⁶ Ibid.

⁶⁹⁷ As explained in Chapter 22 below, provocation is a complete defence to what would otherwise be an unlawful assault.

kind on the basis that it was unnecessary, would bring section 269 into operation, and would complicate directions to juries. In his view, the offence would be inconsistent with the overall policy of the Code.

10.82 Although the Queensland Police Service saw a good deal of merit with a new offence of unlawful assault occasioning death, it saw problems with the penalty that would not be overcome simply by increasing the penalty. In its view, it was incongruous that the maximum penalty for the offence proposed in 2007 was less than that for grievous bodily harm. However, it conceded that this was not resolved by simply increasing the maximum penalty. If the penalty were to exceed that for grievous bodily harm, the Queensland Police Service did not see any reason to prefer the new offence to the alternative option of a new category of manslaughter.

10.83 What the difficulty in terms of the appropriate maximum penalty for the offence really exposes is that the offence of unlawful assault occasioning death is not a homicide offence. It is an assault offence, of which death is a circumstance of aggravation.

The Commission's view

10.84 Although a defendant who causes the death of another person by an unlawful assault may, if the offence is charged on the indictment, be convicted of assault occasioning bodily harm, the Commission is sympathetic to the view that this offence is inadequate in the circumstances, as it does not recognise that a death has occurred.

10.85 However, in addition to the problems referred to in the submissions with an offence of unlawful assault occasioning death, the Commission has a more fundamental concern about the introduction of such an offence.

10.86 If the purpose of this provision is to fill a perceived gap in the law (where the excuse of accident operates to excuse a defendant of what would otherwise be the offence of manslaughter), the new offence could inadvertently have the negative effect of enlarging that gap. The Commission's concern is that an offence that is introduced as the 'backstop' for the marginal case where it may be difficult to secure a conviction for manslaughter, could ultimately become the norm in assault cases where death ensues. In this regard, the Commission notes that, since the introduction of the offence of dangerous driving causing death,⁶⁹⁸ that has become the offence that is usually charged where a person's driving has caused the death of another person. The Commission is concerned that the introduction of an offence of unlawful assault occasioning death could have the effect that manslaughter is not charged when it would normally be the appropriate charge.

698

Criminal Code (Qld) s 328A (Dangerous operation of a vehicle). See s 328A(4).

10.87 At the very least, the existence of the offence of unlawful assault occasioning death could have the effect of reducing the number of guilty pleas to manslaughter charges because defendants may prefer to attempt to negotiate a plea to the lesser offence of unlawful assault occasioning death.

10.88 For these reasons, even though a new offence in these terms would remove the artificiality of a prosecution for assault occasioning bodily harm when a death had in fact occurred, the Commission does not support the creation of an offence of unlawful assault occasioning death.

WHETHER A NEW CATEGORY OF UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER SHOULD BE CREATED

Introduction

10.89 The option of a new category of unlawful and dangerous act manslaughter was supported by a number of respondents, as outlined in Chapter 9.⁶⁹⁹

10.90 However, other respondents identified a number of technical difficulties with this option. These difficulties largely arise from the attempt to insert a common law offence into the Code.⁷⁰⁰

The Commission's view

10.91 Earlier in this chapter, the Commission expressed the view that criminal responsibility for manslaughter should be based on foreseeability of death.⁷⁰¹ Given that view, the Commission does not consider it necessary, or appropriate, to create a further category of manslaughter.

10.92 Further, a new category of manslaughter based on an unlawful and dangerous act would not fit well within the existing structure and policy of the Code. It raises a number of technical difficulties which, while not necessarily insurmountable, demonstrate the difficulty of trying to incorporate, within the Code, a provision based on a common law offence. The framework of the Code in relation to homicide is based on proof of an unlawful killing and a consideration of whether any of the excuses in Chapter 5 of the Code apply to excuse what would otherwise be an unlawful killing. This has the potential to cause considerable confusion and complicate the directions to juries in manslaughter trials if manslaughter under section 303 and manslaughter by an unlawful and dangerous act both arose for the jury's consideration.

699 See [9.189], [9.193]–[9.195] above.

700 See [9.196] above.

701 Note the minority view at [10.51]–[10.52] above.

10.93 The Commission therefore makes no recommendation for a new category of manslaughter based on an unlawful and dangerous act.

STATUTORY ALTERNATIVES

10.94 The Commission's terms of reference require it to have regard to the use of alternative counts to charges of manslaughter (for example, assault or grievous bodily harm), including whether section 576 of the Code should be redrafted. Although the Commission has not recommended the creation of a new offence of unlawful assault occasioning death, the Commission considers it important to address the issue of statutory alternatives.

10.95 Manslaughter cases where death results unexpectedly from a moderate intentional act can be very difficult cases to prosecute. The Commission appreciates that it may appear superficially attractive, in order to secure a conviction of some offence, to provide that a new offence of unlawful assault occasioning death (or even the existing offence of grievous bodily harm or assault occasioning bodily harm) is a statutory alternative.

10.96 However, if any of these offences is a statutory alternative to manslaughter, there is a very real risk that a jury, faced with a choice between manslaughter and a lesser offence, will compromise and convict of the lesser offence. It is therefore important that if, contrary to the Commission's recommendation above, a new offence of unlawful assault occasioning death is created, that offence is not made a statutory alternative to manslaughter. This is the only way to ensure that the lesser offence is available for the jury's consideration only in those cases where the prosecution considers, having regard to the facts of the particular case, that it is an appropriate charge to be left to the jury's consideration. The Commission notes that the Director of Public Prosecutions does not support making any new offence a statutory alternative to manslaughter because of the risk that juries would reach compromise verdicts and convict of the lesser offence.

10.97 For the same reason, the Commission is also of the view that the offences of grievous bodily harm, assault occasioning bodily harm and assault should not be made statutory alternatives to manslaughter. The Director of Public Prosecutions was also of the view, for the same reason expressed above, that section 576 of the Code should not be amended to make these existing offences statutory alternatives to a conviction for manslaughter.

RECOMMENDATIONS

10.98 The Commission makes the recommendations set out below. The terms of reference for this review did not request the Commission to prepare draft legislation and, in any event, the time frame for this review would not have permitted it to do so. However, in view of the fact that implementation of its recommendations will require legislative amendment, the Commission

considers it essential that it be closely consulted on the drafting of any legislation that is prepared to give effect to its recommendations.

- 10-1 Section 23(1)(b) of the Criminal Code (Qld) should continue to excuse a person from criminal responsibility for an event that occurs by accident.**
- 10-2 A majority of the Commission recommends that, in its application to manslaughter, the ‘event’, for the purpose of section 23(1)(b) of the Criminal Code (Qld), should continue to mean the death of the deceased.**
- 10-3 A minority of the Commission recommends that, in its application to manslaughter, the ‘event’, for the purpose of section 23(1)(b) of the Criminal Code (Qld), should mean the death of the deceased or the doing of grievous bodily harm to the deceased.**
- 10-4 A majority of the Commission recommends that the Criminal Code (Qld) should retain a provision to the general effect of section 23(1A).**
- 10-5 A minority of the Commission recommends that section 23(1A) of the Criminal Code (Qld) should be repealed.**
- 10-6 The Commission recommends that, if section 23(1A) of the Criminal Code (Qld) is retained, it should be amended to confine its application to unlawful acts.**
- 10-7 The Criminal Code (Qld) should not be amended to include a new offence of unlawful assault occasioning death.**
- 10-8 The Criminal Code (Qld) should not be amended to include a new offence of unlawful and dangerous act manslaughter.**
- 10-9 The Criminal Code (Qld) should not be amended to provide that:**
- (a) grievous bodily harm;**
 - (b) assault;**
 - (c) assault occasioning bodily harm; or**
 - (d) any new offence of unlawful assault occasioning death (if, contrary Recommendation 10-7, such an offence were created);**
- is a statutory alternative to manslaughter.**

Chapter 11

Provocation in Queensland

INTRODUCTION	208
HISTORICAL DEVELOPMENT.....	208
THE PARTIAL DEFENCE OF PROVOCATION IN QUEENSLAND.....	212
SECTION 304 OF THE CRIMINAL CODE (QLD).....	213
PROVOCATION	214
WHAT CONDUCT MAY AMOUNT TO PROVOCATION.....	216
LOSS OF SELF-CONTROL	217
FURTHER ANALYSIS OF THE HYPOTHETICAL ORDINARY PERSON TEST	219
LIMITING RULES	221
A RECENT DECISION OF THE QUEENSLAND COURT OF APPEAL.....	222

INTRODUCTION

11.1 Where a defendant has killed with the intent required for murder, the successful application of the partial defence of provocation under section 304 of the Criminal Code (Qld) operates to reduce murder to manslaughter, and to allow the defendant to escape the mandatory life sentence for murder.

11.2 The defence is only relevant if the jury is satisfied that the defendant acted with an intention to kill or do grievous bodily harm. If the jury is not satisfied, beyond reasonable doubt, that the defendant acted with such an intention, then the verdict will be not guilty of murder, and it will not be necessary to consider the partial defence of provocation.

11.3 In this chapter the history and development of the partial defence of provocation are summarised as the historical origins of provocation are important to understanding the issues in the review. A basic account of the law in force in Queensland is presented before reference is briefly made to the types of situations in which claims of provocation are commonly advanced. The chapter then considers in greater detail two of the critical concepts central to the present day law of provocation: the common law idea of loss of self-control and the hypothetical ordinary person test.

HISTORICAL DEVELOPMENT

11.4 In the 14th century, the law drew a distinction between premeditated killings (with *malice prepensed*) and hot-blooded killings (*chance medley*).

Murder carried the death penalty but, if it was murder by *chance medley*, then a pardon from execution would be granted.⁷⁰²

11.5 The distinction continued into the 16th century. A killing with *malice prepensed* was murder. A killing arising out of a sudden occasion — a *chance medley* — was manslaughter.⁷⁰³

11.6 During the late 16th and early 17th centuries, the law developed a doctrine of provocation from the concepts of premeditated and unpremeditated killings. A killing was presumed to be premeditated unless it was the result of one of four categories of provocation, which were set out in the judgment of Sir John Holt LCJ in *Regina v Mawgridge*.⁷⁰⁴

- Where the deceased had spoken angry words followed by an assault;⁷⁰⁵
- Where the defendant had seen the deceased attacking a friend or relative being attacked;⁷⁰⁶
- Where the defendant had seen a citizen being unlawfully deprived of his liberty;⁷⁰⁷ and
- Where the defendant had seen another man committing adultery with his wife.⁷⁰⁸

702 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 217.

703 Ibid.

704 (1707) Kel 119; 84 ER 1107.

705 Ibid 1114 (Lord Holt LCJ):

If one man upon angry words shall make an assault upon another ... and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault.

706 Ibid:

[I]f a man's friend be assaulted by another, or engaged in a quarrel that comes to blows, and he in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter.

707 Ibid 1114–15:

[I]f a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance; and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter.

708 Ibid 1115:

When a man is taken in adultery with another man's wife; if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.

11.7 However, even if a homicide fell into one of these four categories, if the defendant had not acted in the 'heat of passion' the offence was treated as murder.⁷⁰⁹

11.8 To reduce the crime from murder to manslaughter, provocation had to arouse:⁷¹⁰

such a passion, as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office, if it appears he ... deliberates ... before he gives the fatal stroke ... the law will no longer under that pretext of passion exempt him from the punishment ... he justly deserves.

11.9 In other words, a successful plea of provocation required an unpremeditated killing while passion was heated and had not had time to cool.

11.10 At the same time the concept of proportionality was also developing:⁷¹¹

where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty.

11.11 In the 18th and 19th centuries, the laws of provocation (and self-defence) were focused on the regulation of violence in public at a time when men commonly carried weapons. 'The law was concerned to regulate the conduct of people involved in drunken brawls and the responses of men who were quick to anger, especially in matters of honour.'⁷¹² It also regulated killing in response to infidelity,⁷¹³ but only if the male defendant caught the deceased in the act of adultery with the defendant's wife. Adultery at that time was regarded as a serious offence which could be punished in the ecclesiastical courts.⁷¹⁴

11.12 Provocation was viewed as a concession to human frailty which partially excused a man for his loss of self-control.⁷¹⁵

709 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 218.

710 Ibid citing *Oneby* (1727) 2 Ld Raym 1485, 1496; 92 ER 465, 472.

711 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 218 citing East, *Pleas of the Crown* (1803) Vol 1, 24.

712 R Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system*, Thesis submitted to the University of Tasmania (2002) 63.

713 Ibid.

714 AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 294.

715 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 218.

11.13 An example of a classic direction to the jury on provocation may be found in *Hayward*.⁷¹⁶ The jury had to consider whether the defendant had acted:

while smarting under a provocation so recent and strong, that [he] might not be considered at the moment master of his own understanding; in which case the law, in compassion to human frailty, would hold the offence to amount to manslaughter only.

11.14 The idea of a loss of self-control distinguished between premeditated revenge and provoked killing.

11.15 In the 19th century, an objective standard developed to measure the degree of provocation and the defendant's reaction to it.⁷¹⁷ At this time (prior to the *Criminal Evidence Act 1898* (UK)) a defendant could not testify on his own behalf at trial. An objective standard enabled a jury to test the credibility of the defence of provocation.⁷¹⁸ This standard was explained by Coleridge J in *Kirkham*.⁷¹⁹

Though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being and requires that he should exercise a reasonable control over his passions.

11.16 By the mid-19th century, the objective standard was expressed in terms of the reasonable or ordinary man.⁷²⁰ So, in *Welsh*,⁷²¹ the jury were directed that:⁷²²

Homicide, which would be *prima facie* murder, may be committed under such circumstances of provocation as to make it manslaughter, and show that it was not committed with malice aforethought. The question, therefore, is — first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury whether it was such that they can attribute the act to the violence of a passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man ... The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion ... in law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow — something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act.

⁷¹⁶ Ibid citing (1833) 6 C & P 157, 159 (Tindal CJ).

⁷¹⁷ MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 218.

⁷¹⁸ Ibid footnote 21.

⁷¹⁹ Ibid 218–219 citing (1837) 8 C & P 115, 119; 173 ER 422, 424.

⁷²⁰ Ibid 219.

⁷²¹ (1869) 11 Cox CC 336.

⁷²² MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 219, footnote 24 citing (1869) 11 Cox CC 336, 338–9 (Keating J).

11.17 The application of the ordinary or reasonable man test did not take into account different degrees of mental ability in defendants;⁷²³ rather, it was about the level of self-control demanded of citizens.⁷²⁴

The test to be applied is that of the effect of provocation on a reasonable man ... so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did.

THE PARTIAL DEFENCE OF PROVOCATION IN QUEENSLAND

11.18 The underlying assumptions of the provocation defence have remained essentially unaltered, although the defence, where it still operates, does so in a very different social and legal context. The plea was conceived as a concession to human frailty, originally formulated to enable some who killed to escape the death sentence.

11.19 The principal assumptions are that, if an ordinary person could have acted as the defendant did once placed in the same circumstances, the crime can be seen to reflect in part a common human weakness; a weakness which, while not excusing the crime, should be taken into account in assessing the blameworthiness of the defendant's conduct (provided, of course, that the defendant acted in sudden retaliation, 'for what a man does on a sudden and serious provocation he is less to blame morally than for what he does deliberately and in cold blood'⁷²⁵). Thus, Blackstone said that the difference between manslaughter and murder 'principally consists in this — that manslaughter arises from the sudden heat of the passions, and murder from the wickedness of the heart'.⁷²⁶

11.20 A later assumption of the law of provocation is that it is important for any civilised society which values human life to insist that its members maintain reasonable standards of self-control towards one another.⁷²⁷

11.21 The tension between these ideas lies at the heart of the issues which arise on this review.

⁷²³ MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 219.

⁷²⁴ Ibid 220 citing *Mancini* [1942] AC 1, 9 (Viscount Simons, affirming *Lesbini* [1914] 3 KB 1116).

⁷²⁵ *Parker v The Queen* (1962) 111 CLR 610, 651 (Windeyer J).

⁷²⁶ Ibid 652 (Windeyer J) citing Blackstone's *Commentaries* IV 190.

⁷²⁷ *Johnson v The Queen* (1976) 136 CLR 619, 656 (Gibbs J):

[T]he law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and a necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life.

SECTION 304 OF THE CRIMINAL CODE (QLD)

11.22 The partial defence of provocation is contained in section 304 of the Criminal Code (Qld):

304 Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

11.23 The Queensland provision specifies three elements for murder to be reduced to manslaughter. The defendant must kill:

- (1) 'in the heat of passion';
- (2) in circumstances where the passion has been caused by a 'sudden provocation'; and
- (3) before there is time for the defendant's 'passion to cool'.

11.24 The word 'passion' refers to any intense emotion or any mix of intense emotions: anger, jealousy, fear, or vengeance. The section does not refer explicitly to a loss of self-control, although, under the influence of the modern law of provocation, the words are normally understood as imposing a requirement of a loss of self-control at the time of the killing.

11.25 The requirements of 'sudden' provocation and of a killing before there is time for the 'passion to cool' in elements two and three may be traced back to the origin of the doctrine in the sudden resort to serious violence between men in the heat of the moment.

11.26 Gleeson CJ in *R v Chhay*⁷²⁸ commented that 'even at common law however, this requirement has been interpreted with a degree of flexibility'.⁷²⁹ In *Chhay* the New South Wales Court of Criminal Appeal held that there is no requirement that the killing immediately follow upon the provocation, and that, in the case of a battered woman, the loss of control may develop after a lengthy period of abuse and without the need for a specific triggering incident.

11.27 At common law a delay between the claimed provocative conduct and the act of killing is treated as a factual matter which bears on whether the defendant killed in a 'sudden and temporary loss of self-control' or not. The New South Wales provocation provision⁷³⁰ has been amended to remove the

⁷²⁸ (1994) 72 A Crim R 1.

⁷²⁹ Ibid 9 citing *R v Ahluwalia* (1993) 96 Cr App R 133, 138–39.

⁷³⁰ *Crimes Act 1900* (NSW) s 23.

requirements that the killing occur suddenly⁷³¹ and immediately after the provocation,⁷³² with the intention of facilitating claims by battered women; however, it is unlikely that the words of the Queensland provision are open to a similar interpretation.

PROVOCATION

11.28 Provocation as it relates to murder is not defined in the Code. The courts in Queensland have accepted that the reference to ‘provocation’ in section 304 of the Code is a reference to the common law meaning of provocation as expounded from time to time,⁷³³ and not to the definition of provocation as a complete defence to assault elsewhere in the Code.⁷³⁴ Applying the common law, conduct can amount to provocation if a reasonable jury could conclude that it might be capable of provoking an ordinary person to retaliate as the accused did.⁷³⁵

11.29 The ordinary person test is an objective threshold test. The High Court considered the ordinary person test in a series of decisions, culminating in *Stingel v The Queen*,⁷³⁶ in which all members of the Court joined in one judgment. The key elements of the test can be discerned in the following passages from *Stingel*. The ordinary person test has two parts. The first part involves an assessment of the gravity of the provocation to the defendant. Of this part the High Court said:⁷³⁷

The central question posed by the objective test — ie of such a *nature* as to be *sufficient* — obviously cannot be answered without the identification of the content and relevant implications of the wrongful act or insult and an objective assessment of its gravity in the circumstances of the particular case. Conduct which may in some circumstances be quite unprovocative may be intensely so in other circumstances. Particular acts or words which may, if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively ...

Even more important, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of

731 *Crimes Act 1990* (NSW) s 23(3)(b).

732 *Crimes Act 1990* (NSW) s 23(2)(b).

733 *R v Callope* [1965] Qd R 456; *Buttigieg v The Queen* (1993) 69 A Crim R 21.

734 Criminal Code (Qld) s 268.

735 *Buttigieg v The Queen* (1993) 69 A Crim R 21, 27 referring to *Parker v The Queen* (1963) 111 CLR 610, 641; *Johnson v The Queen* (1976) 136 CLR 619, 637–8, 658; *Stingel v The Queen* (1990) 171 CLR 312, 324–5.

736 (1990) 171 CLR 312.

737 *Ibid* 325–6.

the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Indeed, even mental instability or weakness of an accused could, in some circumstances, itself be a relevant consideration to be taken into account in the determination of the content and implications of particular conduct. For example, it may be of critical importance to an assessment of the gravity of the last of a series of repeated insults suggesting that the person to whom they are addressed is 'mad' to know that that person has, and understands that he has, a history of mental illness. As Wilson J commented in *Hill ...* [[1986] 1 SCR, at pp 346–347; (1986) 25 CCC (3d), at p 347], the 'objective standard and its underlying principles of equality and individual responsibility are not ... undermined when such factors are taken into account only for the purpose of putting the provocative insult into context'.

11.30 The second part of the test entails asking whether the provocation, so assessed, could have provoked an ordinary person to retaliate as the accused did.⁷³⁸

The 'ordinary person' (sometimes called the 'reasonable person' or 'normal person') was a comparatively late arrival in the law of provocation. The hypothetical 'person' designated by the phrase had, however, become firmly installed by the time of enactment of the Code. The phrase was not then, nor has it since become, 'a term of legal art' in criminal law: see *Camplin ...* [[1978] AC, at p 714]. The function of the ordinary person of s 160 is the same as that of the ordinary person of the common law of provocation. It is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test of s 160(2) relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical 'ordinary person'. Subject to a qualification in relation to age (see below), the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. It will, however, be affected by contemporary conditions and attitudes (see per Gibbs J, *Moffa ...* [(1978) 138 CLR, at pp 616–617]. Thus in *Parker ...* [(1963) 111 CLR, at p 654], Windeyer J pointed out that many reported rulings in provocation cases 'show how different in weight and character are the things that matter in one age from those which matter in another'.

11.31 The test is a composite one. One part involves assessing the gravity of the provocative conduct. On this assessment the subjective characteristics, history and personality of the defendant may all be relevant. The second part involves asking whether the provocation, as assessed, could cause a hypothetical or imaginary ordinary person to lose self-control and act in the way the defendant acted. As the hypothetical ordinary person represents an objective standard, the self-control of the hypothetical ordinary person is unaffected by the distinctive personal characteristics or attributes of the

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Ibid 326–7.

defendant apart from age.⁷³⁹ Instead, the hypothetical ordinary person embodies 'contemporary conditions and attitudes'⁷⁴⁰ in so far as those values bear on self-control.

11.32 *Stingel* provides an example of personal characteristics which, while relevant to an assessment of the gravity of provocation to the defendant, are irrelevant to the question of whether the hypothetical ordinary person could have acted in the way the defendant did.

11.33 The defendant's infatuation with a former girlfriend, and his associated feelings of jealousy, while relevant to an assessment of the gravity of the provocation to him, had to be disregarded for the purposes of the hypothetical ordinary person test because those characteristics 'inevitably detracted from his actual powers of self-control'⁷⁴¹ and, if attributed to the hypothetical ordinary person, would similarly detract from the ordinary person's powers of self-control.

11.34 The hypothetical ordinary person of the test is not an average person, but is a construct intended to represent a minimum standard of conduct.⁷⁴² In formulating the test the High Court drew on Canadian ideas about equality and personal responsibility, quoting from a judgment by Wilson J of the Supreme Court of Canada in *R v Hill*.⁷⁴³ Despite the difficulties in explaining the concept to a jury,⁷⁴⁴ some limiting concept is necessary. If no limiting concept is used, provocation would be available, and murder might be reduced to manslaughter, simply because the defendant failed to exercise any reasonable self-control.

WHAT CONDUCT MAY AMOUNT TO PROVOCATION

11.35 The modern law of provocation is no longer governed by specified categories. Accordingly, a claim of provocation may be founded on any conduct which in fact causes a lethal loss of self-control in the defendant, and which also could have caused the hypothetical ordinary person to kill.

11.36 The statistical information available to the Commission suggests that in Queensland two main groups take advantage of the plea of provocation. The first group are men who kill a partner (or former partner or rival) at or after separation. In all these cases the central dynamic is the exercise by the partner

739 Although McHugh J joined in the court's judgment in *Stingel v The Queen* (1990) 171 CLR 312, in *Masciantonio v The Queen* (1995) 183 CLR 58, 73–4 his Honour strongly disagreed on this issue, arguing that 'true' equality before the law required that the defendant's ethnicity be attributed to the hypothetical ordinary person.

740 *Stingel v The Queen* (1990) 171 CLR 312, 327.

741 *Ibid* 336.

742 *Ibid* 329.

743 (1986) 1 SCR 313 [66].

744 In *R v Yasso* (2004) 148 A Crim R 369, 374, where Charles JA noted that 'the application of this test cannot be easy for a jury to understand, let alone apply'.

(or former partner) of her right to personal autonomy and the man's denial of her right to autonomy.⁷⁴⁵

11.37 The other major group are men who kill other men in situations involving significant violence or the threat of significant violence. The killing may be an act of immediate retaliation, or carried out when significant violence is occurring, or when there is a potential for significant violence. Provocation may be raised at trial in some cases as a fall-back position in case self-defence is rejected by a jury.

11.38 The defence in theory may also be pleaded in any circumstance where the killing is an act of spontaneous retaliation for a serious wrong: the woman who kills her rapist or the man who kills his partner's rapist. A person in the position of the 15-year-old in *R v Camplin*⁷⁴⁶ who had been sodomised by the deceased, then abused verbally, may be able to claim provocation under the Code.

11.39 On the other hand, the battered woman of the literature who kills in a mix of emotions is likely to find it difficult to bring a claim under the Code as it is presently worded because of the requirement of 'sudden provocation', the concept of loss of self-control, and the disqualifying effect of planning.

LOSS OF SELF-CONTROL

11.40 One of the central concepts in the common law test of provocation is that of a temporary loss of self-control by the defendant in circumstances where an ordinary person could also have lost self-control. Consequently, a claim of loss of self-control sits at the centre of every provocation argument. But what exactly is meant by a 'loss of self-control' in the test of provocation? What is reasonably clear is that a loss of self-control in this area of the law is not an absolute state where there is no control over actions; instead, loss of self-control is a matter of degree⁷⁴⁷ — a decision to kill made in a state of intense emotion.

11.41 As Ashworth has observed, the law assumes a rational element in decision making even after a loss of self-control, provided that the loss of control is not total.⁷⁴⁸ On this view, even acting with uncontrolled aggression

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In generalising the category in this way, it is accepted that in any one case the details of an offence may show that the triggering event was other conduct by the deceased (as in the recent case of *R v Mills* [2008] QCA 146, where the triggering event was a combination of aggressive physical acts and a statement that she had deliberately given the defendant a 'gift' of AIDS) but it is argued that the important factor is the man's denial of the woman's right of autonomy.

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[1978] AC 705.

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Johnson v The Queen (1976) 136 CLR 619, 636; *Masciantonio v The Queen* (1995) 183 CLR 58, 68–9; *Phillips v R* [1969] 2 AC 130, 137.

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AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 303. Where the loss of control is total, the defendant may be able to rely on one of the other pleas governing mental capacity (insanity (s 27) or diminished responsibility (s 304A)) or may simply be able to deny the intent to kill.

represents a choice at some level. Such a notion of culpability is not based on concepts of behavioural psychology but on the basic moral assumptions of the law.⁷⁴⁹

11.42 In provocation the common law draws a distinction in culpability between the formation of an intention to kill arising out of hatred, resentment, fear or revenge on one hand, and the formation of an intention to kill (also arising from hatred etc) but following a 'loss of control' induced by an act or acts of the deceased. The distinction is that in one case the killing is premeditated, and in the other it is not (being regarded instead as a spontaneous act of retaliation induced by the deceased's wrongful act).⁷⁵⁰ One of the ways in which the common law drew the distinction was through the requirement of a 'sudden and temporary loss of self-control', which ultimately became the hallmark of the partial defence of provocation.

11.43 A criticism of the term 'loss of self-control' made by the Law Commission of England and Wales is that the term is ambiguous because it may suggest either a failure to exercise self-control or an inability to exercise self-control.⁷⁵¹

The term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control. To ask whether a person could have exercised self-control is to pose an impossible moral question. It is not a question which a psychiatrist could address as a matter of medical science, although a noteworthy issue which emerged from our discussions with psychiatrists was that those who give vent to anger by 'losing self-control' to the point of killing another person generally do so in circumstances in which they can afford to do so. An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to 'lose self-control' and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off-guard.

11.44 While the distinction drawn by the Law Commission is valid in theory, the distinction is irrelevant to criminal responsibility as (provided that the loss of control is not total) legal theory attributes fault to the failure to exercise self-control without embarking on an additional inquiry about whether the failure to exercise self-control arose because the defendant decided not to exercise self-control or because the defendant was incapable of exercising self-control.

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R v Chhay (1994) 72 A Crim R 1, 7 (Gleeson CJ): 'The concept of loss of self-control reflects the idea, fundamental to the criminal law, and related historically to religious doctrine, that mankind is invested with free will, and that culpability consists in the abuse of that faculty.'

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The other factors affecting culpability, such as the requirement of a wrongful act of provocation by the deceased, and the mental state of the defendant, have varied in importance over time. The emphasis the modern law of provocation places on the defendant's mental state at the time of the killing has resulted in one writer observing that 'the mitigation lies in the defendant's diminished power to exercise self-control. The liability lies in failure to exercise the residue of the power of self-control left to the defendant.' D Lanham and others, *Criminal Laws in Australia* (2006) 126.

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Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.28].

What the concept of a sudden loss of control is concerned with in the law of provocation is distinguishing the pre-meditated killing from the spontaneous killing.

FURTHER ANALYSIS OF THE HYPOTHETICAL ORDINARY PERSON TEST

11.45 The purpose of the hypothetical ordinary person test is to establish an objective and uniform standard of self-control expected from all members of the community.⁷⁵²

11.46 A number of criticisms are made of the test: firstly, criticisms that the test is difficult to explain to a jury and difficult for a jury to apply; and secondly, criticisms that the test excludes from consideration characteristics of the defendant (for example, ethnicity) which, in fairness and for reasons of equity, should be considered when the standard of self-control is set for that defendant.

11.47 The particular problems in explanation lie in the dichotomy in attributing the defendant's personal characteristics and history to the hypothetical ordinary person for the purpose of assessing the gravity of the conduct and not attributing those same characteristics to the ordinary person when assessing the ordinary person's power of self-control.⁷⁵³

11.48 This dichotomy was developed by Elias CJ in a detailed critique of the test in *R v Rongonui*.⁷⁵⁴ Elias CJ's criticism is that, because a particular characteristic may affect the defendant's mental function in a way which both exacerbates the gravity of the provocation in the defendant's mind and the power of self-control, it is artificial to incorporate the distinction into the test.⁷⁵⁵ Elias CJ argues that to disregard the defendant's personal characteristics when considering whether the ordinary person, faced with provocation as grave as that faced by the defendant, would have lost self-control unnecessarily complicates the test, is difficult to apply in practice, and is unjust in its application.⁷⁵⁶

11.49 The difficulties of explanation are not assisted by the circumstance that the ideas of 'a loss of self-control' and the 'power of self-control' are difficult concepts, remembering that self-control is not a single characteristic of a person,⁷⁵⁷ like stoicism or strength of will, but is in itself a consequence of other characteristics and beliefs of the person.

⁷⁵² *Stingel v The Queen* (1990) 171 CLR 312, 329.

⁷⁵³ Where the characteristic may affect the power of self-control, it is not to be attributed to the ordinary person of the test.

⁷⁵⁴ [2000] 2 NZLR 385.

⁷⁵⁵ *Ibid* 420.

⁷⁵⁶ *Ibid* 421–422.

⁷⁵⁷ See the discussion in *Jeffrey v The Queen* (1982) Tas R 199, 232–3 (Cosgrove J).

11.50 McHugh J in *Masciantonio v The Queen* argued that the defendant's ethnicity should be attributed to the hypothetical ordinary person:⁷⁵⁸

If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood.

11.51 Australia is a multi-cultural society. Not all of the cultures represented within the Australian community share the same norms of behaviour. In *Yasso*,⁷⁵⁹ for example, evidence was led by the defendant at trial that in Chaldean tradition⁷⁶⁰ a wife's marital infidelity is the source of strong social disapproval, with the potential to result in a life-long smear upon the husband; and the act of a wife spitting at or upon her husband is an insult of such gravity that there is an expectation that a wife would be beaten or killed, if not by her husband then by her family. The question whether norms of behaviour of specific groups in conflict with accepted norms within the broader society should be recognised within the level of self-control expected of all of its members is a very serious question.

11.52 In order to satisfy the principle of equality before the law, the High Court in *Stingel* selected the lowest common level of self-control as the standard.⁷⁶¹ In selecting 'the lowest level of self-control' as the standard, the test will tend to reflect the society's minimum standard. As a result, legislative intervention may be necessary if it is desired to set a higher standard of conduct in some areas of life.

11.53 If provocation as a partial defence is to be retained, then some form of objective test must also be retained. Without an objective standard, provocation would be available to reduce murder to manslaughter whenever an individual lost self-control and killed. An objective test is necessary to enable the law to draw basic moral distinctions.⁷⁶² Ashworth argues that it is intelligible in moral discourse to state that a person was provoked to lose self-control in a situation in which the person ought to have retained self-control.⁷⁶³ An example given by Ashworth relates to children. He argues that no-one should be provoked into a

758 (1995) 183 CLR 58, 74.

759 (2004) 148 A Crim R 369.

760 Both the defendant and his deceased wife belonged to the Melbourne Chaldean community, a small expatriate Iraqi Christian community.

761 *Stingel v The Queen* (1990) 171 CLR 312, 329.

762 An emotion such as anger is intrinsically neither right nor wrong. Context, however, may colour an emotion and, because of context, an emotion may acquire a moral value (for example the anger a man feels towards someone who has just raped his wife is associated with a moral value because it is founded in a wrong (rape) we all recognise as a serious wrong, while the anger a person may feel towards a child, because it may not be founded on a wrong we all recognise as a serious wrong, may have no moral value).

763 AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 318

deadly rage by a young child, and that the defence of provocation should not be available to a person who kills in such circumstances.

11.54 An objective standard, in theory, allows relevant moral distinctions to be drawn; a purely subjective standard does not. Whether the hypothetical ordinary person test of *Stingel* has enabled juries to draw relevant moral distinctions is an important question.

LIMITING RULES

11.55 One limiting rule which is generally accepted as applying to provocation is that the defendant must have personally witnessed the provocation. The New South Wales Court of Criminal Appeal has suggested that the common law had always maintained a policy that provocation required that the defendant have some personal knowledge of the conduct.⁷⁶⁴ Certainly, some reasonable basis should appear from the evidence for the defendant's belief for the provocative conduct.

11.56 At the time Lord Holt CJ in *R v Mawgridge*⁷⁶⁵ endeavoured to state the types of conduct which reduced murder to manslaughter, he also set out a list of conduct which would not reduce murder to manslaughter. Words alone were among the listed conduct which would not reduce murder to manslaughter.⁷⁶⁶ The rule only partially survives today. In *Holmes*⁷⁶⁷ the House of Lords settled on the formula that words could only amount to provocation if they were 'violently provocative'; this is the formulation currently accepted in Queensland. Consistently with the general rule that words cannot normally support a claim of provocation, the House of Lords in *Holmes* held that a confession to adultery

764 *R v Quartly* (1986) 11 NSWLR 332.

765 (1707) Kel 119; 84 ER 1107.

766 *Ibid* 1112–13:

First, no words of reproach or infamy, are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword, or throw a bottle at him, or strike him with any other weapon that may kill him; but if the person provoking be thereby killed, it is murder'.

...

Secondly, as no words are a provocation, so no affronting gestures are sufficient, though never so reproachful ...

...

Thirdly, if one man be trespassing upon another, breaking his hedges or the like, and the owner, or his servant shall upon sight thereof take up at hedge-stake, and knock him on the head; that will be murder, because it was a violent act, beyond the proportion to the provocation ...

...

Fourthly, if a parent or master be provoked to a degree of passion by some miscarriage of the child or servant, and the parent or master shall proceed to correct the child or servant with a moderate weapon, and shall by chance give him an unlucky stroke so as to kill him; that is but a misadventure. But if the parent or master shall use an improper instrument in the correction; then if he kills the child or the servant, it is murder ...

767 [1946] AC 588, 600.

could not support a claim of provocation. Although the effect of the decision in *Holmes* was reversed in England by the *Homicide Act 1957* (UK),⁷⁶⁸ it remains part of the common law.

11.57 The position in Queensland is summarised in *Buttigieg*:⁷⁶⁹

It seems now to be accepted in the cases that the use of words alone, no matter how insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character' (*Moffa* (at 605, 616–617); *Holmes v DPP* [1946] AC 588; (1946) 31 Cr App R 123). A confession of adultery, even a sudden confession to a person unprepared for it, is never sufficient without more to sustain this defence: *Holmes* (at 600; 141); *Tsigos* [1964-5] NSW 1607 at 1610; *Moffa* (at 619). It is however the combination of circumstances that needs to be evaluated.

11.58 A third limiting rule found in the early texts prevents reliance on any act of provocation which was invited or induced by the defendant.⁷⁷⁰

11.59 Finally, the rule that lawful conduct cannot amount to provocation no longer limits the scope of manslaughter provocation.

11.60 As the law has developed the original categories are now only part of the history of provocation, and any conduct which causes a loss of self-control will qualify as provocation if the hypothetical ordinary person of the test could have reacted to the provocation in the way in which the defendant reacted; or, cast in terms of the onus of proof, the conduct will qualify as provocation unless the prosecution satisfies the jury beyond reasonable doubt that the hypothetical ordinary person of the test could not have reacted to the conduct in the way in which the defendant acted.

A RECENT DECISION OF THE QUEENSLAND COURT OF APPEAL

11.61 On 25 July 2008, the Court of Appeal delivered a judgment about provocation.⁷⁷¹ The appellant killed his father. He unsuccessfully raised provocation at trial and was convicted of murder. He appealed against his conviction on several grounds, including an argument that the trial judge had misdirected the jury about provocation.

11.62 A witness provided some evidence of provocation in her testimony about a conversation she had had with the appellant after the killing. The trial judge directed the jury that they had to be satisfied that the appellant said those things to the witness and that they were true. Later during the summing up, the

⁷⁶⁸ *Homicide Act 1957* (UK) s 3.

⁷⁶⁹ *Buttigieg v The Queen* (1993) 69 A Crim R 21, 37.

⁷⁷⁰ AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 295 citing Hale, 1 PC 457 and East, 1 PC 239 as the sources of this rule.

⁷⁷¹ [2008] QCA 205. The Court of Appeal ordered a re-trial in the matter.

trial judge told the jury that they had to do ‘a lot of fact-finding on the basis of the evidence [they accepted] in relation to this question of gravity of the provocation to [the appellant]’. The summing up included another statement to the same effect. The appellant’s counsel argued that, although the trial judge had correctly directed the jury that the prosecution had to negative provocation, these statements about fact-finding had a tendency to create a false impression about the prosecution’s duty to exclude provocation beyond reasonable doubt: the jury did not have to find certain facts.

11.63 The Court allowed the appeal on this ground. The directions about fact-finding may have reversed the onus of proof (McMurdo P, with whom Fryberg J agreed) or caused confusion (Lyons J).

11.64 McMurdo P said:⁷⁷²

Because the onus of proof lay on the prosecution to establish beyond reasonable doubt that the appellant was not acting under provocation when he killed his father, it was not necessary for the jury to be positively satisfied both that the appellant did say these things to [the witness] and that they were true. It was sufficient if the jury considered that he may have said those things to [the witness] and they may have been true when determining whether the prosecution had proved beyond reasonable doubt that the appellant was not acting under provocation. As Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ state in *Stingel v The Queen*:⁷⁷³ ‘... a defence of provocation ... falls to be resolved by reference to the version of events most favourable to the accused’ and ‘... in a case where the evidence gives rise to a question of provocation, the onus lies on the Crown to disprove provocation beyond reasonable doubt.’⁷⁷⁴

[The trial judge’s] further statement to the jury,⁷⁷⁵ suggesting that the jury had to find positive facts in considering provocation was also apt to lead the jury into error as to the onus of proof. As Callinan J said about the somewhat analogous matter of directions to a jury on the defence of accident in *Stevens v The Queen*:⁷⁷⁶ ‘... it is not necessary for an accused in order to be acquitted, to establish any facts, matters or inferences from them’. The jury did not have to conclusively find any facts or draw any inferences before considering provocation. In determining whether the prosecution had disproved provocation beyond reasonable doubt, the jury was required to consider the version or versions of the facts and inferences most favourable to the appellant that were reasonably open from the evidence. Then the jury was required to consider whether the prosecution had satisfied them beyond reasonable doubt that:

⁷⁷² [2008] QCA 205, [6]–[7].

⁷⁷³ (1990) 171 CLR 312, 318.

⁷⁷⁴ *Ibid* 332–3.

⁷⁷⁵ ‘So, what I am saying to you is that you have got to do a lot of fact finding on the basis of the evidence that you accept in relation to this question of the gravity of the provocation to [the appellant].’

⁷⁷⁶ (2005) 227 CLR 319, 371.

- 1 the potentially provocative conduct of the deceased did not occur; or
- 2 an ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
- 3 the appellant did not lose self-control; or
- 4 the loss of self-control was not caused by the provocative conduct; or
- 5 the loss of self-control was not sudden (for example, the killing was pre-meditated); or
- 6 the appellant did not kill while his self-control was lost; or
- 7 when the appellant killed there had been time for his loss of self-control to abate.

If the jury were satisfied of any of those seven things beyond reasonable doubt, then they had to find the appellant guilty of murder. Otherwise, they had to find the appellant not guilty of murder but guilty of manslaughter.

11.65 The significance of this judgment for the purposes of this review is in its clear statement of the 'elements' of provocation in the current law of Queensland, expressed in terms of the prosecution's task in negating the defence.

Chapter 12

Provocation: data on intimate partner homicide

INTRODUCTION	225
DATA	226
Intimate partner homicides per year	226
Intimate partner homicides as a percentage of all homicides	226
Gender of offender	226
History of violence	227
Place at which offence committed	227
Reason for killing	227
Alcohol and drugs	227
USE OF THE PROVOCATION DEFENCE	228
Queensland and the DJAG Audit	228
New South Wales	230
Victoria	232

INTRODUCTION

12.1 To provide some context for the discussion of the use of provocation as a partial defence to murder, the Commission has considered some recent statistics on intimate partner homicides, and other relevant data.

12.2 Studies over the years consistently demonstrate that men and women kill under different circumstances. Speaking generally, in the context of intimate partner homicides, men who kill their intimate partners (or their love rivals) are more likely to kill out of jealousy, to maintain control, in response to losing control of another person or to defend their ‘honour’. Women are more likely to kill in fear or despair — to protect themselves or their children against a violent partner.⁷⁷⁷

12.3 It is not uncommon for men who kill their intimate partners to raise the defence of provocation on the basis that they were provoked to kill by their partner’s infidelity, insults or threats to leave the relationship.

12.4 Generally, women kill their partners when it is ‘safe’ to do so and with some planning. Those circumstances do not readily invite the application of the provocation defence.

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P Dobash and R Dobash, ‘Women’s Violence to Men in Intimate Relationships: Working on a Puzzle’ (2004) 44 *British Journal of Criminology* 324, 343.

DATA

Intimate partner homicides per year

12.5 In Australia between 1989 and 2002 there were, on average, 77 intimate partner homicides each year.⁷⁷⁸

12.6 In 2003–2004⁷⁷⁹ there were 71 intimate partner homicides.⁷⁸⁰ There were 66⁷⁸¹ in 2004–2005,⁷⁸² and 74⁷⁸³ in 2005–2006.⁷⁸⁴ This is more than one a week.

Intimate partner homicides as a percentage of all homicides

12.7 In 2005–2006, 21 per cent of all homicides in Australia were intimate partner homicides.⁷⁸⁵

12.8 In the same year in Queensland, 29 per cent of all homicides were intimate partner homicides.⁷⁸⁶

Gender of offender

12.9 A study examining national homicide data from 1989 to 2002 found that 75 per cent of intimate partner homicides involved men killing women.⁷⁸⁷

12.10 In 2005–2006, 80 per cent of intimate partner homicides involved men killing women.⁷⁸⁸

778 J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 2.

779 1 July 2003–30 June 2004.

780 J Mouzos, *Homicide in Australia: 2003–2004 National Homicide Monitoring Program Annual Report* (2004) 16.

781 J Mouzos and T Houliaras, *Homicide in Australia: 2004–05 National Homicide Monitoring Program Annual Report* (2005) 20.

782 1 July 2004–30 June 2005.

783 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 24.

784 1 July 2005–30 June 2006.

785 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 23.

786 Ibid.

787 J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 2.

788 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006), 24.

History of violence

12.11 In intimate partner homicides there is often a history of physical violence. A national study of homicide data from 1989 to 2002 found that 39 per cent of intimate homicides occurred between partners with a known history of domestic violence.⁷⁸⁹

12.12 More recent data shows an increase. In 53 percent of the 74 intimate partner homicides committed in 2005–2006, there was a history of domestic violence, and a current or expired intervention order in 12 per cent.⁷⁹⁰

Place at which offence committed

12.13 In 2005–2006, consistent with earlier data,⁷⁹¹ 78 per cent of the intimate partner homicides occurred in private homes.⁷⁹²

Reason for killing

12.14 Twenty-nine per cent of intimate partner homicides committed between 1989 and 2002 were believed to stem from jealousy, desertion or termination of the relationship.⁷⁹³

12.15 Recent results are similar. Jealousy apparently motivated 14 per cent of the intimate partner homicides committed in 2005–2006. The end of the relationship apparently motivated another 14 per cent, and 58 per cent arose out of a domestic argument.⁷⁹⁴

Alcohol and drugs

12.16 In 2005–2006, 28 per cent of intimate partner homicides involved both parties having consumed alcohol just before the incident. Just over one in 10

789 Ibid.

790 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 25.

791 Four out of five intimate partner homicides committed between 1 July 1989 and 30 June 2002 occurred in a private dwelling: J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 3.

792 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 24.

793 J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 3.

794 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 25.

intimate partner homicides involved both parties having consumed illicit or prescription drugs just before the incident.⁷⁹⁵

USE OF THE PROVOCATION DEFENCE

Queensland and the DJAG Audit

12.17 In its review of the defence of provocation to murder,⁷⁹⁶ the Commission was required to have particular regard to the results of the Attorney-General's audit of homicide trials on the nature and use of the excuse of accident and the partial defence to murder of provocation.⁷⁹⁷ The audit was undertaken by the Department of Justice and Attorney-General. It was conducted by way of a review of a selection of murder and manslaughter trials conducted during the period between July 2002 and March 2007.

12.18 Of the 131 defendants charged with murder in that period, 101 were tried by jury. The audit team analysed 80 of those trials. The audit of manslaughter trials is not relevant to this present discussion.

12.19 The results of the audit are contained in the Department's Discussion Paper, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, which was published in October 2007 (the 'DJAG Discussion Paper'). The conclusions of the review team drawn from the audit were as follows:

- In the 80 murder trials reviewed, provocation was raised as a defence in 25 trials;
- Eight of those 25 defendants were found not guilty of murder;
- Four of those eight were found guilty of manslaughter by the jury;
- One of those eight pleaded guilty to manslaughter;⁷⁹⁸
- The remaining three were acquitted of manslaughter;
- In two of the 25 cases in which provocation was raised, it was the *only* defence raised;

⁷⁹⁵

Ibid 24–5. In 2005–2006, in intimate partner homicides where the deceased and the offender were Indigenous Australians (24 per cent of the intimate partner homicides committed in 2005–6) either or both were under the influence of alcohol in 92 per cent of cases. Alcohol was involved in 39 per cent of intimate partner homicides involving non-Indigenous Australians (76 per cent of the intimate partner homicides committed in 2005–2006).

⁷⁹⁶

The terms of reference are contained in Appendix 1 to this Report.

⁷⁹⁷

Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, October 2007.

⁷⁹⁸

Presumably at the commencement of the trial, a plea which was not accepted by the prosecution.

- One of those cases was *R v Sebo*,⁷⁹⁹ who was acquitted of murder but convicted of manslaughter. The other defendant was convicted of murder.

12.20 The audit team considered in detail the circumstances of the eight cases which raised the defence of provocation (either as the only defence or in combination with other defences) and which resulted in a defendant's complete acquittal of murder and manslaughter⁸⁰⁰ or a manslaughter verdict.⁸⁰¹ The following observations are drawn from the audit team's summary of the circumstances of each of those cases, contained in table 5 of the DJAG Discussion Paper, and adopt the audit team's numbering of cases.⁸⁰²

12.21 In the three cases in which there was a complete acquittal of murder and manslaughter:

- Self-defence explained the acquittal in MU9;
- Self-defence explained the acquittal in MU45 (the defendant pleaded guilty to interfering with a corpse);
- The acquittal in MU59 was probably based on the accident excuse.⁸⁰³

12.22 In the five cases in which the defendant was acquitted of murder but convicted of manslaughter:

- The manslaughter verdict was based on diminished responsibility in MU28;
- Provocation, self-defence and intoxication were raised as defences to the murder charge in MU65. This was a re-trial. At the first trial, the defendant had been convicted of murder. The Court of Appeal concluded that the jury had not been properly directed on intoxication as relevant to the intent element for murder. Intoxication was the major issue in the case and the verdict of guilty of manslaughter may well have been based on a conclusion by the jury that the Crown had not satisfied them beyond reasonable doubt that the defendant formed a murderous intent.

799 [2007] QCA 426.

800 Indicating the success of a defence other than provocation.

801 A jury is required to consider the defence of provocation only if they are satisfied that the defendant killed the deceased with murderous intent. If a jury has a reasonable doubt about the defendant's murderous intent, but is otherwise satisfied beyond reasonable doubt that the defendant unlawfully killed the deceased, then they may return a verdict of manslaughter on that basis.

802 Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, October 2007, 39.

803 MU59 is the case of *R v Little*, one of the cases which prompted the Department's audit.

- Provocation and intoxication were raised as defences in MU74. The intoxicated defendant argued with his sober father. The defendant accused his father of sexually abusing the defendant's daughter. His father made no reply. The defendant asked his daughter a question and interpreted her response as indicating that her grandfather had sexually abused her. The defendant's father remained silent, and the defendant stabbed him in the heart. The audit team considered intoxication (relevant to the defendant's intention) a significant issue at trial. However, the trial judge sentenced the defendant on the basis that he had formed an intention to do grievous bodily harm, which means that the trial judge concluded that the jury had convicted of manslaughter because the prosecution had not proved beyond reasonable doubt that the defendant did not kill in response to provocation.⁸⁰⁴
- In MU87, the deceased was the defendant's wife. During an argument, he accused her of having an affair and lying about it. She said she would leave him and take custody of the children and the house. He assaulted her by bashing her head against the floor tiles and strangling her with a dog leash. Evidence was led at trial that he suffered from dysthemia and an anxiety disorder, and had a personality disorder involving depressant, avoidant and obsessional behaviour. The defendant was sentenced on the basis of provocation. The trial judge rejected the suggestion that he was suffering from diminished responsibility.
- In MU88, the deceased was a teenage girl who taunted the defendant about her relationships with other men. The defendant admitted unlawfully killing her. The only issue at trial was provocation, which was successful.⁸⁰⁵

12.23 The audit team observed that where more than one defence was left to the jury which, if accepted, might have resulted in a manslaughter verdict, it could draw 'no firm conclusions' about whether the manslaughter verdict was due to the jury's acceptance of the provocation defence.⁸⁰⁶

New South Wales

Provocation based on infidelity or the breakdown of a relationship 1990–2004

12.24 The Judicial Commission of New South Wales conducted an extensive study of homicide cases which were finalised between January 1990 and

804 This is the case of *R v Perry*, which is discussed at [13.49]–[13.53] below.

805 This is the case of *R v Sebo*, one of the cases which prompted the Department's audit, and which is discussed in more detail at [13.111]–[13.125] below.

806 Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, October 2007, 40.

September 2004. The study focussed on partial defences to murder, including provocation.⁸⁰⁷

12.25 During the relevant period, 897 offenders were convicted of murder of manslaughter. Two hundred and thirty-two offenders raised one or more partial defences (provocation, diminished responsibility, substantial impairment or excessive self-defence).⁸⁰⁸

12.26 Provocation was raised in 115 murder cases.⁸⁰⁹ The defence was successful at trial, or a plea to manslaughter on the basis of provocation was accepted by the prosecution, in 75 cases (65 per cent).⁸¹⁰ Provocation was successfully claimed as a defence in the context of infidelity or the breakdown of a relationship in 11 murder cases:⁸¹¹

- In seven of those 11 cases, the Crown accepted a plea to manslaughter based on provocation;
- In the other four cases, a jury accepted the defence at trial;
- In each case, the defendant was male;
- In two cases, the victim was the defendant's wife;
- In two cases, the victim was the homosexual partner of the defendant;
- In the other seven cases, the victim was the male sexual rival of the defendant.

Provocation based on a homosexual advance 1990–2004

12.27 In New South Wales between 1990 and 2004 provocation was successfully claimed as a defence where it was alleged that the victim had made a homosexual advance in 11 murder cases:⁸¹²

- In five of the 11 cases, there was an allegation of a sexual assault (either immediately or some weeks, months or years before the killing) or other aggressive contact by the deceased upon the defendant;⁸¹³

807 Judicial Commission of New South Wales, *Partial Defences to Murder in New South Wales 1990–2004* (2006) 36–8.

808 Ibid 6.

809 Ibid.

810 Ibid 37.

811 Ibid 42. There is no data on the number of times the defence was unsuccessful in the same factual context during that period.

812 Ibid 38.

813 Ibid 43–4.

- In two of the 11 cases, the defendant successfully raised provocation on the basis of a non-violent sexual advance,⁸¹⁴ although more recently a New South Wales jury rejected provocation on that same basis.⁸¹⁵

Provocation claimed by women on the basis of a partner's violence

12.28 In New South Wales, between 1994 and 2004, there were 13 cases in which a defendant successfully relied on provocation in the context of violence committed by the victim against the offender in a domestic setting.⁸¹⁶

12.29 Ten female defendants who had killed their husbands after a history of physical abuse successfully claimed provocation.⁸¹⁷

12.30 Three male defendants who each claimed that their wife hit him during an argument successfully claimed provocation.⁸¹⁸

Victoria

12.31 The Victorian Law Reform Commission (VLRC) published a study of homicide prosecutions⁸¹⁹ in Victoria over the period 1 July 1997 to 30 June 2001,⁸²⁰ although the VLRC acknowledged that the information it collected about the defences to homicide was far from complete.

12.32 The VLRC found:

- Provocation was raised as a defence in 14 of 38 sexual intimacy homicide trials;⁸²¹
- In 12 of those 14 cases, the defendant was male;⁸²²
- 11 of those 12 cases involved men killing women in circumstances of jealousy or control. The 12th case involved the killing of a sexual rival;⁸²³

814 Ibid 44.

815 *R v Hodge* [2000] NSWSC 897 [13].

816 Judicial Commission of New South Wales, *Partial Defences to Murder in New South Wales 1990–2004*, (2006) 45. There is no data on the number of times the defence was unsuccessful in the same factual context during that period.

817 Ibid.

818 Ibid 45–6.

819 Which had proceeded beyond committal.

820 Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003).

821 Ibid [3.36].

822 Ibid [3.25] Table 14.

823 Ibid [3.26].

- The defence was successfully raised in four of the 14 cases;⁸²⁴
- In the two cases in which the defendant was female, it was alleged that male violence provoked the killing. Neither female defendant successfully raised the defence.⁸²⁵

824 Ibid [2.93] Table 13.

825 Ibid [3.30].

Chapter 13

Queensland cases on provocation

INTRODUCTION	234
MURDER REDUCED TO MANSLAUGHTER.....	235
<i>R v Auberson</i> (sentenced 15 May 1996)	236
<i>R v Smith</i> (sentenced 23 November 1999).....	237
<i>R v De Salvo</i> (sentenced 6 September 2001)	238
<i>R v Dhoother</i> (sentenced 22 May 2002)	239
<i>R v Perry</i> (sentenced 6 February 2004).....	240
<i>R v Folland</i> (sentenced 25 February 2004)	241
<i>R v Schubring</i> (sentenced 17 June 2004).....	242
<i>R v Mirasol</i> (sentenced 1 October 2004)	247
<i>R v Middleton</i> (sentenced 3 December 2004)	248
<i>R v Budd</i> (sentenced 19 October 2006)	249
<i>R v Dunn</i> (sentenced 26 February 2007).....	249
<i>R v Sebo</i> (sentenced 30 June 2007)	251
<i>R v Mills</i> (sentenced 29 January 2008).....	258
OBSERVATIONS	261
CASES IN WHICH PROVOCATION HAS NOT BEEN SUCCESSFUL	262
<i>R v Corcoran</i>	262
<i>R v Poonkamelya</i> (sentenced 16 September 2004)	263
<i>R v Exposito</i> (sentenced 4 July 2006)	264
<i>R v Abusoud</i> (sentenced 17 April 2008)	265
OBSERVATIONS	265
WOMEN CONVICTED OF MANSLAUGHTER OF AN INTIMATE PARTNER.....	265
<i>R v Benstead</i> (offence occurred 29 December 1993)	265
<i>R v Babsek</i> (sentenced 4 June 1999).....	266
<i>R v Bob; ex parte Attorney-General (Qld)</i> (Appeal heard 21 March 2003).....	269
<i>R v Brown</i> (sentenced 10 September 2003).....	270
<i>R v Saltner</i> (sentenced 28 October 2004)	272
<i>R v Griffin</i> (sentenced 13 May 2005)	272
<i>R v Pivar</i> (sentenced 26 June 2006).....	273
<i>R v Knox</i> (sentenced 31 July 2006)	275
OBSERVATIONS	275
MANSLAUGHTER VERDICTS NOT BASED ON PROVOCATION	276
<i>R v Whiting</i> (sentenced July 1994)	277
<i>R v Green</i>	277
<i>R v Miguel</i> (sentenced August 1994).....	278

INTRODUCTION

13.1 This chapter contains a discussion of cases relevant to this review. It is not an exhaustive review of the cases but rather the presentation of relevant examples from Queensland.

13.2 The Commission has set out the pertinent details of several Queensland cases in which provocation as a partial defence to murder was accepted, either by the jury at a murder trial or by the prosecution. These cases provide illustrations of the sort of conduct which has been considered provocative (in the context of an intimate partner killing and otherwise). For those matters taken on appeal, a discussion of the appellate decision has also been included.

13.3 There have been cases, of course, in which the defence of provocation has not been successful (in the case of intimate partner killing or otherwise). This chapter contains some cases in which a jury have rejected the defence of provocation in intimate partner homicides.

13.4 The Commission has also included cases in which women have killed a partner or former partner after a failed relationship, in the course of an argument or after years of abuse. The Commission considers more closely the position of the battered person who kills their abuser in Chapter 15.

13.5 The Commission's research revealed other cases in which manslaughter verdicts were returned in circumstances suggesting the motive was possessiveness or jealousy, but where provocation was not relied upon as a defence.

MURDER REDUCED TO MANSLAUGHTER

13.6 In the cases which follow, the defendant relied upon provocation to reduce murder to manslaughter. In each case discussed, the Commission has noted the words or conduct relied upon as provocation.

13.7 In determining whether there is sufficient evidence of provocation to leave the issue to the jury, the evidence is to be considered from the point of view most favourable to the defendant.⁸²⁶ Commonly, the evidence of provocation comes only from the defendant. If a jury do not accept that the provocation alleged in fact occurred, then the defence will fail.

13.8 In accordance with the onus of proof, defendants do not have to satisfy the jury (to any standard) that they committed the fatal act in the heat of passion after sudden provocation and before there was time for their passion to cool.⁸²⁷ Assuming an intention to kill has been proven by the prosecution beyond reasonable doubt, the defendant will be guilty of manslaughter unless the jury is satisfied, beyond reasonable doubt, that the prosecution has negated provocation.

826 *Stingel v The Queen* (1990) 171 CLR 312, 318.

827 Criminal Code (Qld) s 304.

13.9 A jury considers provocation only once they have determined that the defendant is guilty of murder (an intentional killing) beyond reasonable doubt. If the jury are not satisfied beyond reasonable doubt that the defendant committed the fatal act with an intention to kill or do grievous bodily harm, then (subject to any other defences raised) they must return a verdict of guilty of manslaughter, and there is no need for them to consider the defence of provocation.

R v Auberson (sentenced 15 May 1996)⁸²⁸

13.10 Auberson was convicted by a jury of manslaughter. He killed his wife. Provocation and diminished responsibility were issues for the jury. They returned a verdict of ‘guilty of manslaughter with provocation’.

13.11 Auberson and his wife had been together for eight years and married for four. On 31 December 1994 his wife left their home, taking their 18-month-old son with her.

13.12 Auberson was emotionally and financially dependent on his wife. He suspected that she had been having an affair and he became depressed when she left him. On 15 January 1995, he invited her to return to discuss the possibility of the resumption of their marriage: he had recently found employment after a long period of unemployment.

13.13 At 8.30 am on 16 January 1995 his wife arrived at their home. She was dead within seven minutes. The only explanation for her death was contained in Auberson’s interview with police, which took place a couple of hours after the killing. The following summary is taken from the judgment of Fitzgerald P and de Jersey J.⁸²⁹

He said that his wife ‘looked around, sat down, started showing me a piece of paper ... to change the phone number’ and that he ‘tried to persuade her and talk to her and give me all your reasons why you’re leaving ...’. According to the appellant, she said, ‘No, it’s over, there’s nothing to explain’. He then said, ‘Have you got a boyfriend or something, and she sort of hummed and arred and then she said, yes I have’, and the appellant added, ‘I sort of knew that all along’. In his interview, the appellant then stated that his wife said, ‘I am gonna go for all the money I can, go for your super’. Later in the interview, he said, ‘I just fell [sic] that she kept coming back because she wanted to make a go of it but she kept twisting me around. She kept saying a lot of things that just didn’t add up.’ He was asked how he felt about her having another boyfriend and he said, ‘I dunno, I just, the hairs on the back of my neck went up, and I just went wild.’ Later, when asked what he did, he said, ‘I was just standing there and she said: — ‘Yeah’. She said ‘I going [sic] for more money too. I’ll take your super. So I can set me and the kid up.’

13.14 Auberson then strangled his wife, beat her over the head with bathroom scales at least twice and cut her throat with a Stanley knife.

828 [1996] QCA 321.

829 Ibid 3–4.

13.15 He told police that he could not remember much after he began to strangle her, but he later told a psychiatrist that he released his strangle-hold but recommenced the assault when his wife said to him, 'You'll regret that'.

13.16 Auberson then attempted suicide by driving his car over a 40 metre cliff, but he sustained only minor injuries.

13.17 He was sentenced to imprisonment for nine years.

13.18 The Attorney-General appealed against sentence, arguing that it was manifestly inadequate: it failed to reflect the gravity of the offence and gave too much weight to mitigating factors.

13.19 Auberson appealed against conviction and sentence. In his sentence appeal, he referred to his depression and the opinion of a psychiatrist that the killing occurred because of 'quite clearly a severe loss of control from an otherwise placid man' who 'wanted a resumption of the marriage and was attempting reconciliation with his wife', who 'taunted him in return'.⁸³⁰

13.20 Auberson's appeal against conviction was dismissed. In considering his appeal against sentence, Fitzgerald P and de Jersey J observed.⁸³¹

Statements which the appellant made to police in the course of his interview suggested that he had little recall of the attack on his wife, 'didn't want to kill her', 'half way through ... just didn't know what to do'. He said that it 'happened so quick ... I didn't have any feelings ...', and that he was not thinking about anything, 'I was going to end my life anyway'. Emphasis was placed upon the psychiatric evidence that the appellant was a vulnerable personality who was very dependent upon his wife, and was suffering an 'adjustment disorder' associated with depression and disturbed emotions.

13.21 Their Honours considered that the sentence imposed was at or near the bottom of the range, but was not so low as to justify the Court's interference. Pincus JA concurred.

13.22 The provocation relied upon was the deceased's confirmation that her relationship with Auberson was over, her confirmation of a new relationship, and her threat to seek all the money she could.

R v Smith (sentenced 23 November 1999)

13.23 Smith was convicted by a jury of manslaughter. He killed his pregnant partner.

13.24 Smith and the deceased had been in a relationship for three years. They had a daughter who was 11 months old. The deceased was six months

830 Ibid 6.

831 Ibid.

pregnant with their second child. They had both been drinking on the day the deceased was killed. Smith went home first with their daughter. The deceased came home about midnight, drunk.

13.25 Smith claimed that when she got home, she put on loud music and got their daughter out of bed, making her cry. He said she insulted him and swore at him: she did not want his mother in the house, and she was going to get 'Julie' to bash her. He said she said to him 'I only want the kids, I don't want you. You won't even fuck me; all you want is the kids'.

13.26 There was other evidence about the provocation alleged by Smith. A neighbour testified that she heard the deceased say 'Fuck. All you want is a fuck, and I'm left to bring up those kids. I'm not fucking-well having it'.

13.27 Smith said the deceased was shaping up to fight. He punched her in the head, and got her behind the ear. He kicked her and she fell. As he was about to walk down the hallway, having picked up their daughter, she said 'Is that all you've fucking got?' He said she came at him again, and he pushed her away. She said 'You fucking cunt. Why don't you fuck off to your sister's?'

13.28 Smith said he got so angry that he 'lost it completely'. He said he pushed her head into the floor three or four times. He said the deceased went quiet, and he said she started to 'snore'. He left her there and went to bed.

13.29 He said he woke later to find blood coming from her head and ears. He dragged the deceased, who was then just barely alive, to a car and drove her to the hospital, where she and her unborn baby died.

13.30 The deceased's skull was fractured through the bone from ear to ear. Her injuries were consistent with Smith having rammed her head repeatedly into the floor. The injuries she suffered were as severe as those seen in car accidents.

13.31 Smith was 31 years old. He had previous criminal convictions. A sentence of nine years' imprisonment was imposed. It was declared that he had been convicted of a serious violent offence.

On appeal: R v Smith⁸³²

13.32 Smith appealed against the sentence, arguing that there should have been no declaration. He was not successful.

R v De Salvo (sentenced 6 September 2001)

13.33 De Salvo was convicted by a jury of manslaughter.

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[2000] QCA 169.

13.34 He and the deceased were involved in the drug trade. The deceased bore a grudge against De Salvo, and was waiting for De Salvo at a railway station. De Salvo arrived at the station. The deceased came over to him (De Salvo was in his car) and aggressively challenged him. De Salvo got out of the car, realised that the deceased was unarmed, and stabbed him.

13.35 The trial judge observed that any provocative conduct by the deceased was minor and did not warrant De Salvo's reaction. De Salvo had previous convictions for offences of violence, and he was addicted to drugs. He was sentenced to imprisonment for eight years, with a declaration that he had been convicted of a serious violent offence, requiring him to serve 80 per cent of that term of imprisonment before his eligibility for parole arose.

13.36 The provocation relied upon was the aggression of the deceased.

On appeal: *R v De Salvo*⁸³³

13.37 De Salvo successfully appealed against his sentence. The arguments on appeal concerned the circumstances in which a declaration that a person had been convicted of a serious violent offence should be made.

13.38 McPherson JA, with whom Williams JA agreed, Byrne J dissenting, considered that there was no special feature of the case which warranted the declaration. His Honour considered that the appropriate head sentence for a homicide by deliberate stabbing was within the range of 10 to 12 years' imprisonment. Because of De Salvo's remorse and his offer to plead guilty to manslaughter before trial, he was sentenced to nine years' imprisonment (with parole eligibility arising after four and a half years).

***R v Dhoother* (sentenced 22 May 2002)**

13.39 Dhoother was convicted of manslaughter by a jury. He killed his wife.

13.40 During his interview with police Dhoother said that it was anger which dictated his actions, suggesting that the jury's verdict was based on provocation.

13.41 Two of their three children, members of their family and neighbours gave evidence of the domestic relationship of Dhoother and the deceased but none suggested a history of physical violence between them.

13.42 Dhoother and the deceased had been married for 15 years. Neither of their families was in favour of the marriage, creating tension. There was disharmony and arguments from the time of the birth of their first child.

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[2002] QCA 63.

13.43 In 1997 the deceased obtained a domestic violence order against Dhothar, based on her complaints of significant violence and threats of violence, but thereafter they had reconciled, and no other evidence was led about that violence.

13.44 On the evening of 4 January 2001, there was stress about the failing retail business which had been bought for the deceased to operate, and a major grievance about an imminent family party. Dhothar and the deceased went to bed angry. The deceased woke Dhothar at 3.30 am and offered him a coffee. She urged him to drink it immediately, and suggested it would help him sleep. The coffee made him feel dizzy and he asked her what was in it. Her responses suggested to him that she was attempting to poison him.

13.45 Dhothar became angry, and began squeezing her throat. He climbed above the deceased on the bed and maintained pressure for five minutes — during which time she kicked and struggled — until she died.

13.46 The brown liquid left in the coffee cup Dhothar said the deceased had given him contained oxazepan (a sedative) — the equivalent of two tablets of Murelax (a therapeutic dose). Oxazepan was found in the deceased's body, consistent with her having taken two Murelax tablets. Dhothar's blood test revealed the same result — although he denied taking the tablets himself and told ambulance officers that he vomited minutes after strangling the deceased.

13.47 Dhothar had no previous convictions. He came from India as a young man and was 50 years old at trial. He was sentenced to imprisonment for eight years.

13.48 The provocation relied upon was Dhothar's belief that the deceased was trying to poison him.

R v Perry (sentenced 6 February 2004)⁸³⁴

13.49 Perry was convicted by a jury of manslaughter. He killed his father.

13.50 The trial judge considered that the verdict was explicable on the basis that the jury were not satisfied beyond reasonable doubt that the prosecution had excluded provocation. However, the trial judge said, 'But if provocation there was, it can only be viewed as minimal'.

13.51 Perry was drunk on bourbon. His father was sober. They argued about dogs, dog food and the possibility of the deceased's preferential treatment of one of Perry's children. That led to Perry's accusing his father of sexually abusing one of his children. The deceased remained silent in the face of the allegation. Perry called his four-year-old child into the room and questioned her. He interpreted her responses as confirming that she had been

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Indictment No 312 of 2003.

sexually abused by the deceased. Perry yelled at the deceased, who maintained his silence. He picked up a knife and stabbed the deceased in the heart.

13.52 He had offered a plea to manslaughter, which was not accepted by the prosecution. He was sentenced to imprisonment for nine years.

13.53 The provocation relied upon was the deceased's silence in the face of allegations that he had sexually abused Perry's daughter (taken by Perry as an admission).

R v Folland (sentenced 25 February 2004)

13.54 Folland was convicted of manslaughter after a trial.

13.55 Folland, his brother (Kym) and the deceased had been drinking at Kym Folland's house. The deceased had a blood alcohol level of 0.156 per cent.

13.56 The deceased became agitated during a telephone conversation with his partner, and became violent towards Folland, even though he had nothing to do with the reason for the deceased's agitation. As a result of their altercation, Folland sustained three broken ribs and bruising near his right eye.

13.57 The deceased left Kym Folland's house. He crossed the road and was on or near the footpath on the other side of the road. Folland got into his car and drove it on to the street. He reversed it (away from the deceased), and the rear of the car collided with a light pole on the side of the road opposite the house, shattering the rear tail light. Then he drove forward, partly travelling on the footpath until the front driver's side mudguard struck a tree and the car ran completely over the deceased. The deceased was struck 20 metres from the light pole. The jury were entitled to conclude that Folland intentionally drove his car at the deceased.

13.58 The trial judge considered that the jury's verdict was based on provocation rather than criminal negligence. Folland had engaged in angry retribution of the deceased's attack upon him. He was sentenced to nine years' imprisonment, with a declaration that he had been convicted of a serious violent offence, requiring him to serve 80 per cent of that term of imprisonment before his eligibility for parole arose.

13.59 The provocation relied upon was the deceased's attack upon Folland.

On appeal: R v Folland⁸³⁵

13.60 Folland unsuccessfully appealed against his conviction and sentence. Williams JA, with whom de Jersey CJ and Philippides J agreed, found that the

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[2004] QCA 209.

verdict was not unsafe and unsatisfactory and was supported by the evidence. The sentence imposed was appropriate because of the high level of violence and the absence of remorse.

R v Schubring (sentenced 17 June 2004)⁸³⁶

13.61 Schubring bashed and strangled his wife to death during an argument.

13.62 He was tried for murder. He pleaded guilty to manslaughter, but the prosecution did not accept his plea in discharge of the indictment, and the trial proceeded. The jury acquitted him of murder, and convicted him of manslaughter.

13.63 The deceased regularly complained of pain, which she falsely told people was from breast cancer. (The trial judge considered that it was probably psychosomatic.) Schubring refused to pay for her attendance at a pain clinic and they argued.

13.64 Schubring went to work. His wife telephoned him there and said she had cancelled her appointment at the clinic, but was leaving him. He went home and they argued for hours. During the argument, the deceased was crying.

13.65 The trial judge (at sentence) accepted that during their argument the deceased threatened to take their children, and told Schubring that he would lose the house. Also, Schubring believed that the deceased was having a relationship with two other men. She was in fact in a relationship with only one, although she had desired a relationship with another.

13.66 Schubring gave no clear account of what happened before he killed the deceased. The evidence suggested that Schubring attacked the deceased and rendered her unconscious. She had injuries to the back of her head. Schubring got the dog lead, rolled the deceased over, and strangled her with it. The trial judge noted the element of deliberation in his conduct.

13.67 Schubring showed no sign of remorse. After killing his wife, he telephoned his mother and said 'I need every bit of strength I have to be sorry. She killed herself'.

13.68 The trial judge interpreted the manslaughter verdict as one based on the prosecution's inability to negative the occurrence of an act of provocation which led to the killing. Schubring had also relied upon the defence of

836

Indictment No 381 of 2002.

diminished responsibility under section 304A of the Criminal Code (Qld).⁸³⁷

13.69 Schubring had no previous convictions. The sentencing judge described the conduct as 'out of character'. Schubring was well respected at work, and a caring father. He had a troubled upbringing, and suffered psychiatric disorders.

13.70 Schubring was sentenced to seven and a half years' imprisonment, with a declaration that he had been convicted of a serious violent offence (requiring him to serve 80 per cent of that term of imprisonment before becoming eligible for parole).

13.71 The provocation relied upon was the deceased's telling Schubring that she was leaving him, threatening to take the children, and telling him that he would lose the house.

On appeal: R v Schubring; ex parte Attorney-General (Qld)⁸³⁸

13.72 The Attorney-General appealed against the sentence imposed (which required Schubring to serve at least six years' imprisonment before becoming eligible for parole), arguing that it was manifestly inadequate.

13.73 Schubring also appealed against the sentence imposed, arguing that it was manifestly excessive.⁸³⁹ He sought a reduction in sentence by the removal of the declaration that he had been convicted of a serious violent offence (allowing parole eligibility after 50 per cent of seven and a half years).

⁸³⁷ Section 304A of the Criminal Code (Qld) provides:

304A Diminished responsibility

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.
- (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.
- (3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.

⁸³⁸ *R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515.

⁸³⁹ One of the arguments made on Schubring's behalf on appeal was that the trial judge should have asked the jury about the basis of their verdict. Failing to do so, it was argued, may have denied Schubring the benefit of the jury's confirmation that it had been satisfied of Schubring's diminished responsibility, and he would have been sentenced on that basis. For the purposes of this discussion, it is enough to say that de Jersey CJ and Jones J did not accept that argument. A judge was not obliged to make such an inquiry. It was a matter within the judge's discretion.

13.74 de Jersey CJ and Jones J allowed the Attorney-General's appeal and dismissed Schubring's appeal. His sentence was increased to 10 years' imprisonment, requiring him to serve 80 per cent of that term before his eligibility for parole arose.

13.75 de Jersey CJ said:⁸⁴⁰

The respondent caused the death of his wife by first rendering her unconscious. As the respondent said to police officers: '[I] [b]ashed her head against the tiles and wrapped the dog lead around her throat.' Having rendered her unconscious, he went and obtained the dog lead from the garage or the patio, returned, rolled her over, and strangled her with a garrotting action leaving bruises on her neck. As his Honour observed, the respondent's conduct was characterised by an element of deliberation. Having carried out the post-mortem examination, Dr Ashby's view was that the respondent must have maintained pressure on the victim's neck for more than a momentary period. The doctor said that applying a ligature for 10 seconds or so would be insufficient, and that 'this has been considerably longer than that in order to produce these marked asphyxial changes'.

The precise nature of the provocation advanced for the defence was not ... articulated. On the day of the killing, the respondent's wife was due to attend a pain clinic. Considering her complaint of pain to be of psychosomatic origin, the respondent refused to pay for that attendance, and in the context of an argument, his wife informed him, at about 9.00 am that day, that she had cancelled the appointment and was leaving him. The respondent returned home from work, and there was an acrimonious argument between him and his wife. The acrimony persisted over about three hours, and included her threats to take custody of the children, and that he would lose the house. The respondent's approach was influenced by his knowledge that his wife was intimately involved with another man, and that she had lied about that relationship to him. He (wrongly) believed that she was involved with a second man as well.

13.76 The Chief Justice then considered matters particularly relevant to sentence:⁸⁴¹

In favour of the respondent, the learned judge took account of the circumstances that he had no prior convictions, was well respected at work, had had a troubled upbringing, was a caring father, and notified early a willingness to plead guilty to manslaughter.

On the other hand, as the judge held, the respondent intended to kill his wife, and showed no sign of remorse.

The judge considered that he should declare the offence to be a serious violent offence, notwithstanding the Crown Prosecutor's not having sought such a declaration ... [Counsel for Schubring] submitted during oral argument that there was nothing particularly special about the case to warrant a declaration, having regard to *R v De Salvo* (2002) 127 A Crim R 229. In my view, the undoubted violence of the killing — garrotting using a dog leash after rendering

⁸⁴⁰ *R v Schubring; ex parte A–G (Qld)* [2005] 1 Qd R 515, 521–2.

⁸⁴¹ *Ibid* 522.

the victim unconscious by a bashing to the back of the head — while by nature serious, was rendered particularly so by the circumstance that the respondent was not reacting to ‘provocation’ in any particularly immediate sense: as the judge found, the respondent’s conduct was attended by deliberation. Making the declaration was amply justified ...

13.77 Given the way in which the deceased was killed, it is highly unlikely that the jury were left in doubt about the intention with which Schubring attacked his wife. For this reason, the trial judge interpreted the verdict as one based on provocation. It may be thought that the Chief Justice’s observations that Schubring was not reacting to provocation in any ‘particularly immediate sense’ and that he acted with some deliberation, are inconsistent with the requirement for sudden provocation under section 304. However, the trial judge and the Court of Appeal had to make sense of the jury’s verdict. The killing was clearly intentional. Extending the concept of provocation to actions which were not immediate and which were deliberate enabled the court to reconcile the verdict with the evidence in this case. The Chief Justice continued:⁸⁴²

In determining to sentence the respondent to seven and a half years imprisonment (with the declaration), the learned judge worked from a head sentence of ‘ten years or perhaps slightly longer’. Because of the respondent’s co-operation (embracing his plea, and its being foreshadowed), the judge reduced the head sentence to a point below that level ...

...

While the reported cases are replete with references to the need to recognise the significance of a plea of guilty, in appropriate cases, by way of reduction of the penalty otherwise applicable (cf s 13 *Penalties and Sentences Act 1992*), there are three features of this case which combine to reduce that diminishing effect. First, the case against the respondent was particularly strong because he had admitted his responsibility for the killing to many people, so that any attempt to avoid responsibility at the trial would have been futile; second, the plea of guilty to manslaughter was not indicative of remorse, and the judge held as much; and third, while the respondent aided the administration of justice by his plea, it did not facilitate any substantial saving of resources, because the circumstances of the killing had to be led in presentation of the case of the alleged murder which the Crown reasonably determined nevertheless to pursue.

While the acquittal on the count of murder on the basis of the Crown’s inability to negative provocation, albeit provocation of a rather nebulous or amorphous nature, must be respected, the chilling features of the respondent’s intent to kill his wife, and when being sentenced, his lack of remorse, lent this manslaughter a grave complexion.

13.78 The Chief Justice discussed the comparable decisions to which the trial judge had been referred, all of which have been considered by the Commission in this chapter. His Honour also recognised the legislature’s expectation that courts would impose heavier penalties for violent offences after the enactment

842

Ibid 522–3.

of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld).⁸⁴³

The learned judge was referred to a number of previous decisions. In terms of sentencing level, as opposed to sentencing principle, attention before us focused on *R v Babsek* (1999) 108 A Crim R 141, *R v Auberson* CA No 248 of 1996 and CA No 249 of 1996 and *R v Whiting; ex parte Attorney-General* [1995] 2 Qd R 199.

Babsek killed her former de facto husband by shooting him, but without the intent relevant to murder. There was no immediate provocation on the part of her victim. Babsek, who was 24 years old, was sentenced — following trial — to nine years imprisonment with parole to be considered after three years. The Court of Appeal increased the term to 10 years and deleted the parole recommendation.

Auberson strangled his estranged wife, and was sentenced to nine years imprisonment. He had offered to plead guilty to manslaughter. The jury's verdict was 'guilty of manslaughter with provocation'. The sentence of nine years, with which the court did not interfere, was described as 'at or near the bottom of the range'.

Whiting was acquitted of the murder, but convicted of the manslaughter, of his estranged wife by strangulation, and sentenced to eight years imprisonment, lifted to 11 years imprisonment on appeal. He had a relevant history of past violence towards women, by contrast of course with the situation of this respondent, who had no prior criminal history.

[Counsel for the Attorney-General] reasonably made the point that all of those cases were determined prior to the commencement of Part 9A and the amendments to s 9 of the *Penalties and Sentences Act 1992*, which occurred in 1997. Section 9(3), especially, signalled a strengthening of the response expected by the legislature of courts sentencing for violent offending. In those cases, a court was no longer to have regard to the principle that a sentence of imprisonment 'should only be imposed as a last resort'. Part 9A must likewise be regarded as an expression of legislative intent that those who commit serious violent offences should serve longer terms in custody. *Bojovic* (p 191) referred to s 161B(3) of the *Penalties and Sentences Act* (which is concerned with sentences ranging between five and 10 years imprisonment) as providing 'simply another option that has been placed in the court's armoury'. But nothing in *Bojovic* gainsays the proposition just advanced as to legislative intent, and as observed in that case (p 190), 'plainly the courts will not attempt to subvert the intentions of Part 9A by reducing what would otherwise be regarded as an appropriate sentence'.

In summary, the legislative regime introduced in 1997 provides a clear signal that it was intended judicial responses to serious violent offending be strengthened.

13.79 Schubring's sentence was increased:⁸⁴⁴

843 Ibid 523–4.

844 Ibid 524.

Translating what may be drawn from those previous cases to the current sentencing regime, I consider [counsel for the Attorney-General] was correct in his submission that the relevant sentencing level here, after allowing for the plea to manslaughter, and its being foreshadowed, was 10 to 12 years imprisonment, with the automatic enlivening of the serious violent offence regime.

In my respectful view, for reasons expressed earlier in this judgment, the learned judge attributed too great a significance to the entry of the plea of guilty to manslaughter, and its being foreshadowed at an early stage. Conversely, he placed insufficient weight on the brutality of the event, its gravity in foreshortening a vibrant human life, and the need for general deterrence in relation to this particular species of crime. A sentence of seven and a half years imprisonment, with six years necessarily to be served, was in these circumstances manifestly inadequate. In particular, it failed to reflect the present importance of general deterrence: when personal relationships fracture, for whatever reason, the notion that one of the partners, perceiving himself or herself to be the injured party, takes the life of the other, is an outrage which must be discouraged by strong judicial responses.

13.80 Williams JA, in dissent, considered that the sentencing judge was wrong to treat the verdict as one based on provocation rather than diminished responsibility. His Honour considered it appropriate to treat the verdict as one based on diminished responsibility, in which case the sentence imposed after the trial was appropriate.

***R v Mirasol* (sentenced 1 October 2004)**

13.81 Mirasol pleaded guilty to manslaughter. The sentencing judge observed that, had the matter gone to trial on a charge of murder, it was likely that he would have been convicted of manslaughter on the grounds of provocation.

13.82 Mirasol and the deceased worked a ship. It was carrying cargo from Korea to Newcastle. On 18 April 2003, the ship was near Queensland. Mirasol was due to disembark the next day and fly to the Philippines. He had been on the ship, without leave, for 10 months.

13.83 Mirasol and the deceased had a minor altercation in the afternoon of that day. Mirasol packed his bags and went to the mess for the evening meal at 5 pm. There was a confrontation between him and the deceased. Words were exchanged. The deceased served Mirasol his meal. Mirasol might have challenged the deceased to a fight, but he was sitting and about to eat his meal.

13.84 The deceased returned to the table and punched Mirasol. It was a hard punch, causing severe bruising to Mirasol's right eye and causing him to fall to the ground. The deceased punched him again. Mirasol drew a knife he was carrying and plunged it to the hilt into the deceased's chest. It pierced the deceased's heart. The deceased tried to get up and strike Mirasol again before he died.

13.85 Mirasol left the mess, handed the knife to the Captain and told him what he did. He told police that he was angry with the deceased, and retaliated when he punched him. Mirasol said he had 'a burst of anger'.

13.86 The sentencing judge observed that Mirasol was 44 years old and the deceased 34 years old at the time of the killing. Mirasol was 157 centimetres tall and weighed 56 kilograms. The deceased was a bigger man (but not a big man): 167 centimetres tall and 69 kilograms.

13.87 Mirasol was described as hard-working. He co-operated with the administration of justice. There was a low risk of recidivism. He was separated from his family and his mother died while he was in custody. He was sentenced to eight years' imprisonment with a recommendation that he be eligible for post-prison community-based release (the then parole equivalent) after serving two years and eight months of that term.

13.88 The provocation accepted in this case was the deceased's violence towards Mirasol.

R v Middleton (sentenced 3 December 2004)⁸⁴⁵

13.89 Middleton was convicted of manslaughter by a jury. The trial judge considered that the verdict was explicable either on the basis that the jury were not satisfied beyond reasonable doubt of Middleton's intention to kill, or that the jury were not satisfied that the prosecution had excluded provocation beyond reasonable doubt.

13.90 Middleton blamed a person called Lumby for the loss of his employment. Middleton did not know the deceased, who was Lumby's associate. One night, while they were drinking at the same hotel, Middleton thought that Lumby and the deceased were having a joke at his expense. Another night, during a pool competition the deceased knocked Middleton as he was playing, making him miss a ball, and taunted him (in a way not described in the sentencing remarks). The next night, Middleton considered that Lumby and the deceased ignored him.

13.91 On 21 June 2002 Middleton had been smoking cannabis and drinking. The deceased came up to him at the bar of a hotel and said 'You're nothing but a wanker, mate, you're fucking dead'. Middleton felt threatened. Last drinks were called and he was going to leave the bar. He had to walk near the deceased to leave. It is not clear who threw the first punch but Middleton and the deceased began to fight. There was some evidence that the deceased was getting the better of Middleton. He pulled a knife and plunged it into the deceased's neck to a depth of 15 centimetres, the full length of the blade.

845

This was Middleton's second trial. He was convicted of murder at his first trial. That conviction was quashed because of errors made in the summing up about intoxication, and a re-trial was ordered: [2003] QCA 431.

13.92 Middleton had a long-term problem with drugs and alcohol. He had previous convictions. He was sentenced to imprisonment for nine years.

13.93 The provocation in this case may have been the deceased's calling Middleton a 'wanker' and effectively threatening to kill him (although it may be thought that the deceased did not intend the words 'you're fucking dead' literally) and the deceased's violence towards Middleton.

***R v Budd* (sentenced 19 October 2006)**

13.94 Budd was convicted of manslaughter by a jury. He was a courier of illicit drugs for the deceased.

13.95 The deceased had taken advantage of Budd, in what the trial judge described as 'a rather shameless way', by having Budd's property stolen or interfered with. After being mocked and taunted by the deceased, Budd shot him. The sentencing remarks contain no other detail about the killing.

13.96 Budd had previous convictions for minor offences. The sentencing judge was satisfied that this was a one-off situation, and that Budd would not be a danger to the community upon his release. He was sentenced to 11 years' imprisonment (a sentence which, under Part 9A of the *Penalties and Sentences Act 1992* (Qld), automatically required him to serve 80 per cent of it before his eligibility for parole arose).

13.97 The provocation in this case was mocking and taunting against the background of prior shameless treatment.

***R v Dunn* (sentenced 26 February 2007)⁸⁴⁶**

13.98 Dunn pleaded guilty to manslaughter and to doing grievous bodily harm with intent to do grievous bodily harm. The deceased was a man named Jordan. The other victim was a man named Gilbert. Dunn had originally been charged with Jordan's murder. The prosecution accepted his plea to manslaughter on the basis that the jury could have found that the killing was provoked.

13.99 The events occurred on the night of 6 October 2004 at Boronia Heights. Two groups of people were involved: those who lived at number 3 Pimento Court (which included Dunn and his de facto partner) and those who lived at number 4.

13.100 Dunn was sitting outside number 3 when Gilbert (associated with the group at number 4) walked past. Gilbert made a disparaging, 'racist-type' remark about Dunn. They got into a fight. The police were called and things settled down.

846

Indictment No 82 of 2006.

13.101 Gilbert then went into number 4 and smashed a glass against his own head, causing it to bleed. He then collected a group of friends and acquaintances who were under the misapprehension that Dunn had wounded him. His group armed themselves with weapons, which included an 'Irish whacking stick', a crow bar and a fence paling. The deceased was one of the group, armed with a baseball bat.

13.102 The group assembled outside number 3. They threw rocks at cars. Two of them entered the yard of number 3. There was some evidence suggesting Gilbert hit the front door with a baseball bat. Other evidence suggested that threats to kill were made.

13.103 Dunn and a man named Ford, who was carrying a shovel, ran to confront the group. One of Gilbert's group swung his baseball bat and hit someone, although it is not clear whom it hit. Dunn went back inside the house, bleeding from a cut to his chin.

13.104 Dunn's partner telephoned the police. While she was on the phone, Dunn said 'Oy, if that's the coppers, I'm getting knives because these pieces of shit are fucking starting' and '3 Pimento Court. I've got two knives in my hand; I'm going to kill whoever the fuck is starting'. The situation was described as terrifying. There were young children and a baby at number 3.

13.105 Dunn went outside with the knives and approached Gilbert. Gilbert took Dunn in a headlock, and started punching him in the head. Dunn stabbed Gilbert six times in the chest and abdomen. He would have died without medical attention.

13.106 Meanwhile, the fight was ongoing between the two groups. The deceased did not appear to be taking any active part. Either before or after he stabbed Gilbert (it is not clear) Dunn came up behind the deceased and gave him what looked like a bear hug. He stabbed the deceased once between the eighth and ninth ribs. The deceased died from blood loss. The sentencing judge found that, although he was part of the group formed to take revenge on Dunn, there was no suggestion that the deceased offered Dunn any personal assault by words or actions. The deceased was leaving when he was stabbed.

13.107 Dunn had some previous convictions for drug offences and minor offences of violence. He was sentenced to eight years' imprisonment for manslaughter and six years' imprisonment for doing grievous bodily harm with intent. The sentencing judge declared that he had been convicted of serious violent offences, with the consequence that he would have to serve 80 per cent of eight years' imprisonment before his eligibility for parole arose.

13.108 The provocation in this case was the aggressive and violent behaviour and threats of Gilbert and his associates.

On appeal: *R v Dunn*⁸⁴⁷

13.109 Dunn appealed against his sentence, arguing that the declarations that he had been convicted of a serious violent offence should not have been made.

13.110 Holmes JA, with whom Williams and Jerrard JJA agreed, found that the declarations were warranted and the appeal was dismissed.

R v Sebo (sentenced 30 June 2007)⁸⁴⁸

13.111 This was one of the cases which prompted the Attorney-General's audit of homicide trials, and a matter which received significant publicity.

13.112 A jury convicted Sebo of manslaughter on a charge of murder. He killed his teenage girlfriend. The sentencing judge succinctly set out the circumstances of the killing in this way:

Damian Carl Sebo, you were 28 years old when you killed Taryn Hunt. Responding to the taunts of this alcohol-affected, 16 year old girl, in a jealous rage, you attacked her with a steering wheel lock, striking her head several times with great force. She died from the severe injuries you inflicted in this frenzy.

13.113 Sebo told police that the deceased had taunted him about her other lovers, and that he lost control and killed her. He offered to plead guilty to manslaughter, but the prosecution did not accept his plea and the matter proceeded to trial.

13.114 When Sebo was arraigned at trial, he pleaded not guilty to murder but guilty of unlawful killing (manslaughter). The only issue at trial was provocation.

Addresses to the jury

13.115 The transcript reveals that the prosecution's primary position was that Sebo lied when he said that the deceased had taunted him, so there was no provocation at all for his killing her. But even if the deceased had taunted Sebo, what she said did not amount to provocation.

The Prosecutor's address

13.116 This is part of the prosecutor's address to the jury:

You would reject that version — you would reject that version totally and in rejecting it, there is no evidence of provocation and you convict of murder. But, ladies and gentlemen, even if — even if there were a reasonable possibility that she had taunted him, that she had said these things, the Crown says to you that doesn't amount to provocation in the least. Look, there's no doubt he's angry.

847

[2007] QCA 153.

848

Indictment No 977 of 2006.

No doubt at all that he's angry. One would think that 95 per cent of murders — and I'm picking that figure out of my head — they're committed by people who are angry at the victim. I mean, really, when you think about it, to kill someone, you would have to be really angry. But being angry doesn't mean that you're being provoked. Being angry doesn't mean that, 'Oh, well, it's their fault.'

The question is: would an ordinary person in the position of the accused have acted in this way if confronted with these sorts of tauntings. Look, there's no doubt this man is immature. This man is obsessed with Taryn Hunt. This man does want to control Taryn Hunt. That's the position he's in. But he knows that she's been with the person Mat. That was the whole purpose of this confrontation in the kitchen table with Miss Jones. He knows that she's been with Simon. He knows that she's stayed overnight. He knows what the situation is. He has been told by Jones, you know, that, 'She's with all these other guys. Why don't you just leave her and let her get on with her life and you get on with your life.' That's his situation. Now, according to him, what this girl has then said is, 'Those suspicions that you had, those things that you knew, well, yeah, they're correct, and it was easy to do.' That's it, that's what she said. What would the reasonable ordinary man do? The ordinary man, the defence would have you believe, would do this, that even though you're 28 and she's 16, that you would pick up that lethal weapon and you would unmercilessly cave her skull in. Ladies and gentlemen, there is no way in God's green earth that a reasonable ordinary man would behave in that — it doesn't matter what was said by this girl, that reaction is ridiculous. It is certainly over the top. There is no way on earth that such a reaction is what would happen to an ordinary man. The Crown says even if what he says may be true, the defence of provocation still fails. So, what do we have?

We have, realistically, Taryn Hunt doing, well, in the words of the song saying:

'You don't own me, don't make me one of your toys, don't tell me I can't go with other boys, I'm young and I want to be young, I'm free, I want to be free, live my life to do and say what I please.'

And his response is, 'If I'm not going to have you, no-one's going to have you,' and that prophecy that he had made three days before was going to come true and going to come true at his hands: she's going to be raped or murdered. She was murdered, murdered by him. That's it. This is where the ducking of responsibility ends. Ladies and gentlemen, this man is guilty of murder.

Defence counsel's address

13.117 The following extracts are from the address of defence counsel:

You might think the totality of the evidence when you assess it is that Taryn — and this is not character assassination by the way — that Taryn was having relationships with other men or boys or young men, a number of them. You might think that she was misleading her mother, she was misleading Shawn, she was misleading Damian, she was misleading Matthew. Didn't want much to do with her, according to him, because of her lies.

You might think she was manipulative. You might think that in particular the long relationship living as partners with Damian was deceitful. That it was Taryn who was manipulative, and that far from the Crown submission that it was Damian who was leaving the house so that the jezebel would come and get him back being the manipulative one. Again to adopt from a different context the Crown Prosecutor's words is a load of codswallop. It was Taryn.

This young man, immature, in love, was being manipulated, deceived and not one word in evidence despite the investigation by what you might think is a pretty thorough police — one particular investigator, Mr Tuffley, but also others, you did not hear one word which suggested Damian Sebo was anything else but a decent, if immature, non-violent in any way, shape or form despite the rumours person. Particularly you did not hear one single word suggesting that he had ever so much as raised a hand to her. That's what the evidence shows. That he wasn't manipulative. He was obsessed with her, totally in what his version of love is with this young lady who was — if she wants to behave that way, that is her problem, but it's important that you know it because of the effect that it has on this trial, and that's the importance.

...

... it is necessary now to address what happened on the night.

There was a happy group of people. Those that were there, in particular Shawn Milla, describe a few people having a few birthday drinks, a good time, cheery, happy people. Shawn Milla is dropped home, Taryn is tipsy ...

When he left the car about half past 12, she seemed happy enough ... So that's about half past 12.

The next 40 minutes something happened. I'm not sure what the Crown wants you to speculate on about that 40 minutes, but what I ask you to do is look at the evidence as you know it and see whether that evidence which really as it must, because there was only two people there and one of them is now deceased, must come from the accused man.

Do you think that what he tells you about that 40 minutes accords with the other evidence that you've heard? In short this: Taryn in her tipsy state, or for whatever other reason, started to talk about the other relationships that she was having or had had during her relationship, her time together with Damian, that she was goading him. And you might think the most forceful proof of that comes from the fact that they were going to Simon's place. Whether he was an ex-boyfriend or he had been led to belief, as seems to be the case, that he was the current boyfriend, doesn't really matter. What matters is that she was having a relationship with him at that time, and that Damian knew that she either had had or had heard rumours that she was having a relationship with him as well as others.

Not surprisingly, you might think, given that when they were at the casino, as had been the case for the last 18 months or so, they seemed to be together. Again words used by Shawn Milla in evidence. Damian was getting upset. You might think that the scenario as described by Mr Sebo to the police is not only an accurate one, but is supported strongly by the other evidence that you know.

It also is supported, of course, to the extent that it can be by Mr Matheson who says that when he saw them on the overpass at 1.07 or thereabouts, they appeared to be having some sort of argument, that Mr Sebo was short, terse. Miss Hunt, Taryn, either was crying or appeared to have been crying and appeared to have been upset. All that might lead you to believe that it is simply a matter of logic, that they were having an argument and that the argument was about Taryn's other relationships. I'd submit to you there is no reason in the wide world why you would say to yourselves that version of events must be untrue. All of the evidence would point to it being an accurate version of events.

You might also think it is consistent to say that Taryn was escalating her goading for whatever reason. Probably alcohol as far as she's concerned had something to do with it in the sense of she was affected and, therefore, not being quite as well careful, or whatever, with her words as otherwise, but whatever you might think that it's logical that she was escalating it. She was now telling, in effect, 'You know those rumours that have been going around about me that I always denied before, well, they're true. There's this bloke, there's that bloke', et cetera, et cetera, et cetera. She's laying it right fairly and squarely on the line to him. 'Yes, they're all true. This is what I have been doing. You're so easy to cheat on.' Does that sound illogical in the context of what you know? Or does that sound exactly like the sort of things she might have been saying? Damian is getting more and more upset. So upset that he stops in the middle of the overpass and the argument, you might think, is continuing.

They've moved on by Mr Matheson and drive not out of anyone's way in the sense of off to bush somewhere like the cold hard killer [the Crown Prosecutor] would have you believe that Damian is, but to drive all the way to the side of the overpass and stop there and then followed by Mr Matheson. Mr Matheson does not see one movement which is suggestive of any physical activity between the two of them, altercation or otherwise. What he sees is consistent with an argument which has upset them both.

That seems to have occurred — the moving to the area where this incident happened — say 10 past 1, maybe a minute later, but let's say 10 past 1. Six minutes later at 16 past 1, possibly 17, but more likely 16 past 1, Mr Rogers comes along and it's, in effect, over. Taryn is lying there, she's obviously received her injuries. So that's six minutes, possibly less, but it would seem the maximum time is six minutes.

Damian is very upset, doesn't want to hear this, to use his words, 'fucking shit.' Tells her to get out of the car. She is obviously, you might think, continuing to provoke him, goad him. You might think that it comes to a head when she says things like how easy it's been, and maybe most particularly given she sees how upset he is that despite that, she says, 'And it's not going to stop.' That's the final one. That's the final insult.

This decent man, immature as he is, who's never laid a hand on her, according to the evidence, is pushed not only to the limit but over it. This young lady that he's obsessed with, she tells him not only has she just confirmed all the rumours that he's been thinking, but it's been very easy to con him, and 'I'm going to continue doing it.'

Ladies and gentlemen, the defence does not say, to repeat myself, but to ensure that you know what our position is, that, therefore, he is entitled to do what he did. The defence does not say that, therefore, she deserved it. That is just colourful nonsense coming from the Crown. The defence wants you to look at this matter with as little emotion as you can. That's very difficult in a trial like this, but it's what you must do in the courtroom and in the jury room. You must look at it and try and see what you make of it all. The strength of emotions that Damian Sebo was feeling at 7 past 1 that morning or 11 past 1 that morning or 12 past 1, the lashing out when she tells him, 'And I'm not going to stop. I've got you completely and utterly wrapped around my little finger and I'm not going to stop it.'

The summing up

13.118 The trial judge's directions to the jury about provocation included the following:

The prosecution asks you to conclude, and beyond reasonable doubt, that his story of taunts about her encounters with other males and perhaps of daring him to attack her with the wheel lock he held in his hand is wholly unreliable — a concoction invented to minimise his responsibility for what were then obviously life-threatening head injuries.

The essence of the defence case, on the other hand, is that what the accused told the police about what happened is accurate.

You need to consider this contest. The reason is this: if you are satisfied beyond reasonable doubt that the accused's account of what transpired in the moments before the attack is not reliable, then your rejection of his version will leave you with no acceptable account of what the deceased may have said and done in the minutes before the attack. In that event, the evidence would not reveal a basis for a conclusion that it is reasonably possible that the partial defence of provocation is available. And such a view of the evidence, were you to hold it, would mean that the prosecution would have succeeded in excluding provocation beyond reasonable doubt.

If, however, what the accused told the police about what happened in the moments before the killing might, reasonably possibly, be substantially reliable, then the question whether the case is one of provocation falls to be considered. And in that event, you must consider whether the prosecution has discharged its burden of proving beyond reasonable doubt that the deceased's taunts did not constitute provocation reducing what otherwise would be murder to manslaughter.

What then is provocation?

In this legal context, provocation has a particular legal content. Not every hurtful remark excuses murder.

If the accused's account of the circumstances immediately before the attack could, reasonably possibly, be essentially true, then you might think it may be taken that in immediate reaction to Taryn's comments about her sexual activities with other males and perhaps her dare to attack her with the wheel lock, the accused suddenly lost his self-control and struck her forcefully about four times in the head with the wheel lock, intending to cause her at least some life-threatening injury.

If you took that view of things, the critical question becomes this: has the prosecution established beyond reasonable doubt that what the deceased said and did was not such as to amount to provocation in law? If the answer to that is yes, you may find the accused guilty of murder. If no, you will find him not guilty of murder.

To constitute provocation reducing murder to manslaughter, the conduct proposed as provocative must not only cause the loss of control on the part of the accused, it must also be conduct which might have caused an ordinary person in his position to have lost self-control and reacted as the accused did;

that is, by inflicting serious violence on the deceased accompanied by an intention to cause her at least grievous bodily harm.

The first step is to consider the gravity — the severity if you like — of the alleged provocation from this particular accused's perspective. This involves evaluating the nature and degree of the seriousness for him of the things the deceased said and did just before the fatal attack, and the potential impact on his own capacity for self-control.

In assessing the impact of her taunts on him, you would take into account his attributes and characteristics as they may bear upon the sting for him involved in her conduct. In considering that, you would take into account his age — 28 — evidence of his immaturity; and that he is male. Other factors may also be material to the severity of the suggested provocation to him.

One matter of obvious importance in this regard is the relationship between the accused and his victim. It seems that he had been involved in an about two years sexual relationship with her. The deceased's mother thought the accused loved her daughter. This was based on her observations of the two of them, and also on what the accused had himself declared of his affections for the deceased. His attraction for her may have been obsessional. If so, you might think that that may matter to the extent to which her conduct may have been especially hurtful or insulting to him. So it is proper that you view the impact on the accused of the words or conduct of the deceased, among other things, in the light of the nature of the relationship between the accused and the deceased.

I emphasise matters peculiar to this accused because it is vital that you consider the gravity — again, the severity if you like — of the suggested provocation so far as he in particular is concerned. And, in general, conduct that might not be especially hurtful to one person can be extremely hurtful to another because of such things as the person's age or sex or race or ethnic or cultural background, personal attributes, personal relationships or past history.

Now, having considered the gravity for the accused of the conduct, including words of the deceased immediately before the attack, you then confront the final question: whether the prosecution has proved beyond reasonable doubt that the suggested provocation, in all its gravity for this accused, was not sufficient to cause an ordinary person in his position to lose self-control and to react as he did. You are considering the possible reaction of an ordinary person in the position of the accused.

In speaking of the effect of the provocation on an ordinary person, I am referring to an ordinary person who has been provoked to the same degree of severity and for the same reason as this accused. For this purpose, the hypothetical ordinary person is one of the same age and sex⁸⁴⁹ as the accused, who has the minimum powers of self-control to be expected of such a person.

Approaching this issue requires you to take full account of the sting of the provocation actually experienced by the accused. Having done so, if you are

849

The reference in the summing up to the hypothetical ordinary person as a person of the same age *and* sex as the accused was consistent with the terms of the model direction on provocation contained in the Supreme and District Court Benchbook at the time of this trial. That direction was revised after the Court of Appeal's decision in [2008] QCA 205. The current direction, in explaining the concept of the hypothetical ordinary person, does not refer to a person of the same sex as the defendant: see [17.4] below. The Court of Appeal's decision in [2008] QCA 205 is discussed at [11.61]–[11.64] above.

satisfied beyond reasonable doubt that the ordinary person postulated certainly could not have reacted to the provocation the accused actually experienced in the way he did, then this accused's extraordinary want of self-control cannot protect against a conviction for murder.

13.119 His Honour canvassed the evidence concerning the moments before the attack found in Sebo's interview with police and his taped re-enactment of the offence, and summarised the arguments of the prosecution and the defence.

13.120 The jury retired to consider their verdict at 11.26 am on 29 June 2007. At 2.52 pm the next day the jury acquitted Sebo of murder, and convicted him of manslaughter.

13.121 Sebo had no previous convictions and had not previously been violent towards the deceased. He had shown some concern for his victim after the attack, and his offer to plead to manslaughter and the conduct of the trial reflected his willingness to facilitate the course of justice. The sentencing judge described him as 'remorseful, but not completely; he had withheld certain information from hospital staff.

13.122 A sentence of 10 years' imprisonment was imposed. Under Part 9A of the *Penalties and Sentences Act 1992*, Sebo would have to serve 80 per cent of that term of imprisonment before becoming eligible for parole.

13.123 The provocation in this case consisted of the deceased's taunting Sebo about her relationships with other men, her telling him that he was easy to cheat on, and her telling him that she was not going to stop.

On appeal: R v Sebo; ex parte Attorney-General (Qld)⁸⁵⁰

13.124 The Attorney-General appealed against the sentence imposed, arguing that it 'insufficiently reflected the gravity of the offence and the need for deterrence, while giving too much weight to mitigating factors'. Counsel for the Attorney-General emphasised several matters including the deceased's young age, the brutality of the attack and the relatively low level of the provocation offered. He argued that the range within which the sentence should have been imposed was between 12 and 14 years' imprisonment.

13.125 The appeal was unsuccessful and the sentence was not increased. After reviewing several authorities, Holmes JA, with whom Keane JA and Daubney J agreed, said:⁸⁵¹

The worst features of the killing in this case were its brutality, the youth and relative defencelessness of the victim, and the limited nature of the provocation which triggered it ... The mitigating factors were the respondent's relative youth, his co-operation and his lack of any previous criminal history. What the

850 [2007] QCA 426.

851 Ibid [18].

cases cited demonstrate, in my opinion, is that having regard to all of those features,

the sentence might properly have fallen between 9 and 12 years. A sentence of 10 years imprisonment, which carried the requirement that the respondent serve 80 per cent of it, was plainly not inadequate.

R v Mills (sentenced 29 January 2008)

13.126 On 27 November 2007, Mills pleaded guilty to the manslaughter of his wife on the basis that he had been provoked. The prosecution and the deceased prepared 'an agreed statement of facts' upon which sentencing proceeded.

13.127 Mills and his wife were high school sweethearts, who married young. They had two children and were good and loving parents, but their relationship began to deteriorate in 2001 and the deceased wanted to leave it.

13.128 On the evening of 9 July 2005, Mills and the deceased had dinner with friends. When they got home, the deceased said she was going to meet a friend at a nightclub. By that stage, she was seeing someone else and she wanted her friend to give her an alibi.

13.129 The deceased returned home in the early hours of the morning of 10 July 2005. Mills woke and they argued. They became angry and each made accusations of infidelity about the other. The deceased threw her mobile phone at Mills. The argument continued and other objects were thrown. It was not the first time they had argued like this.

13.130 The deceased swung an extension cord at Mills. It hit him on the head, and the hand. Mills grabbed the cord and they tussled. According to Mills, the deceased said 'I've given you a gift too. You should have AIDS by now'. (There was no evidence to suggest whether the deceased was in fact HIV-positive or whether this was just a taunt.)

13.131 The argument deteriorated further, and, as it was put in the agreed statement of facts, '[i]n a loss of the power of self-control the accused went into melt-down. He wrapped part of the cord around the deceased's throat and neck and started to apply pressure. The deceased struggled, the accused could then see the deceased's face going redder and redder. Her eyes were bloodshot and she was gasping for air'.

13.132 Mills released his grip of the cord and stopped pulling, but it was still around the deceased's throat. He grabbed her hair and squeezed her face as hard as he could. The deceased bit his hand. Mills pushed his fingers up her nostrils. He threw himself and the deceased off the bed and onto the floor. The deceased landed on the floor with her face down. Mills was on top of her. He applied pressure to her throat and neck with the cord. The deceased went limp and died.

13.133 Mills panicked. He wrapped the deceased in plastic and buried her in a shallow grave in bushland 15 kilometres away. He said he chose that place in particular because that was where, Mills said, the deceased said she loved him.

13.134 Mills misled police by suggesting that the deceased did not come home that night. He went on television seeking help from the community to find her. Eventually, the police found the deceased's clothing and bedding in the roof of the house (where Mills had hidden it) and Mills was arrested on 12 July 2005. After another two weeks, Mills revealed the location of the body.

13.135 The sentencing judge noted that Mills had no previous convictions; he was a 'very good contributing' member of the community. He had been an excellent father and employed all his life. References showing Mills to be a 'decent person' were tendered: he had led a good life and had been brought up in a loving family.

13.136 In response to the prosecution's submission that Mills had shown no remorse (because he had provided false information to the police and his family), the sentencing judge accepted that he was overwhelmed by events; that things 'snowballed' and that he was unable, for a short time, to explain how he had been the cause of the deceased's death. Mills wrote a long letter to the court expressing his shame, regret and sorrow.

13.137 The sentencing judge intended to sentence Mills at the lower end of the range of appropriate sentences for this offence, which, on the authority of *R v Sebo ex parte Attorney-General (Qld)*,⁸⁵² the sentencing judge took to be 10 years' imprisonment. Accordingly, Mills was sentenced to 10 years' imprisonment. Under Part 9A of the *Penalties and Sentences Act 1992* (Qld) he had been convicted of a serious violent offence, and was required to serve 80 per cent of the term of the imprisonment imposed before becoming eligible for parole.

13.138 The provocation in this case was the deceased's admission of infidelity, her statement that she had infected Mills with HIV and her violence towards him.

On appeal: *R v Mills*⁸⁵³

13.139 Mills successfully appealed against his sentence. Keane JA, with whom Holmes and Fraser JJA agreed, held that a sentence of 10 years' imprisonment was not at the lower end of the range of appropriate sentences in a case of a domestic killing which was not murder because of provocation⁸⁵⁴ and re-sentenced Mills. As discussed above, the Court of Appeal in *Sebo*

852 [2007] QCA 426.

853 [2008] QCA 146.

854 *Ibid* [22].

stated that the appropriate sentencing range was between nine and 12 years' imprisonment.

13.140 It fell to the Court of Appeal to re-sentence Mills. In arriving at the appropriate sentence, Keane JA said:⁸⁵⁵

While the necessary starting point for the consideration of the appropriate sentence is that a human being has been killed, the circumstances of this killing, though tragic, were a far cry from the brutal thuggery which characterises those examples of this crime which have attracted a sentence at the higher end of the range ... In *R v Schubring; ex parte Attorney-General (Qld)*,⁸⁵⁶ the offender strangled his de facto wife after she had been rendered unconscious by a blow to the head.

In *R v Sebo; ex parte A-G (Qld)* ... the offender inflicted fatal injuries on a defenceless 16 year old girl by beating her with a steering wheel lock. In each of these cases, a sentence of 10 years imprisonment was imposed.

13.141 Keane JA considered the circumstances of the killing, and in particular the extent of the provocation:⁸⁵⁷

The escalating violence of the episode in which the applicant killed the deceased was not entirely of his own making: it was the deceased who introduced the electrical cord into the struggle. I mention this, not to cast blame on the deceased who is not here to give her side of the story, but to emphasise that the applicant's victim was not defenceless, as were the victims in *R v Schubring* and *R v Sebo*, and that the provocation to which the applicant was subject was not limited to sexual jealousy ...

It is also necessary to bear in mind that the learned sentencing judge accepted that the applicant's treatment of his wife's corpse was the result of panic on his part, and his subsequent lies to the police and the public reflected his inability to cope with the consequences of what had occurred. The sentencing judge accepted that the applicant was truly remorseful for the killing of his wife. This Court should proceed on the same basis.

13.142 In considering the appropriate penalty, Keane JA said:⁸⁵⁸

The sentence which must be imposed on the applicant must be such as to indicate the community's denunciation of the unlawful killing of a fellow human being, while at the same time recognising the limited relevance, in this case, of the other considerations which usually warrant condign punishment.

This is not a case where there is an evident need to protect the community from a violent aggressor: the applicant's history shows that his crime was radically out of character. Further, having regard to the circumstances of the crime, considerations of deterrence, whether general or personal to the applicant, have little claim upon the sentencing discretion in this case.

855 *Ibid* [24].

856 [2005] 1 Qd R 515.

857 [2008] QCA 146, [25]–[26].

858 *Ibid* [27]–[31].

There is room for considerable doubt as to the practical efficacy of heavy sentences in deterring the kind of crime of passion with which we are presently concerned. In any event, to the extent that the theory of deterrent punishment assumes that a potential offender makes some sort of rational cost benefit calculation before deciding to offend, that assumption is necessarily falsified by the basis on which the Crown accepted the applicant's plea to manslaughter by reason of provocation in full satisfaction of the charge of murder. The 'deprivation of the power of self-control' involved in the concept of provocation under s 268 of the Criminal Code 1899 (Qld) necessarily denies the possibility of the kind of calculation postulated by the deterrent approach to sentencing.

In these circumstances, it seems to me that this is a case where the appropriate sentence is at the lower end of the range described in *R v Sebo*. Bearing in mind the applicant's genuine remorse and the nature of the provocation in this case, I consider that the applicant should be sentenced to nine years imprisonment.

Like the learned sentencing judge, I do not think that this case warrants a declaration that the offence was a serious violent offence. (some notes omitted)

13.143 Mills's sentence was accordingly reduced to nine years' imprisonment. No declaration that he had been convicted of a serious violent offence was made, with the consequence that he would become eligible for parole after serving 50 per cent of that nine year term.

OBSERVATIONS

13.144 Many important questions arise from this review of the cases.

13.145 Does the current operation of the law of provocation reflect sufficient denunciation of the conduct of the defendant, especially in cases in which the provocation has consisted of lawful conduct by the deceased?

13.146 Does an intentional killing in retaliation for insults or taunts or the end of a relationship warrant conviction of, and punishment for, anything less than murder. And if so, by what principle may that position be justified?

13.147 Compare, for example, the fact scenarios raised by the cases examined with fact scenarios raised by a mercy killing. The latter is punished as murder. How is '*I killed her because she said she did not love me any more*' less culpable than '*I killed her because she was in great pain and she begged me to*'? Can it be argued that possessiveness and jealousy are less blameworthy motives for murder than compassion?

13.148 And what of cases where the motive for killing is something corrupt such as greed? How is '*I killed her because she said did not love me any more*' less culpable than '*I killed her because I wanted to benefit from her estate*'? Can it be argued that possessiveness and jealousy are less blameworthy motives for murder than greed?

13.149 The existence of the partial defence of provocation allows those who intentionally kill because they have lost control to be treated with more leniency than those who commit a premeditated killing. Those who intentionally kill because they have suddenly lost control are considered less culpable than those who plan to kill. Is the distinction valid? It may be understandable if a person has lost control having been provoked by something extreme, such as witnessing the killing of a child. It may be less understandable when the provocation alleged is an insult, however hurtful.

13.150 Why should the person who reacts with fatal violence to words alone be convicted of anything less than murder when they have killed with an intention to kill? Words which amount to an admission of the commission of a serious offence (such as rape or homicide) may be in a different category, but how should our society treat those who kill in response to insults or taunts?

13.151 And how can a jury ever determine whether a defendant has in fact lost control? What takes the emotion beyond anger or jealous rage or fear? Hasn't every intentional killer abandoned self-control at some point?

13.152 If we accept that extreme circumstances may provoke the ordinary person to fatal violence, then that raises questions whether our modern society should treat the end of a relationship or a non-violent homosexual advance as such an extreme circumstance?

13.153 Taking the discussion outside the realm of intimate partner homicides, consider the facts of *Mirasol*, *Middleton* and *Folland*. Should an intentional killing for reasons other than self-defence be treated as anything less than murder?

CASES IN WHICH PROVOCATION HAS NOT BEEN SUCCESSFUL

13.154 In the following cases, the defence of provocation did not succeed. The defendant was convicted of murder, and sentenced to life imprisonment.

R v Corcoran⁸⁵⁹

13.155 Corcoran was convicted of the murder of his grandmother. He had lived with her since his birth and was 19 years old when he killed her. She was then aged 75. She was 165 centimetres tall and 68 kilograms, but she was described as frail in the months before her death. Operations for brain tumour had left her with facial palsy, impaired hearing and balance, and loss of vision in her left eye. She used a walking stick. Corcoran showed affection to her, and helped her with her disabilities.

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[2000] QCA 114.

13.156 Corcoran killed the deceased by strangling her with an extension cord and a co-axial cable. He admitted the killing, but argued at trial that it was in self-defence, or alternatively, under provocation. He had told police that they argued continually and she criticised him about not having a job and there being no money.

13.157 On the day of the killing, Corcoran told the police he was sitting downstairs watching television when the deceased started to complain again. He walked upstairs and she followed, arguing all the time. He went to the toilet and she went downstairs again. When he came out, the deceased was coming up the stairs once more with a knife in her hand. The deceased raised the knife and said she was going to put it right through Corcoran. He said he held her arm. She turned slightly, and he grabbed her around the neck with his left arm. She struggled and clawed him. Corcoran applied pressure and wrestled her to the floor. The deceased was making grunting noises, but Corcoran continued to apply pressure, even after she had lost consciousness.

13.158 Corcoran was lying on top of the deceased. Her body was on the stairs, and her head was on the floor at the top of the stairs. Corcoran was lying on top of her with his arm between the floor and her neck. He knew she was dead. There was blood coming from her mouth and her face was purple. He sat there for a while, then got the two cords and tied them around her neck. He said he did not know why he'd done that.

13.159 There was evidence at trial that the deceased had a tendency to brandish a knife when asserting authority. Expert medical evidence concerning the cause of death differed about whether it was the result of strangulation with an arm, or by ligature.

13.160 The provocation alleged was the deceased's brandishing the knife, and criticising Corcoran. It was rejected by the jury, as was self-defence, and Corcoran was convicted of murder.

R v Poonkamelya (sentenced 16 September 2004)⁸⁶⁰

13.161 Poonkamelya was convicted of murder and attempted murder.

13.162 He came home to find his wife having sexual intercourse in the lounge room with his friend. Poonkamelya became extremely angry. He beat them both with a chair, the handle bar of a bicycle and an electric fry-pan. They were both rendered unconscious.

13.163 Poonkamelya dragged his bleeding wife through the house. He took a stanley knife from his room and cut her throat. She died. Poonkamelya went looking for his friend, but he had regained consciousness and fled. He was seriously injured.

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Indictment No 112 of 2003.

13.164 Poonkamelya was an Indigenous man. At his sentence hearing, the co-ordinator of the Community Justice Group referred to certain cultural factors which were said to explain the way he acted and his very possessive and proprietorial attitude to women:

The infidelity of a partner, because of the complex kinship system, involves perhaps significantly more 'loss of face' and 'identity' than in mainstream Australian society. It begets a situation where not only the [immediate] people are affected, but there are serious ramifications and implications which reverberate throughout the kinship system of the whole community and beyond.

13.165 For the murder of his wife, Poonkamelya was sentenced to imprisonment for life. The trial judge noted that provocation was not a defence to attempted murder, but that it was relevant to a sentence for that offence. The sentence imposed for attempted murder was a concurrent sentence⁸⁶¹ of six years' imprisonment, with a declaration that Poonkamelya had been convicted of a serious violent offence.

R v Exposito (sentenced 4 July 2006)⁸⁶²

13.166 Exposito was convicted of murder. He killed his former wife's new partner. He raised the defences of accident, self-defence and provocation. In sentencing him to life imprisonment, the trial judge described those defences as 'barely arguable':

You have been convicted by the jury of a dreadful vengeful murder. It originated in bitter resentment of your former wife's relationship with the deceased, a relationship which ... developed after your divorce.

... Driven by unbridled passion you did not even trouble to conceal your destructive hatred of [the deceased].

When it became clear to you at the club that you were fully supplanted in your former wife's life you left the club, obtained the fuel, returned and lay in wait for the departure of the deceased with your former wife. You were diabolical to the point of lodging chocks behind the wheel of his vehicle to ensure he would not easily escape what you had planned for him.

Then you trapped him in the darkness, drenched him with a large quantity of petrol and set him alight. Once you were satisfied his fate was sealed you decamped. The flames rose from his body to the height of two storeys of a building. This was vengeance of terrible proportion. Having suffered extremely serious burns to three-quarters of his body [the deceased] managed to survive for three months and then succumbed.

861 That is, it ran concurrently with the sentence of life imprisonment.

862 Indictment No 340 of 2005.

13.167 Exposito unsuccessfully appealed his conviction. He did not raise any issue about provocation in argument on appeal.⁸⁶³

R v Abusoud (sentenced 17 April 2008)⁸⁶⁴

13.168 Abusoud was convicted of murdering his wife. He alleged that he was infuriated by his wife's confession of a sexual affair with one of her work colleagues. He slashed her throat in the bedroom of their home, while their three children were outside the room and aware of the disturbance. The sentencing judge described the crime as 'particularly horrendous'.

OBSERVATIONS

13.169 The cases discussed so far illustrate that it is difficult to find consistency in the application of the partial defence. Spoken confessions of infidelity have provided provocation reducing murder to manslaughter but finding one's partner in the act of adultery did not. Spoken confessions of infidelity have provided provocation reducing murder to manslaughter in some cases, but not in others. Words have provided provocation reducing murder to manslaughter in some cases, but not others.

WOMEN CONVICTED OF MANSLAUGHTER OF AN INTIMATE PARTNER

13.170 The following cases concern women who have killed their intimate partners or former intimate partners in circumstances which a jury has found, or the prosecution has accepted, warranted a conviction for manslaughter rather than murder.

13.171 Not all of these women relied on provocation in their defence.

R v Benstead (offence occurred 29 December 1993)⁸⁶⁵

13.172 Benstead pleaded guilty to unlawful killing. She stabbed her male friend once in the chest in the middle of the afternoon in the main street of Nambour. They were both very drunk, and had been arguing. Benstead pulled a knife from her bag, drew it from its sheath and swung her right hand around. The knife became impaled into the deceased's chest, penetrating to the heart. Benstead let go of the knife, leaving it in the deceased's chest. She walked across the road to a store, then to a hotel, where she was arrested.

13.173 She was sentenced to imprisonment for 11 years, with a recommendation that she be eligible for parole after serving four years.

⁸⁶³ [2007] QCA 53.

⁸⁶⁴ Indictment No 47 of 2007.

⁸⁶⁵ [1995] QCA 195.

13.174 Benstead appealed against that sentence, arguing that it was manifestly excessive.

13.175 Benstead had a troubled childhood. She had a borderline personality disorder, and abused drugs and alcohol. She met the deceased in 1991. They lived together for three months, then did not see each other for two years. They met again in October 1993, and lived together at a caravan park. The circumstances in which the killing occurred were not clear.

13.176 The prosecution accepted that, because of Benstead's intoxication, it could not prove an intention to kill or do grievous bodily harm to the deceased. The Court of Appeal described her offence as a 'tragedy resulting from the criminally negligent absence of control of the knife'.⁸⁶⁶

13.177 Benstead's sentence was reduced to seven years' imprisonment, with a recommendation that she be eligible for parole after serving two years and six months of that sentence.

R v Babsek (sentenced 4 June 1999)⁸⁶⁷

13.178 Babsek was convicted of manslaughter after a re-trial. She killed her former de facto partner. She was 24 years old.

13.179 She had known her partner since she was 18. They lived together after the birth of their son in 1994. The relationship began to break down in 1996. On 21 April 1996, the deceased moved to his parents' house in Tully, and Babsek stayed at the deceased's parents' beach house at Mission Beach. They were intimate at least once after their separation. Babsek wished to continue the relationship. The deceased did not.

13.180 On the day of the killing Babsek phoned the deceased in Tully to give him an opportunity to see their son before she went to Cairns for the weekend. The deceased went to the beach house, collected their son and went to the beach. Babsek followed. The deceased confirmed that their relationship was finished. Babsek brought her son home by car. The deceased followed them on foot. The walk to the beach house took about nine minutes.

13.181 Babsek took the deceased's .22 rifle and case from his car, ejected a used cartridge and reloaded the rifle. (The deceased left the used cartridge in the rifle as a safety precaution.)

13.182 The deceased entered the beach house, and Babsek shot once and killed him. She telephoned 000 in distress and said she had shot her boyfriend. She telephoned the Mission Beach Medical Centre and said the same thing.

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Ibid 3.

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R v Babsek; ex parte Attorney-General (Qld) [1999] QCA 364. Babsek was convicted on 10 February 1999. A pre-sentence report was prepared and she was sentenced on 4 June 1999.

When a doctor arrived at the scene, Babsek said 'Oh my God, is he dead?' She was distraught and crying. She told the doctor that they had been living apart for several weeks. She wanted to reconcile, but the deceased told her that he was permanently ending the relationship. Babsek said, 'I couldn't accept him leaving me. I shot him. I didn't really want to kill him'.

13.183 She said she had taken a handful of sleeping tablets. Vomiting was induced. She was later taken to hospital and was discharged later than day suffering no serious effect from the tablets.

13.184 She told police that she shot the deceased with the gun she took from his car. She said, 'I was just so scared that he was taking [their son] ... I didn't want to hurt him ... I love him just so much'. On the way to hospital, she told the police she shot the deceased in the face. She added, 'I didn't really mean to hit him, I just pointed the gun and fired'.

13.185 The bullet entered behind the deceased's ear, which is consistent with his fleeing or retreating when he was shot.

13.186 Babsek was tried and convicted of murder at her first trial. At that trial, she gave evidence that she acted in self-defence. Her conviction for murder was quashed on appeal on the ground that the jury's verdict was based on inadmissible and unfairly prejudicial evidence (which, for example, suggested that Babsek had been previously violent towards the deceased).

13.187 At her re-trial, she did not give evidence, and self-defence was not raised. The defence was that she shot the deceased without an intention to kill him or do grievous bodily harm to him. Criminal negligence was also left to the jury. The jury returned a verdict of guilty of manslaughter and stated that it was not on the basis of criminal negligence. The verdict was consistent with the jury's concluding that Babsek pulled the trigger and caused death without the relevant intention.

13.188 There was some suggestion, but no evidence, that Babsek was the victim of a violent relationship. At her sentence hearing at the second trial, the prosecutor submitted that lies told by her at the first trial indicated her lack of remorse. At the first trial, Babsek claimed that the deceased threatened her and assaulted her at the boat ramp, and that she saw him through the kitchen window making threatening gestures as he approached the beach house. She did not make these claims to the police or to doctors immediately after the killing. Photographs and a lace tablecloth tendered at the first trial showed that the kitchen window through which she claimed to have seen the deceased was blocked by two layers of tablecloth. Nevertheless, Babsek maintained at her sentence after the re-trial that she was the victim of the deceased's violence and abuse.

13.189 The sentencing judge concluded that the relationship between Babsek and the deceased was 'marked on occasions with disputation, altercation and some physical violence' and that Babsek was 'emotionally affected by the most

recent separation, and by the statements made by [the deceased] that he regarded the relationship as being at an end. The sentencing judge found that Babsek was 'deeply in love with [the deceased] and that this heightened [her] emotional state'.⁸⁶⁸

13.190 Babsek was sentenced to nine years' imprisonment with a recommendation that she be eligible for parole after serving three years.

13.191 The Attorney-General appealed against that sentence, arguing that it was manifestly inadequate. A particular of the Attorney's argument was that that insufficient weight was given to deterrence. In response to that point, the Court of Appeal said:⁸⁶⁹

A case such as this where death was caused during the emotional and traumatic breakup of a relationship is less likely to require particular or individual deterrence; the violence usually arises out of a unique relationship and set of circumstances and is therefore less likely to be repeated. General deterrence is however always a very important factor in such cases and a substantial term of imprisonment must generally be imposed upon those who unlawfully kill a former partner who wishes to leave the relationship ... All members of the community must understand that physical violence is not an option when a relationship ends.

As Thomas JA observed in *R v Haack*:⁸⁷⁰

'Courts are rightly concerned at violence by possessive males who cannot accept rejection and who behave violently towards former partners in such situations. Deterrence is needed against overreaction by females in such situations just as it is for males.'

Deterrence of those who choose to damage their partner rather than let him or her escape a relationship is an important sentencing objective. People seeking to escape such relationships deserve the help of the law. The present case is a clear example of such conduct.

13.192 The Court of Appeal considered that the sentencing judge had erred in factoring into the sentence a need for early resolution of the issue of custody of Babsek's son. Having found error, the Court of Appeal was entitled to sentence Babsek afresh. The Court said:⁸⁷¹

The essential feature of this crime was that it was committed by a woman who was not prepared to permit her male partner to terminate their relationship. She shot him through the head from a range of about four metres. There was a not insignificant degree of preparation and deliberation. The shooting was not the result of any physical activity or immediate provocation on the part of the deceased beyond his insistence on terminating the relationship. He would seem to have been in retreat when he was shot. The respondent's state of

868 *Ibid* [11].

869 *Ibid* [13]–[14].

870 [1999] QCA 076.

871 [1999] QCA 364 [24].

mind is encapsulated by her statements to a doctor who arrived soon after when she said 'I couldn't accept him leaving me' and 'I shot him. I didn't really want to kill him'. The last statement seems to be the basis for the verdict of manslaughter returned by the jury; the case is a fairly bad example of manslaughter.

13.193 The Court concluded that the sentence imposed, which required Babsek to spend only three years in custody, did not adequately reflect the seriousness of her conduct, and was manifestly inadequate. The sentence was increased to 10 years' imprisonment, with no recommendation for parole (meaning that parole eligibility would arise after she had served half of the term of 10 years).

13.194 As Babsek admitted, she could not accept the deceased was leaving her: this is a case of a woman killing out of possessiveness.

13.195 Babsek did not rely upon provocation as her defence. To reduce the charge to manslaughter, she relied upon a lack of intention to kill.

13.196 It may be thought that there is some sentencing advantage in basing a manslaughter conviction on a lack of intention to kill rather than on provocation, which requires an intentional killing. Arguably, a defendant who intentionally kills, although acting under provocation, is more morally culpable than one who kills without an intention to do so, and deserving of greater punishment.

13.197 The Commission considered the sentences imposed upon these women in their various circumstances below. The sentences imposed show that *Babsek* was treated, in terms of sentence, in the same way as men who killed out of jealousy. Other women who killed in circumstances in which their absence of relevant intention was clear received much lower penalties.

***R v Bob; ex parte Attorney-General (Qld) (Appeal heard 21 March 2003)*⁸⁷²**

13.198 Bob killed her husband. She was sentenced to five years' imprisonment, suspended after 12 months. The Attorney-General appealed against that sentence, arguing that a sentence of seven to eight years' imprisonment without moderation should have been imposed.

13.199 Bob's husband had a serious gambling addiction. She was angry because her husband took \$50 from her purse to gamble. They argued. She got a knife and stabbed him from behind in the leg. He died from blood loss. The wound was inflicted with moderate force. It was accepted that she had no intention to kill him, but she was intent on causing him pain.

13.200 Bob was in her twenties when she killed the deceased, who was 59. They had lived together since 1993.

872

[2003] QCA 129.

13.201 Bob was sold to the deceased by her parents for about \$4000 when she was a young teenage girl from a village in Papua New Guinea. He was then 51 years old. He brought her to Australia using false papers, and maintained an unlawful sexual relationship with her over the next three years.

13.202 When she was 15, Bob and the deceased went onto the IVF program to conceive a child. Bob delivered a child when she was 17. There was some violence in her relationship with the deceased, but most of it came from her in response to his gambling habit.

13.203 The Chief Justice, with whom Davies JA and Atkinson J agreed, said:⁸⁷³

Unless in the context of the so-called battered wife syndrome a sentence of five years imprisonment suspended after one year imposed on a wife who deliberately stabbed her husband causing his death would cry out for explanation. This is not a battered wife case. Indeed the major violence was apparently the respondent's responsibility albeit a response, it seems, largely to the deceased's succumbing to a serious gambling addiction.

13.204 Although Bob was not a battered wife, she was in a domestic relationship which had been shaped by the deceased's sexual exploitation of her as a young teenager, and affected by his psychological problems (he was a Vietnam war veteran diagnosed with post-traumatic stress disorder) and gambling addiction. The stabbing was impulsive, not premeditated, and it was unusual for the injury caused by it to cause death (according to expert opinion).

13.205 In addition, Bob had pleaded guilty, she had no previous convictions and a custodial term would impact upon the welfare of her young child. The Chief Justice considered that this case was in a 'most unusual category', which justified the extremely lenient sentence. The Attorney's appeal was refused.⁸⁷⁴

13.206 Although the circumstances of the killing in this case reveal some provocative conduct on the part of the deceased prior to his death (namely, stealing from Bob's purse to fund his gambling addiction) the evidence did not support a suggestion that Bob had had an out-of-control reaction to the theft, and formed an intention to kill. The location of the injury was consistent with her lack of intention to kill.

***R v Brown* (sentenced 10 September 2003)⁸⁷⁵**

13.207 Brown was convicted of manslaughter after a trial. She was a child when the offence was committed (six days short of her 17th birthday), but almost 19 years old when she was convicted. Accordingly, she was sentenced

873 Ibid 2.

874 Ibid 5.

875 Indictment No 20 of 2002.

as an adult. Under section 107B of the *Juvenile Justice Act 1992* (Qld), the sentencing judge was required to take into account the penalty which she would have received had she been sentenced as a juvenile.

13.208 The deceased was a 42-year-old man whom Brown had known as a child. They met up again at a hotel in Cairns. They were drinking there with others. They all left the hotel and went to the deceased's residence.

13.209 Brown claimed that the deceased made sexual remarks to her as they travelled to his residence, and that he made sexual advances towards her at the residence. They were both grossly affected by alcohol. An argument developed and others told the deceased to settle down.

13.210 Brown claimed that the deceased made a sexual advance towards her while she was in a bedroom, causing her to lose self-control. In what the sentencing judge described as an hysterical state, Brown stabbed the deceased as he was sitting in a chair in the company of others.

13.211 The trial judge was unable to determine whether the manslaughter verdict was because the jury accepted that Brown did not have an intention to kill (or do grievous bodily harm), or that she was reacting to provocation.

13.212 Brown had an extensive criminal history, including offences of violence. She had a sad childhood and a dysfunctional upbringing. From 13, she lived on the streets. She had been physically and sexually abused.

13.213 She was sentenced to six years' imprisonment.

13.214 If the verdict was based on provocation, then the provocation was the deceased's repeated sexual advances after his earlier advances had been refused.

On appeal: *R v Brown*⁸⁷⁶

13.215 Brown unsuccessfully appealed against sentence. The Chief Justice, with whom Williams JA and Mackenzie J agreed, said:⁸⁷⁷

[Brown] killed the deceased by stabbing him in the neck. She had with deliberation previously obtained the knife she used for that purpose. She and the deceased were intoxicated. They had been drinking at a hotel and then went to his house. She claimed to be reacting to unwanted sexual advances but the reality is the deceased probably posed no real threat to her, in saying that not to diminish the plain unacceptability of his conduct in that regard.

The applicant has had a most unfortunate personal background, one of deprivation and abuse. But the particular difficulty she faced upon sentence was her extensive prior criminal history and especially prior convictions for

876 [2004] QCA 4.

877 Ibid 2–3.

crimes of violence. On 21 February 2001 she was convicted of assault occasioning bodily harm involving a stabbing and sentenced to nine months detention with an order for immediate release. Within one month of her being released she committed a serious assault by pulling a knife on a police officer.

She was required to serve the nine months detention imposed on 21 February 2001 leading to her release in August 2001. The instant offence occurred on 21 December 2001. Against that history and allowing for her youth, six years' imprisonment was unsurprising even against a 10 year maximum ...⁸⁷⁸

R v Saltner (sentenced 28 October 2004)⁸⁷⁹

13.216 After most of the evidence at her murder trial had been completed, the prosecution accepted Saltner's plea to manslaughter. She had offered that plea prior to the commencement of the trial.

13.217 Saltner was a victim of domestic violence. When the deceased drank, he became violent. At the time of his death, he had been drinking to excess. His blood alcohol content was 0.29 per cent.

13.218 He took hold of one of Saltner's children and threatened the child with a knife. Saltner struggled with the deceased and got the knife from him to protect the child. During the struggle, she stabbed the deceased twice in the back.

13.219 It appears that the prosecution ultimately accepted the plea in the course of the trial on the basis that Saltner had not acted with an intention to kill, but was driven by a desire to protect her child.

13.220 Having regard to the history of domestic violence, the trial judge described Saltner's criminality as 'very low'. She was sentenced to five years' imprisonment, wholly suspended for an operational period of five years.

R v Griffin (sentenced 13 May 2005)⁸⁸⁰

13.221 The prosecution accepted Griffin's plea of guilty to manslaughter on a charge of murdering her de facto partner.

13.222 At about 2 am, she woke to find the deceased talking on a phone at the back of the house. The deceased told her he was talking to a mate but when she pressed the 're-dial' button she found that he had telephoned a '1900 sex line'.

13.223 They argued over the deceased's use of the phone to make expensive phone calls. The argument escalated, and the deceased became abusive.

878 The maximum period of imprisonment which would have applied had she been sentenced as a juvenile.

879 Indictment No 8 of 2004.

880 Indictment No 710 of 2004.

Griffin fled to the bathroom. The deceased was bashing on the door. She opened it, escaped under his arms and ran to the kitchen to get a knife.

13.224 As the deceased was coming towards her, she tried to ward him off, and stabbed him twice in the chest. The fatal wound was inflicted with a mild amount of force but it cut a large vein and artery, which caused massive haemorrhaging.

13.225 The prosecution accepted that Griffin was acting in self-defence but that her response to whatever injury she might have suffered was grossly disproportionate. The prosecution submitted that Griffin acted in anger when she stabbed the deceased, and referred to evidence that he was at the time trying to calm her down. There was evidence of previous violence by both towards each other. The defence submitted that Griffin acted in fear, with no intention to kill the deceased.

13.226 The sentencing judge accepted that Griffin had acted disproportionately in self-defence. There was an element of anger to her conduct, but anger was not her primary motivation. She was sentenced to imprisonment for eight years, with a recommendation that she be eligible for parole after three years.

13.227 It may be thought that Griffin could have relied upon the deceased's expensive phone call and his abuse and aggression towards her as provocative. However, Griffin's instructions, as reflected in defence counsel's submissions to the court at sentence, were that she acted out of fear, without an intention to harm the deceased.

R v Pivar (sentenced 26 June 2006)⁸⁸¹

13.228 Pivar, then aged 19, killed her partner. He was 22. She was charged with murder, but the prosecution accepted her plea to manslaughter on the basis that she used excessive force to defend herself. It is important to appreciate that there exists no partial defence of 'excessive force in self-defence' which reduces murder to manslaughter. Although the parties and the courts refer to this concept, in fact the verdict is based on a lack of intention to kill or do grievous bodily harm. In this case, the prosecution must have accepted that Pivar's intention when she stuck the fatal blow was only to defend herself. She was not intending to kill the deceased or to do him serious harm.

13.229 Pivar and the deceased had lived together for three years. They had a 'turbulent' relationship. They separated shortly before the deceased was killed. The deceased stayed in the house they had been renting at Morayfield, and Pivar left.

881

Indictment No 104 of 2005.

13.230 On the evening of 12 February 2004, Pivar was drinking vodka with a friend. She was very drunk. Later that evening, from the house of a friend, she telephoned the deceased 20 times, but he did not answer. She told her friend that she wanted to go home and 'sort things out'. She said 'I love him. I can't leave him. I need him'. She left by taxi at about 11:30 pm, resisting her friend's attempts to convince her stay and contact the deceased in the morning.

13.231 When Pivar arrived at Morayfield, she could not rouse the deceased, who was sleeping inside. He too was affected by alcohol. She lifted a roller door and got into the house. She woke the deceased. He was angry that she had woken him but encouraged her to come to bed. She refused and they argued. They began to push each other. The violence between them increased.

13.232 They punched each other in the kitchen of the house. Pivar overturned a bucket of water, and the deceased pushed her over onto the wet floor. He dragged her into the lounge, where he smashed a coffee table and hit her with the leg of it. He punched her in the back of the head. He overturned the television, and Pivar overturned the stereo.

13.233 The fight moved back to the kitchen. The deceased seized Pivar around the throat and hit her head on the kitchen bench. She grabbed a frying pan to defend herself. Then she got a knife, and stabbed the deceased twice to get him off her. She had stabbed him in the heart.

13.234 The deceased screamed and told Pivar to call an ambulance, which she did. He soon died from a massive internal haemorrhage. The degree of force required to inflict the wound to the heart was 'only mild, to at most, moderate'.

13.235 She was distraught when police arrived; anxious about what might happen to her and remorseful for having stabbed the man she repeatedly said she loved.

13.236 Pivar was examined by a psychiatrist and her report was tendered at the sentence hearing. Pivar described to the psychiatrist the deceased's verbal and physical abuse of her. He was the subject of a domestic violence order when he was killed. Others had intervened in fights between them. One psychiatrist said:⁸⁸²

[H]er account to me of at least 3 years of domestic violence (supported by witness statements) indicated she struggled in the conflicted relationship with [the deceased], was often unhappy or ambivalent, between periods of real attachment and that he was often intoxicated, including during their fights. It is possible, and maybe even probable, she was intoxicated with alcohol at the time of the offence which may have rendered her more irritable or impulsive than usual.

She described being more assertive (or more likely to 'hit back' at [the deceased]) for some months before the offence ...

13.237 The sentencing judge emphasised that Pivar stabbed the deceased when he was attacking her, and sentenced her to five years' imprisonment, suspended after one year for an operational period of five years.

13.238 On these facts, it may be thought that Pivar had a viable defence of self-defence which, if successful, would have resulted in a complete acquittal. This area of the law is complex but essentially, the prosecution would have had to negate, beyond reasonable doubt, the possibility that Pivar feared for her life and believed she had to use fatal force in self-defence.⁸⁸³

R v Knox (sentenced 31 July 2006)

13.239 Knox killed her de facto partner. They had been together for about eight months. The sentencing judge said that it would not be fair to say that their relationship had been violent.

13.240 Knox and her partner had been drinking at a hotel. They argued there but it passed. When they got home, 'further trouble broke out' and the deceased struck Knox in the face. She warned him that she would retaliate by getting a knife if he continued. He taunted her, and she was afraid that he would hit her again.

13.241 They were in the kitchen. She took a knife and stabbed him once in the area of the heart.

13.242 Knox pleaded guilty to manslaughter on the basis that she did not intend to kill the deceased or do him grievous bodily harm. She was sentenced to seven and a half years' imprisonment, with a recommendation that she be eligible for parole after serving two and a half years of that term.

OBSERVATIONS

13.243 The sentences imposed for manslaughter upon the female defendants in these cases are generally lower than those imposed on men, with the exception of the sentence in *Babsek*. Even though the verdict in *Babsek* was consistent with her shooting the deceased *without* an intention to kill, the sentence imposed upon her was the same as or higher than that imposed upon men who intentionally killed out of jealousy (*Auberson, Schubring, Sebo, Mills*).

883

To achieve an acquittal on that basis, Pivar would have had to go to trial and allow a jury to determine the issue. There can be no guarantee about the outcome of a criminal trial. It is not unusual for defendants to decide to plead guilty to manslaughter, in which there is discretionary sentencing, rather than risk a conviction for murder, and mandatory life imprisonment, after trial.

13.244 Other women who killed without an intention to kill or do grievous bodily harm, in the absence of any element of possessiveness, were sentenced to lower terms of imprisonment:

Benstead — seven years' imprisonment, with a recommendation for parole after two years and six months.

Bob — five years' imprisonment, suspended after 12 months.

Brown — six years' imprisonment.

Knox — seven and a half years' imprisonment, with a recommendation for parole after two and a half years.

13.245 Where the manslaughter was based on an absence of an intention to kill because the defendant was acting in defence of herself or another, and the deceased had been previously violent towards the defendant, sentences requiring short periods of actual custody were imposed. A higher sentence was imposed in the absence of evidence of previous violence (ie, in the case of *Griffin*).

Griffin — eight years' imprisonment, with a recommendation that she be eligible for parole after three years.

Saltner — five years' imprisonment, wholly suspended for five years.

Pivar — five years' imprisonment, suspended after one year, for five years.

13.246 These cases suggest that when sentencing for manslaughter the courts recognise the impact of the violence endured by the female defendants upon their culpability, reflected in orders for their release after serving only a relatively short period of custody.

MANSLAUGHTER VERDICTS NOT BASED ON PROVOCATION

13.247 The Commission's research has revealed two cases of intimate partner killings based on possessiveness and jealousy which led to jury verdicts of manslaughter: *R v Whiting*⁸⁸⁴ and *R v Miguel*.⁸⁸⁵ Neither defendant raised provocation, but obtained verdicts of manslaughter based on lack of intention to kill and diminished responsibility respectively. The sentences imposed in these matters were at the higher end of the range of sentences imposed for manslaughter.

884 *R v Whiting; ex parte Attorney-General* [1995] 2 Qd R 199.

885 [1994] QCA 512.

R v Whiting (sentenced July 1994)⁸⁸⁶

13.248 Whiting was convicted of manslaughter by a jury. He killed his second wife. They had separated a week before the killing. Their marriage had been turbulent, and he had been violent to his wife before.

13.249 She had returned to the home to have some forms signed for the transfer of a motor vehicle. Whiting never explained what happened before he killed her. There was therefore nothing to suggest she did anything to provoke him to kill or injure her.

13.250 The likely mechanism of death was pressure applied to her vagus nerve by his hand or fingers. Impulses from that nerve are communicated to the heart and capable of stopping it instantly. The Court of Appeal observed that it might have been for this reason that the jury had a doubt about his intention to kill his wife, and returned a verdict of manslaughter.⁸⁸⁷

13.251 Whiting was 30 years old when he killed his wife. He was a boilermaker, with a satisfactory work history. He had a criminal history of episodic violence to women which had become increasingly severe. He was sentenced to imprisonment for eight years.

13.252 He unsuccessfully appealed against his conviction. The Attorney-General also appealed against the sentence. During the appeal, counsel for Whiting relied on the decision of *R v Green*⁸⁸⁸ to suggest that in cases of 'domestic' manslaughter 'arising out of the frustrations engendered by close relationships'⁸⁸⁹ six years' imprisonment was the upper level of sentencing.

13.253 In allowing the Attorney's appeal, the Court said that *Green* should not be viewed as imposing a definite line of demarcation between domestic cases and other forms of homicide. The sentence imposed did not reflect the seriousness of the offence and its fatal consequences or Whiting's tendency to use violence. It was increased to 11 years' imprisonment.

13.254 For completeness, the facts of *Green* appear below.

R v Green⁸⁹⁰

13.255 Green was a 17-year-old boy who shot and killed his father. His father was an overbearing and domineering alcoholic, and their relationship was poor. At the time of the killing, Green was suffering from a major depressive disorder.

⁸⁸⁶ *R v Whiting; ex parte Attorney-General* [1995] 2 Qd R 199.

⁸⁸⁷ *Ibid* 200.

⁸⁸⁸ [1986] 2 Qd R 406.

⁸⁸⁹ *Ibid* 407 (Connolly J).

⁸⁹⁰ [1986] 2 Qd R 406.

13.256 They lived on a small property at Kilcoy, and Green was required to do all the chores as well as work in Brisbane. On the spur of the moment, in frustration, and while he happened to be carrying a loaded firearm, he shot at his father from 12 feet, intending to harm him. The prosecution accepted that he had no intention to do grievous bodily harm to the deceased, and Green was charged with, and pleaded guilty to, manslaughter. He was remorseful.

13.257 He was sentenced to nine years' imprisonment, with a recommendation that he be eligible for parole after serving three and a half years of that term. He appealed against sentence, arguing that the sentence was:⁸⁹¹

out of line for offences of domestic violence in which the victim is seen to have subjected his or her family over years to cruel and domineering behaviour and has largely created the situation out of which the offence occurred.

13.258 In determining the appeal, the Court considered all the comparable sentences to which it was referred with a view to establishing the range of sentencing for this type of offence.

13.259 After a review of those comparable cases, Connolly J, with whom Williams and Ambrose JJ agreed, concluded that the appropriate sentencing range was a head sentence of five to six years, with parole recommended after one and a half years. Green's sentence was reduced accordingly.⁸⁹²

13.260 As noted above, in *Whiting*⁸⁹³ the Court of Appeal stated that *Green* should not be considered as laying down an upper limit in cases of manslaughter.

R v Miguel (sentenced August 1994)⁸⁹⁴

13.261 Miguel killed his wife. He was convicted by a jury of manslaughter, and sentenced to 12 years' imprisonment.

13.262 Miguel and his wife had been together for ten years. Their relationship was 'turbulent'.⁸⁹⁵ Miguel had had an affair five years before the killing, and their relationship never recovered from it.

13.263 Some months before her death, the deceased obtained a domestic violence order against Miguel, requiring him to leave the house. He would not accept that the relationship had ended. He persisted in visiting her, and on one occasion threatened her with a knife.

⁸⁹¹ Ibid 407 (Connolly J).

⁸⁹² To one of five years' imprisonment, with a recommendation that he be considered for parole after serving 18 months.

⁸⁹³ *R v Whiting ex parte Attorney-General* [1995] 2 Qd R 199, 202.

⁸⁹⁴ [1994] QCA 512.

⁸⁹⁵ Ibid 2.

13.264 Miguel discovered that the deceased planned to marry another man. He said he became enraged at the prospect that she would be taking their children to live with that man in New South Wales. He told his doctor eight days before the killing that he planned to kill the deceased.

13.265 On the day of the offence, he parked his car out of sight of the house. He hid under the house to wait for her and cut the telephone wires.

13.266 He killed her in the presence of their two young children using a hunting knife. The killing was 'brutal and cold-blooded'.⁸⁹⁶ Miguel stabbed the deceased five times, in the chest and the arms. One of the chest wounds penetrated to a depth of 15 or 16 centimetres.

13.267 As noted above, he was convicted of manslaughter after a trial. McPherson JA said:⁸⁹⁷

I find it difficult to believe that the jury could have had much doubt about his intention to kill or at least to inflict grievous bodily harm. It seems to me much more likely that they reached the conclusion they did on the basis of diminished responsibility on the part of the applicant, which was a matter raised by the evidence in the case.

13.268 McPherson JA found it hard to disagree with the sentiment of the trial judge that the killing was not far short of murder, and that Miguel was fortunate that the jury had taken the view of the facts which they did.

13.269 Miguel had a history of psychiatric problems. At the time of the killing, he had an underlying narcissistic personality, which deteriorated into a depressive illness, which, according to expert evidence, substantially impaired his capacity to form a rational intention to kill and to control.

13.270 Miguel's planning and his laying in wait for the deceased would not allow his killing to be characterised as one committed upon sudden provocation.

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Ibid.

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Ibid 3.

Chapter 14

Provocation in other jurisdictions

INTRODUCTION	280
AUSTRALIAN CAPITAL TERRITORY, NEW SOUTH WALES AND THE NORTHERN TERRITORY.....	280
TASMANIA AND VICTORIA	283
WESTERN AUSTRALIA	284
SOUTH AUSTRALIA.....	288
THE MODEL CRIMINAL CODE AND THE COMMONWEALTH.....	289
RECENT DEVELOPMENTS IN NEW ZEALAND	290
RECENT DEVELOPMENTS IN ENGLAND AND WALES	291
RECENT DEVELOPMENTS IN IRELAND.....	295

INTRODUCTION

14.1 A partial defence of provocation, to reduce murder to manslaughter, is available under the legislation in the ACT, New South Wales and the Northern Territory. In the Northern Territory, a conviction for murder is punished by mandatory life imprisonment.

14.2 In Tasmania, Victoria and Western Australia, the partial defence of provocation to murder has been repealed. Neither does the Commonwealth legislation (based on the Model Criminal Code) include a partial defence of provocation. Mandatory life imprisonment for murder does not apply in any of these jurisdictions although a presumptive life sentence now applies in Western Australia.

14.3 In South Australia, the common law defence of provocation applies. And a conviction for murder in that state is punished by mandatory life imprisonment for murder.

14.4 This chapter outlines the current position and recent developments with respect to provocation in each of the Australian jurisdictions. It also includes some discussion of recent developments in overseas jurisdictions.

AUSTRALIAN CAPITAL TERRITORY, NEW SOUTH WALES AND THE NORTHERN TERRITORY

14.5 The legislation in the ACT, New South Wales and the Northern Territory provides, in almost identical terms, for a partial defence of provocation which, if successful, reduces criminal responsibility from murder to

manslaughter.⁸⁹⁸ In the Northern Territory, the offence of murder attracts a mandatory life sentence.⁸⁹⁹

14.6 The defence operates if the act or omission causing death occurred as a result of provocation. This is satisfied if there was a loss of self-control induced by the deceased's conduct (a subjective test) and the conduct could have induced an ordinary person in the position of the defendant to form the requisite intention for murder (an objective test). The deceased's conduct need not have occurred immediately before the act or omission causing death. It is for the prosecution to negative the defence if it is raised by the evidence.

14.7 In the ACT and the Northern Territory, the legislation was amended in 2004 and 2006 respectively to provide that a non-violent sexual advance is not, on its own, to be regarded as provocation.⁹⁰⁰ However, together with other conduct, a non-violent sexual advance may be taken into account in deciding whether the defendant was provoked.

14.8 By way of example, section 13 of the *Crimes Act 1900* (ACT) provides:

13 Trial for murder—provocation

(1) If, on a trial for murder—

- (a) it appears that the act or omission causing death occurred under provocation; and
- (b) apart from this subsection and the provocation, the jury would have found the accused guilty of murder;

the jury shall acquit the accused of murder and find him or her guilty of manslaughter.

(2) For subsection (1), an act or omission causing death shall be taken to have occurred under provocation if—

- (a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and
- (b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control—
 - (i) as to have formed an intent to kill the deceased; or

⁸⁹⁸ *Crimes Act 1900* (ACT) s 13; *Crimes Act 1900* (NSW) s 23; Criminal Code (NT) s 158.

⁸⁹⁹ Criminal Code (NT) s 157(2).

⁹⁰⁰ *Crimes Act 1900* (ACT) s 13(3), inserted by *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) s 3, sch 2 pt 2.1; Criminal Code (NT) s 158(5), inserted by *Criminal Reform Amendment Act (No 2) 2006* (NT) s 17.

- (ii) as to be recklessly indifferent to the probability of causing the deceased's death;

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

- (3) However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused—
 - (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2)(b) applies; but
 - (b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.
- (4) For the purpose of determining whether an act or omission causing death occurred under provocation, there is no rule of law that provocation is negated if—
 - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission; or
 - (b) the act or omission causing death did not occur suddenly; or
 - (c) the act or omission causing death occurred with any intent to take life or inflict grievous bodily harm.
- (5) If, on a trial for murder, there is evidence that the act or omission causing death occurred under provocation, the onus of proving beyond reasonable doubt that the act or omission did not occur under provocation lies on the prosecution.
- (6) This section does not exclude or limit any defence to a charge of murder.

14.9 In 1997, the New South Wales Law Reform Commission recommended that the defence should be retained as a partial defence to murder but that it should be reformulated.⁹⁰¹ In particular, it recommended that the 'ordinary person' test be replaced with a requirement to consider whether, having regard to his or her characteristics and circumstances, the defendant should be excused for having so far lost self-control as to have formed the requisite intention for murder as to warrant the reduction of murder to manslaughter.⁹⁰²

901 New South Wales Law Reform Commission, *Partial Defence to Murder — Provocation*, Report No 83 (1997) [2.23], [2.39].

902 *Ibid* [2.81]–[2.83].

14.10 The following year, a New South Wales Government Working Party recommended that non-violent homosexual advances be excluded from forming the basis of a defence of provocation.⁹⁰³

14.11 As yet, those recommendations have not been implemented.⁹⁰⁴

14.12 Section 158 of the Criminal Code (NT), which contains the defence of provocation, was enacted as part of the Northern Territory's comprehensive reform of its criminal code.⁹⁰⁵ Section 158 replaced the previous section 34 of the Criminal Code (NT), which had provided a partial defence of provocation to murder and a full defence of provocation in other matters not resulting in death or grievous harm.⁹⁰⁶

TASMANIA AND VICTORIA

14.13 In Tasmania, the partial defence of provocation to murder contained in the Criminal Code (Tas) was repealed in 2003.⁹⁰⁷ When the amending legislation was introduced into parliament, the Minister for Justice gave four reasons for the abolition of the defence:⁹⁰⁸

The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. ...

Another reason to abolish the defence is that provocation is and can be adequately considered as a factor during sentencing. Now that the death penalty and mandatory life imprisonment have been removed, provocation remains as an anachronism.

...

903 New South Wales Attorney General's Department, Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party* (1998) [6.7].

904 See generally L Roth, *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, New South Wales Parliamentary Library Briefing Paper No 3/07 (2007) 12–17, 19. Also see Hon MD Finlay, *Review of the Law of Manslaughter in New South Wales*, Report (to the Attorney-General) (2003) [4.5]–[4.10], [10.5] in which it was recommended that the retention of the partial defence of provocation should be examined as part of a larger review of the law of unlawful homicide; and Judicial Commission of New South Wales, *Partial Defences to Murder in New South Wales 1990–2004* (2006), which reported on the findings of an empirical study on the use of the partial defence of provocation in New South Wales.

905 *Criminal Reform Amendment Act (No 2) 2006* (NT) s 17.

906 The provocation defence in s 34 of the Criminal Code (NT) had required that the defendant act 'on the sudden and before there was time for his passion to cool': Criminal Code (NT) s 34, repealed by *Criminal Reform Amendment Act (No 2) 2006* (NT) s 8. In 2000, the Northern Territory Law Reform Committee recommended that this requirement be removed from the partial defence of provocation in order to make the defence available to 'battered women': Northern Territory Law Reform Committee, Department of Justice, *Self Defence and Provocation*, Report (2000) 49.

907 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) s 4(b), repealing Criminal Code (Tas) s 160.

908 Second Reading of the Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003 (Tas): Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003 (Mrs JL Jackson, Minister for Justice and Industrial Relations).

The third reason supporting abolition is that the defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. ...

Finally, the defence of provocation can be subject to abuse. The defence test has become increasingly subjective and it becomes difficult to separate out cases where the defendant was not actually provoked but merely lost his or her temper and decided to kill.

14.14 In Victoria, the partial defence of provocation was removed in 2005.⁹⁰⁹ Section 3B of the *Crimes Act 1958* (Vic) provides that '[t]he rule of law that provocation reduces the crime of murder to manslaughter is abolished.'

14.15 The abolition of the defence was recommended by the Victorian Law Reform Commission in its report on homicide defences in 2004.⁹¹⁰ In its view, provocation is more appropriately a matter for sentencing:⁹¹¹

[F]actors that decrease a person's culpability for an intentional killing should be taken into account at sentencing rather than form the basis of a separate partial defence. In reaching this position we have accepted that an intentional killing only justifies a partial or complete defence to murder in circumstances in which a person honestly believes that his or her actions were necessary to protect himself, herself or another person from injury.

14.16 The Victorian Law Reform Commission also provided a number of other reasons for the abolition of the defence, including that it is illogical to provide a partial defence for one circumstance, out of many different circumstances or factors, that may reduce culpability; that the defence is inconsistent with contemporary community values; and that the test for provocation is confusing and difficult for juries to apply.⁹¹² The Victorian Law Reform Commission also noted the importance of its recommended changes to self-defence so that women who might otherwise have used the defence of provocation are not disadvantaged.⁹¹³

WESTERN AUSTRALIA

14.17 Until very recently, the position in Western Australia was similar to the position in Queensland. Before 1 August 2008, the Criminal Code (WA) provided a partial defence of provocation to murder (in section 281). It also

909 *Crimes (Homicide) Act 2005* (Vic) s 3.

910 Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 58, Recommendation 1.

911 Ibid [2.93]. Also see [2.100].

912 Ibid [2.94]–[2.98].

913 Ibid [2.102]. The Victorian Law Reform Commission recommended the introduction of an evidence provision dealing with information about the social context of family violence: Ibid [3.44]–[3.48] Recommendation 3; and the reintroduction of the partial defence of excessive self-defence: Ibid [3.103]–[3.115] Recommendation 9.

included a provision setting out the scope and meaning of ‘provocation’ (in section 245). These provisions were in like terms to sections 304 and 268 of the Criminal Code (Qld) respectively.

14.18 However, there had been some uncertainty about whether ‘provocation’ for the partial defence was defined by section 245 of the Criminal Code (WA)⁹¹⁴ or by the common law, as it is in Queensland.⁹¹⁵

14.19 The Law Reform Commission of Western Australia recently reviewed the law in relation to homicide in that State. In its Report, it recommended that the partial defence of provocation should be repealed provided that mandatory life imprisonment for murder⁹¹⁶ was replaced with a ‘presumptive life sentence’.⁹¹⁷

14.20 Like the Victorian Law Reform Commission, the Law Reform Commission of Western Australia considered that protection of oneself or of others is the only lawful justification of an intentional killing and that ‘issues affecting culpability for intentional killings should be dealt with in sentencing’, which is flexible enough to take into account both aggravating and mitigating factors.⁹¹⁸

14.21 A Bill to amend the Criminal Code (WA) in accordance with the recommendations of the Law Reform Commission of Western Australia was introduced into the Western Australian Parliament on 19 March 2008.⁹¹⁹ The Criminal Law Amendment (Homicide) Bill 2008 (WA) repealed section 281 of the Criminal Code (WA), containing the partial defence of provocation.⁹²⁰

14.22 The Bill received Royal Assent on 27 June 2008. Changes to the law commenced on 1 August 2008. In addition to abolishing the partial defence of provocation, the *Criminal Law Amendment (Homicide) Act 2008* (WA) abolished

914 *Mehemet Ali v The Queen* (1957) 59 WALR 28; *Sreckovic v The Queen* [1973] WAR 85.

915 *Censori v The Queen* [1983] WAR 89, 101 (Kennedy J); *Hart v The Queen* (2003) 139 A Crim R 520, 528 [33] (Steytler J, with whom McLure J agreed); *Roberts v Western Australia* (2007) 34 WAR 1, 23 [97]–[99] (Roberts-Smith JA).

916 Under s 282 of the Criminal Code (WA).

917 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 222, Recommendation 29: The Commission recommended that the partial defence of provocation be repealed, but only if the mandatory penalty of life imprisonment for murder was replaced with a presumptive sentence of life imprisonment for murder.

Ibid 317, Recommendation 44: The Commission recommended that the provision for mandatory life imprisonment for murder [section 282 Criminal Code (WA)] be replaced with a provision requiring a person convicted of murder to be sentenced to imprisonment for life, unless, given the circumstances of the offence or the offender, a sentence of imprisonment for life would be clearly unjust.

918 Ibid 218, 220–1.

919 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209 (Mr James McGinty, Attorney General).

920 Criminal Law Amendment (Homicide) Bill 2008 (WA) cl 12.

mandatory life imprisonment for murder.⁹²¹ A new section 279 defines the crime of murder and the punishment for it:

279. Murder

- (1) If a person unlawfully kills another person and—
 - (a) the person intends to cause the death of the person killed or another person; or
 - (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or
 - (c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,the person is guilty of murder.
- (2) For the purposes of subsection (1)(a) and (b), it is immaterial that the person did not intend to hurt the person killed.
- (3) For the purposes of subsection (1)(c), it is immaterial that the person did not intend to hurt any person.
- (4) A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless—
 - (a) that sentence would be clearly unjust given the circumstances of the offence and the person;and
 - (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment,in which case the person is liable to imprisonment for 20 years.
- (5) A child who is guilty of murder is liable to either —
 - (a) life imprisonment; or
 - (b) detention in a place determined from time to time by the Governor or under another written law until released by order of the Governor.
- (6) A court that does not sentence a person guilty of murder to life imprisonment must give written reasons why life imprisonment was not imposed.

921

It also abolished the previous distinction between wilful murder and murder.

14.23 Under section 279(4), a person convicted of murder must be sentenced to imprisonment for life unless, having regard to the circumstances, such a sentence would be unjust and the person is unlikely to be a threat to the community upon their release from imprisonment. In those circumstances, a person convicted of murder may be sentenced up to a maximum of 20 years' imprisonment (which would include non-custodial sentences). A court must give written reasons for sentencing an offender to anything other than life imprisonment for murder. There was no change to the penalty for manslaughter (up to 20 years' imprisonment).

14.24 The 'old' section 281 provided for killing on provocation. It has been replaced with a section providing for the new offence of 'unlawful assault causing death', which takes away the excuse of accident where the consequence of an unlawful assault is death.⁹²²

14.25 To accommodate the circumstances in which battered persons may kill their abusers, the Act inserts a new partial defence of excessive self-defence, in subsection (3) of a new section 248:

248. Self-defence

(1) In this section—

“**harmful act**” means an act that is an element of an offence under this Part other than Chapter XXXV.

(2) A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).

(3) If—

(a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and

(b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be,

the person is guilty of manslaughter and not murder.

⁹²²

Criminal Code (WA) s 281 provides:

281. Unlawful assault causing death

(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.

(2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

- (4) A person's harmful act is done in self-defence if—
- (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
 - (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
 - (c) there are reasonable grounds for those beliefs.
- (5) A person's harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.
- (6) For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.

14.26 The Explanatory Memorandum to the Bill states that the reference to whether or not the threatened harmful act is imminent in section 248(4) allows the defence to apply to the battered spouse scenario so long as the response is reasonable in the circumstances as the person believed them, on reasonable grounds, to be. The Explanatory Memorandum states that 'the requirement that the response be reasonable would preclude pre-emptive attacks where it would instead be reasonable for the police to be called'.⁹²³

SOUTH AUSTRALIA

14.27 In South Australia, the partial defence of provocation is available at common law to reduce murder to manslaughter.⁹²⁴ In that State, the offence of murder attracts a mandatory penalty of life imprisonment.⁹²⁵

14.28 As noted above, the High Court set out the parameters of the common law defence in *Masciantonio v The Queen*.⁹²⁶

Homicide, which would otherwise be murder, is reduced to manslaughter if the accused causes death whilst acting under provocation. The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure.

⁹²³ Explanatory Memorandum, *Criminal Law Amendment (Homicide) Bill 2008*, 4.

⁹²⁴ See, for example, *R v R* (1981) 28 SASR 321; *R v Singh* (2003) 86 SASR 473; *R v Lem* [2005] SASC 405.

⁹²⁵ *Criminal Law Consolidation Act 1935* (SA) s 11.

⁹²⁶ (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ).

14.29 The defence involves both a subjective and objective test.⁹²⁷

[T]he gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. ... [I]t is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions.

THE MODEL CRIMINAL CODE AND THE COMMONWEALTH

14.30 The Model Criminal Code Officers Committee, established by the Standing Committee of Attorneys-General, has made recommendations for a Model Criminal Code. In 1998 it released a Discussion Paper containing recommendations in relation to fatal offences.⁹²⁸

14.31 The Model Criminal Code Officers Committee considered a number of arguments for and against the abolition of the partial defence of provocation.⁹²⁹ In particular, it noted that the test of provocation is conceptually problematic, that the defence is gender-biased and that it fails to reflect modern notions of criminal culpability.⁹³⁰

14.32 The Model Criminal Code Officers Committee recommended that the partial defence of provocation should be abolished and that, instead, provocation should be a matter for sentencing:⁹³¹

[T]he sentencing process offers a flexible means of accommodating differences in culpability between offenders. Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment. Provocation is only one among a variety of considerations which reduce the culpability of persons who kill intentionally. It is anomalous because it reduces murder to manslaughter. So, for example, those who kill from compassion, rather than anger, do not escape conviction for murder. The law of murder already encompasses a range of cases from the sympathetic to the heinous. The inclusion of cases of provoked killing within murder is consistent with current practice, which requires humane adjustment of the sentence to individual guilt.

14.33 The Model Criminal Code Officers Committee also recommended that the offence of murder should be punishable by a maximum penalty of life imprisonment.⁹³²

⁹²⁷ Ibid 67. Also see *Stingel v The Queen* (1990) 171 CLR 312, 327.

⁹²⁸ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998).

⁹²⁹ Ibid 87–101.

⁹³⁰ Ibid 103–4.

⁹³¹ Ibid 105, 107.

⁹³² Ibid 65.

14.34 Those recommendations were accepted and, as a result, the Criminal Code (Cth), based on the Model Criminal Code, does not include a partial defence of provocation to reduce murder to manslaughter.⁹³³

RECENT DEVELOPMENTS IN NEW ZEALAND

14.35 The partial defence of provocation to murder has recently been reviewed by the Law Commission of New Zealand.⁹³⁴

14.36 In 2001, the Law Commission of New Zealand examined the operation of the partial defence of provocation, primarily in the context of domestic violence. It recommended that the defence be repealed and that, instead, matters of provocation should be considered in sentencing.⁹³⁵ It also recommended that mandatory life imprisonment for murder should be replaced with a limited sentencing discretion so that the penalty for murder is life imprisonment unless such a sentence would be clearly unjust.⁹³⁶

14.37 Subsequently, mandatory life imprisonment for murder in New Zealand was replaced with a presumptive life sentence.⁹³⁷ This is similar to the presumptive life sentence that now applies in Western Australia. However, in New Zealand, there was concern that removal of the partial defence of provocation might operate harshly for defendants who are victims of domestic violence or who are mentally ill or impaired.⁹³⁸

14.38 In light of those concerns, the Law Commission of New Zealand again reviewed the partial defence. In 2007, the Law Commission of New Zealand again recommended that the partial defence of provocation be repealed. It considered that evidence of alleged provocation 'should be weighed with other aggravating and mitigating factors as part of the sentencing exercise'.⁹³⁹ It also recommended that a sentencing guideline be developed, in the event that the partial defence of provocation were repealed, to cover the relevance of provocation and other mitigating circumstances that might justify rebuttal of the presumptive life sentence for murder.⁹⁴⁰

933 Note, however, s 115.5 of the Model Criminal Code which provides that 'This division is not intended to exclude or limit the operation of any other law of the Commonwealth or of a State or Territory.'

934 The partial defence of provocation to murder in New Zealand is provided in *Crimes Act 1961* (NZ) s 169.

935 Law Commission (New Zealand), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) [120], [164].

936 *Ibid* [151], [154].

937 See *Sentencing Act 2002* (NZ) s 102.

938 See Law Commission (New Zealand), *The Partial Defence of Provocation*, Report No 98 (2007) [7]–[8].

939 Law Commission (New Zealand), *The Partial Defence of Provocation*, Report No 98 (2007) [183], Recommendation 1.

940 *Ibid* [208], Recommendation 2.

RECENT DEVELOPMENTS IN ENGLAND AND WALES

14.39 In 2004, the Law Commission of England and Wales reviewed the partial defences to murder, including provocation, with particular regard to the context of domestic violence.⁹⁴¹

14.40 It noted a number of theoretical and practical difficulties with the defence of provocation⁹⁴² but recognised that ‘there is general agreement that provocation (subject to what is meant by that word) should be capable of making a significant difference in the sentence passed on the defendant’.⁹⁴³ It also noted that, if the defence were abolished, the problems raised by the defence would simply be deferred to the sentencing stage.⁹⁴⁴ It recommended, therefore, that the partial defence of provocation be retained, but reformulated.⁹⁴⁵

14.41 The Law Commission of England and Wales set out a number of principles on which reformulation of the defence should be based. In particular, it considered provocation should be limited to those cases where:

- the defendant acts in response to ‘gross provocation’ (where words or conduct cause the defendant ‘to have a justifiable sense of being seriously wronged’) or ‘fear of serious violence’ toward the defendant or another person (a subjective test);⁹⁴⁶ and
- a person of ‘ordinary tolerance and self-restraint’, in the circumstances of the defendant, ‘might have reacted in the same or a similar way’ (an objective test).⁹⁴⁷

14.42 It also recommended that certain cases be specifically excluded from the defence, namely, where the defendant acted in considered desire for revenge, and where the gross provocation was incited by the defendant to give an excuse to use violence.⁹⁴⁸

941 The partial defence of provocation to murder in the United Kingdom is provided in *Homicide Act 1957* (UK) s 3.

942 Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.20].

943 *Ibid* [3.41].

944 *Ibid* [3.42].

945 *Ibid* [1.13].

946 *Ibid* [3.66]–[3.68].

947 *Ibid* [3.109].

948 *Ibid* [3.135], [3.138].

14.43 Finally, it considered that the defence of provocation need not be left to the jury ‘unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply’.⁹⁴⁹

14.44 In 2006, the Law Commission of England and Wales completed a review of the law of homicide in its jurisdiction.⁹⁵⁰ In that review, it considered the partial defences to murder, including provocation, in the context of its proposed new graduated hierarchy of homicide offences, being manslaughter, second degree murder and first degree murder. It concluded that partial defences, including the defence of provocation, should be confined to reducing first degree murder, which carries a mandatory life sentence, to second degree murder, which does not carry a mandatory life sentence.⁹⁵¹

The fact that there is a mandatory life sentence for murder is the *raison d’être* of the provocation plea in England and Wales, although we recognise that the defence exists in a minority of jurisdictions in which there is no mandatory life sentence for the top tier offence. We do not believe that it would serve the interests of justice to extend the application of this complex defence to any crime where the existence of sentencing discretion already makes it possible to reflect the nature and degree of the provocation in the sentence itself.

14.45 The Law Commission of England and Wales also confirmed its earlier recommendations as to the reformulation of the provocation defence.⁹⁵²

14.46 Having considered the reports of the Law Commission, the Government of the United Kingdom proposed an approach to reform which differs from the Law Commission’s recommendations. On 28 July 2008, the Ministry of Justice, the Attorney General’s Office and the Home Office published a consultation paper entitled *Murder, manslaughter and infanticide: proposals for reform of the law* (the ‘UK Consultation Paper’).⁹⁵³ The paper explains the Government’s plans and seeks submissions in response.⁹⁵⁴

14.47 The UK Consultation Paper summarises its proposals for reform of partial defences to murder. The proposals for reform of provocation follow:⁹⁵⁵

- To abolish the existing partial defence of provocation and replace it with new partial defences of:

949 Ibid [3.141].

950 Note that the review of the law of homicide was recommended by the Law Commission of England and Wales in its review of the partial defences to murder: Ibid [1.12].

951 Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No 304 (2006) [5.8]. Also see [2.158].

952 Ibid [5.11].

953 Ministry of Justice Consultation Paper CP 19/08, *Murder, manslaughter and infanticide: proposals for reform of the law* (July 2008).

954 Consultation will end on 20 October 2008.

955 Ibid 2.

- killing in response to a fear of serious violence; and
 - (to apply only in exceptional circumstances) killing in response to words and conduct which caused the defendant to have a justifiable sense of being seriously wronged.
- To make clear that sexual infidelity on the part of the victim does not constitute grounds for reducing murder to manslaughter.
 - To remove the existing common law requirement for loss of self-control in these circumstances to be 'sudden'.
 - To provide that the 'words and conduct' partial defence should not apply where the words and conduct were incited by the defendant for the purpose of providing an excuse to use violence.
 - To provide that the 'fear of serious violence' partial defence should succeed only where the victim is the source of the violence feared by the defendant and the threat is targeted at the defendant or specified others.
 - To provide that neither partial defence should apply where criminal conduct on the part of the defendant is largely responsible for the situation in which he or she finds him or herself.
 - To provide that these partial defences should apply only if a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or in a similar way.
 - To ensure that the judge should not be required to leave either of these defences to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that they might apply.

14.48 The UK Consultation Paper includes draft clauses which would give effect to the proposed changes:

- 1 Partial defence to murder: loss of control resulting from fear of violence etc**
- (1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder 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) On a charge of murder, where sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

- (3) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
- (4) A loss of self-control had a qualifying trigger if subsection (5), (6) or (7) applies.
- (5) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (6) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
 - (a) amounted to an exceptional happening, and
 - (b) caused D to have a justifiable sense of being seriously wronged.
- (7) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (5) and (6).
- (8) But subsection (1) does not apply if the qualifying trigger to which the loss of self-control is attributable is itself predominantly attributable to conduct engaged in by D which constitutes one or more criminal offences.
- (9) For the purposes of subsection (6)—
 - (a) an act of sexual infidelity is not, of itself, an exceptional happening;
 - (b) a sense of being seriously wronged by a thing done or said is not justified if D incited the thing to be done or said for the purpose of providing an excuse to use violence.
- (10) 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.
- (11) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

2 Abolition of common law defence of provocation

- (1) The common law defence of provocation is abolished and replaced by section 1.
- (2) Accordingly, section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury) ceases to have effect.

3 Saving for offences committed before commencement

- (1) Nothing in section 1 or 2 affects the operation of—
 - (a) any rule of the common law, or

- (b) any provision of an Act or of subordinate legislation, in relation to offences committed wholly or partly before the commencement of those sections.
- (2) An offence is partly committed before the commencement of those sections if—
 - (a) a relevant event occurs before commencement, and
 - (b) another relevant event occurs on or after commencement.
- (3) 'Relevant event' in relation to an offence means any act or other event (including any consequence of an act) proof of which is required for conviction of the offence.

RECENT DEVELOPMENTS IN IRELAND

14.49 As part of an ongoing project on defences in criminal law, the Law Reform Commission of Ireland released a consultation paper examining the partial defence of provocation to murder in 2003. In it, the Law Reform Commission of Ireland provisionally recommended that the defence be retained, but in a modified form.⁹⁵⁶ The Law Reform Commission of Ireland explained its general approach to the issue of provocation:⁹⁵⁷

Cases of legitimate defence aside, the theme of this chapter takes it for granted that the killing of another human being should be treated as unlawful. In particular, it is assumed that retaliation for wrongs is properly the business of the State, acting through the medium of the criminal law. Accordingly, retaliation by the individual at whom a wrong has been directed should not be legally privileged. However, it is accepted that, by virtue of the conduct of the deceased, some intentional killings involve a lesser degree of culpability than others; and that this reality is best catered for by retaining the defence of provocation in some form.

14.50 It noted that, if the defence were abolished, the mandatory penalty for murder would need to be replaced with a discretionary sentence.⁹⁵⁸ It also considered, however, that even if the mandatory penalty for murder were removed, as it also recommended, the partial defence of provocation should be retained.⁹⁵⁹ It considered that the moral boundary marked by the distinction

956 Law Reform Commission of Ireland, *Homicide: The Plea of Provocation*, Consultation Paper No 27 (2003) [7.28].

957 Ibid [7.02].

958 Ibid [7.03], [7.05].

959 Ibid [7.06]. And see, in relation to its recommendation to abolish the mandatory life sentence for murder, Law Reform Commission of Ireland, *Report on Sentencing*, Report No 53 (1996) [5.12]; and, most recently, Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report No 87 (2008) [1.66].

between murder and manslaughter would be undermined if provocation were abolished.⁹⁶⁰

14.51 The Law Reform Commission of Ireland provisionally recommended that the primary focus of the remodelled defence of provocation 'should be on the conduct of the deceased that is said to have provoked the defendant to the point of engaging in fatal violence' (the 'justification-based model').⁹⁶¹ It proposed a draft provocation provision loosely based on the statutory provocation defence in New Zealand.⁹⁶² It has not yet released a final report on these matters.

960 Law Reform Commission of Ireland, *Homicide: The Plea of Provocation*, Consultation Paper No 27 (2003) [7.06].

961 *Ibid* [7.30].

962 *Ibid* [7.36].

Chapter 15

Battered women who kill

TERMINOLOGY	297
CHAPTER OUTLINE	298
THE CASE OF ROBYN BELLA KINA	299
BATTERED WOMEN WHO KILL AFTER A LAPSE OF TIME	304
<i>R v R</i>	304
<i>R v Bradley</i>	309
AMENDING THE DEFENCE TO MEET REALITY	314
<i>R v Chhay</i>	314
REPORT OF THE TASKFORCE ON WOMEN AND THE CRIMINAL CODE	320
FLEXIBILITY IN THE EXISTING COMMON LAW	324
PROVOCATION AT COMMON LAW	329
THE MODEL DIRECTION	330

TERMINOLOGY

15.1 This chapter is entitled 'Battered women who kill' and uses the expression 'battered women' in the discussion that follows because it considers the operation of the defence of provocation for women who kill their seriously abusive partners. It contains a discussion of cases in which battered women have killed, and considers in some detail the work of the Taskforce on Women and the Criminal Code on provocation.⁹⁶³

15.2 The Commission recognises that there are men, parents and children who may suffer the same abuse as 'battered women' and who may present with the characteristics of 'battered person syndrome' (the description of the physical and psychological condition suffered by persons who have been the victims of constant and severe domestic abuse used in the leading diagnostic manuals⁹⁶⁴).

15.3 The discussion in this chapter about the application of the defence of provocation to the circumstances of battered women who kill is applicable to all battered persons.

963 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

964 American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (4th ed, Text Revision 2000); World Health Organisation, *International Statistical Classification of Diseases and Related Health Problems* (10th revision 2007).

CHAPTER OUTLINE

15.4 This chapter begins with a discussion of the case of *R v Kina*⁹⁶⁵ to provide a graphic example of the reality of life for some battered women. To those of us without understanding or experience of the extent and ferocity of domestic violence, Kina's description of her life with the deceased seems incredible — but there was persuasive and independent support for her account.

15.5 The matter of *R v Kina* has resolved in a way that meant a jury was never asked to consider the application of the partial defence of provocation to her circumstances. However, it may be thought that the circumstances of the killing in *R v Kina* allowed for the application of the defence in a straightforward way. The deceased's threat to have anal intercourse with Kina's niece,⁹⁶⁶ without more, may have been considered sufficient provocation, and Kina's reaction to it sufficiently sudden, to warrant her acquittal of murder and conviction of manslaughter.

15.6 It is often argued that the defence of provocation is not available to the battered woman who kills her abuser some time after the provocation has been endured and while she is under no immediate threat of harm, for example, while her abuser is asleep. If there is a lapse of time between the provocation and the killing, then, it may be argued, there has been time for 'passion to cool'. And if she kills while her abuser is asleep, self-defence is not available to her.

15.7 However, the Commission has found a willingness in some courts to permit battered women to rely on the defence of provocation even if they do not react immediately to the provocative behaviour. The courts do this by interpreting passion as rising, rather than settling or cooling, over time, or by focusing on loss of self-control. Also, it seems without doubt that the conduct which a battered woman seeks to rely upon as provocative is viewed in the context of her relationship with the deceased. Something which appears at face value to be harmless may, in context, be extremely insulting.

15.8 The Queensland Taskforce on Women and the Criminal Code (the 'Taskforce') considered in detail the application of the partial defence of provocation to battered women particularly. Its report was published in February 2000.⁹⁶⁷ This chapter discusses the views expressed by the Taskforce below. Briefly, after undertaking consultation, having regard to the arguments for and against retention of the defence and noting that the concept

965 [1993] QCA 480.

966 See [15.42] below.

967 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

of excessive self-defence may be more appropriate to the circumstances of a woman who kills in response to violence the Taskforce said it was.⁹⁶⁸

aware of the enormity of a recommendation to abolish the partial defence of provocation, and therefore [could not] make it without further research and investigation into how the defence is used and whether any injustices have occurred.

15.9 The Taskforce noted that one of its members supported the abolition of the defence.

15.10 Ultimately, the Taskforce formally recommended that the Department of Justice and Attorney-General conduct further research of, review of, and consultation about, provocation, and investigate the viability of a new partial defence of 'excessive self-defence'.⁹⁶⁹

15.11 The Commission's terms of reference for the current review do not specify the Taskforce's recommendations as matters to which the Commission is to have particular regard.⁹⁷⁰ However, the Commission's current research and review of the defence and the consultation it intends to undertake may be considered to meet, to some extent, the recommendations of the Taskforce.

15.12 This chapter discusses cases in which battered women have killed their abusers in circumstances where they have been (or, in the case of *R v Kina*, may well have been) permitted to rely upon the defence.

THE CASE OF ROBYN BELLA KINA

15.13 This case graphically illustrates the circumstances in which a battered woman may be provoked to kill her abuser.

15.14 On 5 September 1988, after a trial which lasted less than a day, Kina was convicted of murdering her partner. The evidence led at trial was to the effect that Kina and the deceased had a close relationship, although he had been 'occasionally aggressive'⁹⁷¹ towards her and had injured her in the past.

15.15 Of the killing itself, there was evidence of loud bumping and screaming from Kina and the deceased's bedroom. There was evidence of Kina's running out of the bedroom into the kitchen and back; pushing the door open with her shoulder. When she went into the room she said 'I am going to stab you, you bastard'. There was evidence that the deceased picked up a chair, but that Kina knocked it out of his hand and stabbed him in the stomach, killing him.

968 Ibid 195.

969 Ibid 196.

970 See Appendix 1 to this Discussion Paper.

971 [1993] QCA 480, 4 (quoting from the judgment of Kelly SPJ, with whom Matthews and Macrossan JJ agreed, in Kina's appeal against her conviction of murder).

15.16 Kina did not give or call evidence at trial and there was, therefore, no evidence from her (or any other witness) about the circumstances leading up to the killing. Provocation was not left as an issue for the jury to consider and Kina was convicted of murder.

15.17 On 24 May 1993, a petition for pardon was delivered to the Governor on behalf of Kina. Under section 672A of the Criminal Code (Qld), the Attorney-General referred 'the whole case with respect to the conviction of ... Robyn Bella Kina on the charge of murder to the Court of Appeal to be heard and determined by the said Court as in the case of an appeal by the said Robyn Bella Kina'.⁹⁷²

15.18 Kina was a shy, withdrawn Aboriginal woman. Her legal representatives for the trial found her deeply depressed, and reluctant to discuss anything about the circumstances of the killing. She seemed to her lawyers 'passive and uninterested in the entire process of the preparation of her defence'.⁹⁷³

15.19 Without going into detail, it is sufficient to say that those representing Kina at trial were not aware of the magnitude of the abuse inflicted upon her by the deceased.

15.20 Before the Court of Appeal, Kina's lawyers argued that she had evidence which, had it been placed before the jury at her murder trial, might have led to her being acquitted entirely, or acquitted of murder and convicted of manslaughter. That evidence was of the deceased's violence towards her and his provocative behaviour before the killing.

15.21 Kina's life had been filled with 'abuse, trauma and hardship'.⁹⁷⁴ The Court of Appeal considered in detail her experiences as an abused child and a battered woman.

15.22 Kina was one of 14 children. By the time she was 34, seven of her siblings were dead. Her father flogged her mother and the children. When Kina was seven or eight, she was sexually abused by an uncle. She engaged in sexual intercourse when she was very young.

15.23 Her mother left the family when Kina was 12. Her father took her out of school to look after her three younger siblings. She prostituted herself to earn money to run the household — her violent father drank away most of his money.

972 Ibid 5.

973 Affidavit, Theresa Hamilton, then Principal Solicitor, Aboriginal Legal Service, paragraph 18: [1993] QCA 480, 22.

974 [1993] QCA 480, 6 (Fitzgerald P and Davies JA).

15.24 She was an uncontrollable teenager. She abused alcohol and pills. At 19, she got into a brawl at a hotel, and was convicted of unlawful wounding and assault occasioning bodily harm, for which she was imprisoned.

15.25 Kina's mother died in late 1983. In November 1984, Kina started working as a prostitute. She suffered health problems, including depression.

15.26 In February 1985, she met the deceased. He paid for their first sexual encounter, but then he asked her to stop working on the streets. She lived with him, and he worked and supported her. They often argued, but they were happy and she loved him. He was violent towards her during all of their relationship.

15.27 The deceased drank a lot. He gambled frequently. If he lost, he would ask Kina for money. If she refused, he would hit her. Kina started drinking again. She had not had alcohol for two years prior to meeting the deceased.

15.28 They fought over the deceased's demands for anal sex. Kina did not wish him to have anal sex with her. It made her feel 'dirty'.⁹⁷⁵ The deceased insisted. He regularly forced her down, punched her and anally raped her. If he hit her onto the floor, he would kick her with his work boots in the stomach or the back. She hid her injuries with her clothes.

15.29 In September 1985, the deceased found Kina in bed with another man. He beat her up, leaving her with a swollen face and black eyes. He threatened to bash her and put her in hospital, or flog her in the bush when no one was around. On one occasion when she refused anal sex, he threatened to throw her over the balcony. On another occasion he demanded anal sex under threat of throwing her out a window, and she complied.

15.30 The deceased was a shift worker. He worked from midnight to 6 am on a construction site. Once, before Christmas in 1985, Kina went out on the town, while he was at work, without telling him. After he found out, he either brought her to the construction site with him, or tied her to the bed when he went to work.

15.31 In August 1986, while Kina was with the deceased at the construction site, he said he wanted sex. He took off her clothes and had sex with her while his workmates watched. Then he said to them 'Who wants to go next?' The other men raped her as she lay cold and naked on the concrete. This occurred twice.

15.32 On the nights the deceased did not take Kina to work with him, he tied her to the bed. Sometimes he tied her face up, sometimes face down. To restrain her, he tied each hand to a corner of the bed, or tied her hands together (sometimes behind her back), or tied her feet together and to the corner of the

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Ibid 9.

bed. He often tied her up naked, although she was permitted a blanket. She was not untied until the deceased came home from work.

15.33 Regularly, the deceased had sexual intercourse (vaginal or anal) with Kina before releasing her (although he would have to untie her feet). On some occasions, after sex, he would go and have his breakfast, or a beer, and leave Kina tied to the bed. She was tied tightly to prevent her escaping; as she had done once. On that occasion, she was flogged.

15.34 Kina stabbed her sister during a drunken argument in June 1986. She was charged with unlawful wounding and remanded in custody without bail. She was released on bail in September 1986 to alcohol rehabilitation and had not had a drink since. For the offence of unlawful wounding, she was imprisoned for six months, followed by three years' probation. She was released from custody in October 1986, and stayed with her brother, his girlfriend and his girlfriend's son (Simon, aged 18 or 19) in Cleveland. The deceased was working at Eumundi at the time, and saw Kina on the weekends.

15.35 The deceased feared that Kina would form a relationship with Simon. On his visits, the deceased locked Kina in her room if Simon was home. She was required to urinate in a bucket in the room.

15.36 Kina went to live with the deceased at Eumundi. On an occasion when he had been drinking (Kina was sober) she forgot her purse. The deceased became angry with her and she feared a flogging, so she pushed him down some hotel steps. He fractured his heel and was unable to work. He said that he would really hurt Kina when he got better.

15.37 Kina struggled with depression after November 1987, at which time she was taking fertility treatment. By Christmas 1987, the deceased was drinking particularly heavily. In January 1988, Kina's niece, Enid, came to live with them.

15.38 On 15 January 1988, Kina was depressed. Her menstrual bleeding was very heavy and she did not feel well. She had an argument with the deceased during which he jumped off the bed, punched her in the mouth and pulled her by the hair onto the bed. He punched her about the face and the stomach, and then raped her. While she was showering he struck her across the face. Later he apologised and cuddled her.

15.39 When Kina woke on 16 January 1988, she felt sore and hurt and particularly depressed. She took some tablets which caused her to sleep until 2:30 pm. When she woke, she went to a hotel to meet the deceased. He told her she had ended his winning streak (he had been gambling at the hotel) and became angry.

15.40 At about 11 o'clock that night they went to bed. Kina asked him not to touch her. He punched her in the head and mouth. She started to cry. He said he was going to the toilet and by the time he got back, she had to be naked. He

left the room. The door closed and locked after him. Kina would not open it until she thought he had gone. When she did open it, the deceased was there. He pushed her into the room and punched her. He made her remove all her clothes, except for her underpants, and tied her to the bed by her wrist, feet and body.

15.41 On Sunday morning, the deceased untied Kina. She tried to keep him out of the room after he went to the toilet — but he got in, and raped and belted her. Monday, 18 January and Tuesday, 19 January 1988 were uneventful.

15.42 On Wednesday, 20 January 1988, Kina was still depressed and menstruating. The deceased wanted to have anal intercourse with her. She refused and he punched her in the face and stomach. He said to her that if she would not have sex that way with him, he bet her niece Enid would. Kina became extremely upset. She got up and left the room. She went into the kitchen, and saw a knife. Something snapped. She was thinking of her niece Enid. She feared the deceased would carry out his threat.

15.43 She shouldered the door of the bedroom open, intending to threaten the deceased with the knife. He grabbed a chair and came towards her. Kina thought he was going to hit her with the chair and, if he started, he would not stop. He said, 'You won't use that you gutless cunt'. Kina stabbed him once in the body. She was not aiming for his heart. He fell to the ground. Kina was extremely upset. She said that she was sorry and that she loved him and asked him not to die. She asked her niece to call an ambulance.

15.44 There was independent corroboration of Kina's description of the violence she suffered.

15.45 Without going into detail, the Court of Appeal was satisfied that Kina's trial representatives had failed to recognise the factors which contributed to the exceptional difficulty she had communicating with her legal advisers, namely, her Aboriginality, the battered woman syndrome and the shameful (to her) nature of the events which characterised her relationship with the deceased:⁹⁷⁶

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.

In the exceptional events which occurred, the appellant's trial involved a miscarriage of justice.

15.46 The Court considered that the evidence placed before it raised issues of self-defence and provocation. It ordered that her conviction of murder be quashed and a retrial was ordered.

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Ibid 40.

15.47 On 11 December 1993, the then Attorney-General announced that there would not be a second trial in this case.

15.48 As a result, no jury had to consider issues of provocation (or self-defence) as they applied to Kina. As noted in the introduction of this chapter, it may be thought that the deceased's behaviour prior to his death was sufficiently provocative, and Kina's reaction to it sufficiently sudden, to allow for the application of the partial defence of provocation in a straightforward way. The defence of self-defence may also have been available to her.

BATTERED WOMEN WHO KILL AFTER A LAPSE OF TIME

15.49 The partial defence of provocation contemplates a killing in the heat of passion, caused by sudden provocation and before there is time for passion to cool. Some women, like Kina, react immediately with violence to their abuser's provocation. In those circumstances, provocation would appear to be available — the killing has been in 'hot blood'.

15.50 The facts of other cases show that some battered women, subject to provocation against a background of abuse, allow some time to pass before they kill their abusers. Nevertheless, the courts have allowed battered women who kill in those circumstances to rely upon the defence. An example is the South Australian case of *R v R*.

R v R⁹⁷⁷

15.51 *R*, a 47-year-old woman, was convicted of murder. She killed her husband with an axe while he was asleep in the early hours of the morning on Thursday, 2 April 1981. The trial judge would not allow the jury to consider provocation. *R* appealed against her conviction on this ground.

15.52 The availability of the defence is to be determined by reference to the facts most favourable to the defendant. In this case, those facts revealed that the defendant had been subjected to many years of abuse and ill-treatment by the deceased.

15.53 *R* and the deceased married in 1954. They had six children: five girls and one boy. The deceased was 'violent, domineering and manipulative'.⁹⁷⁸ He had affairs with other women, and brought one of them with him to visit *R* in hospital after the birth of one of their children.

15.54 Unknown to *R*, the deceased committed incest with all his daughters. For this reason, the two eldest girls left home five years before he was killed. In the case of *D* (one of the younger girls), the deceased began sexually

977 (1981) 28 SASR 321.

978 Ibid 323 (King CJ).

interfering with her when she was six years old, and had sexual intercourse with her when she was 10. The deceased 'terrorised'⁹⁷⁹ the girls and their mother.

15.55 On Friday 27 March 1981, D and another daughter, A, indicated that they wanted to leave home. The deceased reacted violently, and would not let them go. He was in a bad mood over the week-end.

15.56 On the following Tuesday, after some violence, he forced the girls out of the house. Then he went to R's workplace and created an angry scene, informing R that he had 'chucked' 'the bitches out'.⁹⁸⁰ R persuaded the girls to return home.

15.57 The deceased took D out in his car, where he raped her and inflicted knife wounds upon her. He brought her home, and R saw her injuries. D did not tell her mother about the rape. The deceased said there would be no more talk about the girls leaving home.

15.58 R did not sleep that night. The next morning, she obtained a rifle (from the house next door) and bullets.

15.59 Later that morning, D told her about the deceased's sexual abuse of all of the girls. This was R's first knowledge of the abuse. It affected her profoundly. She said in evidence that she 'seemed to freeze up, everything went cold'.⁹⁸¹ She went to work, and then came home. She was alone in the house until about 12.30 am, when the deceased and D came home. R gave evidence at trial of the events leading up to the killing:⁹⁸²

'She sat at the table and he went out to the toilet. While he was out there she said, 'Mum, he tried to rape me, but I told him I had my periods, so he left me alone.' I said 'Thank God for that.' I said to her to go to bed, 'Don't stay up please.' She said 'But I want to stay with you.' I said, 'Go to bed'. He came back in the room then, I asked did he want a cuppa and he said 'yes'. D sat for a little while and she didn't have a cuppa. I made another cup of tea. I sat down and he sat at the end of the table.

All of a sudden I felt something red hot on my arm and I flinched away for it was him touching me. He was stroking my arm and he was saying to me, 'We settled our differences. We are going to be one big happy family. There isn't going to be no more talk about the girls leaving home. I am going to take you to England. You will be there within 12 months'. I got up and went in the room, got the pills that the doctor had given me and brought them back. He asked me what I had and I said the doctor gave me some pills to relax me. He said 'You better give me one, I feel a bit uptight'. So I went back in the bedroom and there was an old bottle of Valium there — I don't know how long I had it, years and years. I got two out and I gave him one and he took them. Then he told us

979 Ibid.

980 Ibid 329 (Zelling J).

981 Ibid 323 (King CJ).

982 Ibid 323–4.

to go to bed, something like that. D went to bed. He said he would be along in a few minutes. He was going to say goodnight to the girls.

15.60 Her evidence continued:⁹⁸³

Q When he said to you that he felt a bit uptight, what effect on your mind did that have?

A I remember thinking, 'I am not surprised, you bastard, I am not surprised.'

Q When he spoke about the future, no more talk about the girls leaving, what effect did that have on your mind?

A I thought, 'You hypocrite. How could you say those things after what has been happening.'

Q You said that he went to say good night to the girls?

A Yes.

...

Q How long was he away for?

A I don't know, I never kept count. It was always a long time.

Q Did that worry you?

A Yes, it used to. If I followed him or went down to see where he was he abused me and told me I had a dirty mind.

Q As a result of the information that you had received from D that day about what had been occurring between the children and their father, did you think about that when he had gone to say good night to D?

A I think so. I think I turned around and must have thought to myself 'Maybe this is what has been happening when he has been saying good night and things like that.' All I could feel was this hatred. I have never felt such hatred for anyone.

Q Did he come back to the bedroom?

A Yes

...

A He got into bed and he moved over towards me. He put his arm across my chest and he said, 'We are going to be happy [R]. I love you. We are going to England next year.' He said something about 'Why don't we go away for a second honeymoon.' Something like that. I said, 'Go away, will you. I am tired, go away' and I pushed him away. He turned over on his face away from me and he just lay there.

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Ibid 324-5.

Q What was in your mind — what was your mind like on this occasion? How was your mind working?

A I was thinking about all the nights when I worked and I worked nights and all the things I had done for him over the years, waited on him hand and foot and now how he had violated the girls like that. I sat on the edge of the bed. I smoked one cigarette after another — I don't know if it was one or two or what. I just don't know what I was thinking about. I just thought about all them kids, them four kids and what they must have gone through and what a sucker I was. How stupid I had been. Why hadn't I seen things like that happening before. Then the next thing I got up and went outside and went to the shed and I got the axe. I thought if I had a bullet I was frightened it would ricochet and come back and hit me. I pulled the bedclothes back and said, 'you bastard. What you have done all these years' I hit him ... He tried to get up in the bed. I kept on hitting after that and he kept trying to get up. I got scared. I thought 'if he turns the axe on me these kids are at his mercy; they will never be free'. So I grabbed the pillow and he kept trying to lift himself off the mattress. I kept saying, 'Damn you, you bastard, die.' His head hit the floor. I did feel his pulse and I couldn't feel it any more and I kept pushing his head. Then I walked out of the room and shut the door. I went and had a cigarette and I remember thinking, 'I can't let the girls see that'. So I went down and dialled 000 for the police. I said, 'I have just murdered my husband', and I heard D said, 'Mum, what have you done?' And I said to her, 'We are free, no matter what happens now, we have nothing more to worry about. We are free.' That is all I was worried about, my girls being free. Then all their friends could come to the house and not have dirty things said against anybody.

15.61 After considering this version of the facts, King CJ made the following observations about what did not constitute provocation in law:⁹⁸⁴

The loss of self-control which is essential, is not to be confused with the emotions of hatred, resentment, fear or revenge. If the appellant, when in control of her mind and will, decided to kill the appellant because those emotions or any of them had been produced in her by the enormity of the deceased's past behaviour and threatened future behaviour or because she considered that that was the only way in which she or her children could be protected from the deceased's molestations in the future, the crime would nevertheless be murder. The law of a well-ordered and civilised society cannot countenance deliberate killing, even to the extent of treating it as extenuated, as a response to the conduct of another however abhorrent that conduct might be. Nor can society countenance killing as a means of averting some apprehended harm in the future. The law, of course, permits the use by a person of force, even to the extent of inflicting death, if that is necessary to defend that person against immediately threatened harm. But the law has always and must always set its face against killing by way of prevention of harm which is merely feared for the future. Other measures which are peaceful and lawful must be resorted to in order to deal with threats of future harm. Self defence is therefore not in question in this case.

15.62 King CJ explained that R's hearing from D the history of incest would not amount to provocation, but it was important as part of the background to what was said and done by the deceased. The actions and words of the deceased on the night he was killed were to be considered against the background of family violence and sexual abuse. King CJ concluded that the deceased's words and actions amounted to provocation.⁹⁸⁵

The deceased's words and actions in the presence of the appellant on the fatal night might appear innocuous enough on the face of them. They must, however, be viewed against the background of brutality, sexual assault, intimidation and manipulation. When stroking the appellant's arm and cuddling up to her in bed, and when telling her that they could be one happy family and that the girls would not be leaving, the deceased was not only aware of his own infamous conduct but must also have at least suspected that the appellant knew or strongly suspected that, in addition to the long history of cruelty, he had habitually engaged in sexual abuse of her daughters. The implication of the words was therefore that this horror would continue and that the girls would be prevented from leaving by forms of intimidation and manipulation which were only too familiar to the appellant. In this context it was ... open to the jury to treat the words themselves and the caressing actions which accompanied them as highly provocative and quite capable of producing in an ordinary mother endowed with the natural instincts of love and protection of her daughters, such a loss of self-control as might lead to killing. A jury might find, to adopt the words of Dixon J in *Parker v The Queen*,⁹⁸⁶ 'all the elements of suddenness in the unalleviated pressure and the breaking down of control' as the night's events reached their climax in the bed. There was the effect of a sustained course of cruelty over the years: *Reg v Jeffrey*.⁹⁸⁷ There was, moreover, the progressive build up of tension and horror from the time the girls returned on the previous Friday. There was intensification of the tension on the Wednesday night. The effect of the final actions and words are to be gauged in this context. There was, it is true, some interval of time between the provocative conduct and the killing, but in the words of Windeyer J in *Parker v The Queen*⁹⁸⁸ 'passion and emotion were mounting not declining'.

15.63 King CJ added that, while there was evidence of R's having lost her self-control, there was other evidence in the case which showed that she decided to kill the deceased while in command of her mind and motivated by hatred and a desire to ensure that he never again molested her daughters. That evidence would have to be carefully considered by a jury at R's re-trial, but there was also material on the issue of provocation which ought to have been left to the jury.

15.64 King CJ allowed the application of the defence by accepting that, although there had been a lapse of time between the provocative conduct and the killing, in that time passion had not been cooling, it had been building.

985 Ibid 326.

986 (1936) 111 CLR 610, 630.

987 [1967] VR 467, 484.

988 (1963) 111 CLR 610, 663.

15.65 His Honour also viewed the words and conduct of the deceased, which at face value were neutral, if not affectionate, in the context of the background of abuse, brutality and manipulation, as capable of being considered by a jury as provocative. It may be thought that this approach extends the boundaries of provocation to such an extent that the underlying rationale for the defence is forgotten. Alternatively, it may be argued that King CJ's approach allows for the reasonable adaptation of the defence to meet contemporary reality.

15.66 Jacobs J agreed with the Chief Justice.

15.67 Zelling J dissented. He said of the deceased, 'This man's behaviour towards the accused and his family was about as repulsive as it is possible to imagine'.⁹⁸⁹ However, his Honour considered that the acts of the deceased relied upon, namely his stroking R's arm, saying they would be happy in England, and cuddling R in bed, were not provocative acts, even when taken in the context of the history of the deceased's wrongful conduct.⁹⁹⁰ In his Honour's view, the element of suddenness was also missing: 'there was no sudden transport of passion sufficient to bring the doctrine of provocation into play'.⁹⁹¹ Also, his Honour considered that the killing was done pursuant to an intention to kill formed before the provocation.

15.68 The Taskforce considered this case to be 'the case that started reshaping the law of provocation in Australia', by allowing for its application to women who killed violent partners.⁹⁹² The Taskforce also noted that R was acquitted upon her re-trial 'despite the jury having no perceivable legal basis for doing so'.⁹⁹³

R v Bradley

15.69 This case contains details of horrific abuse of Bradley over many years. She finally killed her abuser. The most recent act of provocation by him was his not eating the breakfast she had prepared at his request. She was charged with murder, and convicted of manslaughter on the basis of provocation. The facts are taken from the sentencing remarks of Coldrey J.⁹⁹⁴

15.70 Bradley married the deceased when she was 19. They had four children. One died when 7 months old. The early years of their marriage were 'stormy'. The physical abuse started in the third year of their marriage. Bradley

989 (1981) 28 SASR 321, 328.

990 Ibid 337.

991 Ibid 338.

992 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 173, 174.

993 Ibid 174.

994 Sentencing remarks, Coldrey J, 14 December 1994.

told her husband she wanted a divorce. He beat her with his fists and a stick. He forced a box of matches into her vagina and threatened to set them alight.

15.71 Over the following days, the deceased forcibly cut her hair and poured tea on it (believing it would remove dye). He placed almost all of her clothes in the bath, and poured battery acid over them. It was the first of many occasions on which he told her that she would always belong to him and that, wherever she went, he would find her.

15.72 Over the next 25 years, the deceased assaulted Bradley leaving bruising and black eyes and committed other acts of violence upon her. He tried to run her over after she accidentally damaged the door of his car. She got away from him, but he later attempted to strike her with a tomahawk. He tried to shoot her with a spear gun. In 1974, he forced her to drink his urine and lick her menstrual blood off the floor. She had to sit on a couch while the deceased fired shots over her head.

15.73 The deceased was pathologically jealous. In 1978, his jealousy erupted and he destroyed all the Christmas presents Bradley had been given by her mother. His violence escalated, and he tied her hands to some cupboards and scrubbed her vagina with a hairbrush.

15.74 In 1983, after his release from prison, he shattered Bradley's right arm with a chain.

15.75 In 1984, the family moved to Queensland. Here, he used a whip to assault Bradley if she refused him oral sex. In Queensland, Bradley discovered that the deceased was committing incest. She reported the matter to the police, and he was ultimately jailed for two years. He threatened to kill her upon his release from jail. He went to her unit at Main Beach and smashed the furniture and destroyed her belongings, including the dress and shoes she had purchased to wear at her daughter's wedding. He beat her, and smashed her false teeth. This was not the first or last occasion upon which the deceased smashed Bradley's teeth. This and blackening her eyes were devices he used to embarrass her so that she would not go out in public, and so that other men would not find her attractive.

15.76 While the deceased was in Queensland, Bradley got a divorce but the deceased did not accept it. Bradley attempted to escape from him on eight occasions. On five occasions, she went to a women's refuge. He always found her, and through threats and harassment, compelled her to return to him.

15.77 In 1984, Bradley travelled to Perth to escape the deceased. She said something to her sons about the weather in a letter she wrote to them. The deceased made inquiries of the Bureau of Meteorology and determined that she was in Perth, where he found her.

15.78 The deceased gave her a bullet as a present. He took her and their two boys to a tent in isolated bushland where they lived for three months, during which time he assaulted her with sticks and fan belts.

15.79 Later they moved to Kwinana. Things settled. The deceased told Bradley that, if she behaved herself and gave him no trouble, life would be wonderful.

15.80 In 1990, the family moved to Victoria. The deceased falsely accused Bradley of hiding a letter from a non-existent boyfriend. She suffered a sustained beating, and was later attacked by the deceased in the laundry, during which the deceased tried to drown her. Her screams attracted their son, and the assault ceased.

15.81 On other occasions, the deceased struck Bradley with a gun butt, attacked her with a wheel brace, struck her on the knees with a monkey wrench, held a lit cigarette to her legs, threw knives at her, and had her use a spoon to procure an abortion of a child he did not believe was his. He threw food she prepared at the walls, and destroyed her precious possessions, including photographs of her great-granddaughter.

15.82 In the 12 month period before the shooting, there was some physical violence, and a high level of psychological oppression was maintained. The deceased isolated Bradley from her friends.

15.83 The sentencing judge observed that, by this stage, the deceased had complete control of Bradley and regarded her as a chattel. The sentencing judge accepted expert evidence that Bradley suffered from battered woman syndrome: she felt helpless, with nowhere to go and no one to turn to, depressed, frightened and anxious.

15.84 In April 1993, the deceased was hospitalised for pneumonia and fluid on the lung. His condition was moderately serious, and complicated by his asthma. He acted irrationally in hospital, and discharged himself prior to surgery. He believed he was dying.

15.85 He was verbally aggressive and irrational. He remained in bed for most of the day and would not let Bradley out of his sight. She was too frightened to shower or go to the toilet. He said that, to show her love for him, she had to be with him all the time.

15.86 During this time, Bradley rang her mother-in-law, crying and distressed. She had lost two and a half stone since Christmas 1992. She was in ill-health and physically exhausted.

15.87 Bradley purchased cartridges the day before the deceased's death. She told police she had intended killing the deceased to end her life of torment — but that she did not know when or where or how or whether she had the courage to do so.

15.88 In the week before the killing, the deceased told Bradley that he had hidden cartridges in the house, but would not tell her where. She now feared he would kill her.

15.89 Coldrey J said:⁹⁹⁵

I accept that, added to the distress engendered by the deceased's other conduct, you now feared that he would kill you. That fear was exacerbated by both the fact that the deceased's conduct was becoming increasingly irrational and by his belief that he was, himself, dying. Moreover, you did not believe that there was any safe place to which you could go.

It is against this background that the immediate events leading up to the shooting must be assessed. On that morning you had, in response to the deceased's demand, brought him breakfast in bed. Thereafter you told him you were tired and requested to be able to return to the bed. He denied that request referring to you as 'dog'; an expression you knew from his prison parlance was a description of the lowest of the low. Having refused to allow you back into bed and having emphasised your worthlessness, the deceased did not eat the breakfast you had prepared and went back to sleep himself.

These events cannot be seen in isolation but as representing a culmination of years of abuse and controlling behaviour to which you had been subject. Additionally, you were in a debilitated state and experiencing fear and panic at what you perceived as your own imminent death. You also feared the safety of your two sons. Consistently with the effect of the battered woman syndrome and your prior experiences, you formed the view that no-one could help you. It was at this point that the dam of self-control you had built up over the years burst and the shooting occurred.

15.90 Bradley was 47 when she was sentenced. The Crown acknowledged at sentencing that the provocation she experienced went beyond that encountered in normal provocation-manslaughter cases and that, in reality, she was a prisoner of the deceased for 25 years.

15.91 She had spent 31 days in prison prior to sentence. Coldrey J did not think that any reasonable, well informed person would regard further actual imprisonment as necessary or appropriate. His Honour sentenced her to imprisonment for two years, wholly suspended for 24 months.

15.92 *R v Bradley* is a Victorian case decided in December 1994. Provocation has since been abolished in Victoria, and, had Bradley been tried today, provocation would not have been available to her as a defence to murder. She had offered to plead to manslaughter but the Crown did not accept her plea.

15.93 This case raises the issue of the implication of the abolition of the defence of provocation for battered women.

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Ibid.

15.94 It is extremely difficult, if not impossible, to apply the defence of self-defence to a woman who kills her sleeping abuser. The defence requires that the woman have a reasonable apprehension of death or grievous bodily harm, and a belief, on reasonable grounds, that she has no other way of saving herself from death or grievous bodily harm.⁹⁹⁶

15.95 The prosecution bears the onus of negating self-defence. The prosecution may find it difficult to negate the argument that it was reasonable for a woman like Bradley to be in reasonable apprehension of her partner's inflicting grievous bodily harm upon her when he woke. However, the defence will not succeed if the prosecution satisfy the jury that she did not believe on reasonable grounds that there was no other way of preserving herself. It may be that, as a consequence of battered woman syndrome, she in fact believed that there was no other way of preserving herself, but the prosecution will argue that that belief was not based on reasonable grounds.

15.96 A woman like Bradley may be unable to avail herself of the defence of self-defence. If there is no partial defence of provocation, then a woman like Bradley is at risk of conviction for murder. And in Queensland, upon such a conviction, she will be imprisoned for life.

15.97 Commentators have argued that the partial defence of provocation must be retained because it is used by battered persons who kill their abusers.⁹⁹⁷ However, as the discussion in the balance of this chapter shows, it is only by stretching the language of the common law that the defence

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Sections 271 and 272 of the Criminal Code (Qld) provide:

271 Self-defence against unprovoked assault

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

272 Self-defence against provoked assault

- (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
- (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

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For example, by the Taskforce (see [15.121]), Forell (see [16.19] and McSherry (see [16.22])).

embraces the circumstances of the battered person. And the language of section 304, and its requirement of immediacy, cannot be read in a way that encompasses a killing after a lapse of time. A jury's acceptance of the defence may in fact be an act of compassion, rather than a conclusion based on a strict consideration of the requirements of the partial defence.

15.98 This raises the issue whether section 304 should be recast in language that permits of its application to battered women by, for example, removing the requirement of suddenness. That suggestion then leads to the question whether the removal of the requirement of suddenness changes the partial defence to such a degree that it can no longer be understood as provocation.

AMENDING THE DEFENCE TO MEET REALITY

15.99 In 1982, section 23 of the *Crimes Act 1900* (NSW) was amended to allow the application of the defence of provocation to victims of domestic violence. The amendment removed the requirements of a specific triggering event before the killing, and a sudden response to it.

R v Chhay⁹⁹⁸

15.100 In *R v Chhay*, the New South Wales amendment and the reasons for it were discussed by Gleeson CJ, (with whom Finlay and Abadee JJA agreed) in the New South Wales Court of Criminal Appeal.

15.101 Before 1982, section 23 of the *Crimes Act 1900* (NSW) provided:

- 23.(1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow.
- (2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly:

Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find:—

- (a) That such provocation was not intentionally caused by any word or act on the part of the accused;
- (b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and,

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(1994) 72 A Crim R 1.

- (c) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life.

15.102 Gleeson CJ explained that there was considerable dissatisfaction with the law. A particular criticism was that ‘the law’s concession to human frailty was very much, in its practical application, a concession to male frailty’.⁹⁹⁹

The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law’s concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.

To quote a recent article commenting on the decision in *Ahluwalia*:¹⁰⁰⁰

‘According to research and many cases themselves, battered women tend not to react with instant violence to taunts or violence as men tend to do. For one thing, they learn that this is likely to lead to a bigger beating. Instead, they typically respond by suffering a ‘slow-burn’ of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed’.

It is not necessary to accept the full effect of words such as ‘typically’ and ‘usually’ in that passage, or to construct a stereotype of a battered woman to appreciate the force of the underlying point.

The orientation of the law towards relief of the plight of males, rather than females, was also noted in the area of self defence. It was discussed, for example, in the judgment of the Supreme Court of Canada in *R v Lavallee*.¹⁰⁰¹ The leading judgment in that case was written by Wilson J. She observed that the law catered much better for the position of a person against whom another person’s hand was raised in sudden threat or anger, than for a person who, over a lengthy period, has become sensitised to danger from her batterer and who ought not to be required to wait until a knife is uplifted, a gun is pointed, or a fist is clenched, before her apprehension of danger is deemed reasonable.¹⁰⁰²

15.103 His Honour referred to the Task Force on Domestic Violence, which reported to the New South Wales Government in 1982 about, inter alia, the inadequacy of the ‘protection’ offered by the law to women on the subject of provocation. As a result of that report, section 23 of the *Crimes Act 1900* (NSW) was amended, and now provides:

999 Ibid 11.

1000 *Reg v Ahluwalia* (1993) 96 Cr App R 133; D Nicholson and R Sanghvi, ‘Battered Women and Provocation’ [1993] *Criminal Law Review* 728, 730.

1001 (1990) 76 CR (3d) 329.

1002 Ibid 352.

23 Trial for murder—provocation

- (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
 - (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
 - (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
- (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:
 - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
 - (b) the act or omission causing death was not an act done or omitted suddenly, or
 - (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
- (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
- (5) This section does not exclude or limit any defence to a charge of murder.

15.104 In introducing the amending legislation, the Attorney-General said:¹⁰⁰³

The current law of provocation is based on a theory of human behaviour which assumes that all people respond to provocation suddenly — as the present section says, in the heat of passion. This is not true. It is certainly not true for women, and it is also not true for men.

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New South Wales, *Parliamentary Debates*, 11 March 1982, 2485.

...

The rule requiring sudden action upon provocation caters for those whose personality is explosive or whose conduct has not been inhibited by years of training in submissive behaviour. The new section 23 says that ... conduct may be provocative, in the legal sense, whether it occurred immediately before the act or omission causing death, or at any previous time. Under the new law, it matters not when the provocation occurred. The only question is whether, at the time of the act, the accused had lost self-control. Loss of self-control is the basis for the old law of provocation, and has not been changed in the new provision. The new section 23 makes it clear that any conduct of the deceased, towards or affecting the accused, may be a basis for provocation.

15.105 Gleeson CJ addressed the question of the nature of the distinction between killing as the result of a loss of self-control and killing, which, even though it followed ill-treatment of the defendant by the deceased, is murder:¹⁰⁰⁴

[W]ith all its theoretical imperfections, and practical roughness, the law of provocation is still only a limited concession to a certain type of human frailty, and is not intended to allow a jury to reduce what would otherwise be murder to manslaughter upon a view that a deceased person received his or her just deserts. The law is not intended to encourage resort to self-help through violence.

It will probably remain the case that, for many people, loss of self-control is a concept that is most easily understood, and distinguished from, a deliberate act of vengeance in the factual context of a sudden eruption of violence. However, times are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident. The presence of such an incident will assist a case of provocation, but its absence is not fatal. This is an area in which psychiatric evidence may assist juries to develop their understanding beyond the commonplace and the familiar. There are, for example, circumstances in which a psychiatrist's explanation of post-traumatic stress syndrome may help make a case of provocation even where there is a substantial interval of time between the provocative act of the deceased and the accused's response. This, however, is a matter for evidence and argument in individual cases. What the law still requires is that it should be explained to the jury that the key concept for them to bear in mind, whether for the purposes of the subjective or objective aspect of the problem, is that of a killing which results from a loss of self-control.

Emotions such as hatred, resentment, fear, or the desire for revenge, which commonly follow ill-treatment, and sometimes provide a motive for killing, do not of themselves involve a loss of self-control although on some occasions, and in some circumstances, they may lead to it. What the law is concerned with is whether the killing was done whilst the accused was in an emotional state which the jury are prepared to accept as a loss of self-control.

As has been observed, the distinction which the law regards as critical in this area has never been amenable to rigorous analysis, and it is usually expressed in language which is metaphorical and in terms of concepts that are imprecise. The breaking down, and ultimate removal, of the requirements of immediacy of the deceased's provocative conduct and suddenness of the accused's

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R v Chhay (1994) 72 A Crim R 1, 13–14.

response, in aid of extending the scope of the concession made by the law to human frailty, has made the distinction even less precise, although it has served what many regard as an important social purpose.

15.106 In the case in which these comments were made, the defendant, Chhay, had been convicted of murder.

15.107 She killed her husband by cutting his throat and striking him on the head with a meat cleaver. The prosecution alleged that she killed him while he was asleep. Her main defence was self-defence.

15.108 When first interviewed by police, Chhay told a false story about a prowler having killed her husband. After consulting a lawyer, she told police that she had killed her husband in self-defence. She said that there had been a domestic argument, and that he later swung a meat cleaver at her. She said she ducked and grabbed her husband's leg, which caused him to fall. He dropped the meat cleaver; she grabbed it and struck him with it.

15.109 At trial, in an unsworn statement, she told of her unhappy marriage to the deceased. She had been forced to marry him by the authorities in Cambodia. They came to live in Australia. He was a heavy drinker, who physically abused her for many years. There was some support for her allegations and some evidence that she was otherwise a person of good character and gentle disposition. At trial, she described the circumstances of the killing in the same way as she had described them to the police.

15.110 There was other evidence which supported the prosecution case that Chhay had killed her husband while he was asleep and that her story about his attacking her was a fabrication.

15.111 Chhay's main defence at trial was self-defence. However, in his address, defence counsel made a brief reference to the jury's accepting provocation, even if they rejected Chhay's claim that her husband had attacked her, on the basis of his ill-treatment of her over the years.

15.112 The trial judge left provocation to the jury only on the basis that the provocative act was the deceased's taking up a weapon, and her reaction to it being disproportionate (and therefore not self-defence). The jury's verdict indicated that it accepted the prosecution's argument.

15.113 It was argued on appeal that provocation was left to the jury on too narrow a basis: provocation should have been left to the jury on the basis of the deceased's ill-treatment of her over the years.

15.114 In her unsworn statement, Chhay told the Court that she came from Phnom Penh. During the Pol Pot regime she and her family were sent to the countryside, where they endured hardship. She was forced to marry her husband, whom she had not previously known, in 1978. He was cruel and abusive. She bore a child in 1979. The child was sick. The deceased beat

Chhay and refused to care for the child or obtain medical aid. The child died. Chhay bore another three children. The deceased refused to care for her during her pregnancies. He spent most of their money on drink. The family migrated to Australia, where the violence continued. Chhay started to go to church, but the deceased beat her when she came home. The deceased was violent with others, and found it hard to keep a job. When he lost a job, he beat Chhay. She was obliged by tradition to stay with him. They went into business, but it failed. That made the deceased more violent, and the beatings increased. Chhay was afraid of the deceased. On the day of the killing, there was a lot of drinking and swearing, mainly about the failed business. The deceased swore at Chhay and hit the furniture. Chhay was very scared. Eventually, the deceased took a blanket and pillow and went to sleep in the lounge room. Then Chhay went on to give her version of events, which the jury disbelieved.

15.115 Defence witnesses testified about the violence they had seen the deceased inflict upon Chhay, which included his hitting her, kicking her and threatening to kill her. She never fought back.

15.116 The issue was whether that material provided a sufficient basis for the defence of provocation to be left to the jury. After considering several authorities and section 23 of the *Crimes Act 1900* (NSW), Gleeson CJ concluded that provocation should have been left to the jury on this basis:¹⁰⁰⁵

[T]he learned trial judge was in error in ruling that the acceptance by the jury, at least as a possibility, of a knife or a cleaver attack by the deceased upon the accused immediately before the killing was essential to a case of provocation. That view may reflect ideas of the need for immediacy, and suddenness of response, which, in the light of the decision in *Reg v Ahluwalia* did not reflect the common law and which, in any event, cannot be reconciled with s 23 of the *Crimes Act*.

...

It may well have assisted the defence if the psychiatric evidence that was called on sentencing (and available at the time of the trial) had been led. However the main defence was self-defence and tactical considerations were obviously at work. Nevertheless I think it was open to the jury to conclude that an ordinary person in the position of the appellant could, as a consequence of her husband's conduct, up to and including the evening of 6 August [the day of the killing], have so far lost self-control as to form an intent to kill him.

15.117 His Honour made it plain that the issue was one for the jury. The outcome was not inevitable.

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Ibid 14–15.

REPORT OF THE TASKFORCE ON WOMEN AND THE CRIMINAL CODE¹⁰⁰⁶

15.118 The Taskforce focused on the partial defence of provocation in situations of domestic homicide. It considered whether the defence should be retained amended or abolished, and whether, if abolished, a partial defence of excessive self-defence should be introduced.¹⁰⁰⁷

15.119 The Taskforce considered the current law in Queensland, and its interpretation by the High Court.¹⁰⁰⁸ It referred to the case of *R v R*¹⁰⁰⁹ (discussed above) as the case which tested the applicability of the defence to women who kill violent partners.¹⁰¹⁰

15.120 In its consideration of gender issues in the law of provocation, the Taskforce noted that men and women use provocation in different circumstances. The Taskforce quoted from a Canadian paper which explained that:¹⁰¹¹

research studies comparing women incarcerated as a result of killing men to men incarcerated for killing women have shown that when men kill women over 'provocative' conduct that conduct likely involves verbal taunting, infidelity or other sexual behaviour. On the other hand, when women claim to have been provoked into killing men, the provocative conduct is most likely to be physical violence.

15.121 The Taskforce also referred to the similar results of a New South Wales study.¹⁰¹²

15.122 The Taskforce referred to literature which suggested that anger was the dominant emotion for men, but that, generally, women reacted to physical provocation out of a combination of fear and anger:¹⁰¹³

Men often respond with instantaneous bursts of violence and attack their provoker with their hands or with any weapon that so happens to be available at the time. Women, on the other hand, are usually the targets rather than the instigators of the violence ... The underlying emotion of fear may explain the choice of weapons by women, the timing of the homicidal act, the stealth in

¹⁰⁰⁶ Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

¹⁰⁰⁷ Ibid 171–2.

¹⁰⁰⁸ Ibid 172–3.

¹⁰⁰⁹ (1981) 28 SASR 321.

¹⁰¹⁰ Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 173–4.

¹⁰¹¹ Ibid 175; Canadian Department of Justice, *Reforming Criminal Code Offences: Provocation, Self-defence and Defence of Property* (1988) 4–5.

¹⁰¹² H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990–1993: A Legal and Sociological Study* (1995) Judicial Commission of New South Wales, 46.

¹⁰¹³ S Yeo 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 314–15.

carrying out and the apparent appearance of calmness and deliberation displayed by these women before and after the killing.

15.123 Of the requirement of an immediacy of reaction, the Taskforce said:¹⁰¹⁴

[Provocation] anticipates and excuses quick, unthinking responses that are often outside the capacity, or standard behaviour patterns, of women.

15.124 After considering the change to the law in New South Wales allowing a concept of cumulative provocation, the views of Gleeson CJ in *R v Chhay*,¹⁰¹⁵ developments in England and academic commentary, the Taskforce said:¹⁰¹⁶

Some argue for an expansion of the time element in the defence of provocation 'in order to take into consideration the slow-burning effects of prolonged and severe abuse'.¹⁰¹⁷ However there are concerns that this could partially excuse actions that were calculated and retaliatory, rather than the result of passion, and justify killing due to jealousy and loss of control after a period of 'stewing'.¹⁰¹⁸

15.125 On the question of whether the defence was gender-biased, the Taskforce considered the results of an analysis by the New South Wales Judicial Commission¹⁰¹⁹ of 62 cases finalised between 1990 and 1993 in which provocation was raised as an issue (although not the only issue). The results of that study were:¹⁰²⁰

The Crown accepted a plea to a lesser charge in 21 cases.

41 proceeded to a murder trial.

Out of those 41, there were 21 convictions for murder, and 20 convictions for manslaughter.

15 men relied upon provocation — 9 were successful, and were convicted of manslaughter (6 were convicted of murder).

5 women relied upon provocation — all were successful, and were convicted of manslaughter (none was convicted of murder).

¹⁰¹⁴ Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 176.

¹⁰¹⁵ (1994) 72 A Crim R 1.

¹⁰¹⁶ Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 178.

¹⁰¹⁷ Canadian Department of Justice, *Reforming Criminal Code Offences: Provocation, Self-defence and Defence of Property* (1988) 10.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990–1993: A Legal and Sociological Study* (1995) Judicial Commission of New South Wales, 59.

¹⁰²⁰ Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 179.

33 men relied upon diminished responsibility — 20 were successful, and were convicted of manslaughter (13 were convicted of murder).

3 women relied upon diminished responsibility — 2 were successful, and were convicted of manslaughter (1 was convicted of murder).

3 men relied upon provocation and diminished responsibility — 2 were convicted of manslaughter (1 was convicted of murder).

3 women relied upon provocation and diminished responsibility — all were convicted of manslaughter (none was convicted of murder).

15.126 A study conducted by the Law Reform Commission of Victoria produced a similar result.¹⁰²¹

15.127 The Taskforce observed that the results of those studies did not necessarily mean that the defence was not gender-biased, but rather that it is not valueless to women:¹⁰²²

As Debbie Kirkwood from the *Women who Kill in Self-Defence Campaign* pointed out in the Submission to the [Model Criminal Code Committee] Report of Fatal Offences Against the Person:

‘Both reports [of the Judicial Commission and the Law Reform Commission of Victoria], however, fail to acknowledge that many of those cases in which women are found guilty of manslaughter on the basis of provocation are in fact cases in which the women killed in self-defence. It should be noted that the fact that women who kill to protect themselves from violence are using provocation successfully while men who kill women for leaving them or otherwise ‘provoking’ them are slightly less successful is not evidence against the claim that the defence is operating in a gender biased fashion. So while provocation is gender biased it is proving to be more successful for women defendants than self-defence. Provocation is working to ensure women who, due to the problems with self-defence, are not convicted of murder.’¹⁰²³

15.128 The Taskforce considered the ‘ordinary person’ test, and the sort of behaviour which could amount to provocation. Should it include words alone? Must the act be unlawful? Should it include infidelity?

15.129 It considered the arguments for and against reform, which, briefly put, are:¹⁰²⁴

1021 B Naylor, Law Reform Commission of Victoria, *Homicide Prosecutions Study: the importance of context* (1991).

1022 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 180.

1023 D Kirkwood, *Submission to the Model Criminal Code Officers’ Committee — Fatal Offences Against the Person Women Who Kill in Self-Defence Campaign* 14.

1024 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 187.

Arguments for abolition of the partial defence

It condones violence: It is illogical and dangerous to excuse killings based on anger (to the exclusion of other more noble emotions).

Extending the defence to encompass the experience of women may make it easier for violent men to benefit from it.

Provocation may be taken into account on sentence.¹⁰²⁵

Efforts designed to make the defence available to women have changed the law beyond recognition.

Arguments for retaining the partial defence

Eliminating the defence eliminates community standards and jury input: murder should be reserved for the worst cases — some circumstances may drive a person beyond the bounds of normal self-control, and warrant excusal. Juries may exercise moral judgment in considering the defence.

The community will accept more readily a reduced sentence for manslaughter, rather than murder.¹⁰²⁶

Women use provocation — it is becoming more available to women with genuine claims. (note added)

15.130 The Taskforce considered it arguable that our criminal justice system might not be served well by the abolition of the partial defence. There might be a risk of an increase in acquittals if no alternative to a murder verdict was available and the defendant was considered to be less morally blameworthy. The Taskforce considered, as an alternative reform, the 're-introduction of excessive self-defence' as a partial defence.¹⁰²⁷

15.131 The Commission notes that, in several of the cases under review, manslaughter verdicts were said to be based on the defendant's excessive use of force in self-defence. More accurately, they were based on an acceptance that the jury was not (or, in the case of pleas accepted by the prosecution, was not likely to be) satisfied beyond reasonable doubt that a defendant acted with an intention to kill or do grievous bodily harm: the defendant acted in self-defence with no intention beyond self-preservation. Queensland law does not provide for manslaughter 'on the basis of excessive force in self-defence', although some outcomes appear to reflect that position de facto.

15.132 Returning to the partial defence of provocation, the Taskforce reported that women consulted by it were 'overwhelmingly' against any excuse for violence, other than the need for self-preservation. By contrast, submissions

1025 The Commission notes that this argument is irrelevant to its current review, because of the Government's stated intention to retain the penalty of mandatory life imprisonment for murder.

1026 Again, the Commission notes that this argument is irrelevant to the current review.

1027 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 190.

received on the Taskforce Discussion Paper generally favoured retaining provocation as a partial defence to murder.¹⁰²⁸ In considering this difference, the Taskforce said:¹⁰²⁹

As stated, women consulted by the Taskforce did not favour there being any excuse for violence other than the need for self-preservation. So, one could say, that to be true to our own consultations the Taskforce would have to recommend that the partial defence of provocation should be abolished. However, it is important to acknowledge that most of these submissions were received in response to the Taskforce Issues Papers or in the response sheets. We believe that respondents may not have distinguished between a complete and partial defence, or the fact that a sentence for murder cannot be mitigated. Discussion at the face to face consultations revealed that the issue was far from simple.

The Taskforce is aware of the enormity of a recommendation to abolish the partial defence of provocation, and therefore cannot make it without further research and investigation into how the defence is used and whether any injustices have occurred. One Taskforce member, however, supports the abolition of the defence.

15.133 The Taskforce made formal recommendations accordingly:¹⁰³⁰

Recommendation 57

- 57.1 That JAG investigate the operation of the defence of provocation as a partial defence to murder with a view to determining whether it should be abolished or reformulated.
- 57.2 That further consultation on this issue is required.
- 57.3 That research be conducted into how the defence is used, by whom, and with what results.
- 57.4 That the investigation include whether a new partial defence of 'excessive self defence' is a viable alternative.

15.134 The Commission notes that its terms of reference are similar to recommendations 57.1 and 57.2.

FLEXIBILITY IN THE EXISTING COMMON LAW

15.135 Gleeson CJ in *R v Chhay* was of the view that the common law requirements of the suddenness of the fatal act, and its being done in the heat of passion, were interpreted with flexibility. His Honour's analysis of the position at common law suggests that it currently permits provocation to apply to the

1028 Ibid 193.

1029 Ibid 195.

1030 Ibid 196.

situation where there has been some time between the provocative conduct and the lethal reaction to it.

15.136 His Honour referred to English authorities which encouraged a focus on the lack of self-control, rather than the immediacy of the reaction. Arguably, that focus does not work against the battered woman:¹⁰³¹

The history of the common law on the subject of provocation as a partial defence to a charge of unlawful homicide, reducing what would otherwise be murder to manslaughter, has been examined at length by the High Court in *Parker v The Queen*,¹⁰³² *Van Den Hoek v The Queen*,¹⁰³³ and *Stingel v The Queen*.¹⁰³⁴

As Windeyer J pointed out in *Parker*,¹⁰³⁵ the law on this subject emerged from a multiplicity of rulings in single instances, which in turn were given over a period during which the law of culpable homicide underwent considerable change and development. The modern law recognises provocation as a circumstance in which an accused person is 'less to blame morally than for what he does deliberately and in cold blood'.¹⁰³⁶ This has been explained as a concession to human frailty. The concept of loss of self-control reflects the idea, fundamental to the criminal law, and related historically to religious doctrine, that mankind is invested with free will, and that culpability consists in the abuse of that faculty. The capacity to distinguish between right and wrong, and to choose between actions, or between action and inaction, is central to our notions of moral and criminal responsibility. Legal principles concerning voluntariness and intent, insanity and diminished responsibility, are formulated in terms that assume such a capacity in ordinary people acting in ordinary circumstances ...

Devlin J, in his direction to the jury in *Reg v Duffy*,¹⁰³⁷ cited with approval by the English Court of Appeal in *Reg v Ahluwalia*¹⁰³⁸ said:

'Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.'

The kind of loss of self-control that is here in question is not something that results in a state of automatism. Rather it is something that results in intentional homicide, the conduct of the accused, and the intent with which that conduct occurred, being attributable to the accused's emotional response to the provocation. The very fact that we are not dealing with absolute loss of self-

1031 *R v Chhay* (1994) 72 A Crim R 1, 7–8.

1032 (1963) 111 CLR 610.

1033 (1986) 161 CLR 158.

1034 (1990) 171 CLR 312.

1035 (1963) 111 CLR 610, 650.

1036 *Ibid* 651.

1037 On appeal at [1949] 1 All ER 932.

1038 (1993) 96 Cr App R 133.

control, and that questions of degree are involved, raises a difficulty, as does the consideration that a variety of emotions can produce an urge to kill, and that such emotions are not all neatly separated.

In *Van Den Hoek*,¹⁰³⁹ Mason J pointed out that, although anger is the characteristic emotion associated with provocation, fear and other emotions may also be relevant. His Honour said:

‘Traditionally the onset of sudden passion involving loss of self-control characteristic of provocation has been associated with acts or actions which provoke the accused to uncontrollable anger or resentment ... a notion that may be traced back as far as Aristotle. Indeed, the historical concept of provocation as a defence has reflected the ordinary meaning of the word, ie, an act or action that excites anger or resentment. These days, however, judicial discussion of the doctrine places emphasis on the accused’s sudden and temporary loss of self control, without necessarily attributing that loss of self-control to anger or resentment, except insofar as it is asserted that the act which causes death was done as a result of passion or, as it is colourfully expressed, “in the heat of passion”.’

Mason J went on to reject the notion that loss of self-control caused by fear, panic, or mental instability cannot be brought into the defence of provocation.

15.137 Gleeson CJ made the point that the defence under the Criminal Code (Qld) drew upon the common law.¹⁰⁴⁰

The language of statutes of other Australian States embodies the common law principle. Section 304 of the Queensland Criminal Code speaks of the act causing death being done in the heat of passion caused by sudden provocation. The same words are used in section 160 of the Tasmanian Criminal Code. This in turn reflects what was said, in explanation of the concept of provocation, by Tindal CJ in *R v Hayward*.¹⁰⁴¹ The jury were to decide ‘whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only, or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder.’

15.138 Of the language of the defence, his Honour said:¹⁰⁴²

The necessity to resort to metaphor in expounding the law on this subject is disconcerting. References to supposed raising or lowering of blood temperature, reason becoming unseated, and passion mastering understanding, seem calculated to confound, rather than assist, analytical reasoning. However, our understanding of consciousness and mental processes, as compared with our understanding of more readily observable

1039 (1986) 161 CLR 158, 166–7.

1040 *R v Chhay* (1994) 72 A Crim R 1, 8–9.

1041 (1833) 6 Car & P 157; 172 ER 1188.

1042 *R v Chhay* (1994) 72 A Crim R 1, 9.

physical phenomena, is so limited that metaphor seems generally to be regarded as essential in the expression of the ideas which guide us in this area of discourse.

15.139 And of the concept of loss of self-control, his Honour said:¹⁰⁴³

Assistance is sometimes found in the use of contrast. The mental or emotional state of an accused acting under provocation is described by contrast with other states of mind. For example, in *The Queen v R*¹⁰⁴⁴ King CJ said:

'The loss of self-control which is essential is not to be confused with the emotions of hatred, resentment, fear or revenge. If the appellant, when in control of her mind and will, decided to kill the appellant because those emotions or any of them had been produced in her by the enormity of the deceased's past behaviour and threatened future behaviour, or because she considered that that was the only way in which she or her children could be protected from the deceased's molestations in the future, the crime would nevertheless be murder'.

In *R v Croft*¹⁰⁴⁵ O'Brien CJ Cr D said:

'It is never sufficient that there be simply a history of violence and abusive conduct on the part of the deceased towards the accused person which leads to a sense of grievance, frustration, repression, depression or the like, so that a day comes when the accused decides to get rid of the source of this miserable state ...'

15.140 Gleeson CJ considered the basis upon which it may be determined that an intention to kill is based on a loss of self-control, and the relevance to that determination of an 'immediate' reaction to provocation:

The contrast between the formation of an intention to kill or cause grievous bodily harm arising out of emotions of hatred, resentment, fear or revenge on the one hand, and the formation of such intention as a result of loss of self-control in response to provocative conduct is not based on rigid and scientifically demonstrable distinctions. Emotions such as hatred or fear can fuel anger, and can lead to what is often regarded as a loss of self-control. One of the ways in which the common law sought to make the contrast was through the requirement that the retaliatory act be done suddenly and in the heat of passion. Even at common law, however, this requirement has been interpreted with a degree of flexibility. This flexibility, and the related practical problems of giving effect to the distinction earlier mentioned, can be seen at work in *Reg v Ahluwalia*.¹⁰⁴⁶ That case concerned an Asian woman who had entered into an arranged marriage and who had suffered years of abuse and violence from her husband. One evening the husband threatened to beat the appellant the next morning. The appellant waited until he went to sleep then killed him. (The facts have a degree of similarity to the present case.) The trial judge left the issue of provocation to the jury, but the jury found the appellant guilty of murder. The

1043 Ibid 9.

1044 (1981) 28 SASR 321, 325.

1045 [1981] 1 NSWLR 126, 140.

1046 (1993) 96 Cr App R 133.

Lord Chief Justice (Lord Taylor), in considering the trial judge's directions on the point said, at 138–139:

'The phrase 'sudden and temporary loss of self-control' encapsulates an essential ingredient of the defence of provocation in a clear and readily understandable phrase. It serves to underline that the defence is concerned with the actions of an individual who is not, at the moment when he or she acts violently, master of his or her own mind. Mr Robertson suggested that the phrase might lead the jury to think provocation could not arise for consideration unless the defendant's act followed immediately upon the acts or words which constituted the alleged provocation ...

Nevertheless, it is open to the judge, when deciding whether there is any evidence of provocation to be left to the jury and open to the jury when considering such evidence, to take account of the interval between the provocative conduct and the reaction of the defendant to it. Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control. The passage of time following the provocation may also show that the subsequent attack was planned, or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation. In some cases, such an interval may wholly undermine the defence of provocation; that, however, depends entirely on the facts of the individual case and is not a principle of law.

...

We accept that the subjective element in the defence of provocation would not as a matter of law be negated simply because of the delayed reaction in [cases of prolonged violence to women], provided that there was at the time of the killing a 'sudden and temporary loss of self-control' caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation'.¹⁰⁴⁷

15.141 Gleeson CJ concluded that, at common law, the fact that the fatal act did not follow immediately after the provocation did not of itself exclude the operation of the defence. The focus is on loss of self-control:¹⁰⁴⁸

The above passage recognises, as a matter of common law, that it is essential that at the time of the killing there was a sudden and temporary loss of self-control caused by the alleged provocation but, at the same time, it denies that the killing need follow immediately upon the provocative act or conduct of the deceased. It accepts the possibility of a significant interval of time between such act or conduct and the accused's sudden and temporary loss of self-control. However, it observes that, as a matter of fact, the longer the interval, the more difficult it will usually be to attribute the actions of the accused to loss of self-control rather than, for example, the deliberate and cold-blooded implementation of a desire for revenge.

¹⁰⁴⁷ *R v Chhay* (1994) 72 A Crim R 1, 9–10.

¹⁰⁴⁸ *R v Chhay* (1994) 72 A Crim R 1, 10.

PROVOCATION AT COMMON LAW

15.142 It is accepted that provocation in section 304 of the Code draws its meaning from the common law. Accordingly, it may be expected that this interpretation of the common law (permitting of the possibility of a significant interval of time between the provocation and the fatal act) is incorporated into that section.

15.143 However, the language of provocation under the Code requires immediacy of response to a greater degree than the language of the common law.

15.144 Section 304 of the Code provides:

304 Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death *in the heat of passion*, caused by *sudden* provocation, and *before there is time for the person's passion to cool*, the person is guilty of manslaughter only. (emphasis added)

15.145 The Code uses the expressions 'does the act which causes death *in the heat of passion*, caused by *sudden* provocation, and *before there is time for ... passion to cool*.' It reflects the language and attitudes of the time at which it was written — over a century ago.

15.146 The language of the defence is different at common law:¹⁰⁴⁹

Homicide, which would otherwise be murder, is reduced to manslaughter if the accused causes death whilst acting under provocation. The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has the opportunity to regain his composure.

15.147 On analysis, the two principal obstacles that the battered woman confronts in fitting the circumstances in which she may kill into the law of provocation in Queensland are found in the exact language of the Code, and in the requirement of loss of self-control when 'the underlying emotion of fear may explain the choice of weapons by women, the timing of the homicidal act, the stealth in carrying out and the apparent calmness and deliberation displayed by these women before and after the killing'.¹⁰⁵⁰

¹⁰⁴⁹ *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane Dawson and Gaudron JJ).

¹⁰⁵⁰ S Yeo 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 314–15.

THE MODEL DIRECTION

15.148 Chapter 17 sets out the model direction for the partial defence of provocation contained in the Supreme and District Court Benchbook.

15.149 The language of section 304, as reflected in the model direction, appears to require an immediate reaction to sudden provocation. On this point, the direction says:

Was the defendant acting while provoked?

A further matter for your consideration is whether the defendant acted in the heat of passion, caused by sudden provocation and before there was time for his/her passion to cool. You must consider whether the defendant was actually deprived of self-control and killed the deceased whilst so deprived.

15.150 The model direction explains how the prosecution may negative or overcome the defence, which includes its satisfying the jury beyond reasonable doubt that the defendant's loss of self-control was not sudden.

15.151 A battered woman who kills after a delay will struggle to bring herself within the language of the current provision.

Chapter 16

Provocation: literature review

INTRODUCTION	239
SUBSTANTIVE GENDER EQUALITY	240
GENERAL ARGUMENTS FOR ABOLISHING THE DEFENCE	241
ARGUMENTS IN FAVOUR OF RETAINING THE DEFENCE	242
GENDER INEQUALITY ARGUMENTS	247
'Differences and similarities among the three countries'	248
THE AMERICAN ' <i>EXTREME EMOTIONAL DISTURBANCE</i> ' DEFENCE.....	249
FINDINGS FROM NON-LEGAL LITERATURE	249
'The defence is flawed'	251
Analysis of non-legal literature	258
'Asymmetrical killings'	261
Key predictors of men killing women	262
'Judicial attitudes'	262
Consideration of those cases by Coss.....	263
'Trying to understand the cases'	264
Coss's final argument.....	265
SHOULD WE ACCEPT THAT THE ORDINARY PERSON MAY INTENTIONALLY KILL?	265

INTRODUCTION

16.1 There is a substantial body of academic literature and other commentary from Australia and overseas about the partial defence of provocation in murder, most of which calls for its abolition.

16.2 It is frequently argued in the literature that the defence is a gender-biased anachronism; that it is complex, and that its application produces indefensible inconsistencies. Less often, arguments are made in favour of the defence.

16.3 This chapter summarises some of the arguments raised in selected pieces of academic literature. Several of the arguments raised have informed the recommendations of other law reform bodies about this topic. In addition, the Commission has extended the analysis of some of the cases mentioned in the literature beyond their treatment in the literature to provide additional material for consideration.

SUBSTANTIVE GENDER EQUALITY

16.4 The male gender-bias in the application of the defence is the aspect of it that attracts most criticism. Some of the Canadian literature refers to two

visions of gender equality, formal and substantive, against which the operation of a legal rule may be judged.

16.5 Formal gender equality judges the *form* of a rule, requiring it to treat men and women on the same terms, without special barriers or favours on account of their gender. Substantive equality looks to the *results* or *effect* of a rule.¹⁰⁵¹

16.6 Under formal gender equality, the same laws are applied to men and women — but they may punish or work against women in areas ‘where consensus and commonality between men and women do not exist’.¹⁰⁵² Substantive equality requires that the laws themselves treat individuals as substantive equals.¹⁰⁵³

16.7 Data show that for intimate partner homicides (also referred to in the literature as ‘domestic killings’) there is little commonality between men and women.¹⁰⁵⁴ Generally, men are more likely to be provoked by jealousy or other emotions into a rage and kill. Women are more likely to kill in fear. It is frequently argued that the defence of provocation embraces the circumstances in which men kill — but its requirements of suddenness and out-of-control behaviour rarely reflect the circumstances in which women kill. Accordingly, it may be argued that the current law of provocation does not achieve substantive equality as between men and women.

16.8 The Commission considers that the concept of substantive equality provides a compelling principle against which the current operation of the defence of provocation, and any change to or abolition of it, may be judged.

16.9 The Commission acknowledges that there are women too who are provoked by jealousy into a rage and kill,¹⁰⁵⁵ just as there are men who kill women in fear. The principle of substantive equality would require the law to treat like behaviour equally, regardless of gender. It may therefore be more accurate to say that the current law of provocation does not achieve substantive equality as between those who explode with rage and intentionally kill (more often men) and those who intentionally kill out of desperation (more often women).

1051 C Forell, ‘Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia’ (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27; KT Bartlett et al, *Gender and Law: Theory, Doctrine, Commentary* (3rd ed, 2002) 265.

1052 C Forell, ‘Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia’ (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, footnote 7, quoting from CA Forell & DM Matthews, *A Law of her Own: The Reasonable Woman as a Measure of Man* (2000) 173–4.

1053 The Honourable Claire L’Heureux-Dubé, ‘A Conversation about Equality’ (2000) 29 *Denver Journal of International Law and Policy* 65, 69.

1054 See Chapter 12.

1055 Or attempt to kill: see, for example, *R v Evans* [2004] QCA 458, in which the defendant tried to run her ex-husband down in her motor vehicle as he was pushing his new baby in a pram after months of violent incidents committed by her upon him.

GENERAL ARGUMENTS FOR ABOLISHING THE DEFENCE

16.10 Allen asks whether the defence of provocation is 'ethically tenable'.¹⁰⁵⁶ He asks whether the law should excuse, even partially, violent behaviour. He contrasts the situation of a bad-tempered parent who throttles their infant with that of the compassionate parent who performs euthanasia on their suffering, terminally ill child: provocation is potentially available only to the parent who kills out of anger. He asks whether the law should ever condone lethal violence motivated by anger.¹⁰⁵⁷

16.11 Allen refers to an argument of Reilly's that, 'while the concept of self-control remains the central pillar of the defence of provocation, the defence will continue to excuse unacceptable conduct' which in turn may influence the behaviour of others:¹⁰⁵⁸

If a legal rule espouses a norm that the ordinary man can lose his self-control when his wife is unfaithful, men can weave this apparent reality into narratives of excuse, and other men might feel less constrained to control their behaviour in the face of infidelity. If the ordinary man is understood to be capable of succumbing to homophobic rage in the face of a non-violent homosexual advance, heterosexual men can build dramatic stories of their homophobia and other men might be less given to effective self-control in the face of such advances.

16.12 Yule argues that the test of provocation is conceptually difficult for a jury to understand. The objective test is biased towards the dominant culture, and biased towards heterosexual men. Assuming a jurisdiction without a mandatory life sentence for murder, Yule suggests that relevant factors may be taken into account at sentence. Murder should be labelled murder.¹⁰⁵⁹

16.13 Eastal considers the position of the battered woman who ultimately kills her partner:¹⁰⁶⁰

The effects of living under the constant threat of violence constitute the battered woman's reality — a reality which the lenses of our male-dominated legal system, in most cases, have failed to acknowledge. Without such an understanding, judges and jurors find it hard to comprehend a woman's action of killing her violent partner as 'reasonable' when 'reasonable' has traditionally been interpreted through a masculocentric framework. Moreover, the defences of self-defence and provocation, which are available to a woman charged with murder, have been constructed through that same masculocentric framework

1056 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *The Journal of Criminal Law* 216.

1057 Ibid 242.

1058 A Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320, 355.

1059 JM Yule, 'Current Issues with Regards to the Defences of Provocation and Self-Defence in the Criminal Law Context' (2007) (Paper presented at the Australian Law Teachers Association, Perth, 2007).

1060 P Eastal, 'Women who kill violent partners "But he was asleep"' 42: a revision of P Eastal and C Currie 'Battered Women on Trial — Revictimisation by the Courts' (1998) *Sister in Law, A Feminist Law Review* 3, 56–74.

and as a consequence fail to cover the unique experiences of battered women
...

16.14 Of the defence of provocation in particular, Easteal says:¹⁰⁶¹

Provocation is a partial defence to murder. It is tested by contrast to a standard of what would have induced an 'ordinary person' to have lost self-control and formed an intent to kill or seriously harm the other person. As a defence for the battered woman, provocation can prove problematic. The 'ordinary person' continues to be interpreted by what is 'ordinary' behaviour for a white middle class male. Further, the crux of the provocation defence is a loss of self-control — in other words, the woman's act of killing must be 'an unreasonable but understandable over-reaction to an emotionally stressful incident.'¹⁰⁶² This entrenches the assumption that women cannot act rationally (like men) but are instead emotive and illogical. Even if provocation is successful, it will only reduce the charge from murder to manslaughter, rather than resulting in an acquittal. In this sense it fails to produce a just outcome for a battered woman given the context of her actions. Denying the reasonableness of a battered woman's actions also denies the gravity and criminality — the reality — of domestic violence.

ARGUMENTS IN FAVOUR OF RETAINING THE DEFENCE

16.15 Forell¹⁰⁶³ asks whether it is necessary to abolish the defence of provocation and considers Lee's arguments¹⁰⁶⁴ in favour of allowing juries to decide the provocation issue rather than leaving it to the sentencing discretion of judges. Forell finds the following argument the most convincing:¹⁰⁶⁵

Jurors should be encouraged to deliberate explicitly about social norms, stereotypes, and bias when deciding what constitutes reasonable provocation ... [because they] deliver ... commonsense justice ... [and] serve as a bulwark against overzealous government prosecutors and cynical judges.

16.16 Forell ultimately concludes that abolition is the wrong response.¹⁰⁶⁶ She is persuaded by Lee's argument that the jury has to be included in the normative decision about how to treat men who kill out of rage and jealousy:¹⁰⁶⁷

1061 Ibid 47.

1062 E Sheedy, J Stibbs and J Tolmie, 'Defending Battered Women on Trial: the battered woman syndrome and its limitations' (1992) 16 *Criminal Law Journal* 378.

1063 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27.

1064 C Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003).

1065 Ibid 247–50.

1066 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 67.

1067 Ibid 67–8.

Both Lee and I prefer the court educate the jury about the gender and other biases stemming from existing social norms that provocation law elicits. Our goal is to enable the jury to recognise the prejudices that exist in our society, and thereby encourage them to empathize with parties who are not traditionally dominant groups.

16.17 However, Forell acknowledges that very few courts do the kind of explicit gender and other bias education of the jury that she and Lee advocate. Indeed, it may be questioned whether it is the court's role to do this.

16.18 The defence of provocation operates with a lack of substantive gender equality. Men, more than women, kill in a rage, and are therefore able to rely upon the defence. Women, more than men, kill out of fear and despair in circumstances which do not attract the operation of the defence.

16.19 Forell considers whether abolishing provocation is the most effective method of achieving substantive gender equality. She sees two risks: (1) juries acquitting jealous killers rather than convicting them of murder, and (2) juries convicting battered women instead of acquitting them. Abolishing provocation also carries the risk of labelling as murderers battered women who kill out of fear.¹⁰⁶⁸

16.20 Forell argues that allowing juries to find provocation, which results in a manslaughter verdict and the application of a sentencing discretion to the punishment, may work better than abolition 'so long as most prosecutors, juries and judges have embraced the view that jealousy and rage are less deserving emotions than fear and despair.'¹⁰⁶⁹ Forell continues:¹⁰⁷⁰

Jurisdictions that have enlightened provocation rules may provide greater protection for battered women who kill while also allowing severe punishment of persons who kill out of possessiveness. In particular, two Australian jurisdictions, Australian Capital Territory¹⁰⁷¹ and New South Wales,¹⁰⁷² may

1068 Ibid 68.

1069 Ibid 69.

1070 Ibid.

1071 See the *Crimes Act 1900* (ACT) s 13, which is set out at [14.8] above.

1072 See the *Crimes Act 1900* (NSW) s 23, which is set out at [15.103] above. The *Crimes Act 1900* (NSW) s 421 provides:

421 Self-defence—excessive force that inflicts death

(1) This section applies if:

- (a) the person uses force that involves the infliction of death, and
- (b) the conduct is not a reasonable response in the circumstances as he or she perceives them,

but the person believes the conduct is necessary:

- (c) to defend himself or herself or another person, or
- (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

have the best solution currently possible. Both have provocation statutes that have attempted to account for the problems battered women who kill face when trying to claim provocation. In addition, neither has a mandatory minimum sentence for manslaughter or murder. Thus, regardless of whether a jury finds a battered woman guilty of murder or manslaughter, a trial judge still has the ability to tailor the sentence to take her circumstances into account. (notes added)

16.21 McSherry considered the option of having the explanation for violent conduct (ie, the provocation alleged by the defendant) taken into account by a judge at sentence.¹⁰⁷³ (Of course, this is not, at present, an option in Queensland.) McSherry argues that having judges ascertain the basis for the killing undermines the role of the jury in apportioning criminal responsibility. Also, McSherry asks, should the stigma attaching to the label 'murderer' apply to those who kill without premeditation and with provocation?¹⁰⁷⁴

16.22 McSherry observes that, if provocation is abolished, it will close off a defence for women who kill their violently abusive partners. In her view, it is preferable to work towards circumscribing the scope of the defence and providing it with a workable objective component.¹⁰⁷⁵ The challenge:

is to try and imbue it with a substantive moral context without relying on judges or jury members to do this in an ad hoc fashion. One option in this regard is to ensure that the 'ordinary person' test is expressed more clearly as a normative standard. Wilson J stated in the Canadian case of *R v Hill*:¹⁰⁷⁶

'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.'

16.23 McSherry considers the current two-part test of provocation 'exceptionally difficult to apply in practice' and suggests that a workable ordinary person test would 'go a long way to strengthening the normative basis of the defence'.¹⁰⁷⁷

16.24 To further imbue the defence with a 'substantive moral context', McSherry suggests that legislation should provide that 'mere words' cannot amount to provocation.¹⁰⁷⁸ The circumstances in which provocation may be

1073 B McSherry, 'It's a Man's World: Claims of Provocation and Automatism in 'Intimate' Homicides' (2005) 29(3) *Melbourne University Law Review* 905.

1074 Ibid 918.

1075 Ibid 919.

1076 [1986] 1 SCR 313, 343.

1077 B McSherry, 'It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides' (2005) 29(3) *Melbourne University Law Review* 905, 919.

1078 Ibid.

raised should be limited to exclude those where the deceased has left, attempted to leave or threatened to leave an intimate sexual relationship.¹⁰⁷⁹

Curtailling the ambit of a claim of loss of self-control in such circumstances would recognise a presumption that individuals ought to take appropriate steps to maintain self-control.

GENDER INEQUALITY ARGUMENTS

16.25 Substantive gender equality:¹⁰⁸⁰

'insists that the law take into account and respond to the actual effect of a rule on both men and women, thereby better assuring that justice for all is achieved'.¹⁰⁸¹ It requires more than just making the provocation defence available to both men and women who kill out of jealousy and rage, or out of fear and despair. Instead, applying substantive equality would mean that killing in a heat of passion out of sexual possessiveness would no longer be an acceptable basis for a claim of provocation because everyone has a right to sexual and physical autonomy. Applying substantive equality would also mean that killing one's batterer out of fear would often be a basis for self-defence because everyone has a right to defend him or herself from physical harm. If substantive gender equality were considered adequately, killings out of jealousy and rage would result in murder convictions, while most killings out of fear and despair would result in acquittals. (some notes omitted)

16.26 With desired substantive gender equality outcomes in mind, Forell compares the application of the law of provocation in the context of 'domestic homicide' (the killing of an intimate partner) in the United States, Canada and Australia. Forell considers Australia the 'leader' of the three countries in incorporating substantive equality into its provocation doctrine.¹⁰⁸²

16.27 Forell notes that in all three countries, approximately three-quarters of those who kill an intimate partner are male, many of whom have previously committed violence against the deceased. Nevertheless, they are frequently permitted to use the defence of provocation where the provocative conduct alleged was a 'lawful exercise of sexual or personal autonomy' such as sexual intercourse with another person, or leaving the relationship. This expansion of the traditional defence is seen as 'a concession to human frailty'.¹⁰⁸³

1079 Ibid 920.

1080 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 29.

1081 C L'Heureux-Dubé, 'A Conversation About Equality' (2000) 29 *Denver Journal of International Law and Policy* 65, 69 (remarking that 'equality isn't just about being treated the same, and it isn't a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society.')

1082 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 30.

1083 Ibid 34.

16.28 Forell discusses the different circumstances in which men and women kill, and notes that women commit domestic homicide much less frequently than men. Relying on a study by Bradfield, Forell observes that provocation provided battered women who killed their partners with a 'back-up' defence which was more likely to succeed than self-defence.¹⁰⁸⁴ And those who seek to reform the law of provocation may find it difficult to ensure just treatment for battered women who kill their abusers.

16.29 Bradfield studied 65 Australian cases in which battered women killed their partners over the period between 1980 and 2000. In 21 of those cases, the defendants raised self-defence. Of those, nine were acquitted, 11 were convicted of manslaughter and one of murder. In all of the 22 cases in which provocation was raised at trial, the defendant was successful. Bradfield found that men had less success with the defence of provocation based on jealous rage: it was successful in only eight of the 15 cases in which it was raised at trial.¹⁰⁸⁵

16.30 Forell suggests that in Canada and the United States there is evidence that, although there has been no change to the *law* of provocation, feminist critiques and changing social values have influenced its *application*:¹⁰⁸⁶

[E]volving community assessments of violence arising out of possessiveness and violence resulting from fear may frequently be resulting in substantive gender equality under provocation and other criminal rules that were created with men in mind.

'Differences and similarities among the three countries'¹⁰⁸⁷

16.31 Forell observes that there had been vigorous criticism of the traditional provocation doctrine in all three countries.¹⁰⁸⁸ She expresses surprise that Canada, with its embrace of substantive equality and its high percentage of female appellate judges, was not the most protective of women's rights of the three countries and had not found the traditional provocation doctrine a form of gender discrimination that had to be revised or abolished.¹⁰⁸⁹

1084 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 35–6.

1085 R Bradfield, 'The Treatment of Women who Kill their Male Partners Within the Australian Criminal Justice System' (2002) Unpublished Ph D Thesis, University of Tasmania.

1086 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 37.

1087 Ibid.

1088 Ibid.

1089 Ibid 41.

United States provocation law16.32 American judges have very little sentencing discretion:¹⁰⁹⁰

Currently, for violent crimes such as manslaughter and murder, all fifty American states have some form of determinate sentencing, most frequently mandatory minimum sentences and sentencing guidelines. This often gives American trial judges substantially less room to factor in circumstances using their own discretion than exists in Australia or Canada. American juries (through more gradations in crime such as manslaughter, degrees of murder, and, in certain cases, application of the death penalty), prosecutors (through deciding what crime to charge) and legislatures (through mandatory minimum sentences, sentencing grids and sentencing guidelines), determine the length of time a convicted murderer will serve instead of trial judges.

Most American trial judges have little or no discretion to provide for a suspended or a short murder sentence. This may explain why American legal commentators are highly critical of current provocation rules, yet fail to urge that provocation be abolished entirely. Abolition is too risky and punitive for battered women who kill, and perhaps, even for homicides committed out of rage or jealousy. (notes omitted)

16.33 Two sets of provocation rules ‘that permit male-bias’ are ‘firmly entrenched’ in the United States; traditional provocation, and the ‘extreme emotional disturbance’ defence under the Model Penal Code.¹⁰⁹¹*Traditional provocation*16.34 The four elements of the typical, traditional provocation defence as it applies in the United States are:¹⁰⁹²

the provocation must be adequate;

the defendant must not have had time to cool off between the provocation and the slaying;

the provocation must have actually impassioned the defendant; and

the defendant must not have actually cooled off before the slaying.

16.35 Another commentator suggests that the modern provocation test contains objective elements:¹⁰⁹³

the defendant was actually provoked into a heat of passion;

the reasonable person in the defendant’s shoes would have been so provoked;

1090 Ibid 43.

1091 Ibid 43–44.

1092 *State v Viera*, 787 A 2d 256, 264 (NJ Super Ct App Div 2001).

1093 C Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003).

the defendant did not cool off; and

the reasonable person in the defendant's shoes would not have cooled off.

Extreme emotional disturbance

16.36 This defence is provided by section 210.3(1)(b) of the Model Penal Code (1962), and it requires that the jury find that the killer acted:

under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such an explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

16.37 Both of these defences are available to men who kill women who leave, or seek to leave, the relationship, or who are unfaithful.

16.38 Forell notes that formal equality permits a woman who kills for the same reason to rely on these defences as well: substantive equality is limited to allowing other emotions besides rage and jealousy to be considered.¹⁰⁹⁴ Forell argues that social norms and the goal of substantive gender equality make unjust the similar treatment, under the defence of extreme emotional disturbance, of battered women who kill and those who kill out of rage and jealousy.¹⁰⁹⁵

16.39 Forell refers to an article which suggests that there is a stronger attachment to the jury system in America than in Australia: 'the American jury is seen as a political weapon'.¹⁰⁹⁶ Accordingly, Forell expects that this stronger attachment to the jury system would make it difficult for Americans to give up the provocation defence, even if judges were given unfettered discretion at sentence.¹⁰⁹⁷

16.40 The role of the jury in provocation was considered significant by the New South Wales Law Reform Commission and the Victorian Law Reform Commission.

16.41 The New South Wales Law Reform Commission said:¹⁰⁹⁸

1094 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 44.

1095 Ibid.

1096 P Marcus and V Waye, 'Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds' (2004) 12 *Tulane Journal of International and Comparative Law* 27, 97.

1097 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 45.

1098 New South Wales Law Reform Commission, 'Provocation, Diminished Responsibility and Infanticide', Discussion Paper 31 (1993) [3.133].

The jury has traditionally been and remains the appropriate arbiter of community values. To remove fundamental issues of culpability from the jury and to pass them on to the sentencing judge undermines its role. In addition, a jury finding of manslaughter enables the public to understand why a seemingly lenient sentence has been proposed. It therefore aids community understanding of the law.

16.42 The Victorian Law Reform Commission explained that one of the more compelling objections made to the abolition of the defence of provocation was that to do so 'placed too much power in the hands of the judges'. Juries reflected 'community values and standards', which promoted 'community confidence in the justice system'.¹⁰⁹⁹

16.43 The reports of these and other law reform commissions are considered in Chapter 14 of this Report.

Canadian provocation law

16.44 In Canada, criminal law is governed by national, rather than provincial, law. Under section 232 of the Canadian Criminal Code:

- (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
- (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive the ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
- (3) For the purposes of this section, the questions (a) whether a particular wrongful act or insult amounted to provocation, and (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are question of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do.

16.45 Forell states that the section has been interpreted like the provocation law in the United States in that 'it empathizes with men who commit domestic homicides in the heat of passion'.¹¹⁰⁰

16.46 In Canada, murder carries mandatory life imprisonment.¹¹⁰¹ Manslaughter using a firearm is punishable by a minimum sentence of four years' imprisonment. There is no minimum for manslaughter by other

¹⁰⁹⁹ Victorian Law Reform Commission, 'Defences to Homicide', Options paper (2003) 251.

¹¹⁰⁰ C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 46.

¹¹⁰¹ Canadian Criminal Code s 745. Parole eligibility arises after 25 years for first degree murder (planned and deliberate murder: s 231(2)), and after 10 years for second degree murder (all murder that is not first degree murder: s 231(7)).

means.¹¹⁰² Forell notes that the sentencing differences between murder and manslaughter are 'extreme', and that the abolition of provocation would result in lengthy sentences for women who killed out of fear, as well as for men who killed in the heat of passion:¹¹⁰³

Even feminist critics of Canada's provocation defence, such as the National Association of Women and the Law, only recommend abolition of provocation if mandatory minimum sentences for murder are also abolished. (note omitted)

16.47 The Commission notes that under the Canadian statute 'no one shall be deemed to have given provocation to another by doing anything he had a legal right to do'. At face value, this would appear to exclude lawful conduct which is regularly alleged to be provocative, such as a partner's spoken desire to leave a relationship, or preference for another man, or infidelity. However, as Forell explains, the statute has not been so interpreted. The significant case is *R v Thibert*¹¹⁰⁴ (discussed below), the facts of which are similar to those in the Australian case of *Stingel v The Queen*.¹¹⁰⁵

*R v Thibert*¹¹⁰⁶

16.48 Thibert was charged with murder. He shot his estranged wife's new lover. At trial, he argued that he did not have the requisite intent for murder or, in the alternative, that he was provoked. The trial judge left the defence of provocation to the jury, but failed to direct them that there was no onus upon the defendant to prove the defence. The jury requested clarification of the provocation defence twice during their deliberations. They ultimately convicted Thibert of murder in the second degree.¹¹⁰⁷

16.49 Thibert appealed against his conviction to the Alberta Court of Appeal.¹¹⁰⁸ By majority, his appeal was dismissed. He then appealed to the Supreme Court of Canada. By a majority of 3:2, he was successful. His conviction was quashed and a re-trial was ordered.

16.50 The question for the Supreme Court was whether the trial judge was correct in leaving the defence of provocation to the jury. If it should not in fact have been left to the jury, then the misdirection did not taint the conviction.

1102 Canadian Criminal Code s 236.

1103 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 47.

1104 [1996] 1 SCR 37.

1105 (1990) 171 CLR 312.

1106 The following discussion of this case is based on the judgment, not on Forell's summary of it.

1107 According with a finding that the killing was provoked and impulsive rather than planned and deliberate: [1996] 1 SCR 37 [58].

1108 (1994) 157 AR 316.

16.51 Cory J wrote the judgment of the majority, Sopinka and McLachlin JJ concurring. Major J, with whom Iacobucci J concurred, formed the minority. It is interesting to contrast the facts as recited by Cory J, who concluded that the defence of provocation applied, and Major J who concluded that it did not.

16.52 Cory J gave this brief outline of the facts:¹¹⁰⁹

The accused's wife had, on a prior occasion, planned to leave him for the deceased but he had managed to convince her to return to him. He hoped to accomplish the same result when his wife left him for the deceased on this second occasion. At the time of the shooting he was distraught and had been without sleep for some 34 hours. When he turned into the parking lot of his wife's employer he still wished to talk to her in private. Later, when the deceased held his wife by her shoulders in a proprietary and possessive manner and moved her back and forth in front of him while he taunted the accused to shoot him, a situation was created in which the accused could have believed that the deceased was mocking him and preventing him from having the private conversation with his wife which was vitally important to him.

16.53 A reader may be left with the impression of an unfaithful wife and a husband only wanting to talk to her.

16.54 Major J gave a much more detailed description.¹¹¹⁰ The Thiberts married in 1970 and had two children who were adults at the time of the trial.¹¹¹¹

The Thiberts' marriage had its share of problems. Early on in the marriage, Mr Thibert admitted to his wife that he had had three extra-marital affairs. In September 1990, Mrs Thibert began an intimate relationship with the deceased, a co-worker. She disclosed this relationship to her husband in April 1991. He was distraught and eventually convinced his wife to remain with him and attempt to make their marriage work.

On July 2, 1991, Mrs Thibert decided to leave her husband. She took a hotel room rather than returning home. The appellant drove around the city that evening, unsuccessfully searching for the hotel where his wife was staying. When he returned home, he removed a rifle and a shotgun from the basement of the house to the garage. He testified that he thought about killing the deceased, his wife, or himself. He loaded the rifle, and then left the guns in a corner of the garage, having at that point abandoned his violent thoughts.

The daughter, Catrina arrived home to find her father very upset. He told her of her mother's affair. At approximately 11:00 pm, Mrs Thibert telephoned her husband at home to tell him of her decision to leave him. At his request, she agreed to meet him the next morning, at Smitty's Restaurant ... at 7:00 am.

The next morning Mr Thibert and Catrina went to the restaurant to meet Mrs Thibert who arrived at the meeting with the deceased. The appellant attempted to persuade her to return home with him, but she refused. The meeting at Smitty's lasted approximately one hour. At the end of the meeting, Mr Thibert

1109 [1996] 1 SCR 37 [23].

1110 Ibid [37].

1111 Ibid [38]–[50].

promised not to bother his wife at work, and in return, she promised to think about coming back home that night to again talk to him. Outside the restaurant, while waiting for Mrs Thibert to finish talking to Catrina, the appellant told the deceased, 'I hope you intend on moving back east or living under assumed names ... Because as long as I have got breath in my body I am not going to give up trying to get my wife back from you, and I will find you wherever you go.

The appellant testified that when he returned home, he thought about killing himself, and so returned to the garage and retrieved the guns. He sawed off the barrel of the shot gun, but then discovered that the gun was inoperable ...

He telephoned his wife at work several times in an effort to persuade her to live with him.

During one afternoon call, she asked him to stop phoning her and told him that she was leaving work to make a bank deposit. The appellant then drove into the city, planning to find his wife while she was at the bank, and away from the influence of the deceased, and again attempt to convince her to give the marriage another try.

He put the loaded rifle in the back of his car before departing, thinking that he might have to kill the deceased. He testified that a few miles from home he abandoned that thought, but instead planned to use the rifle as a final bluff to get his wife to come with him ...

At approximately 2:45 pm, the appellant parked across the street from his wife's place of work. When he saw Mrs Thibert depart for the bank, he followed her. She noticed him at a stoplight, at which time he attempted to persuade her to get into his car so they could talk. The appellant followed Mrs Thibert to the bank, and insisted that they go some place private to talk. Mrs Thibert agreed to meet him in a vacant lot but instead, out of fear returned to her workplace. The appellant followed her into the parking lot. The appellant again tried to persuade Mrs Thibert to go some place with him to talk, but she continued to refuse.

The appellant told Mrs Thibert that he had a high powered rifle in his car, but claimed that it was not loaded. He suggested that he would have to go into Mrs Thibert's workplace and use the gun. At that time, the deceased came out of the building and began to lead Mrs Thibert back into the office. The appellant then removed the rifle from the car.

The appellant's evidence was that the deceased began walking towards him, with his hands on Mrs Thibert's shoulders swinging her back and forth, saying 'You want to shoot me? Go ahead and shoot me' and 'Come on big fellow, shoot me. You want to shoot me? Go ahead and shoot me.' At some point, Mrs Thibert either moved, or was moved aside. The appellant testified that the deceased kept coming towards him, ignoring the appellant's instruction to stay back. The appellant testified that his eyes were closed as he tried to retreat inward and the gun discharged.

After the shot, Mrs Thibert ran into the office building. At some point, the appellant put the gun down, entered the office building, and calmly said that he wanted to talk to his wife. He then exited the building, picked up the gun, put more ammunition in it, and said he was not going to hurt anyone. He placed the gun in his car and drove away.

While he was driving, the appellant noticed a police car following him. He pulled off to a side road, and surrendered to the police. At the time of his arrest, Constable Baumgartner recorded that the appellant stated 'It's out of me now. He was fooling around with my wife.' Constable Turner recorded the appellant's statement as 'For what it's worth, I was just after him. For what it's worth, it's out of me now. He was fooling around with my wife.'

16.55 This detailed description reveals planning and a recurring desire in Thibert to kill the deceased.

16.56 In deciding whether the defence of provocation should have been left to the jury, Cory J adopted a wide view of the 'ordinary person' test and concluded that, taking into account the past history between the deceased and the defendant, a jury could find the actions of the deceased (holding Thibert's wife in a proprietary and possessive way while he taunted the defendant to shoot him) taunting and insulting. The jury might think an ordinary married man, faced with the break-up of his marriage, would have been provoked by the deceased's actions to the point of losing self-control.¹¹¹² Cory J considered that there was evidence in the defendant's testimony which met the subjective element of the test of provocation that Thibert had been provoked.

16.57 Cory J then considered whether the deceased's acts were ones which he had a 'legal right' to do:¹¹¹³

In the context of the provocation defence, the phrase 'legal right' has been defined as meaning a right which is sanctioned by law as distinct from something which a person may do without incurring legal liability. Thus the defence of provocation is open to someone who is 'insulted'. The words or act put forward as provocation need not be words or act [sic] which are specifically prohibited by law. It was put this way in *R v Galgay*¹¹¹⁴ ... by Brooke JA:¹¹¹⁵

'The absence of a remedy against doing or saying something or the absence of a specific legal prohibition in that regard does not mean or imply that there is a legal right to so act. There may be no legal remedy for an insult said or done in private but that is not because of a legal right. The section distinguishes legal right from wrongful act or insult and the proviso of the section ought not to be interpreted to license insult or wrongful act done or spoken under the cloak of a legal right.'

16.58 The deceased's possessive or affectionate behaviour towards the defendant's wife, coupled with his taunting remarks, could be considered insulting. The defence of provocation was available to Thibert. The jury had not been correctly directed upon it at trial. Accordingly, his conviction for murder was quashed and a re-trial ordered.

1112 Ibid [24].

1113 [1996] 1 SCR 37 [29].

1114 [1972] 2 OR 630 (CA).

1115 Ibid 649.

16.59 Major J (in dissent) considered that the defence of provocation should not have been left with the jury in this case. In his Honour's view, there was no evidence of a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control.¹¹¹⁶

That the deceased may have positioned Mrs Thibert between himself and the appellant cannot constitute a wrongful act or insult. Nor can the statements 'You want to shoot me? Go ahead and shoot me' and 'Come on big fellow, shoot me' be considered a wrongful act or insult. Those actions are not contemptuous or scornful;¹¹¹⁷ they are legitimate reactions to a dangerous situation. It would be improper to require victims to respond in a certain way when faced with armed, threatening individuals. The defence claim that the wrongful act or insult came from the appellant's evidence that the deceased used Joan Thibert as a shield while taunting him to shoot is ironic. The appellant had control of the only true weapon involved in the situation, the rifle.

Further, that the deceased had a personal relationship with Mrs Thibert is not a wrongful act or insult sufficient to cause an ordinary person to lose the power of self-control. The break-up of a marriage due to an extra-marital affair cannot constitute such a wrongful act or insult ...

...

At law, no one has either an emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the appellant exhibited.

16.60 Major J concluded that the defence should not have been left to the jury, and that the error did not therefore prejudice the appellant.

16.61 Forell is critical of the majority judgment and, in particular, of its interpretation of a 'legal right':¹¹¹⁸

Canada's provocation statute did not mandate this outcome [ie the reversal of the murder conviction]; its ordinary person test's language is strictly objective. In particular, it is disturbing that the Court found the statutory language that says that provocation cannot be based on something someone has a legal right to do, did not mean what it said. Acknowledging that 'the actions of the deceased ... were clearly not prohibited by law,' the *Thibert* Court still held that, because the deceased's actions could be found to be insulting, the law might not approve of them, and therefore, the jury could find the deceased had no 'legal right' to insult the defendant.¹¹¹⁹ However, as the dissent noted, 'no one has either an emotional or proprietary interest in a spouse that would justify the loss of self-control that the [defendant] exhibited.'¹¹²⁰

1116 [1996] 1 SCR 37, [63]–[65].

1117 Those adjectives reflected the definition of 'insult' in the Oxford Dictionary.

1118 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 48.

1119 [1996] 1 SCR 37 [29].

1120 Ibid [65].

16.62 Other comments by Cory J provide further material for contemplation in this review. Of the ordinary person test, Cory J said:¹¹²¹

The objective aspect [of the defence] would at first reading appear to be contradictory for, as legal writers have noted, the 'ordinary' person does not kill. Yet, I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence.

....

In Canada, the courts have also sought to attain a proper balance in the interpretation of the provocation section. It has been properly recognised that the objective element exists to ensure that the criminal law encourages reasonable and responsible behaviour. A consideration of the defence of provocation must always bear this principle in mind. On the other hand, if the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered. In the context of other cases it may properly be found that other factors should be considered. It is how such an 'ordinary' person with those characteristics would react to the situation which confronted the accused that should be used as the basis for considering the objective element.

16.63 In Cory J's view, relevant characteristics of the ordinary person would include those factors which would give the act or insult a special significance (for example, race¹¹²² or the background of the relationship between the defendant and the deceased¹¹²³).

Australian provocation law

16.64 Forell considers Australia the 'trend-setter'¹¹²⁴ of the three countries on the law of provocation, and much less supportive of the traditional provocation doctrine and more willing to incorporate substantive equality into the law of domestic homicide.¹¹²⁵ Noting that the Australian High Court's test of provocation required the jury to decide whether the deceased's provocation could cause an ordinary person to lose self-control and kill, Forell was surprised that appellate case law suggested that men who killed out of rage or jealousy were successful in asserting the defence.¹¹²⁶

1121 Ibid [4], [14].

1122 Ibid [11].

1123 Ibid [15].

1124 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 49.

1125 Ibid 50.

1126 Ibid.

16.65 Forell refers to *Stingel v The Queen*¹¹²⁷ and the finding of the High Court that the trial judge's refusal to leave provocation to the jury was correct in circumstances very similar to those in *Thibert* and under a statute similar to the Canadian one.

16.66 Australia's provocation test was less subjective than those used in the United States and Canada because the defendant's gender and other personal characteristics were not as completely factored into the ordinary person test. On Forell's review of the cases, Australian courts usually looked unfavourably upon allowing provocation in cases of male rage and jealousy, although there were exceptions, such as *Ramage*.

16.67 After considering the abolition of the defence in Tasmania and Victoria and Victoria's introduction of the new offence of defensive homicide, Forell describes the Victorian Parliament's abolition of provocation and enactment of the new offence as a clear example of 'lawmakers choosing to substitute substantive for formal equality'.¹¹²⁸ Forell considers Tasmania's abolition of provocation 'a positive step on behalf of women',¹¹²⁹ but is uncertain how battered women will fare without this defence.

16.68 Forell predicts that those Australian jurisdictions that have mandatory life sentences for murder will not abolish provocation.

THE AMERICAN 'EXTREME EMOTIONAL DISTURBANCE' DEFENCE

16.69 The re-statement of provocation as 'extreme emotional disturbance' in the Model Penal Code¹¹³⁰ has been adopted (to varying degrees) in some States of America but not in others. An extensive empirical study over a fifteen-year period (1980–1995) by Nourse¹¹³¹ supports Forell's argument that the 'extreme emotional disturbance' treatment of domestic homicide, based on rage and jealousy, is unjust.

1127 (1990) 171 CLR 312.

1128 C Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 27, 56.

1129 *Ibid* 57.

1130 (USA). This was developed by the American Law Institute in 1962.

1131 V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) 106 *Yale Law Journal* 1331.

16.70 The study showed that just over one quarter (26 per cent) of the Model Penal Code claims of ‘extreme emotional disturbance’ that reach juries involve what the author classified as a ‘departure’ context.¹¹³²

16.71 Nourse argues that the extreme emotional disturbance defence, in focussing on the emotional state of the killer (and on the killer’s particular characteristics), in practice hid the value judgments underlying the claim of emotional disturbance. Nourse poses the question ‘which losses of self-control merit the law’s compassion?’¹¹³³ — and suggests that the answer entails a moral judgment.

16.72 The article ventures a re-examination of the relationship between emotion and reason before returning to a ‘fundamental question’:¹¹³⁴

Where does this understanding of emotion lead us? It helps us to see why we might distinguish intuitively the rapist killer from the departing wife killer. In the first case, we feel ‘with’ the killer because she is expressing outrage in ways that communicate an emotional judgment (about the wrongfulness of rape) that is uncontroversially shared, indeed, that the law itself recognizes. Such claims resonate because we cannot distinguish the defendant’s sense of emotional wrongfulness from the law’s own sense of appropriate retribution. The defendant’s emotional judgments are the law’s own. In this sense, the defendant is us. By contrast, the departing wife killer cannot make such a claim. He asks us to share in the idea that leaving merits outrage, a claim that finds no reflection in the law’s mirror. In fact, the law tells us quite the opposite: that departure, unlike rape and batter and robbery, merits protection rather than punishment.

16.73 The statistical analyses collected by Nourse sound a warning against a subjective approach, while the theoretical discussion lucidly explores the connections between reason and emotion, and unpicks some of the moral assumptions of the extreme emotional disturbance defence.

FINDINGS FROM NON-LEGAL LITERATURE

16.74 An Australian article by Coss entitled ‘The Defence of Provocation: An Acrimonious Divorce from Reality’¹¹³⁵ analyses a selection of recent, non-legal literature and relevant cases and draws from it support for an argument against the defence. The theme of Coss’s article is that those who appear to be entitled

1132 ‘*Departure* claims involve a wide range of situations inspiring rage, from divorce to rejection, from protective orders to broken engagements. On one end of the spectrum are cases of legally enforced departure, in which one partner forces the other to leave by obtaining a protective order. At the other end are cases that amount to ‘rejection’ in dating or other casual relationships. Somewhere in between these two extremes are the majority of cases: cases in which the victim moves the furniture out, announces that she is leaving, or files for divorce. In all cases, the defendant’s legal theory depended in whole or in part upon the separation’ [notes omitted]: V Nourse, ‘Passion’s Progress: Modern Law Reform and the Provocation Defense’ (1996) 106 *Yale Law Journal* 1331, 1353.

1133 Ibid 1333.

1134 Ibid 1392.

1135 (2006–2007) 18 *Current Issues in Criminal Justice* 51.

to raise the defence of provocation in murder are often proprietary, violent men who are least deserving of the law's 'understanding'.

16.75 Before considering the non-legal literature in his article, Coss makes his arguments against the defence, which are discussed below for their contribution to the debate.

'The defence is flawed'

16.76 Coss asks 'Why privilege "loss of control"? Why does lethal retaliatory anger in response to an insult warrant the law's sympathy?' In Coss's view, the historical foundation of the defence¹¹³⁶ provides no justification for the continuation of the defence.¹¹³⁷

16.77 Coss argues that the provocation defence is flawed. Men raise provocation by alleging that they have been insulted, mocked, humiliated or spurned. Coss makes the point that is regularly made, that the only real 'loss of control' is that men have lost control of their women. Losing control is an affront to honour but, usually, the only person who can testify to the occurrence of the allegedly provocative act is dead.¹¹³⁸

16.78 As to ordinariness, Coss asks 'could an ordinary person respond with lethal violence to an insult', and refers to statistics on relationship breakdowns to argue that ordinary people do not so respond:¹¹³⁹

In Australia each year on average 77 intimate partner homicides occur; and on average, men are perpetrators in about 60 of them ... In most cases there are insults, threats of actual separations, suspicions of or confessions of unfaithfulness — all affronts to male honour. It would appear that approximately 50 men kill their intimate partners each year in these classic circumstances. But how many intimate partner breakdowns occur each year? We know from the Australian Bureau of Statistics that there are between 50,000 and 55,000 divorces recorded each year. Anecdotal evidence suggests that the number of de facto breakdowns is likely to be considerably higher than that. It would be impossible to determine the numbers of breakdowns of intimate couples (boyfriend and girlfriend, or same sex). But it is conceivable that the combined figure of all these groupings is likely to swell the total out to 200,000 or more. And in Australia each year, in 100% of those breakdowns, insults and hurtful remarks would be exchanged. But this figure does not include the massive number of intimate relationships which do not break down but in which hurtful remarks are exchanged — numbers in the millions.¹¹⁴⁰ And yet only 50 men kill their intimate partners each year when affronted by insults, separations, or confessions. Men who kill when affronted by the intimate

1136 That it arose to express tolerance for human frailty at a time when men bore arms and retaliated to affronts to their honour.

1137 (2006–2007) 18 *Current Issues in Criminal Justice* 51, 52.

1138 *Ibid.*

1139 *Ibid* 52–3.

1140 The Commission acknowledges that there may be overstatement in this claim.

partners are truly *extraordinary*. It is problematic that the provocation defence's existence confirms that the criminal law believes such men warrant sympathy, and thus a significant reduction in sentence.

16.79 Additionally, Coss argues that the 'ordinary person' test is incomprehensible to the ordinary person.¹¹⁴¹

Analysis of non-legal literature

16.80 Coss identifies as the key finding of the literature on intimate partner violence that 'sexual proprietariness' — feelings of ownership, exclusivity and jealousy — is the predominant motivating factor for wife¹¹⁴² killing,¹¹⁴³ citing two cases in which 'proprietary males' pleaded provocation after killing their wives: *R v Ramage* and *R v Butay*.

*R v Ramage*¹¹⁴⁴

16.81 Ramage was a wealthy businessman. His wife left him. He lured her to their former home and bashed and strangled her to death. He alleged at trial that she had sneered at the renovations he had arranged for the home, and told him sex with him repulsed her. He knew she had found another partner. He said he lost control and killed her.

16.82 Ramage was charged with murder. The jury accepted his defence of provocation and returned a verdict of guilty of manslaughter. In his sentencing remarks, Osborn J said:¹¹⁴⁵

[Y]ou were at the time of the fatal confrontation in a state of extreme obsessive anxiety and desperately seeking to reassert control over the relationship with your wife. It was in this context that the jury was entitled to conclude that it was reasonably possible you were provoked to lose self-control.

...

I am satisfied (a) that the attack was carried out with murderous intent; (b) that it was brutal and required a continuing assault to achieve its end; and (c) ... the gravity with which you were confronted was far from extreme. It was rather of a character which many members of the community must confront during the course of a breakdown of a relationship.

...

1141 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 53.

1142 'Wife' is used in this chapter to include female partners of males — spouses, de-facto partners or girlfriends, consistently with the use of the word in the literature.

1143 Referring particularly to the work of Wilson and Daly including MI Wilson and M Daly, 'Sexual Rivalry and sexual conflict: recurring themes in fatal conflicts' (1998) 2 *Theoretical Criminology* 291.

1144 [2004] VSC 508.

1145 Ibid [35], [38], [40], [42].

[T]he history of your relationship with your wife ... [involves] ... episodes of violence and elements of continuing intimidation and dominance over her for many years ... I must record some underlying concern as to your capacity to function in a non-violent manner within a marital relationship should you re-establish one. I say this because it is apparent that your offence was the product of core aspects of your personality and it seems to me that these will not easily change.

16.83 Coss notes the phrase ‘desperately seeking to reassert control’ (in the first quoted paragraph above) and asks, ‘Why does a manipulative, controlling, proprietary male who kills when challenged warrant some sympathy, some excuse?’ How could a reasonable jury, properly instructed, believe an ordinary person might have lost control in these circumstances? Coss’s interpretation of the verdict is, in effect, that the jury acknowledged that Ramage’s vicious killing of his wife was an ordinary retaliation to the affront contained in her statement that sex with him repulsed her.

16.84 Ramage was sentenced to 11 years’ imprisonment.

Other commentary on R v Ramage

16.85 *Ramage* was considered by McSherry in ‘Men Behaving Badly: Current Issues in Provocation, Automatism, Mental Impairment and Criminal Responsibility’.¹¹⁴⁶ McSherry asked whether words should be considered sufficient to deprive an ‘ordinary person’ of the power of self-control? Why should killing in anger be tolerated yet not killing based on other emotions such as compassion or fear of future abuse?¹¹⁴⁷

Basing provocation on a loss of self-control implies that men like James Ramage *could have* controlled themselves, but lacked the strength of will to do so. This raises the issue as to whether the criminal law should be about setting standards of self-control and punishing those who breach them rather than excusing people from criminal responsibility because they killed in anger.

R v Butay¹¹⁴⁸

16.86 Butay was described as a caring, considerate, courteous, respectful well-spoken person. She had separated from her husband. He said that he begged her to keep their marriage alive, but she told him she was having an affair. Butay said his wife:¹¹⁴⁹

1146 B McSherry, ‘Men Behaving Badly: Current Issues in Provocation, Automatism, Mental Impairment and Criminal Responsibility’ (2005) 12(1) *Psychiatry, Psychology and Law* 15.

1147 *Ibid* 17.

1148 [2001] VSC 417.

1149 *Ibid* [8].

told [him] that [X] was her lover and that he was much better, 'meatier' than [Butay] She said that [he was] a 'dickhead' and that [he had] better 'cut off [his] dick'. She said she 'can now fuck around because she won't get pregnant'. She also pushed [him] in the face. She was laughing and yelling. [Butay felt that he was] drowning.

16.87 Butay battered his wife to death with a hammer. He struck her savagely at least five times in the back of the head as she lay face down on the floor.

16.88 On trial for murder, the jury accepted Butay's defence of provocation, and found him guilty of manslaughter. He was sentenced to 8 years' imprisonment. The trial judge made the following remarks at sentence:¹¹⁵⁰

[Y]our wife had determined to leave you and you were not prepared to accept ... that [your] wife had the right to make her own choice ...

...

[Y]our wife's family have found the trial an ordeal ... From their perspective, just as Ruth was unable to defend herself from your violent and savage attack with the hammer, equally she was unable to defend herself from your allegations as to her use of provocative and abusive words ... I would emphasise to Ruth Butay's family and friends [that] the jury verdict means no more than a finding that the jury could not exclude beyond reasonable doubt, the possibility of those words being said.

16.89 Coss comments: 'Apparently the jury believed that nothing could be more insulting to a man who cannot accept that he is losing his possession than to be told he is sexually inadequate as well.'¹¹⁵¹

'Asymmetrical killings'

16.90 Coss identifies a finding of crucial differences between male and female violence as 'fundamental' and 'complementary' to the finding that proprietariness motivates wife killing:¹¹⁵²

[W]omen's violence differs from that perpetrated by men in terms of nature, frequency, intention, intensity, physical injury and emotional impact ... [The violence used by women had occurred mostly] in the context of 'self-defence' or 'self-protection' ... [W]omen did not use intimidating or coercive forms of controlling behaviour ... Men who were the recipients of women's violence usually reported that it was inconsequential, did not negatively affect their sense of well-being and safety ... [The findings] indicate that the problem of intimate partner violence is primarily one of men's violence to women partners and not the obverse.

1150 Ibid [22], [25], [26].

1151 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 56.

1152 RP Dobash and RE Dobash, 'Women's Violence to Men in Intimate relationships. Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, as referred to in G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 57.

16.91 Other studies have similarly illustrated the contrast between the circumstances in which men and women usually kill.¹¹⁵³ Of the international research, Coss notes:¹¹⁵⁴

International researchers ... are in agreement on the fundamental differences: stalking and killing post-separation; murder-suicides; killing the whole family; lethal retaliation to infidelity; killing after years of inflicting verbal and physical violence — these are almost exclusively committed by male spouses, virtually never by female spouses. Women kill their spouses under very different circumstances.

'Unlike men, women kill male partners after years of suffering physical violence, after they have exhausted all available sources of assistance, when they feel trapped, and because they fear for their own lives.'¹¹⁵⁵ (notes omitted)

Key predictors of men killing women

16.92 Coss identifies three key predictors of the men killing women: prior violence committed upon the deceased, separation by the deceased (and stalking), and an affront to male 'honour'.¹¹⁵⁶

Prior violence

16.93 Coss notes that major studies have found that everywhere in the world women are beaten before they are killed.¹¹⁵⁷ He refers to the most recent study in Britain examining intimate partner homicide, which found that:¹¹⁵⁸

[Intimate partner] murder would not appear to be associated with the one-off violent event of high emotion in which the man just 'snaps' and acts *out of character* by using violence against his woman partner. Instead, they are more likely to be events in which the man acts *in character* by continuing to use violence against the woman whom he has previously abused. (emphasis in original)

1153 A Wallace, *Homicide: The Social Reality*, NSW BOSCAR (1986); K Polk, *When Men Kill: Scenarios of Masculine Violence* (1994); J Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) Australian Institute of Criminology, Research and Public Policy Series (28).

1154 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 58.

1155 MI Wilson and M Daly, 'Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States' (1992) 30 (2) *Criminology* 189, 206.

1156 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality', (2006–2007) 18 *Current Issues in Criminal Justice* 51, 58.

1157 JC Campbell, 'If I Can't Have You, No One Can': Power and Control in Homicide of Female Partners' in J Radford and DEH Russell, *Femicide: the Politics of Women Killing* (1992); J McFarlane, J Campbell and K Watson, 'Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety' (2002) 20 *Behavioural Sciences and the Law* 51; PH Smith, KE Moracco and JD Butts, 'Partner Homicide in Context. A Population Based Perspective' (1998) 2 *Homicide Studies* 400; JC Campbell et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003) 93 *American Journal of Public Health* 1089.

1158 Dobash et al, 'Just an Ordinary Killer — Just an Ordinary Guy: When Men Murder an Intimate Woman Partner' (2004) 10 *Violence Against Women* 557, 597–8 in G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 58–59.

16.94 Having regard to that finding, Coss considered the Victorian case of *R v Kumar*¹¹⁵⁹ decided by the Victorian Court of Appeal in September 2002.¹¹⁶⁰

16.95 Kumar was convicted of the murder of his de facto partner, Raj Mani. They formed a relationship when he was 18 years old, and lived together. Kumar was 20 when he killed Mani. She was 36. They were both born in Fiji. They were of the Hindu faith.

16.96 Kumar was violent towards Mani during their relationship, and she separated from him twice before she left Queensland. Evidence was led at trial of his assaults upon her and his jealousy. The deceased obtained a protection order against him, which permitted contact, but prohibited him from inflicting violence upon her. He was convicted by a Magistrate of an assault. At the hearing, Mani told the Magistrate that it was *her* fault that she had been assaulted: she had sworn at Kumar and insulted his parents.¹¹⁶¹

16.97 In November 1998, Mani moved from Queensland to Victoria to end her relationship with Kumar.

16.98 In December 1998, Mani went to a wedding in Fiji. Kumar telephoned her family in Fiji and told Mani's sister that, wherever they were hiding Mani, he was going to come and kill her. He also threatened to kill her sisters. The sister who received the phone call did not take the threat seriously.

16.99 Before Christmas 1998, Mani wrote to Kumar. In the letter, she complained about his past treatment of her, and said she was aware of his threats to kill her, but it was addressed to 'my sweetheart' and was in loving terms. In the opinion of Eames JA, the terms of the letter:¹¹⁶²

overall, were capable of being regarded by a jury as conveying to a 20 year old, immature, youth that the deceased wanted the relationship to resume, albeit on terms as to modification of the future conduct of the applicant.

16.100 His Honour added:¹¹⁶³

The jury might well have considered that the applicant either disregarded or did not appreciate that Ms Mani (if she was offering any hope, at all, or a resumption of the relationship) was making that important qualification.

1159 (2002) 5 VR 193.

1160 The facts are taken from the judgment, rather than from Coss's summary of the case.

1161 It is not clear whether Kumar pleaded guilty to the assault or was convicted after a trial. The judgment refers to a hearing, which may suggest that he raised a defence of provocation under ss 268 and 269 to the assault, which was not successful.

1162 (2002) 5 VR 193, 196.

1163 Ibid.

16.101 Kumar travelled to Victoria and searched the streets of Thomastown for Mani. Mani saw his car at the house of her uncle in January 1999. She asked a friend to tell him to return to Queensland. He did not, and over the next few weeks they came into contact. Sometimes Mani appeared fearful of Kumar. Other times they were friendly, and on some occasions they had sexual relations. Kumar stayed occasionally at Mani's apartment, but she did not invite him to live with her.

16.102 After 3 February 1999, Kumar made arrangements to move permanently to Melbourne. There was some evidence that Mani had invited him to live with her, although there was other evidence that Mani told a friend on 1 February 1999 that it was safer not to live with Kumar. On 6 February 1999, she told the same friend that she was scared.

16.103 Kumar's evidence was that after a long drive he arrived in Melbourne on 6 February 1999. He slept in his car overnight, and went to the deceased's unit in the morning at about 8:30 am. She refused to open the door. He asked for food but she did not offer him any. He left, then returned and knocked on the door. Mani spoke to him through a locked flyscreen. At 8:36 am she telephoned the police for assistance. She said he was 'hassling' her and (in response to a question from the operator) that he had threatened violence. She told police who arrived at 8:50 am that he had managed to open the screen door. He was not at the apartment when police arrived.

16.104 Half an hour later, Kumar went to Mani's unit again and knocked on the door. He got no response. He walked to a primary school and picked up a piece of pipe about a metre long. He got a folding knife from his car. He went back to the unit, smashed the front bedroom window and gained entry. He took the knife from his pocket, unfolded it, approached Mani and stabbed her many times in the back.

16.105 Mani suffered knife injuries and injuries consistent with her having been chopped with a meat cleaver which was found in the house. Eames JA described her injuries:¹¹⁶⁴

There was one stab wound to the abdomen which went through the spleen and kidney on the left side. There were two stab wounds to the front of the chest, one of which penetrated to the lungs. There were six to 10 stab wounds to the back, one of which penetrated the chest and another penetrated the lower part of the spinal canal. In all there were between nine and 13 stab wounds to the body. The chopping injuries were to the head of the deceased. There were eight chopping injuries to the head and neck and an additional two chopping injuries to the left side and front of the scalp and a further injury to the right side of the face. In all there were 11 injuries from a chopping implement. Additionally, there were nine defence injuries to the forearms of the deceased. The injuries to the deceased suggested an attack of great ferocity had taken place.

1164

Ibid 199.

16.106 Evidence of provocation came almost entirely from Kumar's interview with police.¹¹⁶⁵ Kumar did not give evidence. He referred to the arguments they had had when he was refused entry to Mani's apartment, during which he said Mani insulted his parents and family. On his description of her insults, they were grossly offensive remarks.

16.107 When he broke in with the knife he saw Mani and just stabbed her. He was asked by police 'She didn't provoke it in any way?', and he said 'no'. He was asked what made him so angry and he said:¹¹⁶⁶

A: Like all the things just came in my mind, she had been accusing my parents and on the other hand I'd lost everything, and she had called me from there to here for nothing and ...

Q: You had your car accident yesterday.¹¹⁶⁷

A: Yeah. And everything came in my mind and I was mad to do something wrong.

16.108 The trial judge refused to leave provocation to the jury, and Kumar was convicted of murder. He appealed against his conviction to the Victorian Court of Appeal. By majority, the appeal was dismissed. Eames JA, in dissent, considered that provocation ought to have been left to the jury.

16.109 Eames JA analysed the evidence from the perspective most favourable to Kumar:¹¹⁶⁸

The language used by the deceased, if the jury believed she used such language, was deliberately offensive and insulting, and the attack on the character of the applicant's family would no doubt have inflamed him. The deceased must be taken to have known that the applicant would be upset by such language. It was, however, language of such absurd exaggeration and hyperbole¹¹⁶⁹ that not even the applicant seems to have believed that anything said was true, merely that it offended him that it was said at all. Assuming it was used, it was the sort of gross and hysterical language which common experience suggests might well accompany the break down of any relationship. It is not difficult to conceive that an ordinary person in such circumstances might become angry, might possibly damage property, might even become violent. I find it difficult to conceive, however, that a reasonable jury could conclude that such language, or conduct, in denying entry to the flat or resumption of the relationship might cause an ordinary person to so lose control as to form the intention to kill or cause really serious bodily injury. The one reservation I have is whether an ordinary jury might have had a reasonable

1165 Ibid.

1166 Ibid 203.

1167 Kumar had an accident during his drive to Melbourne.

1168 (2002) 5 VR 193, 224.

1169 The deceased allegedly called Kumar's family lower caste. She allegedly called Kumar's mother a bitch, a slut and a prostitute, and said his father was a 'poofter' and not a man: (2002) 5 VR 193, 202.

doubt as to whether a reasonable person who was only 20 years of age might so react.

No doubt a failed relationship might be responded to more emotionally and passionately by a 20 year old person than by an older person, whose experience of life and appreciation of the probability of recovery from its disappointments would be greater. As the court observed in *Stingel*,¹¹⁷⁰ (when allowing age as the one characteristic of the accused with which the ordinary person might be endowed), '[a]s a broad generalization, it is true to say that the powers of self-control of a young adult of eighteen or nineteen years are likely to be less than those of a more mature person'. Similar comments might be applied to a 20 year old. The court held that it was appropriate that age be taken into account' at least in any cases where it may be open to the jury to take the view that the accused is immature by reason of youthfulness.

When it is accepted that for the purpose of the objective test the ordinary person is not an unusually volatile 20 year old, nor a person with unusual immaturity (that is, over and above the immaturity which an ordinary 20 year old might be expected to exhibit), nor is a person with a particular ethnic or racial background, then so much more compelling seems the answer that no reasonable jury could have a reasonable doubt whether an ordinary 20 year old person, for whom the gravity of the provocation was as great as that felt by the accused, might be so provoked by the provocation in this case as to lose self-control and form the intention to kill or to cause really serious injury.

In my opinion, however, ... I cannot say that no reasonable jury could answer this question favourably to the applicant. It follows that the defence of provocation, in my view, should have been left to the jury.

16.110 Coss refers to the following passage from Eames JA's judgment:¹¹⁷¹

The question in this case — whether an ordinary 20 year old might be so inflamed by the conduct alleged in this case as to lose self-control and kill — might well raise concerns that if a jury were to hold a reasonable doubt and to acquit the accused of murder, then it was adopting a standard of subjugation of women by violent men which was antithetical to a civilised society. Some of the reasons of the learned trial judge might be thought to reflect such concerns. That, in my opinion, would not be a valid basis for refusing to leave the defence to the jury where there were items of provocation which might be viewed in a different light by a jury.

16.111 Coss then makes this argument:¹¹⁷²

It could be argued that Kumar, a jealous, violent, proprietary male, was the least deserving of the Law's compassion. But Eames JA asserted [in the passage quoted immediately above] that these sorts of sentiments should play no part in the Law's application of the defence.

...

1170 (1990) 171 CLR 312, 331.

1171 *Ibid*, 219–20.

1172 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 59.

The provocation defence, by its very existence, already adopts a standard which potentially subjugates women. It is of concern if a senior judge, for the sake of legal correctness, could embrace a position that acknowledges and then disregards that subjugation.

16.112 Coss contrasts Eames JA's comments with those of O'Bryan AJA. Coss refers to the italicised part¹¹⁷³ of the following extract from the judgment of O'Bryan AJA:¹¹⁷⁴

I am clearly of the view that the deceased's conduct on 7 February ... could not satisfy the objective test. I consider that the conduct relied upon by [appellate counsel for Kumar] fell far below the minimum limits of the range of powers of self-control which must be attributed to the ordinary person. It is not altogether unknown for a wife to lock out her husband from the matrimonial home for what seemed to her to be a good and sufficient reason, or to refuse to provide a meal to him. In my view, for the husband to lose self-control and react in the violent manner demonstrated in the present case, would be far outside what the community would expect from an ordinary person.

This is a case where the objective test must be applied to 'mere words alone'. In my opinion, the law on provocation has developed to a stage where, as a matter of principle, it may be stated that words which are merely insulting, hurtful and offensive, but are not of a 'violently provocative character' cannot be taken to satisfy the objective test. Into the equation, account must be taken of the context in which the words were used and the degree of reaction produced by the words. In the present case, the words were no more than insulting, hurtful and offensive, but the applicant's reaction, whether or not attributable to the words, was both extreme and of great ferocity, his intention being to kill and mutilate the deceased.

In my opinion, if the applicant was angered and offended by the deceased's words, no ordinary person could then and there form the necessary murderous intent and no reasonable jury properly instructed could find otherwise.

It is the law that 'violently provocative words', in very exceptional circumstances, are capable of causing an ordinary person to lose self-control and act as ferociously as did the applicant, but I have never experienced such a case in my lengthy experience with the criminal law ...

...

I regard provocation as anachronistic in the law of murder since the abolition of capital punishment and would support its abolition (by Parliament) as a so-called defence ... I have experienced, as I believe have other judges who have presided over murder trials, unjustified verdicts which could only be explained in terms of provocation.

It is important and necessary to maintain objective standards of behaviour for the protection of human life. Judges' views will differ, as they have in the present case, as to how an ordinary person will react to particular conduct or words. I consider that a jury properly directed on the law of provocation could only have found that the applicant exploded into anger and formed an intention

1173 Ibid 59.

1174 (2002) 5 VR 193, 231–2.

to kill or seriously injure the deceased, not because of the words attributed to her in the house, but because he became very frustrated by her refusal to admit him to her unit. Before the words were spoken the applicant had retrieved the knife from the car and had obtained a piece of pipe. These actions indicated an intention to enter the house forcefully, armed with a knife.

In my opinion, the trial judge was justified in withdrawing provocation from consideration by the jury ...

16.113 O'Bryan AJA appears to have made a factual error. As noted above, the only evidence about Mani's provocative words came from Kumar's interview, relevant parts of which are contained in Eames JA's judgment. On the Commission's reading of the extracts of the interview, Kumar took the pipe and retrieved the knife *after* Mani insulted him.¹¹⁷⁵ However, earlier in his judgment, O'Bryan AJA clearly appreciates that Kumar did not react immediately to the insults with violence.¹¹⁷⁶ Nevertheless, the significant point to be made in contrasting the judgments of Eames JA and O'Bryan AJA for the purposes of the Commission's review is that judges may reach different conclusions about whether certain conduct (or words) could satisfy the objective test of provocation.

16.114 Eames JA recognised this in his judgment:¹¹⁷⁷

Although the trial judge has an obligation, in appropriate cases, to remove the defence from the jury's consideration, it is by no means clear what objective criteria the judge must apply when adopting that role of overseer of community standards. The objective test, couched as it has been in vague and general terms concerning the minimum standards of self-control acceptable to the community, invites disagreement among judges when the test comes to be applied in any given case. In those circumstances there is a real risk that the decision whether the defence should be left to the jury will be affected by the judge's views of what a reasonable person should or should not do when confronted by the suggested provocation — that is, by a moral judgment of what minimal standard of self-control ought to be applied — rather than by reference to what a reasonable jury might regard as being the ordinary person's reaction to the suggested provocation. Although applying what is said to be an objective standard, the trial judge must inevitably be applying his or her own moral standards and by adopting an approach which is as much subjective as it is objective. In my opinion, the objective standard does not involve the imposition of a 'moral' standard at all, and certainly not a moral standard which varies as between particular categories of killings. It is meant to be a standard which is imposed in all cases, to ensure that principles of equality and individual responsibility are not undermined by allowing those who are least capable of exercising self-control and most quick to anger and kill, to set their own standard whereby killing might be excused.

1175 For example, in questions 1732–1737, set out at (2002) VR 193, 203, Kumar confirms that he did not react straight away to the insults, but instead, went away and it made him 'mad' after a while. He was walking past [the school] crying, when he saw the iron bar 'And it made me mad to do something'. He said he did not have it in his mind to kill Mani, but as soon as he got into her apartment, he stabbed her.

1176 (2002) VR 193, 229.

1177 Ibid 217.

There is an additional danger, too, when applying the objective test. Whilst the authorities make it clear that the question whether the defence should be left to the jury is one which must be evaluated upon the view of the evidence most favourable to the accused, it is very easy for a judge, having heard the evidence, and without appreciating that he or she is doing so, to act upon his or her own assessment of the facts, whereas a jury, whose province it is to decide facts, might have come to a different conclusion as to those facts.

Separation and stalking

16.115 Coss considers that the non-legal literature 'conclusively established' that the most dangerous time for a woman in an intimate relationship is separation.¹¹⁷⁸ In several countries, from one-half to one-third of women killed by their partners had left or were trying to leave when they were murdered.¹¹⁷⁹ Separation is a key predictor of homicide.¹¹⁸⁰

16.116 The same point is made in Kaplan & Sadock's *Synopsis of Psychiatry*.¹¹⁸¹

Battering is often severe, involving broken limbs, broken ribs, internal bleeding, and brain damage. When an abused wife tries to leave her husband, he often becomes doubly intimidating and threatens to 'get' her. If the woman has small children to care for her problem is compounded. The abusive husband wages a conscious campaign to isolate his wife and make her feel worthless. Women face risks when they leave an abusive husband; they have a 75 per cent greater chance of being killed by their batterers than women who stay ...

16.117 Stalking, a 'key controlling behaviour',¹¹⁸² also ranks high as a predictor of women being killed by intimate partners. Coss refers briefly to an American study of 821 women (from 10 cities across the United States of America¹¹⁸³) who had been killed by their intimate partner or had been the victim of intimate partner violence between 1994 and 2000.¹¹⁸⁴ Those 821 women included 263 killed by their intimate partner, 174 who had survived an attempt on their life and 384 who had reported intimate partner violence falling short of an attempt on their life.¹¹⁸⁵ Almost half (49 per cent) of the women killed or surviving an

1178 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 59.

1179 RE Dobash et al, 'Just an Ordinary Killer — Just an Ordinary Guy. When Men Murder an Intimate Woman Partner' (2004) 10(6) *Violence Against Women* 577, 582.

1180 H Johnson and T Hotton, 'Losing Control. Homicide Risk in Estranged and Intact Intimate Relationships' (2003) 7 (1) *Homicide Studies* 58, 59, 68; M Dawson and R Gartner, 'Differences in the Characteristics of Intimate Femicides' (1998) 2 (4) *Homicide Studies* 378, 382.

1181 BJ Sadock and VA Sadock, *Kaplan & Sadock's Synopsis of Psychiatry* (10th ed, 2007) 882.

1182 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 60.

1183 J McFarlane, JC Campbell and K Watson, 'Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety' (2002) 20 *Behavioural Sciences and the Law* 51, 56.

1184 Ibid 56.

1185 Ibid.

attempt on their life had been stalked by their killer (or would-be killer), although they were not previously physically abused.¹¹⁸⁶

16.118 Coss considers the position of women unable to leave a violent relationship because they fear retaliation by their partner and those in a position to help,¹¹⁸⁷ particularly those women 'tied inextricably to a cultural group threatening reprisals should she abandon her family'.¹¹⁸⁸ Coss refers to the case of *R v Denney*¹¹⁸⁹ and observes that 'killing a violent partner may be perceived to be the only solution ... once again, a far cry from the reasons a violent proprietary male kills'.¹¹⁹⁰

*R v Denney*¹¹⁹¹

16.119 *R v Denney* was a case in which a woman killed her husband while he slept by shooting him twice in the head. She had concealed his death for 13 years until his body was found by bushwalkers. The jury accepted the defence of provocation, and she was sentenced by Coldrey J to three years' imprisonment, wholly suspended.

16.120 Denney was born in Scotland, the youngest of six children. Her father was a violent drunk, and her brother sexually assaulted her. Her first husband was unable to protect her from her brother, so she married the deceased, who was a strong man. People were wary of provoking his anger.

16.121 The deceased was a jealous man. He assaulted Denney's son from her first marriage. She attempted to leave him, but he told her he would never let her go and that, if she left him, he would kill her. The deceased assaulted Denney on parts of her body which were ordinarily not visible to others. Denney was required to always meet the deceased's sexual demands.

16.122 They moved to Australia in 1977. The family (there was now also a daughter and another son) lived with Denney's sister in Geelong for two years. Denney was not allowed to go out. The deceased refused to let her wear make-up or perfume. Denney made herself unattractive so that other men would not look at her. She was described by witnesses as 'reserved'.

1186 Ibid 66. The study also showed that, during the 12 months before the attempted or actual murder, 68 per cent of the women were stalked and 69 per cent were assaulted.

1187 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 60.

1188 A Kasturirangan, S Krishnan and S Riger, 'The Impact of Culture and Minority Status on Women's Experience of Domestic Violence', *Trauma, Violence & Abuse* (2004) 5 (4) 318; N Shalhoub-Kevorkian 'Reexamining Femicide: Breaking the Silence and Crossing 'Scientific' Borders', *Signs* (2003) 28 (2) 581.

1189 [2000] VSC 323.

1190 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61.

1191 [2000] VSC 323.

Coldrey J was satisfied that Denney was subject to psychologically demoralising physical and mental abuse.

16.123 The deceased controlled the family's finances; Denney was on a budget and required to detail all her expenditure. She was unable to cover price increases with the money he allowed her, so she took out loans and acquired debts of \$5000. Denney dreaded the confrontation she would have with the deceased when she revealed the debts.

16.124 The deceased wanted to go shooting with a friend and, to appease him, Denney obtained a gun and ammunition from the deceased's friend.

16.125 When Denney told the deceased of the debt, there was an angry confrontation, and he struck her a couple of times. She fell into a chair. She told him she had borrowed a gun for him, at which point, she said, he 'lost it', it seems because she had gone to his friend to ask for it. He said she was a stupid bitch and worthless and threatened to kill her. He told her she was only good for one thing, and raped her. Denney said she felt fearful, degraded, humiliated and angry. His Honour said:¹¹⁹²

In addition, the incidents of your years of marriage filled your mind. The intensity of your husband's anger was such that you were terrified that he would kill or seriously harm you. It was during this period of emotional turmoil and when your husband had fallen asleep after the sexual assault, that you took the gun from where you had stored it in the laundry, and shot him twice in the head.

16.126 Denney told her children that the deceased had left home after an argument. She hid his body in bushland, where it remained for 13 years before it was discovered by bushwalkers in April 1988. Denney told no one about killing the deceased for fear of its effect upon her family.

16.127 Her younger son drowned in 1986, aged 11. Denney told the jury she believed God took him because of what she had done.

16.128 Coldrey J considered that the physical and psychological toll of harbouring the secret of the deceased's death had been immense, and constituted a severe punishment. Added to her punishment was her interpretation of the death of her son. His Honour accepted that Denney was genuinely remorseful, and sentenced her to three years' imprisonment, wholly suspended. The Crown conceded at sentence that the circumstances of the case were highly unusual.

16.129 The fact that this matter went to trial suggests that the Crown would not accept that the killing was provoked. That was perhaps because of the delay between the assault and rape and the shooting although, on the Commission's reading of the case, the act of rape accompanied by the threats to kill and other insults amounted to immense provocation (without need to resort to its context

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Ibid [21].

of years of abuse) and the delay between the provocation and the killing was not substantial. Indeed, one may ask how long a woman is permitted to be 'impassioned' after a rape before it is thought that she has had time for her 'passion' to 'cool'.

16.130 The Commission notes that Coss refers to this case in his arguments about women tied to a particular cultural group which threatens reprisals if the woman abandons her family. Denney did not appear to belong to such a group, but her case provides an example of the situation in which battered women lose the control and restraint they have exercised for years and kill their abuser.

'Honour'¹¹⁹³

16.131 Coss observes that many commentators consider the concept of 'male honour' of paramount importance. This concept centres on:¹¹⁹⁴

- (a) the control of female behaviour ... (b) male feelings of shame when that control is lost ... (c) the individual man acts alone; he is both judge and executioner, responding to feelings of wounded pride and violated identity.

'Judicial attitudes'

16.132 Coss then considers cases in which the concepts of proprietariness, prior violence, stalking and an affront to honour occur to determine how judges 'perceive the explosions of male violence'¹¹⁹⁵ and, in particular, whether proprietariness attracts condemnation or sympathy. Coss considers the cases of *R v Yasso*,¹¹⁹⁶ *R v Khan*¹¹⁹⁷ and *R v Conway*,¹¹⁹⁸ and contrasts those cases with those of *R v King*¹¹⁹⁹ and *R v Mankotia*.¹²⁰⁰

¹¹⁹³ G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61.

¹¹⁹⁴ NV Baker, PR Gregware and MA Cassidy, 'Family Killing Fields. Honor Rationales in the Murder of Women (1999) 5 (2) *Violence Against Women* 164, 166, 179.

¹¹⁹⁵ G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61.

¹¹⁹⁶ *R v Yasso* (2002) 6 VR 239 (the ruling on provocation); *R v Yasso* [2002] VSC 468 (sentencing remarks); *R v Yasso (No 2)* (2004) 10 VR 466 (appeal from conviction); *R v Yasso* [2005] VSC 75 (sentencing remarks from retrial).

¹¹⁹⁷ (1996) 86 A Crim R 552.

¹¹⁹⁸ [2002] VSC 383; [2002] VSC 486; [2004] VSCA 181; [2005] VSC 205.

¹¹⁹⁹ [1998] NSWSC 289.

¹²⁰⁰ [1998] NSWSC 295; [2001] NSWCCA 52; No S61 of 2001 (before Gleeson CJ and Callinan J).

R v Yasso

16.133 Hermiz was stabbed to death by her estranged husband, Yasso. Coss summarises the facts of the case in this way:¹²⁰¹

Fearing for her life after he persistently threatened her, she had taken out intervention orders, but he continued to breach them and stalk her. Armed with a kitchen knife, he accosted her behind a suburban shopping mall. He believed that she was having an affair. He trapped her against a wall, and she screamed. He alleged that he demanded that she hand over her mobile phone (to prevent her alerting the police), and that she refused and then spat at him. She screamed for help as Yasso commenced stabbing her. Various distant witnesses saw the confrontation, heard his yelling and screaming, and watched the stabbing. A number cried out to him to stop. He looked up and then continued to drive the knife in. No one could verify the alleged spitting. The injuries detailed by Coldrey J [the trial judge] were shocking:¹²⁰²

‘there were 12 stab wounds to the area of the neck and chest, some of which had entered the chest cavity damaging the left lung and heart. One stab wound had penetrated the breast bone. This would have required severe force. [There were also] eight defensive type wounds to the deceased’s upper limbs.’

16.134 At Yasso’s trial, cultural witnesses gave evidence that a wife spitting on her husband was a grievous affront for an Iraqi-born Chaldean Christian male. As Coss puts it: ‘in short the defence was asking the court to give credence to a savage honour killing’.¹²⁰³ He referred to the comments of other academics about the relevance of ethnicity in provocation:¹²⁰⁴

Although long championed by some, the ‘ethnicity argument’ in provocation has been roundly condemned, Howe¹²⁰⁵ labelling them ‘profoundly racialised excuses for men to murder women’. She is not alone in identifying sound bases for ignoring the values of certain ethnic/cultural groups:

‘It is morally wrong that men should believe and act in a way that demeans women to the status of something akin to property ... Logical consistency would mean that some men would be permitted to have more than one wife, female circumcision would be permitted and some women would be compelled always to have sex with their partners.’¹²⁰⁶

1201 G Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61–62.

1202 Yasso [2002] VSC 468, [53].

1203 G Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006–2007) 18 *Current Issues in Criminal Justice* 51, 62.

1204 Ibid.

1205 A Howe, ‘Provoking Polemic — Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition’ (2002) 10 *Feminist Legal Studies* 39, 46.

1206 L Neal and M Bagaric, ‘Provocation: The Ongoing Subsistence of Principle to Tradition’ (2003) 67 *Journal of Criminal Law* 237, 251–2.

16.135 In *R v Yasso*, Coldrey J refused to leave provocation to the jury.¹²⁰⁷ His Honour observed that the relevant legal principles were those contained in *Masciantonio v the Queen*¹²⁰⁸ and considered the evidence led at trial, including Yasso's account of events (contained in his interview with police) and the evidence of 'a matriarch of the Iraqi community'.¹²⁰⁹ His Honour accepted that the act of spitting constituted a 'serious affront'.¹²¹⁰

However, the question is whether the action of spitting alone, or in combination with other factors, attracts the application of the doctrine of provocation.

In regard to such factors a number of events in the history of the relationship were relied upon. These were the fact that Ms Hermiz had left the accused and the distress it occasioned to him; the fact that he believed she was having an affair with another man ... which also upset him; the fact that he believed Ms Hermiz had taken his British passport and, on his version, taken and used his MasterCard; the obtaining of the intervention order against him; and the withdrawal of sponsorship by Ms Hermiz which would result in his expulsion from the country. Consequently it was argued that the spitting should not be seen in isolation but as the explosive culmination of a series of distressing events.

The evidence of the humiliation of a man in the situation of the accused and the destruction of his honour within Iraqi society is also relied upon.

16.136 In arguing that provocation should not be left to the jury, the prosecution submitted that the background matters referred to above were not relied upon by Yasso in his interview with police as having played any role in his loss of self-control. He in fact denied that she separated from him because of her affair, or that he was upset by rumours in the Iraqi community about that relationship. Coldrey J accepted that the background events made Yasso upset and angry, but they did not influence his fatal conduct. Coldrey J concluded that the events at the scene, including the spitting, were not such that a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense, even adding the background into the mix.¹²¹¹

16.137 Coldrey J also made some 'general comments' (also quoted by Coss):¹²¹²

Cultural values inevitably change over time. In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it.

1207 (2002) 6 VR 239.

1208 Ibid 240. See *Masciantonio v The Queen* (1995) 183 CLR 58.

1209 Ibid 242.

1210 Ibid.

1211 Ibid 243.

1212 Ibid 243–4.

What is abnormal is the reaction to this conduct in a small percentage of instances where that former partner (almost inevitably a male) loses self control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury.

In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the twenty-first century. Significant additional provocative factors would normally be required before the ordinary person test could be met.

16.138 Yasso was convicted of murder and sentenced to 20 years' imprisonment. Coldrey J ordered that he spend 15 years in custody before becoming eligible for parole.¹²¹³

16.139 Yasso successfully appealed against his conviction. The Court of Appeal, by majority, held that provocation should have been left to the jury.

16.140 Charles JA, with whom Batt JA agreed, considered that Coldrey J had not considered the issue of provocation on the evidence most favourable to him, which went beyond the contents of his interview with police.¹²¹⁴

In the present case there was much evidence that the alleged affair between the deceased and [NH] had brought shame and humiliation to the applicant and caused him much distress. All of this would have provided a basis for suspecting that the applicant in speaking to the police may have down-played or lied about the deceased's relationship with [NH].

16.141 Charles JA concluded that, on the version of events most favourable to Yasso, it would have been open to a jury acting reasonably to fail to be satisfied, beyond reasonable doubt, that the killing was unprovoked in the relevant sense: provocation should have been left to the jury.¹²¹⁵

16.142 In response to Coldrey's comments, Charles JA said:¹²¹⁶

[T]he comments suggest first that there is a particular category of case in which there ought to be a presumption against leaving provocation to the jury; and secondly that the relevant gravity of the conduct, in the context of relationship breakdown, is to be judged by the ordinary person test without reference to the ethnicity of the accused. If this is a correct interpretation of these paragraphs, they are in my respectful view inconsistent with the test propounded in *Masciantonio* ...¹²¹⁷

1213 The sentencing remarks are at [2002] VSC 468.

1214 *R v Yasso (No 2)* (2004) 10 VR 466, 477.

1215 *Ibid* 481.

1216 *Ibid* 481–2.

1217 Namely, that the gravity of the allegedly provocative conduct is to be assessed by reference to the characteristics of the accused which relevantly includes race, ethnicity, personal relationships and past history.

16.143 In dissent, Vincent JA said:¹²¹⁸

Where then does the concept of provocation fit and what is its area of operation? The law has long recognised that circumstances can arise in which a person of ordinary firmness of mind and powers of self-control might, by reason of a loss of self-control induced by the provocative behaviour of another, breach what is perhaps the most fundamental principle of human society — ‘Thou shalt not kill’. The concept provides to the law a degree of flexibility such that in such circumstances the crime is reduced from one of murder to manslaughter. However, the law has also taken the view that there must be some sensible limits imposed upon the area of operation of this concept which otherwise could provide a partial justification for the fatal expression of uncontrolled anger and aggression. It is confined to situations in which there exists a reasonable possibility that there may have been an actual loss of self-control. Additionally, there must be an appropriate relationship between the perceived provocation and the resultant killing. That relationship is assessed by reference to the response which might have been induced in the precise circumstances that existed at the time in a person with ordinary powers of self-control.¹²¹⁹

16.144 Vincent JA found that Coldrey J did not ignore the background concerning the deceased’s alleged affair and the rumours about it and their causing Yasso deep concern and offence. His Honour observed that it was doubtful that the deceased, who feared Yasso’s violence, would have spat at him but that it had to be accepted that she did. In Vincent JA’s view, the cultural evidence fell far short of suggesting that spitting, even by a cheating wife, was an insult of such seriousness that an ordinary person with Yasso’s cultural background would have been provoked to stab her 20 times with a kitchen knife.¹²²⁰ Vincent JA also said:¹²²¹

Each of these witnesses spoke of the cultural expectations concerning the husband’s response in such circumstances [his wife having an affair and spitting]. It is not to the point that as a matter of cultural background an individual may regard himself as entitled to kill his unfaithful or insulting wife, or her father for that matter, or to beat her or break her arm or leg. Importantly, neither of the witnesses dealt with the likelihood, or otherwise, that an ordinary person with that cultural background may have lost control and acted as the applicant did; the central notions underlying the availability of the partial defence of provocation. The closest that Mrs Kakos came to that suggestion was her remark that it ‘depends on his nerves’. Mr Allos said at one point that the response of the individual may be influenced by his or her level of education. Again he did not suggest that an ordinary person, operating according to the cultural mores of his community, might have less control and act in the fashion of the applicant. If anything, he seemed to be at pains to communicate the notion that individuals would be expected to react rationally according to those mores.

1218 *R v Yasso (No 2)* (2004) 10 VR 466, 483.

1219 *Masciantonio v R* (1995) 183 CLR 58.

1220 *R v Yasso (No 2)* (2004) 10 VR 466, 484.

1221 *Ibid* 486.

16.145 Vincent JA considered that Coldrey J was correct in refusing to leave provocation to the jury, having regard to the evidence and the relevant principles. His Honour concluded that no reasonable jury would have failed to be satisfied beyond reasonable doubt that Yasso's reaction to the deceased's conduct fell a long way below the minimum limits of the range of powers of self-control of an ordinary person.

16.146 At Yasso's re-trial, the defence of provocation was left to the jury. They rejected it, and he was convicted of murder again, and sentenced to 20 years' imprisonment (15 years non-parole). At sentence the second trial judge said of the allegation of spitting (also quoted by Coss):¹²²²

First, there was considerable evidence before the court of the traumatic physical consequences that awaited any Iraqi woman who spat at her husband. [The deceased] would have been well aware of those possible consequences.

Secondly, it is beyond credence that this small woman, just 152 centimetres tall and weighing 47 kilograms, faced with a large angry male wielding a knife, and in a remote location away from any possible assistance, would spit at you.

Finally, given the fear which you say your wife exhibited at the time, it may be doubted whether she could have produced any spittle from what it likely to have been a dry mouth.

16.147 This aspect of the case illustrates the point often made that the evidence of provocative words or conduct usually comes from the defendant and cannot otherwise be objectively determined. It also illustrates the extent to which the defence operates in favour of the defendant: no matter how unlikely the alleged provocative conduct, if there is evidence of it, a jury is required to consider it.

16.148 Coss is 'heartened'¹²²³ that the jury rejected provocation, but states his opinion that a 'defence which has the potential to partially excuse a Yasso, the epitome of a homicidal proprietary male, has no credence'.¹²²⁴

R v Khan¹²²⁵

16.149 Khan suspected that his wife was having an affair with the deceased, who was a friend, living at their house. Khan secretly arrived home early from the mosque at about midnight and hid in a room beside the deceased's bedroom.

¹²²² [2005] VSC 75, [48]–[50] (Hollingworth J).

¹²²³ G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 63.

¹²²⁴ Ibid.

¹²²⁵ (1996) 86 A Crim R 552.

16.150 He heard his wife receive a telephone call from the deceased, who was close to the end of his shift as a taxi driver. She told the deceased she would be in his room, waiting for him. Khan heard the deceased come home at about 3 am. He heard the deceased and his wife having sex. He went into the kitchen and took a knife. He went to the deceased's bedroom and saw the deceased and his wife in bed together. Khan stabbed the deceased to death, inflicting appalling injuries by 67 knife wounds. In Coss's words: 'he sought to obliterate him'.¹²²⁶

16.151 Khan was acquitted of murder and convicted of manslaughter. He was sentenced to imprisonment for five years with a minimum term of two years and an additional term of three years. In imposing sentence, the trial judge considered Khan's religion and ethnicity, which related to the extent of the provocation to which he was subjected.¹²²⁷ The Crown appealed against that sentence, arguing that it was manifestly inadequate.

16.152 In the appeal judgment, Allen J, with whom Gleeson CJ and Sperling J agreed, considered the rationale for the defence of provocation and its 'humanitarian' application:¹²²⁸

It must be understood that the defence of provocation is a defence which the law gives only to a charge of murder or, possibly, attempted murder. It is not a defence available in respect of any other crime. In respect of any other crime if the accused establishes that he was gravely provoked and lost self-control as a result of that provocation, the response of the law is: 'You should not have lost your self-control'. That response is in respect of a loss of self-control resulting in far less heinous conduct than the taking of human life.

The defence of provocation to a charge of murder does not absolve a person who establishes that defence either from criminal culpability or moral responsibility. What it does is that it reduces both. It does not absolve.

...

Why, then, does the law accord for a charge of murder the defence of provocation? It is the product of humanity. The crime of murder is so heinous, the taking of human life so criminally serious, that the full measure of the retribution available under the law is ameliorated to some degree, where the defence succeeds, by categorising the homicide as manslaughter rather than murder. This, of course, involves difficulties in sentencing. In *Alexander* (1995) 78 A Crim R 141 Hunt CJ at CL said (at 143): 'The tensions involved in the imposition of the appropriate sentence in a provocation case — where necessarily there has been at the same time both a loss of self control and an intention to kill or to inflict grievous bodily harm — were discussed by the former Chief Justice, Sir Laurence Street, when speaking for the Court of Criminal Appeal in 1981 in *Hill* (1981) 3 A Crim R 397 at 402 in a passage which bears quotation in full: 'The circumstances leading to the felonious taking of human

¹²²⁶ G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 63.

¹²²⁷ (1996) 86 A Crim R 552.

¹²²⁸ *Ibid* 556–7.

life being regarded as manslaughter rather than murder can vary infinitely, and it is not always easy to determine in any given case what should be done in the matter of sentence. At the start it should be recognised that the felonious taking of a human life is recognised both in the *Crimes Act 1900* (NSW) and in the community at large as one of the most dreadful crimes in the criminal calendar. The Courts have, however, over the decades gradually manifested a willingness to recognise factual contexts which provide some basis for understanding the human tragedies that can lead to the taking of a life. The manifestation of this humanitarian tendency is necessarily attended by the utmost caution.⁷

16.153 Allen J then considered the criminality in the present case:¹²²⁹

In assessing the criminality it cannot be overlooked that the respondent came home from the Mosque because he suspected that his wife was having an adulterous association with the deceased. He waited for an hour in an adjoining bedroom to see what would happen. He must have known full well what was likely to happen because he heard his wife speak to the deceased on the telephone saying that he, the respondent, was not there and that she, the wife, would see the deceased in his bedroom when he came in from his taxi run at 3 am. This is material in that he did have time within which to steel his self control, as he should have, but failed to do so.

In his remarks on sentence his Honour said: ... 'in my view the fact that what he heard and saw realised his worse fears does not in any way mitigate the seriousness of the affront to him of the deceased's conduct.' In the sense that the deceased's conduct was no less, for the appellant, an act of treachery by a man accepted into his house as his 'brother', an act which was a grave sin and an act striking at the unity of family life so essential to a devout Muslim his Honour's view is doubtless the correct one. Nevertheless the respondent had far more time than often is the case in tragedies of this type within which to prepare himself to cope with the provocation without resorting to the taking of human life. That is relevant to sentencing.

16.154 Allen J considered the approach of the trial judge to sentence, and in particular, the relevance of Khan's religious beliefs:¹²³⁰

His Honour properly gave full weight, in assessing the criminality of the respondent, to his religious convictions and ethnic background. It is, of course, not only devout Muslims who highly value family life, who regard it as central to their role in life and who recognise that obligations of open-heartedness to others extend to treating as if they were family members persons living in their home. His Honour fully accepted that those views are held particularly strongly by devout Muslims. That is relevant to the gravity of the provocation to the respondent. But what matters is not why the provocation was so grave, whether it was because of religious beliefs or for any other reason, but what the gravity in fact was. Adulterous abuse of hospitality can be highly provocative for the irreligious as well as for the religious. Cultural pressures are manifold. For many men adultery committed with his wife is an intolerable insult to his manhood and an act of gross betrayal. Violent reaction to adultery is no new phenomenon. It has existed as long as men have been men and doubtless it will continue for as long as men are men. The law does not recognise that the

1229 Ibid 557.

1230 Ibid 557–8.

particular reason why in any given case the provocation was as grave as it was is relevant to the criminality. What matters is the gravity of the provocation, not the reason why it was so grave. No cause for provocation justifies the taking of human life.

16.155 Allen J considered the sentence so excessively lenient that it required the interference of the appellate court. The sentence was increased to one of six years' imprisonment (a minimum term of four years, with an additional term of two years).

16.156 Reflecting the judgment of Allen J, Coss observes that the provocation defence was meant to rest on 'loss of self-control' but that Khan merely avenged his honour, having lost control of his wife.¹²³¹

R v King¹²³²

16.157 Coss contrasts the case of *Khan* with that of *King* (a woman). King stabbed her husband once and killed him. She had been subjected to many years of drunken physical and verbal abuse. The provocation on the day of the killing was described as great. She was sentenced to six years' imprisonment. Coss makes these comments:¹²³³

A single stab wound, compared to 67 stab wounds. Years of abuse compared to an act of adultery. Given what is known of the asymmetry [in the circumstances in which men and women kill] these two cases, at least on face value, seem extraordinary.

16.158 King and the deceased had been together for at least ten years. In 1996, when the deceased was killed, they were married but occupied separate bedrooms.

16.159 King and the deceased had been drinking from 10 am until 3.30 pm on 17 April 1996. He had approximately 16 schooners of beer in that period, and his blood alcohol content was 0.248 per cent. King had three schooners of beer. She drove the deceased home.

16.160 According to King, the deceased verbally abused her and accused her of adultery during the trip home. The abuse continued at home and the deceased called King's mother a 'slut'. The abuse continued while King was in the kitchen feeding her cats and the deceased was in the bedroom. Eventually, King took a knife from the kitchen, went into the bedroom and stabbed the deceased. He was taken by ambulance to hospital. He died three hours later.

1231 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 63.

1232 [1998] NSWSC 289.

1233 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 64.

16.161 She was charged with murder. The Prosecution accepted her plea to manslaughter and she was sentenced by Studdert J. King gave sworn evidence at her sentence hearing. The details which follow are taken from the sentencing remarks.

16.162 King claimed she was the victim of violence and verbal abuse by the deceased for many years. Studdert J observed that that claim required close scrutiny. His Honour accepted that the deceased was a heavy drinker, and that his behaviour changed when he was drunk; that he verbally abused King when he was drunk; and that he verbally abused King's deceased mother, which King found particularly distressing. The deceased accused King of having affairs, with men and women. There was no evidence that King was ever unfaithful.

16.163 King said that during their marriage the deceased used to strike her about the head. In the last five years of their marriage, this occurred two or three times a week. She said that when the deceased assaulted her, he would 'continue until he was exhausted'. The deceased always punched her in the head, knowing that she had had a car accident which left the right side of her head sensitive. The deceased had assaulted King, pushed her out of home, and locked her out five times over the years. She was too embarrassed to tell anyone, although on a number of occasions she had taken out apprehended violence orders.

16.164 In assessing King's claim, Studdert J acted with 'necessary caution'. His Honour considered the statements of witnesses interviewed by the police about the relationship between King and the deceased, and other evidence, including of the deceased's convictions for assaulting King. Studdert J considered that there was 'considerable corroboration' for King's evidence about the deceased's treatment of her. She stayed with him because the house they lived in had been her home for 30 years and she had nowhere else to go. She said she loved the deceased, and when he was sober 'you could not meet a nicer person'. Studdert J accepted that the deceased had subjected King to repeated verbal abuse, including accusations of infidelity and that there were many instances of assault, but none on the day of the killing. The last time the deceased had been physically violent towards King was two weeks before his death.

16.165 At the sentencing hearing, King's counsel urged Studdert J to find that she had acted without an intention to kill or do grievous bodily harm, and to sentence her for manslaughter on that basis. The prosecution submitted that his Honour should act on the basis that King killed the deceased with an intention to kill or do grievous bodily harm, but she acted under provocation sufficient to reduce murder to manslaughter.

16.166 Studdert sentenced her on the basis that she intended to do the deceased grievous bodily harm but that her actions were not premeditated. King was sentenced on the basis that the cumulative effect of her earlier mistreatment by the deceased contributed to her loss of self-control, as did his

relentless abuse of her on the day of the offence. The level of provocation was great, and Studdert J considered her criminality substantially reduced by reason of such provocation. King was sentenced to six years' imprisonment (three years non-parole).

16.167 The Commission's review of Queensland cases in Chapter 13 suggests a sentence in the order of 10 to 12 years' imprisonment would be imposed for a provoked killing in jealous rage. For women in King's position, comparable Queensland decisions suggest a sentence in the order of five to six years' imprisonment, with significant amelioration by way of early release (for example, after 12 months).

R v Mankotia¹²³⁴

16.168 Coss contrasts *Khan* with *Mankotia*. He argues that Khan was treated with 'empathetic inverse racism'¹²³⁵ but that 'mercifully' Mankotia's attempt to explain why he stabbed his girlfriend 42 times when she said their relationship had ended by reference to his ethnic background was rejected. Coss suggests that *Mankotia* is an example of the law refusing to give any credence to this excuse for a patriarchal honour killing.

16.169 A close analysis of the two cases reveals that, in accordance with the authorities, ethnic background was considered relevant to the gravity of the provocation in *Khan*, but irrelevant to the objective test in *Mankotia*.

16.170 The relevant facts of *Mankotia* are stated in the judgment of the New South Wales Court of Criminal Appeal:¹²³⁶

The factual background is that the appellant was born in a village in India on 15 March 1970. The trial Judge said that the culture from which he came was 'a very rigid one'. The custom of arranged marriages prevailed. The appellant never had a girlfriend before coming to Australia in 1996 and meeting the deceased in late 1996 or early 1997. They began to go out together. The appellant fell deeply in love with the deceased. However, on 23 March 1997, the deceased telephoned the appellant without prior warning and said the relationship was over. This greatly shocked the appellant. On the evening of 25 March 1997 the appellant went to the deceased's flat. She persisted in her refusal to continue the relationship. The appellant became enraged and attacked her with a knife in a fit of fury.

16.171 Mankotia was convicted of murder. The jury was directed to the effect that the personal characteristics of the accused to be attributed to the ordinary person did not include the defendant's ethnic or cultural background.

1234 (2001) 120 A Crim R 492.

1235 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 64.

1236 (2001) 120 A Crim R 492, 493.

16.172 Mankotia appealed against his conviction. He argued that, although the trial judge had directed the jury on the characteristics of the ordinary person in accordance with the view of the majority of the High Court, the Court of Appeal of New South Wales should find that the trial judge erred and that the view of McHugh J, in the minority in *Masciantonio v The Queen*¹²³⁷ and *Green v The Queen*,¹²³⁸ was correct. In McHugh J's view, the ordinary person's standard should incorporate the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue.¹²³⁹

16.173 On the hearing of the appeal, Mankotia conceded that the trial judge had directed the jury according to law. Accordingly, the appeal was dismissed.¹²⁴⁰ He was told that, if he wished the High Court to reconsider *Stingel*,¹²⁴¹ he should apply for special leave, which he did. Special leave was refused.¹²⁴²

16.174 The Commission does not consider that it is correct to say that the law endorsed ethnicity as an excuse in one case, but not the other. In the Commission's view, the correct interpretation of these two decisions is that a jury considered Khan's witnessing his wife's act of adultery sufficiently grave provocation to warrant a reduction of murder to manslaughter. In *Mankotia*, a jury did not consider that the deceased's ending the relationship (which on the facts was in existence only a couple of months) was so sufficiently grave.

16.175 In expressing this view, the Commission is not side-stepping the issue of the relevance of ethnicity; rather, it is testing the arguments expressed in the literature. The relevance of ethnicity (and other personal characteristics of the defendant) is discussed at [11.45]–[11.52] above.

R v Conway

16.176 Conway was convicted of murder, and sentenced to 19 years' imprisonment.

16.177 He was engaged to the deceased when he was sent to jail for drug offences. While he was in jail, she told him that the engagement was over and that she had met someone else. He refused to accept that the relationship had ended. Nine days after his release from prison, he visited her at work with a kitchen knife in his jeans. He told her that he wanted to know where he stood. She told him that the relationship was over, and that they had no future. He

1237 (1995) 183 CLR 58.

1238 (1997) 191 CLR 334.

1239 *Masciantonio v The Queen* (1995) 183 CLR 58, 73; *Green v The Queen* (1997) 191 CLR 334, 368.

1240 (2001) 120 A Crim R 492.

1241 (1990) 171 CLR 312.

1242 *Mankotia v The Queen* (2002) 23(1) Leg Rep C 18.

said he told her that he would kill himself. He pulled out the knife, he said, and tried to stab himself. Then he said she laughed at him and said 'If you want to kill yourself, what do I care?' He grabbed the deceased. Another female shop assistant managed to disarm him, but he grabbed another knife and stabbed the deceased repeatedly.

16.178 The trial judge refused to leave provocation to the jury: provocation required something 'beyond laughter and words of a scornful, derisive or taunting kind'.¹²⁴³ The trial judge said:¹²⁴⁴

A review of the cases reveals the importance of noting the policy considerations underlying the defence of provocation, as well as the importance of comparing the background to, as well as the events immediately preceding, the killing in any particular case. That background includes the relevant characteristics of the accused. A comparison of background and events is not done simply to determine which side of a bright line they might be seen to fall ... there is an assessment of whether the reaction of the accused to the conduct of the victim fell above or below the minimum limits of the range of powers of self-control that must be attributed to the ordinary person. The test is much more likely to be satisfied where there are (as there are not in the instant case) violent acts on the part of the victim, beyond laughter and words of a scornful, derisive or taunting kind (as is the position in the instant case). Some added guidance comes from a passage noted by Charles JA in *Leonboyer*¹²⁴⁵ at para 147. Lord Hoffman in *Smith (Morgan)*¹²⁴⁶ said, at 169: 'Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide ...'

16.179 In the trial judge's sentencing remarks, his Honour said:¹²⁴⁷

I cannot accept your claim that [the deceased] acted in an uncaring way when you told her you would take your own life if you could not have her. You claimed: that she just laughed: that she invited you to go ahead; that you lost it; and that you reacted spontaneously by using the knife to kill her instead of yourself. Your claim of an intention to harm yourself is scarcely supported by the injuries you sustained. Moreover, it was extremely unlikely, given other evidence, that she would laugh derisively as you claimed. All the indications are that she was scared of what you might do. Whatever [the deceased] said to you on the fatal day was likely to have been compassionate, not new or shocking or uncaring. You were already well aware that the relationship was over. The evidence points much more strongly to your having acted as you did for a very different reason. That was that if you could not have [the deceased] no one else would. You were motivated by jealousy and resentment for her having preferred another man to you.

1243 [2002] VSC 383, [7] (Teague J)

1244 Ibid.

1245 [2001] VSCA 149.

1246 [2001] 1 AC 146.

1247 [2002] VSC 486, [5] (Teague J).

16.180 Conway successfully appealed against his conviction on the ground that provocation should have been left to the jury by the trial judge. Callaway JA held:¹²⁴⁸

[O]n the view of the evidence most favourable to the applicant, this was not, or was not just, a case of possessiveness and jealousy. The applicant went to see the deceased, wanting to know whether there was hope of re-establishing their relationship. His intention was that, if there was no hope, he would kill himself. Deplorable as such emotional blackmail is, it may be evidence of very real grief associated with rejection. An ordinary person would not lose self-control by reason only of grief but, on his version of events, the deceased mocked his grief. Further, and very importantly, and still on the view of the evidence most favourable to the applicant, she mocked the grief of a man who was then holding a knife, in her presence, with the intention of killing a human being, namely himself. A more dangerous taunt could hardly be imagined. In my opinion, a reasonable jury might have failed to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense. It was certainly not 'distant from the realities of human response'.¹²⁴⁹ (some notes omitted)

16.181 Coss makes the following comments about the outcome of this appeal:¹²⁵⁰

A woman tried to exercise her independence and make a choice about her future, and is brutally murdered. The Law is prepared to contemplate excusing her murderer because he alleged that she provoked him by laughing at him, and because an ordinary person might well retaliate in a similar fashion to like provocation. It is arguable that the reality of male violence and possessiveness, and the commonplace of relationship breakdown, is being completely disregarded.

16.182 Conway was convicted of murder at his re-trial, and sentenced again to 19 years' imprisonment (14 years non-parole).

Consideration of those cases by Coss

16.183 Coss refers to the inconsistency in judicial comments about provocation in intimate partner killings, some condemning it and others empathising with it. This argument was illustrated by reference to several other cases from Victoria and New South Wales containing irreconcilable statements about the defence.

16.184 In Queensland, the cases considered by the Commission show that trial judges tend to leave provocation to the jury even if it is barely arguable.

¹²⁴⁸ (2004) 149 A Crim R 206, 209–10.

¹²⁴⁹ *R v Tuncay* [1988] 2 VR 19, 30 (Hedigan AJA).

¹²⁵⁰ G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 65.

This approach is in accordance with *Buttigieg*.¹²⁵¹

16.185 In *Buttigieg*, the Queensland Court of Appeal listed a number of propositions about provocation which were ‘generally accepted’,¹²⁵² including this proposition about the circumstances in which a trial judge should withhold the partial defence of provocation from the jury and the circumstances in which the trial judge should leave provocation to the jury:¹²⁵³

The judge should withhold the issue of provocation from the jury if it is such that no reasonable person could hold the evidence sufficient to raise a reasonable doubt: *Rose* [1967] Qd R 186 at 192; *Stingel* [(1990) 171 CLR 312] (at 333 ...). However a trial judge should leave the issue to the jury if in the least doubt whether the evidence is sufficient: *Callope* [[1965] Qd R 456] (at 462–463); *Van Den Hoek* [(1986) 161 CLR 158] (at 161–162, 169 ...); *Stingel* (at 334 ...).

The failure of an accused person to testify is not fatal to provocation and a jury is able to infer provocation from evidence, suggesting a possible loss of self-control: *Lee Chun-Chuen* [1963] AC 220 at 233; *Van Den Hoek* (at 169 ...).

Further, if there is evidence, it is the duty of the judge to leave the question of provocation to the jury notwithstanding that it has not been raised by the defence and is inconsistent with the defence which is raised: *Stingel* (at 333, 334 ...).

16.186 Also, leaving the defence to the jury if in the least doubt whether there is sufficient evidence of it avoids an argument on an appeal against a conviction for murder that the defence ought to have been left. If that argument succeeds, then there will be a re-trial, which may be particularly difficult for the family and friends of the deceased.

‘Trying to understand the cases’

16.187 At the end of his paper, Coss asks why the reality of male retaliatory anger was frequently not recognised by the Courts. He suggests that the answer might be ignorance and that expert evidence about intimate partner violence might be required to bring ‘enlightenment’ to the criminal courts. He contemplates: expert evidence, to refute the notion of ‘loss of control’ and to reaffirm that retaliatory violence was merely a response to losing control of an intimate partner; and empirical evidence about how few men who suffer relationship breakdowns resort to violence, to disprove the basis of the ‘ordinary person’ test.¹²⁵⁴

1251 (1993) 69 A Crim R 21.

1252 Ibid 26.

1253 Ibid 27.

1254 Ibid 69.

16.188 Coss considers studies of the attitudes of ordinary people who might be empanelled as jurors. One study was of American university students, which revealed that:¹²⁵⁵

Male students were more likely than female students to attribute blame to victims of domestic violence, and male students who used violence in their dating relationships were more likely to attribute blame in domestic violence incidents to the victim.

16.189 An Australian study of community attitudes to domestic violence, and youth attitudes to sexual coercion, revealed that 18 per cent believed that male violence was justified in certain circumstances.¹²⁵⁶ Another Australian study of separated men found that nearly 50 per cent thought violence was sometimes justified: 40 per cent blamed 'her provocation' for a resort to violence.¹²⁵⁷

16.190 Other studies revealed tolerance of jealousy-inspired violence,¹²⁵⁸ which Coss suggests is consistent with the verdicts rendered in *Ramage* and *Khan*.

16.191 Coss argues that '[s]ympathy for the accused leads inexorably to attributing blame to the victim'¹²⁵⁹ and notes that certain observers of the *Ramage* trial believed it was the deceased on trial, not her husband.¹²⁶⁰

Coss's final argument

16.192 Coss concludes with this argument for the abolition of the defence:¹²⁶¹

All of the above discussion — not merely the wildly inconsistent legal outcomes and judicial statements, but also the sociological arguments revealing the reality of male violence — make the arguments in favour of the abolition of the defence ... irresistible. Tasmania abolished the defence after virtually no discussion ... Law reform bodies in NSW ... and in England ... eventually recommended retention of the defence, albeit in modified forms; no legislative action to date has modified the defence in those jurisdictions. In New Zealand, recommendations have been in favour of abolition ... again, commentators

1255 SA Bryant and GA Spencer, 'University Students' Attitudes about Attributing Blame in Domestic Violence' (2003) 18 (6) *Journal of Family Violence* 369, 374 in G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 69.

1256 R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002) 306–8 in G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 69.

1257 AM McMurray et al 'Post-Separation Violence: The Male Perspective' (2000) *Journal of Family Studies* 6, 89–105.

1258 Ibid 101; S Puente and D Cohen, 'Jealousy and the Meaning (or Nonmeaning) of Violence' (2003) 67 *Personality and Social Psychology Bulletin* 239, 457–8; JA Vandello and D Cohen, 'Male Honour and Female Fidelity: Implicit Cultural Scripts that Perpetuate Domestic Violence' (2003) 84 (5) *Journal of Personality and Social Psychology* 997–1010.

1259 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 70.

1260 Ibid.

1261 Ibid 71.

await a legislative response. Victoria has now abolished provocation, enacting legislation recommended by the Victorian Law Reform Commission (2004). Central to the VLRC's view was the incontrovertible logic: 'While extreme anger may partly *explain* a person's actions, in the Commission's view it does not mean such behaviour should be partly *excused*'.¹²⁶²

... It is hoped that other jurisdictions will follow the Victorian lead and consign provocation to the historical archives ...

SHOULD WE ACCEPT THAT THE ORDINARY PERSON MAY INTENTIONALLY KILL?

16.193 Many articles consider whether there is something wrong with the idea that an ordinary person can lose self-control and kill another human being.

16.194 In a liberal, democratic society, the rights of an individual are important, and self-control must be encouraged. Yule asks whether, if we allow loss of self-control to be an excuse, people will be encouraged to frame their justification to fit in with the excuse.¹²⁶³ Yule refers to the argument that the idea of loss of control is a fallacy:¹²⁶⁴

Angry impulses do not so overwhelm us to the point that we become enslaved by them. We are endowed with a high level of choice concerning how we act, even in relation to the most provocative forms of conduct. Those who lash out when confronted with a distasteful experience do not respond in this manner because of an absence of a meaningful choice. They do so because they elect to do so.

16.195 Yule makes the same argument as Coss does that in the light of the divorce rate it cannot be said that an ordinary person could lose control and kill because their partner has commenced another relationship. Yule asks whether it is also about the 'power relationship' and men 'regarding women as their property'. Yule argues that infidelity should not be a defence to murder, and that victims, who cannot tell their side of the story, should not be blamed.

1262 Victorian Law Reform Commission, Report (2004) Executive Summary, xxi.

1263 JM Yule, 'Current Issues with Regards to the Defences of Provocation and Self-Defence in the Criminal Law Context' (2007) (Paper presented at the Australian Law Teachers Association, Perth, 2007).

1264 L Neal and M Bagaric, 'Provocation: The Ongoing Subservience of Principle to Tradition' (2003) 67 *Journal of Criminal Law* 237, 247.

Chapter 17

Jury directions: the partial defence of provocation

INTRODUCTION	226
THE MODEL DIRECTION ON PROVOCATION	226
DISCUSSION	226

INTRODUCTION

17.1 The Supreme and District Court Benchbook for Queensland provides a model direction to the jury to be included in a trial judge's summing up where the partial defence of provocation is raised.

17.2 After an introduction, the model direction explains to the jury what provocation is. It then discusses the different questions a jury has to consider: namely, whether the defendant was actually provoked; whether the defendant was acting while he or she was provoked; and whether an ordinary person could have been so provoked. The model direction explains the onus of proof and how the prosecution might negative or overcome the defence.

17.3 The Benchbook also contains further information about the law of provocation for the benefit of the trial judge.

THE MODEL DIRECTION ON PROVOCATION

17.4 The model direction is repeated in full below. The footnotes are as they appear in the Benchbook.

Provocation s 304

You only need to consider the issue of provocation if you provisionally reach the view that the defendant had the necessary intent to kill or cause grievous bodily harm and that he would be guilty of murder.

Under our law, the defence of provocation operates in the following way. When a person kills another under circumstances which would constitute murder, and he/she does so in the heat of passion caused by sudden provocation and before there is time for his/her passion to cool, he/she is guilty of manslaughter only. The defence therefore operates as a partial defence, not a complete defence, because if it applies its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter.

What then is provocation? In this context, provocation has a particular legal meaning.¹²⁶⁵ Provocation consists of conduct which:

- (a) causes a loss of self-control on the part of the defendant; and
- (b) could cause an ordinary person to lose self-control and to act in the way which the defendant did.

Was the defendant actually provoked?

You must consider whether the deceased's conduct, that is, the things the deceased did or said, or both, caused the defendant to lose his/her self control and to [here insert the fatal act]? In that regard, you must consider the conduct in question as a whole and in the light of any history of disputation between the deceased and the defendant, since particular acts or words which considered separately could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to actually lose his/her self control.¹²⁶⁶

In considering whether the alleged provocative conduct caused the defendant to lose control, you must consider the gravity or level of seriousness of the alleged provocation so far as the defendant is concerned, that is, from this particular defendant's perspective. This involves assessing the nature and degree of seriousness *for the defendant* of the things the deceased said and did just before the fatal attack.

Matters such as the defendant's [race, colour, habits, relationship with the deceased and age] are all part of this assessment. And you must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of such things as that person's age, sex, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history.¹²⁶⁷

So you must consider the gravity of the suggested provocation to this particular defendant. The acts relied on by the defendant as relevant in affecting his/her mind and causing him/her to lose self-control include ... [*Summarise evidence of provocative conduct and of its effect upon the defendant. Refer to the special characteristics of the defendant raised by the evidence. This would include in an appropriate case the 'battered wife syndrome'. It will be necessary to relate any expert evidence as, for example, with regard to the 'battered wife syndrome' to the particular facts and circumstances of the subject case. Summarise the defence and prosecution cases.*]

Was the defendant acting while provoked?

A further matter for your consideration is whether the defendant acted in the heat of passion, caused by sudden provocation and before there was time for his/her passion to cool. You must consider whether the defendant was actually

¹²⁶⁵ Provocation for this purpose takes its meaning from the common law, not from s 268: *Callope* [1965] Qd R 456; *Young* [1957] St R Qd 599; *Pangilinan* [2001] 1 Qd R 56, 64. Cf *Masciantonio* (1995) 183 CLR 58, 66. For useful cases see: *Buttigieg* (1993) 69 A Crim R 21; *Stingel* (1990) 171 CLR 312; *Romano* (1984) 36 SASR 283, 289.

¹²⁶⁶ *Stingel*, 326.

¹²⁶⁷ *Stingel*, 326.

deprived of self-control and killed the deceased whilst so deprived.¹²⁶⁸
 [Summarise the competing defence and prosecution cases.]

*Could an ordinary person have been so provoked?*¹²⁶⁹

You must also consider whether the alleged provocation was such that it was capable of causing an ordinary person to lose self control and to form an intention to kill or do grievous bodily harm and to act upon that intention as the deceased did, so as to give effect to it.¹²⁷⁰

An 'ordinary person' is simply one who has the minimum powers of self control¹²⁷¹ expected of an ordinary citizen [who is sober, not affected by drugs] of the same age as the defendant.¹²⁷² The ordinary person is expected to have the ordinary human weaknesses and emotions common to all members of the community, and to have self-control at the same level as ordinary citizens, so that extraordinary aggressiveness or extraordinary want of self control on the part of the defendant confers no protection against conviction for murder.

It is for the prosecution to prove beyond reasonable doubt that the suggested provocation in all its gravity for this defendant was insufficient to cause an ordinary person in the defendant's position to lose self control and act as he/she did.

So you must ask yourself whether an ordinary person, reacting to the alleged level of provocation, could¹²⁷³ suffer a similar loss of control. That is, could an ordinary person who is subjected to ... [describe the alleged conduct, for example, a sexual advance by the victim which is aggravated because of the defendant's special sensitivity to a history of violence and sexual assault within the family¹²⁷⁴] have lost self control and acted as you find the defendant did? [By eg stabbing the deceased, reacting by inflicting serious violence on the deceased, accompanied by intention to kill or to cause at least grievous bodily harm].

1268 Where there is evidence of intoxication it may be appropriate to add:

A person's intoxication may be taken into account when considering whether the defendant did in fact lose control as the result of provocative behaviour. It is a question of fact for you, the jury, as to whether the defendant's loss of self control was caused by the deceased's words or conduct, or solely by the inflammatory effects of drink or drugs. (Note that intoxication is not a relevant consideration in determining the impact of the provocation on the ordinary person.)

1269 *Stingel*, 327–32.

1270 See *Masciantonio*, 69; also *Johnson v The Queen* (1976) 136 CLR 619, 639, 642.

1271 *Stingel*, 327.

1272 Note that in *Stingel* at 331 the High Court stated that the preferable approach is to attribute the age of the defendant to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the defendant is immature by reason of youthfulness. However, age is the only characteristic or attribute of the particular defendant which may be attributed to the "ordinary person" for the purposes of the objective test; the sex of the defendant is not an attribute which the High Court considered to be available for similar application in this context.

1273 *Stingel*, 329.

1274 Note that none of the attributes or characteristics of the particular defendant will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct: *Stingel*, 324.

Onus

It is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation before a verdict of murder is appropriate. The prosecution will have succeeded in satisfying you that provocation is excluded as a defence, if it has satisfied you beyond reasonable doubt of any one of the following matters:

- 1 the potentially provocative conduct of the deceased did not occur; or
- 2 an ordinary person [where relevant of the same age as the defendant] in the circumstances could not have lost control and acted like the defendant acted with intent to cause death or grievous bodily harm; or
- 3 the defendant did not lose self-control; or
- 4 the loss of self-control was not caused by the provocative conduct; or
- 5 the loss of self-control was not sudden (for example, the killing was pre-meditated); or
- 6 the defendant did not kill while his/her self-control was lost; or
- 7 when the defendant killed there had been time for his/her loss of self-control to abate.

If you are satisfied beyond reasonable doubt as to any of these matters, then the prosecution has disproved provocation, and if you are satisfied beyond reasonable doubt as to all the elements of murder, to which I have earlier referred, the appropriate verdict is 'guilty of murder'. If, however, a reasonable doubt remains as to provocation, you must acquit the defendant of murder. In that event, you would convict him/her of manslaughter if satisfied beyond reasonable doubt of all the elements of manslaughter to which I have referred.¹²⁷⁵

17.5 The following notes are included in the Benchbook after the model direction for the assistance of the trial judge:

Preliminary question — when is the issue sufficiently raised to let it go to the jury as an issue?

*It is sufficient to raise provocation if there is some evidence which might induce a reasonable doubt as to whether the prosecution has negatived the question of provocation.*¹²⁷⁶ *A trial judge in determining whether the issue of provocation is raised on the evidence must look at the version of events most favourable to the defendant open on the evidence which could lead a jury acting reasonably to be satisfied beyond reasonable doubt that the killing was unprovoked.*¹²⁷⁷ *More needs to be raised than the reasonable possibility of dispute and friction. Various forms of conduct capable of producing anger in others have been ruled to be incapable of raising this issue (eg a bare confession of adultery is not*

1275 *R v Rae* [2006] QCA 207, [37].

1276 *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162.

1277 *Stingel*, 334; *Masciantonio*, 67–68; *Buttigieg*, 27, *Rae*, [29].

enough). The cases are usefully reviewed in *Buttigieg*.¹²⁷⁸ Note that in *Buttigieg*¹²⁷⁹ the Court of Appeal observed that in respect of provocation as a defence to murder, 'It seems now to be accepted in the cases that the use of words alone, no matter how insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character'.' However, the issue should be left to the jury if the trial judge is 'in the least doubt whether the evidence is sufficient',¹²⁸⁰ even if it is not requested by the defence and is in fact inconsistent with a defence raised.¹²⁸¹

Directing the jury

The gravity of the provocative conduct must be assessed from the perspective of the particular defendant, so that his 'age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.'¹²⁸² In a case of 'battered person syndrome' expert evidence as to the defendant's state of 'heightened arousal' may be of significance as providing the context in which an apparently minor insult is to be viewed.¹²⁸³ The history of an abusive relationship will of course be relevant also.

The doctrine of provocation is not confined to loss of self-control arising from anger or resentment but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic as well as anger or resentment; the central element in the doctrine is the sudden and temporary loss of self-control.¹²⁸⁴

A critical matter for assessment is whether a hypothetical ordinary person could under such provocation lose self-control and do the act causing death. In that objective test, the age of the defendant where it is relevant to level of maturity should be attributed to the 'ordinary person'.¹²⁸⁵ It is to be noted that the reference is to the ordinary person and not to the average person.¹²⁸⁶ Reference should not be made in this context to a 'reasonable person'; to do so is to suggest a requirement of a higher level of control.¹²⁸⁷ An instruction that the jury put themselves, as the embodiment of the ordinary person, in the defendant's shoes should be avoided.

1278 *Buttigieg*, 26–35.

1279 *Buttigieg*, 37.

1280 *Pangilinan*, 64, *Van Den Hoek*, 161–2, 169.

1281 *Pangilinan*, 64. See also *R v Cowan* [2005] QCA 424, [21], [22].

1282 *Stingel*, 326.

1283 *Osland* (1998) 197 CLR 316, 337.

1284 *Van Den Hoek*, 168; *Pangilinan*, 64.

1285 *Stingel*, 329, 331; *Mogg* (2000) 112 A Crim R 417.

1286 *Stingel*, 322.

1287 *Stingel*, 326–8; *Vidler* (2000) 110 A Crim R 77.

DISCUSSION

17.6 The subjective/objective test of provocation has been criticised for its complexity. Consider the summing up in the trial of *Sebo*, set out at [13.118] above. How might the jury have understood the explanation that they were ‘considering the possible reaction of an ordinary person in the position of the accused’ when they are soon after told to ‘take full account of the sting of the provocation actually experienced by the accused’ to determine whether ‘the ordinary person postulated certainly could not have reacted to the provocation the accused actually experienced in the way he did’?

17.7 The Commission notes that the Benchbook explains, consistently with authority (citing *Buttigieg*), that as a matter of law words, no matter how insulting or upsetting, are not to be regarded as provocation except in circumstances of a most extreme and exceptional character.

17.8 *Buttigieg*¹²⁸⁸ is discussed above at [11.57] and [16.184]–[16.185]. As noted above, it is a decision of the Queensland Court of Appeal which sets out certain ‘generally accepted’ propositions about provocation.¹²⁸⁹ Proposition ‘(c)’ explains that a trial judge should withhold the issue of provocation from the jury if it is such that no reasonable jury could find the evidence of provocation to be sufficient to raise a reasonable doubt. But that proposition is qualified by a statement that a trial judge is to leave the issue of provocation to the jury ‘if in the least doubt’ whether the evidence is sufficient.¹²⁹⁰

1288 (1993) 69 A Crim R 21.

1289 Ibid 26.

1290 Ibid 27.

Chapter 18

The onus of proof of provocation

INTRODUCTION	205
SIGNIFICANT CASES	205
<i>Woolmington v DPP</i>	205
<i>Johnson v The Queen</i>	206
<i>Moffa v The Queen</i>	206
DISCUSSION	390

INTRODUCTION

18.1 In a criminal trial the defence carries an evidential onus of raising the partial defence of provocation as an issue. However, once provocation is raised, the final onus of proof moves to the prosecution to negate or overcome that defence. This means that, if provocation is raised as an issue and the jury is unable to exclude the claim of provocation beyond reasonable doubt, then section 304 of the Criminal Code (Qld) directs that the defendant be convicted of manslaughter and not murder.

18.2 Until *Woolmington's* case¹²⁹¹ the onus of proof lay on the defendant to demonstrate that he or she killed under provocation. This approach was consistent with the view that provocation was regarded as a matter that went primarily to mitigation of sentence and was not a complete defence to a homicide.

18.3 The way in which provocation operates in mitigation of a proved offence of murder is that it allows the offence to be re-classified as manslaughter. The question to be examined in this chapter is whether the present arrangements governing the onus of proof should be changed and, specifically, whether the onus of proof should be placed on a defendant who wishes to claim the benefit of provocation.

¹²⁹¹ [1935] AC 462.

SIGNIFICANT CASES

*Woolmington v DPP*¹²⁹²

18.4 In *Woolmington's* case the trial judge directed the jury that, once the prosecution had proved that the defendant had killed the deceased, the law presumed the element of malice¹²⁹³ unless the defendant satisfied the jury that the killing was excused as an accident, or mitigated by provocation to manslaughter.¹²⁹⁴ The following extract sets out the trial judge's direction to the jury:¹²⁹⁵

The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth.'¹²⁹⁶ That has been the law of the country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or something which could be justified.

18.5 As the trial judge's direction, or at least the first part of it, was based on an often-cited passage from *Foster's Crown Law* written in 1762, the House of Lords decided to state, in categorical terms, the rule that the prosecution carries the onus of proof in a criminal trial. In doing so, the Court acknowledged only two exceptions: the rule that proof of insanity rests on the defendant, and any exception created by statute.

18.6 In applying the general rule to the charge of murder, Viscount Sankey LC said:¹²⁹⁷

When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i.)

1292 Ibid.

1293 Malice is the mental element of murder at common law.

1294 At trial, *Woolmington* had testified that the gun discharged a bullet into his estranged wife's heart as 'a pure accident'. Although accident was the principal issue presented to the jury, there was some evidence before the jury which may have raised a claim of provocation to be considered in the event that the jury rejected the claim of accident.

1295 *Woolmington v DPP* [1935] AC 462, 465.

1296 *Foster's Crown Law* (1762) 255.

1297 *Woolmington v DPP* [1935] AC 462, 482.

intentional and (ii.) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused the death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

18.7 When in the last sentence it is said that 'the prisoner is entitled to be acquitted', what is meant in a case to which provocation applies is that the defendant is entitled to be acquitted of murder and to receive a verdict of guilty of manslaughter.

18.8 The decision of the House of Lords to apply the general rule to provocation was no doubt thought to rest in principle.

18.9 In a criminal trial provocation does not negate any element of the offence of murder. If it did, provocation would need to be negated in order to prove the elements of murder; and, of necessity, the onus of negating provocation would fall on the prosecution. However, all the elements of murder must be proved before it becomes necessary to consider provocation. Once murder is proved, provocation allows the crime of murder, as a matter of mercy, to be mitigated to manslaughter. A close analogy exists between provocation and diminished responsibility in the way in which provocation functions in relation to proof of the elements of murder.¹²⁹⁸

Johnson v The Queen¹²⁹⁹

18.10 In *Johnson v The Queen*, a question before the High Court was whether section 23 of the *Crimes Act 1900* (NSW)¹³⁰⁰ placed the onus on the

¹²⁹⁸ The *Homicide Act 1957* (UK) introduced diminished responsibility as a means of sentence mitigation for mentally disordered defendants. Like provocation, diminished responsibility only becomes relevant to consider after the prosecution has proved that the defendant is guilty of murder. Under the *Homicide Act 1957* (UK) the onus of proof is placed on a defendant wishing to claim the benefit of diminished responsibility.

¹²⁹⁹ (1976) 136 CLR 619.

¹³⁰⁰ Section 23(2) of the *Crimes Act 1900* (NSW) then provided:

- (1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow.
- (2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly:

Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find:—

- (a) That such provocation was not intentionally caused by any word or act on the part of the accused;

prosecution to exclude a claim of provocation, or on the defence to establish provocation. The court held that, as a matter of construction, the section placed the onus on a defendant to establish provocation. Barwick CJ, after commenting that provocation did not provide a defendant with 'a defence properly so called' but instead afforded a defendant 'a means of avoiding the extreme penalty,' said:¹³⁰¹

It is thus understandable that, though the establishment of all elements of criminality should rest on the Crown, there is no reason why any of the elements of provocation should be established by the Crown. Section 23 gives effect to such a view. It does not create, in my opinion, an unjust or unfair situation.

Moffa v The Queen¹³⁰²

18.11 Barwick CJ returned to this theme in the next important provocation case before the High Court, *Moffa v The Queen*. *Moffa* was an appeal from South Australia, where the common law rules governed provocation and where, since *Woolmington's case*,¹³⁰³ the onus lay on the prosecution to exclude any claim of provocation. Barwick CJ said:¹³⁰⁴

In my reasons for judgment in *Johnson v The Queen*¹³⁰⁵ I indicated that a claim to the reduction of murder to manslaughter by reason of provocation is not really a matter of defence which the Crown should be required to negative beyond reasonable doubt: and that it would not be unjust or unfair to place upon the accused the satisfaction of the jury on a balance of probabilities of all the elements necessary to warrant a refusal to find murder and a finding of manslaughter. The administration of criminal justice would, in my opinion, be aided and not impaired by the production by statute of such a position.

18.12 The comments made in both cases were obiter.

DISCUSSION

18.13 The conflict is between (1) the great principle of the common law that the onus of proof of a criminal charge should rest on the prosecution, and (2) a general principle that a party seeking to take advantage of a particular rule (in this case one allowing murder to be mitigated to manslaughter because of provocation) should carry the onus of persuasion in relation to the rule.

(b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and

(c) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life.

1301 (1976) 136 CLR 619, 643.

1302 (1977) 138 CLR 601.

1303 *Woolmington v DPP* [1935] AC 462.

1304 *Moffa v The Queen* (1977) 138 CLR 601, 608.

1305 (1976) 136 CLR 619.

18.14 Sir Garfield Barwick's point in the passages cited is that a claim of provocation engages the second principle, and not the first; and moreover that considerations of policy justify legislative intervention to place the onus of proof on a defendant.

18.15 The Criminal Code (Qld) contains a number of statutory defences in which an onus of proof is placed on a defendant. The most immediate example is the onus cast on a defendant who wishes to rely on a claim of diminished responsibility¹³⁰⁶ to establish diminished responsibility on the balance of probabilities.¹³⁰⁷ Another example is provided by section 208(3) of the Code, which creates a statutory defence to sodomy if the defendant proves that he or she 'believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more'. Similar statutory defences cover the offences of attempted sodomy (section 209), unlawful carnal knowledge of a child under 16 years (section 215), and indecent treatment of a child under 16 years (section 211). In these cases, but for the statutory provision, the onus of proof would be on the prosecution to negate (beyond reasonable doubt) any claim raised on the evidence that the defendant believed the complainant was above the prescribed age.

18.16 Another example of a statutory exception is found in section 129(1)(c) of the *Drugs Misuse Act* (Qld), which provides that proof that a drug was found in a place occupied¹³⁰⁸ by the defendant is conclusive evidence that the defendant was in possession of the drug unless the defendant proves that he or she did not know or have reason to suspect that the drug was in the place. If possession is an element of the offence, the statutory provision facilitates proof of that element of the offence.

18.17 A common feature of all these provisions is that the onus of proof may be more readily discharged by the defendant than by the prosecution.¹³⁰⁹

18.18 Sir Garfield Barwick's argument that the administration of justice may be advanced by placing the onus of proof of provocation on the defendant is supported by four arguments set out below. Consistently with principle, the standard of proof to be met by the defence would be on the balance of probabilities.

18.19 Firstly, the prosecution will very often not be in a position to contest the factual detail of the claim as the only other potential witness will have been killed by the defendant. Once the prosecution has established beyond reasonable doubt all the elements of the offence of murder against the defendant, it is not unreasonable to require the defendant to establish, on the

1306 Criminal Code (Qld) s 304A.

1307 Criminal Code (Qld) s 304A(2).

1308 Or concerned in the management or control of the place (*Drugs Misuse Act* (Qld) s 129(1)(c)).

1309 Alternatively, it may be said that the relevant facts are likely to be within the defendant's capacity to prove, but not within the prosecution's capacity to disprove.

balance of probabilities, the essential facts on which the claim of mitigation is based as the defendant will often be the only witness with knowledge of all the relevant facts.

18.20 Secondly, if the onus of proof is placed on the party who wishes to rely on provocation, it is likely to result in more clearly articulated claims of provocation. At the moment, the onus is placed on the party who does not wish to rely on provocation and may not be in possession of all the relevant facts. Under the current law a trial judge is required to direct the jury on provocation, even if not requested by the defence, if, on any reasonably possible view of the evidence, a claim of provocation is raised. A trial judge, it has been said, 'is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and is, therefore, likely to tilt the balance in favour of the defence.'¹³¹⁰ The more clearly defined a claim of provocation, the fairer it is to all concerned in the trial (including the jury). Generally, the administration of justice will be enhanced if the onus of proof is on the party who wishes to rely on the claim.

18.21 Thirdly, if the onus of formulating the claim of provocation is placed on the party who wishes to rely on the claim, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims being advanced before juries. Under the current rules the trial judge has a limited capacity to stop unmeritorious claims. This capacity may be essential if the parameters of provocation are to be redrawn in a way that is more consistent with current community expectations.

18.22 Fourthly, a strong analogy exists to the partial defence of diminished responsibility.¹³¹¹ A successful claim of diminished responsibility, like provocation, reduces murder to manslaughter. It only becomes necessary to consider diminished responsibility, like provocation, after the prosecution has proved that the defendant is guilty of murder. Diminished responsibility, like provocation, relates to the defendant's exceptional state of mind at the time of the offence. Defendants who wish to avail themselves of the mitigating effect of diminished responsibility carry the onus, on the balance of probabilities, of establishing diminished responsibility at the time of the killing.

18.23 It is difficult to see why a different rule should apply to each of the partial defences.

18.24 These arguments do not apply to provocation as a defence to assault.

¹³¹⁰ *Lee Chun-Chuen v The Queen* [1963] AC 220, 230.

¹³¹¹ Criminal Code (Qld) s 304A.

Chapter 19

Provocation in murder: analysis

INTRODUCTION	185
CLAIMS UPON WHICH THE PARTIAL DEFENCE MAY BE BASED	185
RESEARCH FINDINGS AND LITERATURE	186
FURTHER ANALYSIS OF THE GROUPS.....	188
MODIFICATION OF THE LAW TO OBTAIN SUBSTANTIVE GENDER EQUALITY	192
GENERAL ISSUES IN REFORMING PROVOCATION.....	193
THE LIMITING RULES.....	194

INTRODUCTION

19.1 The Provocation Discussion Paper contained the following broad analysis of issues relevant to reform of the law on provocation. This analysis led to the various options presented by the Commission in the Provocation Discussion Paper. Some of the respondents referred to parts of this analysis in their submissions which are discussed in Chapter 20 of this Report.

CLAIMS UPON WHICH THE PARTIAL DEFENCE MAY BE BASED

19.2 Any reform of the law of murder provocation is complicated by the wide range of conduct on which claims of provocation may be based. The different situations in which provocation is claimed tend to raise separate issues. In exploring the possibility of reform of the law, it is useful to group, as far as is possible, the different situations in which claims of provocation are made or refused.

19.3 At least six situations may be identified. The groups are not mutually exclusive and areas of overlap are present between some of the groups; however, each group has sufficiently common features to assist in the analysis of the law.

19.4 Group A consists of defendants who kill a partner (or former partner) at, or around, separation. Although this group overwhelmingly consists of men, it should be recognised that some women may also be in this group. However, because the pattern of behaviour is distinctively male, the focus of the discussion will be on men. In this group the central dynamic is the denial by the defendant of the woman's right of autonomy, accompanied in most cases by an assertion of autonomy by the woman.

19.5 A variation to group A is where the person killed is a sexual rival of the defendant. Because the central dynamic is the same, no relevant distinction

can be drawn between these two groups. In both groups the offender's exercise of control is often associated with a high level of possessiveness and jealousy.

19.6 Group B consists of situations where the killing is in retaliation or response to serious violence (or threatened serious violence) by the deceased, but where self-defence is not available to excuse the killing. In this group a claim of provocation may be a fall-back position to a claim of self-defence. Typically in this group both the defendant and the deceased will be men.

19.7 Group C consists of situations where the killing is a response to a non-violent homosexual advance by the deceased.

19.8 Group D consists of defendants who are in seriously abusive and violent relationships. This group is discussed in Chapter 15. Although this group overwhelmingly consists of women it is accepted that men, parents, and children may also be in seriously abusive and violent relationships. To assist in discussion the focus will be on battered women. The distinguishing feature of this group is the seriously abusive and violent relationship in which the defendant woman is the victim. The motivations and circumstances in which these killings take place are characteristically different from the other groupings. Typically men¹³¹² kill in anger to punish, while women in this group kill in fear to survive. Typically men kill because they can, women kill how they can, sometimes waiting until the man is unable to defend himself.

19.9 Group E consists of situations in which a child kills a violent and abusive parent. The central dynamic here is a seriously abusive and violent relationship. A strong analogy exists between this group and group D.

19.10 Group F consists of situations in which the defendant kills in spontaneous retaliation for a serious wrong. The woman who kills her rapist, the man who kills his wife's rapist, and the parent who kills the person who has killed or seriously harmed the parent's child all fit into this category. The defendant must be, in some sense, a witness to a wrong, and have killed in an act of spontaneous retaliation (with loss of self-control). Although an overlap may exist between this group and Group B, this group in some respects more easily fits the theoretical model of provocation with its emphasis on a sudden retaliation involving some loss of control in response to a serious wrong.

RESEARCH FINDINGS AND LITERATURE

19.11 The partial defence of provocation is one of the most examined and most condemned areas of the criminal law. A very substantial body of statistical investigation and social and legal writings exist. A selection of some of the more relevant work has been examined in Chapter 16.

1312

That is, men in group A.

19.12 The idea of substantive gender equality developed in the literature provides a useful tool for analysis. There can be no doubt that the law of provocation, as it presently works in Queensland does not satisfy the test of substantive gender equality.

19.13 On the one hand, it partially excuses the man who kills his intimate partner in circumstances where the partner is merely seeking to exercise a choice to live separately from him.

19.14 On the other hand, because of the rules that have developed around the plea of provocation, and because of the different circumstances in which women kill, the battered woman¹³¹³ who has killed her violent and abusive partner may find it difficult to bring her claim of mitigation within the law of provocation.

FURTHER ANALYSIS OF THE GROUPS

19.15 In group A the central dynamic lies in the contest between the defendant's control over the victim's life and the victim's assertion of autonomy. The right of autonomy is respected by society,¹³¹⁴ and recognised in law by the availability of protection orders and a range of criminal offences (ie assault, stalking) intended to safeguard the victim's physical integrity. That a victim's exercise of a lawful right of autonomy can give rise to the partial defence of provocation is inconsistent with society's recognition and protection of individual freedoms. In principle, those in group A should not be entitled to claim the benefit of the defence in such circumstances.

19.16 The distinction between group A and group F is described by Nourse. In writing about a man who kills his wife's rapist (a representative of group F) and a man who kills his wife because she has left him (a representative of group A) Nourse says:¹³¹⁵

It helps us to see why we might distinguish intuitively the rapist killer from the departing wife killer. In the first case, we feel 'with' the killer because he is expressing outrage in ways that communicate an emotional judgment (about the wrongfulness of rape) that is uncontroversially shared, indeed, that the law itself recognizes. Such claims resonate because we cannot distinguish the defendant's sense of emotional wrongfulness from the law's own sense of appropriate retribution. The defendant's emotional judgments are the law's own. In this sense, the defendant is us. By contrast, the departing wife killer cannot make such a claim. He asks us to share in the idea that leaving merits outrage, a claim that finds no reflection in the law's mirror. In fact, the law tells

1313 Or man or parent or child.

1314 Symbolised by Australia's adoption of the Universal Declaration of Human Rights: United Nations, *Universal Declaration of Human Rights*, GA Res 217 A (III), 10 December 1984.

1315 V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) 106 *Yale Law Journal* 1331.

us quite the opposite: that departure, unlike rape and battery and robbery, merits protection rather than punishment.

19.17 This argument explains why one should be regarded as less culpable than the other.

19.18 Group C raises special considerations. The killer in *Green v The Queen*¹³¹⁶ claimed to have been provoked by a homosexual advance by the deceased. In the circumstances of *Green* three members of the Court¹³¹⁷ thought that the hypothetical ordinary person could have been so provoked as to form an intention to kill or do grievous bodily harm.¹³¹⁸ Two members did not.¹³¹⁹ Although the different conclusions reached may be explained at a factual level, the question of principle raised is whether a non-violent¹³²⁰ homosexual invitation could ever justify killing the person making the advance.

19.19 More broadly, it is difficult to imagine how a non-violent sexual advance to a man by a woman could be regarded as justification for killing the person making the advance.

19.20 In principle, gender should make no difference to the law's conclusion. The point has been taken up in two Australian jurisdictions. In both the ACT and the Northern Territory the provocation defence was amended, in 2004 and 2006 respectively, to prevent reliance on a non-violent sexual advance as the sole basis for a claim of provocation.¹³²¹

19.21 Group D also raises special considerations. In the discussion on battered women¹³²² the observation is made that, while the different circumstances in which battered women kill can be brought within the common law test of provocation only by stretching the requirement of immediacy of response, the express language used in section 304 and the requirement of 'sudden provocation' make the section difficult to read in a way that encompasses a killing after a significant lapse of time.

19.22 The other obstacle the battered woman confronts, in endeavouring to fit the circumstances in which she may kill into a claim of provocation, is in satisfying the requirement of a loss of self-control. The difficulty here is an

1316 (1996) 191 CLR 334.

1317 Brennan CJ, Toohey and McHugh JJ.

1318 *Green v The Queen* (1996) 191 CLR 334 was an appeal from New South Wales. Section 23 of the *Crimes Act 1900* (NSW) requires that the question be asked in terms of intention.

1319 Gummow and Kirby JJ.

1320 A sexual assault, irrespective of questions of gender, depending upon all the circumstances and the nature of the assault, could support a plea of provocation (see group D).

1321 *Crimes Act 1900* (ACT) s 13(3), inserted by *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) s 3, sch 2 pt 2.1; *Criminal Code* (NT) s 158(5), inserted by *Criminal Reform Amendment Act (No 2) 2006* (NT) s 17.

1322 Chapter 15.

evidentiary one. Her actions may involve elements of planning,¹³²³ which may suggest premeditation rather than loss of control.¹³²⁴

MODIFICATION OF THE LAW TO OBTAIN SUBSTANTIVE GENDER EQUALITY

19.23 The Commission has commented earlier that to regard a victim's exercise of a lawful right of autonomy as capable of supporting the partial defence of provocation is inconsistent with the recognition of individual rights, and the principle of gender equality.¹³²⁵

19.24 In contrast to the killing of a woman who is seeking to exercise a lawful right of autonomy, a claim to mitigation by a woman in a seriously abusive and violent relationship is at least as strong as a claim to mitigation from any of the other groups under the current test of provocation.

19.25 In these circumstances substantive gender equality may be achieved by denying claims inconsistent with the recognition of individual rights and gender equality, and by modifying the law where it inhibits deserving claims to mitigation only because of rules derived from a particular gender model of human behaviour.

19.26 The requirement of 'sudden provocation' and the associated requirement of a reaction to the provocation 'before there is time for the person's passion to cool' are impediments to adoption in Queensland of the developments in the common law softening the element of immediacy and dispensing with any requirement of a specific triggering incident. These changes in the common law have enabled some claims by battered women to be successfully advanced.

19.27 Quite apart from the issue of substantive gender equality, the current section is expressed in somewhat archaic language. The present review provides an opportunity to redraft the section to reflect modern language and understandings.

GENERAL ISSUES IN REFORMING PROVOCATION

19.28 As explained earlier in this Report, section 23 of the *Crimes Act 1900* (NSW) was amended to remove the requirements that the killing occur suddenly¹³²⁶ and immediately after the provocation.¹³²⁷ At the same time the

¹³²³ The planning may involve obtaining a weapon and choosing the moment to strike.

¹³²⁴ Although the admission of expert evidence may assist the jury to understand the motives and actions of the defendant, the difficulty in distinguishing a premeditated killing from a provoked killing is a real one.

¹³²⁵ See [11.36] above.

¹³²⁶ *Crimes Act 1900* (NSW) s 23(3)(b).

requirement of a loss of control at the time of the killing was retained as a safeguard against premeditated killings.

19.29 These changes were intended to align the requirements of the law more with the circumstances in which battered women sometimes kill. Because they are not confined to any particular type of defendant, the changes would apply generally to all defendants, and may provide a partial defence to murder in relation to more killings than would otherwise be the case.

19.30 An alternative approach to reform is to include a different paradigm of provocation, based on the different circumstances in which women who are battered sometimes kill. The defining characteristic of a battered woman is the seriously abusive and violent relationship. An amendment in which the focus of provocation is shifted to the seriously abusive and violent relationship, may have a number of advantages, provided adequate safeguards are inserted to prevent premeditated killings giving rise to the defence.

19.31 Such a reformulation of provocation for battered persons would not inadvertently widen the scope of provocation generally, and at the same time it would focus on the key feature of a battered person, that is, the seriously abusive and violent relationship.

THE LIMITING RULES

19.32 The categories defined in *R v Mawgridge*¹³²⁸ are now part of the history of provocation. The rule that words alone could not constitute provocation survives in a modified form: only words of 'the most extreme and exceptional character'¹³²⁹ may constitute provocation. Words may constitute provocation in combination with other circumstances if they are capable of provoking an ordinary person to retaliate as the defendant did.

19.33 One issue which arises is whether the provocative effect of words should be limited to an admission of, or a threat to commit, a serious criminal offence (where a serious criminal offence may be defined as a sexual offence, or any offence which carries a maximum penalty of imprisonment for life).

19.34 The old rule that lawful conduct cannot amount to provocation no longer limits the scope of murder provocation. The rule survives to limit assault provocation (section 268(3)) but the scope of the limitation has been watered down by confining 'lawful' to be something which is expressed to be 'lawful' by virtue of a provision in the Criminal Code.¹³³⁰

1327 *Crimes Act 1900* (NSW) s 23(2)(b).

1328 (1707) Kel 119; 84 ER 1107.

1329 *Buttigieg v The Queen* (1993) 69 A Crim R 21, 37.

1330 See [22.15] above.

19.35 A third limiting rule found in the early texts prevents reliance on any act of provocation which was invited or induced by the defendant.¹³³¹ Today there is some potential to apply this rule to situations which occur within group A (men who kill a partner or former partner). Typically in group A the acts of provocation relied on will be verbal insults or minor acts of assault during an argument. It does not seem too far-fetched to regard the insult or minor assault as induced by the man's refusal to accept the woman's exercise of choice. If such an analysis is correct, it is difficult to see why such conduct should be regarded as provocation for murder.

19.36 With the passage of time the limiting rules have moved to side stage as the focus of the law has progressed to the ordinary person test and the concept of a temporary loss of control as the essential features of provocation. If, however, both the nature of the provocation and the defendant's emotional reaction to the provocation are seen as important ingredients in provocation, the limiting rules may still have a useful role to play in defining the defence.

1331

AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 295 citing Hale, 1 PC 457 and East, 1 PC 239 as the sources of this rule.

Chapter 20

The partial defence of provocation: submissions and consultation

INTRODUCTION	118
Submissions in response to the DJAG Discussion Paper	120
SUBMISSIONS.....	121
Respondents to the DJAG Discussion Paper	402
Respondents to the Provocation Discussion Paper.....	403
GENERAL OBSERVATIONS MADE IN SUBMISSIONS	404
General observations made in submissions to the Department	404
General observations made in submissions to the Commission	410
MANDATORY LIFE IMPRISONMENT.....	123
Submissions in response to the DJAG Discussion Paper	124
Submissions in response to the Provocation Discussion Paper.....	126
OPTION 1: ABOLITION OF THE PARTIAL DEFENCE OF PROVOCATION.....	126
Submissions in response to the DJAG Discussion Paper	130
Submissions in response to the Provocation Discussion Paper.....	130
OPTION 2: RECASTING THE PARTIAL DEFENCE OF PROVOCATION	131
Introduction.....	135
Redefining the conduct that may amount to provocation.....	137
Submissions in response to the DJAG Discussion Paper	137
Submissions in response to the Provocation Discussion Paper.....	142
Removal of the requirements of 'suddenness' from section 304 of the Code	146
Reform of the objective test	150
OPTION 3: CHANGE TO THE ONUS OF PROOF.....	150
THE BATTERED PERSON WHO KILLS HIS OR HER ABUSER.....	151

INTRODUCTION

20.1 Chapters 11 to 19 of this Report contain the matters that the Commission considered in its review of the partial defence of provocation, all of which were contained in its Provocation Discussion Paper.¹³³²

20.2 In Chapter 12 of the Provocation Discussion Paper, the Commission considered several options for change to the law of the partial defence of provocation and the arguments for and against each option or the issues raised by each option. At the end of the discussion of each option, the Commission posed certain questions that were addressed in submissions by respondents to the paper.

1332

Queensland Law Reform Commission, *A review of the excuse of provocation*, Discussion Paper, WP 63 (August 2008).

20.3 This chapter outlines those options and the submissions received by the Commission in response to the questions posed about each.

Submissions in response to the DJAG Discussion Paper

20.4 As well as submissions sent directly to the Commission in response to the Provocation Discussion Paper, the Commission had the benefit of most of the submissions sent to the Department of Justice and Attorney-General in response to the Department's own discussion paper. This chapter considers both sets of submissions.

20.5 As explained in Chapter 1, the results of the audit of homicide offences commissioned by the Attorney-General in May 2007 were published in October 2007 in a Discussion Paper entitled *Audit on Defences to Homicide: Accident and Provocation* (the 'DJAG Discussion Paper').¹³³³

20.6 The Attorney-General sought the consent of the authors of submissions sent in response to the DJAG Discussion Paper to their use by the Commission in this review. If the author's consent was given, the Commission received a copy of the submission and it has been considered. Some authors sent supplementary submissions to the Commission. Others were content to rely upon the submissions sent to the Department. Most but not all of the authors gave their consent to the use of their submissions by the Commission.¹³³⁴

20.7 The purpose of the Attorney-General's audit was to 'ascertain the nature and frequency of the reliance' on the partial defence of provocation (and accident) in homicide trials, and the DJAG Discussion Paper sought responses in that context.

20.8 The DJAG Discussion Paper asked four questions about provocation:¹³³⁵

- 1 Does the current law on provocation reflect community expectations in relation to criminal responsibility?
- 2 Is the defence of provocation appropriate for a case when death results?
- 3 In what circumstances, if any, should provocation provide a partial excuse¹³³⁶ for murder?

1333 Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007).

1334 The Department received 34 submissions. The authors of 26 submissions either consented to their use by the Commission or provided a copy of their submission directly to the Commission. The Commission did not obtain access to the remaining eight submissions.

1335 Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 45–6.

- 4 Does it make a difference to your views that mandatory life imprisonment applies to murder in Queensland?

20.9 Having regard to its terms of reference, the Commission has conducted a thorough review of the partial defence of provocation. It necessarily asked different questions from those asked by the Department. However, there has been some overlap, and the submissions made to the Department have been of considerable value to the Commission.

20.10 Under each of the options discussed below, the Commission has considered the views of respondents to the Provocation Discussion Paper and the views of respondents to the DJAG Discussion Paper if those respondents expressed views relevant to that option.

SUBMISSIONS

20.11 The Department and the Commission received submissions from a variety of stakeholders. While some consistent patterns emerged in the responses to questions about the excuse of accident, views about provocation were diverse. The only patterns detected were dissatisfaction with the current position expressed by the majority of respondent members of the public¹³³⁷ and a call by the majority of respondents for the abolition of the mandatory life sentence as punishment of murder.

Respondents to the DJAG Discussion Paper

20.12 The authors of the submissions to the DJAG Discussion Paper that were available to the Commission comprised:

- five professional bodies (the Queensland Bar Association, the Queensland Law Society, the Women's Legal Service Inc, the Aboriginal and Torres Strait Islander Legal Service (Qld South) Ltd and Legal Aid Queensland);
- two private law firms specialising in criminal law work;
- three practising barristers;
- the Honourable JB Thomas AM QC;
- the Honourable WJ Carter QC;

¹³³⁶ Under s 304 of the Criminal Code (Qld) provocation is a partial 'defence' to murder rather than a partial 'excuse'.

¹³³⁷ The response to the discussion papers from individual members of the public was low. However, the Commission notes that the Queensland Homicide Victims' Support Group response to the Department enclosed 2000 letters from members of the public.

- four law academics¹³³⁸ and one law student;
- the Commission for Children and Young People and Child Guardian;
- the Department of Child Safety and Office for Women (joint submission);
- six members of the public; and
- the Queensland Homicide Victims' Support Group ('QHVSG').

20.13 The submission to the Department from QHVSG enclosed over 2000 letters from members of the public. The letters were in one of two standard forms drafted by QHVSG. One letter sought the abolition of the defence of provocation. The other urged a review of the excuse of accident and of jury directions.

Respondents to the Provocation Discussion Paper

20.14 The Commission received 13 written submissions in response to its Provocation Discussion Paper. The respondents were:

- three professional bodies (Legal Aid Queensland, Women's Legal Service and the Bar Association of Queensland);
- three members of the public;
- one lawyer;
- the Honourable JB Thomas AM QC;
- two law academics;
- the Queensland Police Service;
- the Commission for Children and Young People and Child Guardian;¹³³⁹ and
- the Office of the Director of Public Prosecutions.

20.15 Additionally, to discuss certain aspects of their submissions, the Commission met separately with:

- a representative from the Women's Legal Service;

¹³³⁸ One of whom explained that the views expressed in his submission were not just his own academic views, but also included the views of his students: DJAG Submission 20.

¹³³⁹ The Commission for Children and Young People and Child Guardian sent to the Commission the same submission it sent to the Department about murder provocation, with some additional material. The Commission for Children and Young People and Child Guardian also sent a separate submission about assault provocation.

- the Public Defender, Mr Brian Devereaux SC (from Legal Aid Queensland) (currently, his Honour, Acting Judge Devereaux SC); and
- Mr Tony Moynihan SC, the Director of Public Prosecutions and Mr Ross Martin SC, a Consultant Crown Prosecutor.

20.16 On 5 August 2008, the Commission conducted a lunchtime seminar at Legal Aid Queensland, which was attended by employees of Legal Aid Queensland and members of the profession, during which attendees expressed their views about accident and provocation.

20.17 On 4 September 2008, the Commission conducted a consultation meeting with Justices of the Supreme Court of Queensland.

GENERAL OBSERVATIONS MADE IN SUBMISSIONS

20.18 Before discussing the submissions about each option raised in the Provocation Discussion Paper, the Commission has considered some general comments made by those who responded to the DJAG Discussion Paper and to the Commission's Provocation Discussion Paper.

20.19 Some respondents argued strongly for the abolition of the defence; others argued just as strongly for its retention. The purpose of setting out these general observations is to present the broad views of the respondents and to highlight the different theoretical and practical considerations that underpinned the respondents' decision on whether the defence should be abolished or retained.

20.20 Some of the submissions mentioned under this heading deal with the case of *R v Sebo*. The Commission appreciates that the issue is not whether the jury's decision in that case was the correct one, but rather whether the applicable law was appropriate. However, the Commission acknowledges that various respondents made reference to *R v Sebo* to illustrate their point of view.

General observations made in submissions to the Department

20.21 The Hon JB Thomas AM QC provided a detailed submission to the Department as well as a submission to the Commission. He was in favour of retention of the partial defence, although suggested a need to restrict its application.

20.22 In his submission to the Department, the Hon JB Thomas made particular reference to *R v Sebo* and expressed his surprise that provocation was left to the jury in that case.¹³⁴⁰

1340

DJAG Submission 17.

20.23 Speaking generally of the partial defence, he said:

In dealings between human beings, it occasionally happens that a person is so grossly affected by the conduct of another that he or she is pushed beyond ordinary human endurance and over-reacts to a stressful situation. The law recognises that when this results in human death, juries should have the power, not to forgive, but to recognise that the offender may be less culpable on that account. Without the preceding provocation there would not have been a death. The law is not blind to human frailty. If the point is reached when an accused has understandably been pushed beyond proper control of his or her actions, *and* an ordinary person might reasonably react similarly, the consequences should be less than those of murder. The consequential verdict of manslaughter is not an extrication, and it results in the offender being severely sentenced according to the facts of the case. It is a perfectly reasonable provision, and none of the arguments against it justify its removal from the *Code*. Indeed its removal would result in serious injustice in many instances.

However the *Sebo* case is extraordinary, and it is surprising that the defence of provocation was allowed to go to the jury at all. If the law as stated by the Court of Appeal in *Buttigieg*¹³⁴¹ had been applied, the jury would have been told that no such defence was available in the circumstances. *Buttigieg* states:

It seems now to be accepted in the cases that the use of words alone, no matter ... insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character' (*Moffa v The Queen* (1977) 138 CLR 601, 605, 616–617; *Holmes v DPP* [1946] AC 588.) A confession of adultery, even a sudden confession to a person unprepared for it, is never sufficient without more to sustain this defence (*Holmes* ... 600; *R v Tsigos* (1964–1965) NSW 1607, 1610; *Moffa* ... 619).

20.24 To further his argument, the Hon JB Thomas outlined the facts in *Buttigieg* and the finding of the Court of Appeal:

the 'provocation' included a wife's admission to her husband of seeing another man with whom she had had an affair, her statement that she had been taking her husband for a ride [during] the last six years and that she was going to take everything that he had, her hitting back and scuffling when he gave her 'a couple of hits' and calling him a 'spack' (spastic) (a term to which he was particularly sensitive).

The Court held those circumstances to be too weak to justify any issue of provocation going to a jury:

The evidence in the present case was in our view insufficient to justify sending the question of provocation to the jury. No jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct he attributed to his wife fell below the minimum limits of the range of the powers of self-control which must be attributed to any 'hypothetical ordinary' man.

1341

[1993] 69 A Crim R 21, 35–38.

20.25 The Hon JB Thomas observed that a similar view had been expressed by the High Court in *Stingel v The Queen*,¹³⁴² but added:

Of course one must sympathise with trial judges who are under a duty, if there is any possibility that the issue might be left to the jury, to let it go. But where it is too lightly submitted to a jury for consideration, errors can occur, because, unfortunately, the *Stingel* tests that the jury has to consider are highly complicated and are capable of engendering confusion. This can sometimes be mistaken for a 'reasonable doubt' that will be resolved in favour of an accused person.

20.26 In his view, *R v Sebo* was a straightforward case of murder where the preceding conduct of the deceased 'did not even come close' to requiring the defence of provocation to be considered by the jury.

20.27 A respondent academic made the same point: accepting the deceased's taunts as provocation in *R v Sebo* ran contrary to *Buttigieg*.¹³⁴³

20.28 Case MU87 of the audit (in which the provocation was verbal only) was another case in which the Hon JB Thomas found it surprising that provocation had been left to the jury. He wondered whether the trial judges (in *R v Sebo* and MU87) had been referred to the relevant authorities and continued:

Irrespective of this, these cases illustrate the need for trial judges to maintain a firm line in ruling whether the defence of provocation properly arises for a jury's consideration. If they fail to do this, miscarriages of justice are bound to occur, which will be followed by public disquiet and unnecessary submissions for the law to be changed.

Frankly, judges find themselves between a rock and a hard place when ruling on these points, and most tend to 'play it safe' by letting the defence go to the jury in doubtful cases. The problem is that the accused has an effective appeal against an unsafe conviction, but there is no appeal by the Crown that can set aside an unsatisfactory acquittal.

If judges fail to hold a reasonable line on this, legislation might be necessary to draw a firm line emphasising the gravity of the conduct necessary to invoke the defence ...

20.29 The Honourable WJ Carter QC saw no need for excluding provocation or modifying its operation:¹³⁴⁴

The defence will only become relevant in those easily understood and not uncommon human experiences where a person responds by doing an act which causes death 'in the heat of passion caused by sudden provocation and before there is time for a person's passion to cool'.

1342 (1990) 171 CLR 312, 337.

1343 DJAG Submission 20.

1344 DJAG Submission 18.

This very human reaction in a particular case is acknowledged by the criminal law to be relevant when assessing or adjudicating on one's culpability for a death caused by the reactive response of he or she who has been provoked. That provocation must be such that the person is deprived of one's self-control and acts while so deprived. That is surely a just and proper rule. The language of s 304 itself — that death is caused 'in the heat of passion and before there is time for his passion to cool' — is not formal or legalistic in character but words in common usage, easily understood, as expressing a common, easily recognisable, human weakness, loses one's self-control as a result of provocation but would not have so reacted had the person not been provoked.

That is essentially a question of fact and of course, a question for a jury which is well equipped to make a proper judgment in a particular case.

20.30 Continuing his argument that provocation appropriately accommodated human weakness, the Hon WJ Carter said:

The notion that provocation has no place in the criminal law on the basis that persons should always, whatever the consequences, exercise and act with self-control is unrealistic and reflects a poor understanding of the inherent weaknesses in human nature. Also the notion that juries cannot be trusted with defences, such as provocation, reveals a poor understanding of and a limited experience with juries. Juries generally decide in accordance with their oath and, in my view, are superbly well equipped to decide questions of criminal liability in cases of homicide where provocation is raised by the evidence.

In my view it is unwise to follow slavishly the theoretical and bookish writings of law reformers who are significantly removed from the intensity of an emotional criminal trial, many of whom have never participated in a criminal court action but who attempt to unravel the mind of a jury and to propose 'solutions' which often become the source of unnecessary legal confusion.

20.31 However, at the consultation meeting with Justices of the Supreme Court of Queensland, one Justice recalled a trial in which a jury sought guidance about the meaning of 'in the heat of passion', assuming that it required a romantic or sexual connotation.

20.32 A respondent law firm noted the arguments for and against the abolition of provocation, including (1) that it operated with gender-bias; (2) that it had been used as a partial defence to a non-violent sexual advance; and (3) that, in modern society, people are expected to control themselves, but suggested that these were problems with the application of the partial defence, not with its existence. The respondent law firm said:¹³⁴⁵

These matters [(1), (2) and (3) above] are a concern as to how provocation is being applied in practice. But the problem is really with the application rather than the principle ... the test [of provocation] includes as its final limb whether an ordinary person would have lost control in these circumstances. A jury, representing the community, is best placed to assess what an ordinary person would do.

... Concerns with provocation arise because we see, in some cases, juries making decisions and value judgments that we may not agree with.

But that is exactly what the jury is there to do. There are circumstances and issues peculiar to each case, the significance of which are often not apparent in the written record of the trial, that the jury needs to weigh up in their most serious judgment as to a person's liberty. The members of the jury bring their combined common sense and experience to bear on these judgments. The answer therefore is not to do away with provocation, which may result in more acquittals through the removal of the 'half-way house' of verdicts, but to educate about the problems of domestic violence. (note omitted)

20.33 The respondent law firm supported the recommendations of the New South Wales Law Reform Commission about provocation made in 1997.¹³⁴⁶ In those recommendations, the New South Wales Law Reform Commission recommended the retention of the defence (having regard to the fact that there is no mandatory life sentence for murder in New South Wales). It argued that the question of whether a person's culpability ought to be reduced because of provocation was a question for the community, via a jury verdict, and not for a judge.¹³⁴⁷ It also recommended that the 'ordinary person' test be replaced with a requirement to consider whether, having regard to his or her characteristics and circumstances, the defendant should be excused for having so far lost self-control as to have formed the requisite intention for murder as to warrant the reduction of murder to manslaughter.¹³⁴⁸

20.34 A respondent barrister considered that the results of the Department's audit showed that the current system worked well. The respondent found that there was:¹³⁴⁹

no particular pattern and [that] provocation tends to be raised in conjunction with a number of other defences and obviously in the context of fairly complicated circumstances.

20.35 This respondent identified two cases in which provocation appeared to be the determining factor: MU87 and MU88 (*Sebo*). Of those two cases, the respondent said:¹³⁵⁰

Cases MU87 and MU88 (*Sebo*) may very well be cases where persons might think that the accused was lucky to escape a murder conviction. However, they were also cases presided over by a judge of [the] Queensland [Supreme] Court. They were cases where the judge put the law of provocation to the jury and told them (no doubt) that in order to convict of murder they had to be satisfied beyond reasonable doubt that there was no relevant provocation etc. The jury would have considered whether the provocation was such as to cause the

1346 New South Wales Law Reform Commission, *Partial Defence to Murder — Provocation*, Report No 83 (1997).

1347 Ibid [2.23], [2.39].

1348 Ibid [2.81]–[2.83].

1349 DJAG Submission 5.

1350 Ibid.

accused to lose his power of self-control and also whether the provocation was such as to cause an ordinary person to lose his power of self-control.

The cases, I suggest, show nothing more than the exercise of judgment by a jury on the facts.

From time to time there is criticism of some jury decisions. In my experience¹³⁵¹ Queensland juries take their function very seriously ...

... cases like MU87 and MU88 (*Sebo*) may, to some people appear as verdicts which unduly favour an accused. However, the persons reviewing the case (including me) didn't see the evidence unfold. We didn't see the witnesses give evidence. We have no idea as to the feeling in the courtroom as the drama unfolded. The juries in both those cases did. The juries in both those cases no doubt took their roles very seriously and the juries in both those cases were left in a reasonable doubt concerning provocation.

On what is described in the [DJAG] Discussion Paper of cases MU87 and MU88 (*Sebo*) they are nothing more than evidence of an incredibly strong criminal justice system working.

20.36 A respondent academic argued that the partial defence did not reflect the community's expectations about criminal responsibility:¹³⁵²

When there is an intention to kill the public generally expect it to be labelled murder. Why should the loss of self-control be the basis of a defence? Society in general would seem to support the concept that a person should be allowed to be promiscuous, or of a different sexual orientation, and not be killed for it. This statement would be supported by the public response to recent cases.¹³⁵³ It could be argued that it is about power and one person should not have power over another to control what they do or who they sleep with. That message needs to be consistent and clear.

20.37 In the context of arguing that provocation should be a matter relevant to sentence (and implying that mandatory life for murder should be abolished) a respondent law student disputed the worth of juries in determining whether a killing was provoked (and generally):¹³⁵⁴

the worth of juries is disputed, and it is commonly accepted that jury involvement in the law should be limited, as evidenced by the move towards jury trials only being available for the more serious indictable offences ...

... juries have allowed their prejudices to show in cases such as *Green*,¹³⁵⁵ and there is no evidence to suggest that juries can better distance themselves from these prejudices than judges who do so on a daily basis.

1351 This respondent was a barrister and senior counsel with extensive experience as a prosecutor and defence counsel in criminal matters.

1352 DJAG Submission 14.

1353 The respondent was referring to *R v Sebo*, *R v Ramage* [2004] VSC 334 and *Green v The Queen* (1997) 191 CLR 334.

1354 DJAG Submission 7.

1355 (1997) 191 CLR 334.

20.38 This respondent suggested that the community is not more likely to accept the verdict of a jury than the verdict of a judge, and referred to the public reaction to *R v Ramage*¹³⁵⁶ and *R v Sebo*. The respondent continued:

Communities will be more likely to accept judicial decisions that weigh up provocation as one factor in sentencing, by judges who have more [experience] in balancing considerations and applying complex tests. Furthermore, judges are required to justify their decisions and juries are not, the public can be fully informed as to why provocation was a mitigating factor, which will inevitably lead to more acceptance of the judicial process.

General observations made in submissions to the Commission

20.39 The Commission has divided these submissions into those that support the retention of the partial defence and those that favour its abolition. Also presented are the broad observations and criticisms of the provision made by the Office of the Director of Public Prosecutions in its submission to the Commission.

Submissions in favour of retention

20.40 The Bar Association of Queensland made an assessment of the results of the Attorney-General's audit and submitted that there was no statistical justification for removing the partial defence of provocation:¹³⁵⁷

That audit demonstrated that of 25 trials in which provocation was raised as a defence to murder, only on 8 occasions was the partial defence of provocation arguably successful, and on only 3 occasions was there a complete acquittal, i.e., an acquittal also for manslaughter. Of those 3 cases, "self defence" and "accident" defences were thought to be the operative cause for those verdicts.

20.41 The Bar Association of Queensland considered that the two-step test articulated in *Stingel v The Queen*¹³⁵⁸ was a 'sensible, understandable and appropriate test':

the hypothetical ordinary person embodies 'contemporary conditions and attitudes', in so far as they are relevant to the question of self-control. The hypothetical ordinary person was said to be a construct intended to represent a minimum standard of conduct.

We think that this two-tiered test, as it is applied by juries to the partial defence of provocation, is a sensible, understandable and appropriate test.

20.42 The Bar Association of Queensland considered that the results of the audit demonstrated that the test had been conscientiously applied by Queensland juries and further demonstrated no reason to change the law:

1356 [2004] SCV 508.

1357 Provocation Discussion Paper Submission 11.

1358 (1990) 171 CLR 312.

Clearly, the Attorney General's audit demonstrates that over a 5 year period, Queensland juries have conscientiously applied that test in at least 25 trials, and a "manslaughter" result was reached (whether by verdict or plea of guilty) in only 5 of those cases. And in only 2 of those 25 cases could it be said clearly that provocation only was operative as the defence, because in those 2 cases it was the only defence raised.

To put it another way, the Attorney General's audit demonstrates that the partial defence of provocation on murder is only available in the narrow circumstances where the provocation is so extreme as to be likely to cause a reasonable person to kill. It is a narrow and stringent test, which has clearly been applied conscientiously by Queensland juries. There is simply no reason to amend a law which appears to have been applied to the benefit of the accused in a small number of cases which is statistically insignificant.

The Discussion Paper, at page 35, discusses only 3 cases which appear to have turned solely on the question of provocation — MU74, MU87 and MU88. On the assumption that the two-tiered test was properly put to those juries by their respective Trial Judges, those juries gave effect to a reasonable doubt that provocation had been negated. In all other cases, where other defences were open, no firm conclusion could be drawn by the Attorney General about the effect of the provocation defence upon the ultimate verdict. This is eloquent testimony to the conscientious approach taken by Queensland juries. The audit demonstrates the extremely narrow nature of the defence as it is applied in our Courts by juries properly instructed. There is absolutely no justification for a change in the law.

20.43 In response to observations and questions posed in the Provocation Discussion Paper about, for example, whether an intentional killing in response to taunts and insults warrants conviction of, and punishment for, anything less than murder or, for example, whether a compassionate killing was more culpable than a killing upon provocation, the Bar Association submitted:

The '*observations*' made and questions asked, by the Commission at page 67 of the [Provocation] Discussion Paper can be answered sufficiently by the results of the audit of relevant cases which has been referred to in this submission. The extremely low incidence of application of this defence by juries demonstrates that juries do conscientiously compare the gravity of particular kinds of conduct which result in the death of a person. They effectively compare the conduct complained of in each trial with the conduct of the hypothetical ordinary person, at the same time taking into account the gravity of the provocation allegedly suffered by the accused, in his/her specific circumstances. The Attorney General's audit has revealed that the accused has rarely received the benefit of the defence. It can be concluded that the concept of "reasonableness" is alive and well in criminal trials. It is therefore unhelpful to compare, in a vacuum, different types of conduct which results in the death of a person. Especially where a mandatory sentence applies on a charge of murder, criminal cases are best left to be decided by juries properly instructed, applying tests that are appropriately humane, but necessarily narrow in their application. (emphasis added)

20.44 Legal Aid Queensland supported retention of the defence. It considered the results of the Attorney-General's audit and the case of *R v Sebo* in particular. Of that case, Legal Aid Queensland said:¹³⁵⁹

Whilst it has been commented that, on the face of it, the case is difficult to morally justify, the jury were in the best position having seen and heard all of the relevant evidence in the case. Sebo did not escape unpunished. He has been punished for losing control after being provoked by the victim. We have already submitted in our response to your earlier discussion paper on the [excuse] of accident ... that a single, perhaps unique, case is not a proper basis on which to abolish important and long-held laws. From time to time, where a presumption of innocence underlies the operation of a criminal justice system, an accused person is acquitted of murder by a group of peers. The audit suggests this is not very often.

Submissions in favour of abolition

20.45 The Queensland Police Service indicated that the views it expressed in its submission to the Department (a copy of which the Commission has not seen) had changed upon its consideration of the Commission's Provocation Discussion Paper.

20.46 In its response to the Department, the Queensland Police Service submitted that there should be no change to the status quo: mandatory life for murder and the retention of provocation as a partial defence. Having read the Commission's Provocation Discussion Paper, the Service now supported the abolition of the partial defence together with the replacement of mandatory life imprisonment for murder with a sentencing discretion (with certain limits).¹³⁶⁰

20.47 The Service explained the view it took in its submission in response to the DJAG Discussion Paper:

The Service submission to the Attorney-General was to the effect that the defence of provocation was appropriate for a case where death results and that the status quo should continue. This view was premised on two principles. The first is that the Service considers the appropriate sentence for murder is life imprisonment. As we noted in our earlier submission to the Attorney-General, the Service holds the view that murder is 'a crime so repugnant that release other than on permanent parole should not be considered in the interests of the community'. The second principle accords with the development of the partial defence of provocation. The [Provocation] Discussion Paper notes that the partial defence developed as a 'concession to human frailty' which militated the harshness of a death sentence [3.17]. The Service views this concession [as] appropriate, notwithstanding the abolition of capital punishment.

20.48 The Service explained why it altered its position having read the Commission's Provocation Discussion Paper:

1359 Provocation Discussion Paper Submission 6.

1360 Provocation Discussion Paper Submission 10.

The Service adopted a position in its submission to the Attorney-General that gave effect to these two principles. However, the Service acknowledges that this position may not be the only approach that will give effect to these principles. Moreover, the Service recognises that there are a number of difficulties with the practical application of the partial defence of provocation to murder offences. These difficulties were described in the [Provocation] Discussion Paper. The Service notes that these concerns include, in no particular order, the manner in which the defence tends to operate differentially on the basis of gender, the incongruity of a specific defence of provocation when none exists for arguably less culpable circumstances and the difficulties which juries appear to have in applying the defence.

20.49 The Service explained that it kept those considerations in mind when responding to the questions posed in the Commission's Provocation Discussion Paper and, as noted above, submitted to the Commission that provocation should be abolished as a partial defence: it should become instead a matter which may operate in mitigation of penalty, which would require a sentencing discretion in the punishment of murder. The Service's submission is discussed in more detail under relevant headings below.

Observations and criticisms

20.50 The submission from the Office of the Director of Public Prosecutions ('ODPP') ultimately suggested limits or restrictions upon the availability of the partial defence. In support of its proposal, the ODPP began its submission with a discussion of 'problems of principle', which is set out in full below:¹³⁶¹

The difficult issue of "control"

1.1 The conceptual origin of the excuse of provocation is, as identified in the [Provocation] discussion paper, derived from the loss of self-control said to be involved. That loss of control might be conceived of as being kindred to that state which arises in the excuses of acts beyond the exercise of the will, insanity, and diminished responsibility.

1.2 It is this that purports to justify treating provocation differently from more worthy emotional responses such as compassion (in euthanasia cases) or the like. And it is also this central element of loss of self-control that purports to justify what is said to be a sexed distinction between men who kill in an uncontrolled rage and women who kill after waiting for their abusive husbands to fall asleep. A person who lacks psychological control is, in some existential sense, in a different category from a person who is wronged and trapped.

1.3 All the above propositions would be true if the loss of control in provocation was truly the moral equivalent of absence of will (in, for example, somnambulism cases, fugue states, etc) or of the absence of control in insanity cases. But there are good reasons for thinking that it is not. As observed in the [Provocation] discussion paper, people tend to lose self-control when they can afford to. This strongly suggests that self-control is not truly taken from a person in the sense that an external event beyond the control of the person serves to erase it. A significant component of choice remains.

1361

Provocation Discussion Paper Submission 12.

1.4 In insanity cases, deprivation of the ability to control one's actions means complete deprivation of the ability. The reasoning behind this is that if any residual ability to control behaviour remains, then the person is culpable for their behaviour to that extent that they retained control, and the issue goes to penalty. (That proposition is modified in the case of murder where incomplete deprivation ("substantial impairment") would not be capable of being reflected in a reduced sentence because of the mandatory life sentence involved in murder. Hence the excuse of diminished responsibility.)

1.5 It is noteworthy that no-one ever suggests that what is said to be the loss of control associated with provocation genuinely puts the suspect's actions beyond the exercise of will (so raising a s 23 excuse), nor that it amounts to a mental disease or natural mental infirmity, or an "abnormality of mind".

1.6 For these reasons, it is possible to doubt whether the loss of self-control said to arise in provocation is truly the moral equivalent of cognate situations. Once the central platform justifying the excuse is seen to be on shaky foundations, other issues weaken the structure further.

The consequences of provocation as a "concession to frailty"

2.1 The excuse of provocation is conceived of as a concession to human frailty. This is a central, but much overlooked, consideration. For that reason, it is not on the same footing as excuses which involve issues which might be thought of as derived from vindication of fundamental rights. Self-defence, for example, is derived from the right to autonomy, and in extreme cases the right to existence. By contrast, it is not possible to speak in terms of a "right" to be provoked.

2.2 That difference is substantial. There is justification for excuses based on rights to be treated differently by courts from excuses based merely on concessions to human frailty. The laudable liberal impulse favouring a generous reading of excuses based on vindication of rights is less compelling where the excuse at hand is a mere concession. Prima facie, one might think that excuses based on concessions to frailty might sensibly be read restrictively rather than liberally.

2.3 Yet historically this has not occurred. Courts seem to have treated all excuses found in the Code as though they were all underpinned by the same foundational considerations. This has led to some of the practical problems which appear further below.

Inelegance in expression

3.1 The Code's failure to deal consistently with provocation is a consequence of the fact that s 268, which purports to define provocation for assault offences, does not include all the elements of the excuse. One must also look to s 269 to see such important components as suddenness of response, actual deprivation and proportionality.

3.2 If provocation in s 304 was governed by the definition in s 268, the important component of proportionality would be missing. That would seem to be a substantial part of the reason for the law's conclusion that provocation in s 304 is not to be equated with s 268. That is said subject to the observation that there is modern authority for the proposition that proportionality is not a substantive element of the defence but a consideration going to the comparison with the conduct of the ordinary person.

3.3 The upshot of all of this is that there is a distinct clumsiness in the Code which might well benefit from some consistency of drafting.

Significance of non-mainstream cultural issues

3.4 *Stingel* deals at substantial length with an issue that arises only in a relative minority of cases. There is much to be said for the proposition that the rather academic analysis undertaken by the law since *Stingel* (resulting in confusing directions about what characteristics of the accused are and are not imputed to the ordinary person, and at what point in the process they are or are not relevant) needs reform to be comprehensible. *Stingel* makes heavy weather of an issue which can generally reliably be solved by common sense. It is obvious that calling an Aborigine a “boong” is insulting whereas calling a Swedish backpacker a “boong” is most likely simply bizarre. The Aborigine might be thought likely to react with indignation in a way the other might not (although whether the first is justified in reacting with homicidal indignation is another issue). Similarly, there are hand signals which have significance as insults in some minority subgroups in the community which would pass unnoticed by the majority. But the analysis in *Stingel* is far too elaborate, and prompts general directions which are far too elaborate, for the vast majority of cases, particularly of homicide. The great majority of cases involve provocative acts which can be understood as an affront of universal significance. There is no necessity in those cases for the abstract explanation from *Stingel* to be given at all.

3.5 Taking the point further, the suggestion that cultural considerations compel the availability of the excuse in cases which involve a radical departure from values central to Australian democracy (such as cases of “honour killings” where a young woman is asserted to have gravely stained patriarchal or familial honour by refusing to adhere to some obligation of obedience) is simply wrong.

3.6 These issues are very difficult to correct by enactment, however. The better course, respectfully, is to restore the gate-keeping role of courts, which would be achieved by a reversal of the onus of proof (discussed further below).

20.51 The submission from the ODPP then addressed what it considered to be the ‘practical problems’ with the current law, which included the need for a trial judge to leave the partial defence to the jury even in those cases where the evidence of it was slim and the complexities of the ‘ordinary person’ test:

Practical problems – overburdening juries with excuses

4.1 A series of principles have in recent decades combined to make jury direction a task where it is almost impossible for a trial judge to be confident he or she has got right. The rise of a plethora of mandatory directions of specific issues of fact has contributed to this, but it is also true that directions on excuses have become very difficult.

4.2 One principle is that reflected in cases such as *Stingel* (1990) 171 CLR 312 and *Stevens* (2005) 222 ALR 408. The thrust of these cases is effectively to deprive courts of much of what was once its gate-keeping role with respect to which excuses were left to juries. Where there is evidence on which a jury could find the Crown had not discharged its onus on a particular issue, the defence must be left. In practice, that is a very soft test.

4.3 That issue is amplified when the evidentiary bar required to raise an excuse is lowered further. Cases such as *Pangilinan* [2001] 1 Qd R 56 exemplify the proposition that the evidentiary onus to raise an excuse can be met without the accused having to give evidence of what might have been thought to be necessary states of mind. These, it is now clear, can be treated as potentially present by inference without the accused actually testifying to them.

4.4 Further, the duty on the court to leave all excuses if they are open, even if they are disavowed by the defence, is a particularly heavy one. This is an area where concessions by counsel generally do not bind the client on appeal. One might have thought that it would be legitimate for the law to take the view that the defence is bound by the ground on which it chose to fight, particularly where there are tactical advantages involved. For example, an accused might not want provocation left for fear of a manslaughter conviction where he thinks he has a good argument on self-defence. Nevertheless, he is forced to run the risk.

4.5 It is now clear since *Stingel* that a provocation excuse can be based on fear (as opposed to rage). That has its advantages in cases of battered spouses. But a consequence is that every case where self-defence is raised almost inevitably raises provocation.

4.6 A net consequence of the combination of these trends is the modern practice of summings-up directed to the Court of Appeal rather than the jury. In violence cases these incorporate, out of an abundance of caution, lengthy directions about almost all the excuses set out in the Code whether or not they are truly live issues. The sense one has in listening to modern directions in violence cases is one of exhaustion. Acquittals achieved through the intellectual attrition of the jury are not outcomes of which a system of justice can be proud. The reverse possibility is also true. In the same way as too many warnings in a product's instruction manual amount to no warnings at all, intellectual attrition can lead to a jury simply falling back on its native sense of justice, which may not reflect the law. This, too, is manifestly undesirable.

4.7 These observations lead to the conclusion that there is good reason for expanding the trial court's gate-keeping role in the leaving of excuses for the consideration of a jury, or for making the excuses more restrictive so that there is greater focus brought in those which are left and less scope for the leaving of excuses in "scatter-gun" fashion.

The actual directions in provocation cases

5.1 The problem is made worse by the confusing nature of the directions actually given on provocation. The *Stingel* analysis which divides consideration of the ordinary person test into two parts, in the first of which the subjective characteristics of the particular accused are relevant and in the second of which only some of them are relevant is not a model of clarity. Any non-lawyer subjected to an oral explanation of the distinction can only be expected to come away utterly puzzled. The distinctions drawn are so fine as to be clear only to lawyers, if then.

5.2 As observed above, worse still is the suggestion that ethnic cultural values should be available to the advantage of an accused on the grounds of 'equality before the law'. The practical consequence of this is that the law would excuse so-called honour killings based on cultural practices utterly at

odds with the foundational premises of Australian democracy of liberty and autonomy.

5.3 The process of conceiving of provocation as being on the same footing or in the same class as excuses such as self-defence has led to a development of principles which are excessively generous to those who have used violence. The language of equality before the law which appears in *Stingel* is, respectfully, misplaced once it is accepted that a distinction should be drawn between those excuses that are based on fundamental rights and those which are mere concessions.

5.4 In that context, setting the test at the level of how an ordinary person could behave sets the bar too low. There is no breach of equality involved if the law sets the standard of self-control at a level higher than the lowest common denominator once one accepts that the excuse is a concession, and the loss of self-control involved is not truly the equivalent of a loss of will. Even without that recognition, the law sets standards above the lowest common denominator in many areas — honesty, reasonableness of self-defence, dangerousness (in dangerous driving cases) and so on.

5.5 Generally, objective tests appear in offences and excuses to prevent people being able effectively to write the law for themselves by adopting subjective standards that are self-serving. Where, however, the law sets the supposedly objective standard as low as behaviour which an ordinary person could undertake, then the law comes close to abandoning the objective test altogether. Unless the accused is somehow not an ordinary person, the standard has effectively become a subjective one. Demonstrating that an accused is not “ordinary” has moral consequences of its own.

20.52 The balance of this submission from the ODPP addressed the questions posed in the Provocation Discussion Paper and is discussed under relevant headings below.

20.53 In his submission to the Commission, the Hon JB Thomas suggested that reform of the defence would involve accommodating competing claims that it should be tightened to prevent its abuse and at the same time relaxed to ensure its availability in meritorious circumstances.¹³⁶²

It is desirable that in homicide cases the law of provocation be tightly controlled so that it operates as a safety valve only in those few exceptional cases where human endurance is stretched beyond what anyone could be expected to bear. This has been mentioned as its justification in the first part of this paper. In such cases there also needs to be a spontaneous reaction to a very serious wrong.

This seems to suggest tightening rather than relaxing the definition. But the law of provocation should also be capable of acceptable cumulative response to a very seriously violent relationship, and to do this, the test might need to some extent to be relaxed. The production of a formula that meets both of these apparently conflicting aspirations is an extremely difficult task. Proper critical appraisal will only be possible when proposed solutions are drafted. Further consultation will be desirable when this is done.

MANDATORY LIFE IMPRISONMENT

20.54 As noted above, the DJAG Discussion Paper asked respondents to comment on whether the fact that murder was punishable by a mandatory sentence of imprisonment for life affected their views. However, the Commission's terms of reference state that the Queensland Government has no intention of changing this punishment for murder and the Commission was required to review the law of murder provocation and make recommendations about it within this constraint.

20.55 Although the Commission made it clear in its Provocation Discussion Paper that the Government had no intention of changing the penalty for conviction of murder, almost every respondent to the Provocation Discussion Paper made a comment about it.

20.56 This section canvasses the views of the respondents to the DJAG Discussion Paper and the Commission's Provocation Discussion Paper about mandatory life imprisonment for murder in the context of a review of the partial defence of provocation.

Submissions in response to the DJAG Discussion Paper

20.57 These submissions fell into three groups: those that supported the status quo (retention of mandatory life imprisonment and the retention of provocation); those that argued for the abolition of mandatory life imprisonment; and one that sought to retain mandatory life imprisonment and abolish provocation.

Submissions in favour of the status quo

20.58 A respondent barrister was in favour of retaining mandatory life for murder:¹³⁶³

It has been argued from time to time over the years, that there should not be mandatory life sentences for murder. But why? If there is an intentional killing and no defence, should it not be that such an offence carries the highest penalty? Is not mandatory life imprisonment an appropriate community response to the unlawful, intentional extinguishment of a human life? Difficulties arise if mandatory life for murder is removed. There must be a danger, for instance, in having judges determine that one intentional killing is less culpable than another. I am sure that victims' families will have a great deal of difficulty in accepting that the intentional killing of their relative is somehow or another less serious than the intentional killing of someone else's.

If provocation is not a defence to murder but it is an issue to be taken into account on sentence, then who decides whether there has been provocation? There are two alternatives. The first is to have the jury determine whether there has been provocation and have them return a special verdict.¹³⁶⁴ Therefore the

¹³⁶³ DJAG Submission 5.

¹³⁶⁴ Criminal Code (Qld) s 624.

jury would bring in a verdict of guilty to murder but then bring in a special verdict that there has been provocation. If that is to be the system then what is the point in changing the current position? ... Further, such a system would make things even more difficult for a jury. They would be asked to determine such issues as self-defence as part of their finding of guilt of the primary charge and they would then be asked to consider provocation as part of a special verdict.

Alternatively, the matter could be left to the judge. A judge, of course, makes findings of fact on sentence in the current system. However, one of the main reasons why the jury system works as well as it does is because the community generally accepts jury verdicts. Surely it would be better to have a jury determine whether there has been provocation. Surely it is better for the jury to consider provocation in the context of guilty of murder (if provocation is excluded) or manslaughter (if it isn't).

20.59 However, the respondent argued that, if provocation were removed as a defence, it would be necessary to remove mandatory life as the sentence for murder:

Otherwise, provocation, which clearly lowers the culpability of a person who kills, will not be reflected in the sentence.

20.60 Another respondent barrister considered that the penalty of mandatory life for murder ought to remain:¹³⁶⁵

If a person, with the intention to kill or to do grievous bodily harm, kills another person and does so without any legal excuse, defence or partial defence, then an argument exists for mandatory life imprisonment.

In such circumstances the need for a civilised society in the 21st century to ensure that such a penalty is reserved for the worst offenders is paramount.

Submissions arguing for the abolition of mandatory life imprisonment

20.61 Many respondents to the DJAG Discussion Paper were in favour of the abolition of mandatory life imprisonment upon conviction of murder.¹³⁶⁶ Those in favour of the abolition of the mandatory penalty observed that there would be thereafter no need to retain provocation as a partial defence to murder. As a factual matter, it could be taken into account on sentence. For example, the Women's Legal Service suggested that:¹³⁶⁷

By far the most elegant solution to the issues surrounding the partial defence of provocation is to remove the mandatory life sentence for murder.

1365 DJAG Submission 9.

1366 DJAG Submissions 1, 6, 7, 19, 20, 21, 22.

1367 DJAG Submission 21.

20.62 Those in favour of the abolition of mandatory life for murder considered that, if it were to remain, then so too must provocation.¹³⁶⁸ For example, it was submitted that:¹³⁶⁹

If provocation is removed without a corresponding abolition of mandatory life imprisonment [for murder] then serious injustices will be done in this state.

20.63 One respondent barrister observed that abolition of the mandatory penalty would encourage more pleas of guilty to murder.¹³⁷⁰

20.64 A respondent member of the public was against mandatory life for murder and would prefer a judge to determine the sentence taking into account individual circumstances:¹³⁷¹

A mandatory life sentence will predispose juries towards a not guilty verdict, and this can result in injustice.

20.65 Although not referring to the mandatory penalty, another respondent member of the public thought that provocation ought to be a matter of mitigation of sentence rather than a partial defence.¹³⁷² This respondent referred particularly to the 'battered wife' who killed and argued that the sentence imposed upon her ought to be attenuated by 'natural justice' in those circumstances.

20.66 A respondent law student argued for the abolition of mandatory life and the abolition of the partial defence:¹³⁷³

What started out as a concession for human frailty evolved into a general excuse for hot-blooded killing. As the defence has expanded over time, society's tolerance for violence has moved in an inverse manner. In today's society, killing in response to provocation such as sexual jealousy and non-violent homosexual advance is unacceptable. However, it must be conceded that there are circumstances when killing in response to provocation is justified, such as prolonged domestic violence. Removing the defence of provocation and implementing sentencing discretion will ensure that accused persons who react excessively will be held fully culpable, whilst those who act in a reasonable fashion will have their circumstances considered in sentencing.

1368 DJAG Submissions 10, 19 20, 21, 25.

1369 DJAG Submission 10.

1370 DJAG Submission 1.

1371 DJAG Submission 6.

1372 DJAG Submission 2.

1373 DJAG Submission 7.

Submission in favour of retaining mandatory life for murder and abolishing the partial defence of provocation

20.67 The Queensland Homicide Victims' Support Group supported the abolition of provocation and the retention of the punishment of mandatory life imprisonment for murder:¹³⁷⁴

Mandatory life imprisonment reflects community expectations that:

- Those responsible for the violent and deliberate death of another must be punished for their actions
- Victims deserve a sense of justice for their loss and suffering
- Sentencing must serve as a deterrence for others considering the same crime

Since questioning the legitimacy of the provocation defence, QHVSG has been asked repeatedly about mandatory life sentencing, and the risk of complete acquittals if jurors are presented only with the option of life imprisonment.

It is our view that this argument is a red herring to the provocation debate, and really bears no significant impact on the outcome of securing murder convictions.

The case of Damien Sebo found that the jurors agreed that this crime satisfied all elements of murder. Therefore, if the defence of provocation did not exist, it follows that a murder conviction would have occurred.

Submissions in response to the Provocation Discussion Paper

20.68 These submissions have been divided into those that sought to retain mandatory life for murder and those that sought to abolish it.

Submissions in support of mandatory life for murder

20.69 The Bar Association of Queensland opposed any change to mandatory life imprisonment for murder:¹³⁷⁵

In our submission, removal of the mandatory life sentence for murder would create more difficulties within the community, especially among victims' families. There will always be an attempt to assess a (non-mandatory) sentence imposed by a Trial Judge, such sentence having the implication that one intentional killing is regarded by the Judge as being less culpable than the intentional killing of another person in another case.

While mandatory sentences are generally undesirable in the criminal law, and tend to work injustices in individual cases, the Association considers that mandatory sentences upon conviction of murder, for intentional killing where

1374 DJAG Submission 15.

1375 Provocation Discussion Paper Submission 11.

there is no defence, is entirely appropriate. A conviction for murder is, after all, the most serious crimes in the calendar.

Submissions arguing for the abolition of mandatory life imprisonment

20.70 Legal Aid Queensland stated that, if provocation were removed altogether, the mandatory life penalty for murder had to be removed.¹³⁷⁶ Legal Aid Queensland suggested that the fact that there was a significantly higher percentage of pleas of guilty to manslaughter than to murder (72 per cent as to 23 percent, based on the Attorney-General's audit) was 'intimately related' to the mandatory life penalty for murder:

Our current system provides no incentive for accused persons to plead guilty to murder, and encourages them to roll the dice and take their chances at trial. Murder trials are rarely resolved quickly ... The process is ... expensive ...

...

Having no regard to circumstances of offending and varying degrees of culpability [is] grossly unfair and archaic ...

Our experience is that empathetic/compassionate verdicts happen from time to time with no legal basis but that 12 members of the community are of the belief that certain crimes do not deserve the punishment of mandatory life.

20.71 However, even with the abolition of mandatory life for murder, Legal Aid Queensland did not support the determination of the issue of provocation by a judge at sentence. It argued that such an issue was a matter for a jury, but added:

If however the law [were] amended to include such a process, section 132C of the *Evidence Act 1977*¹³⁷⁷ should be amended to make it plain that because [A finding that there has been] provocation [for a killing] has no adverse consequences ... — a low degree of satisfaction on the balance of probabilities is required before a sentencing judge can act upon it.

20.72 In response to the question whether the partial defence of provocation ought to be abolished, the Queensland Police Service said, essentially, that

1376 Provocation Discussion Paper Submission 6.

1377 *Evidence Act 1977* (Qld) s 132C provides, in part:

132C Fact finding on sentencing

- (1) This section applies to any sentencing procedure in a criminal proceeding.
- (2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.
- (3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.
- (4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.

removing mandatory life for murder and instead providing judges with a sentencing discretion was preferable:¹³⁷⁸

[It is] preferable to adapt the law to make allowance for the range of circumstances that the community would ordinarily consider as lessening the gravity of an intentional killing ... [by] ... transferring the responsibility from a jury to a judge by incorporating provocation and other circumstances rendering a person less culpable into the sentencing process ... Incorporating these circumstances into the sentencing process necessarily requires reforming the mandatory life imprisonment penalty for murder.

20.73 The Service explained that it did not resile from the position that life imprisonment is the only appropriate penalty for an intentional killing, but considered that:

concessions should be made in some circumstances to militate against the harshness of a murder sentence. The Service therefore supports a presumptive life sentence for the crime of murder. The Service would not support the abolition of the partial defence in the absence of a presumptive life sentence for murder.

20.74 The Commission understands 'presumptive' life imprisonment to mean that, upon conviction for murder, an offender will be sentenced to life imprisonment unless the sentencing judge determines, by reference to some criteria (such as, for example, 'the interests of justice' or 'exceptional circumstances') that a lesser penalty is warranted.

20.75 A respondent academic considered the Commission's terms of reference too limited in time and scope:¹³⁷⁹

The fact that the QLRC cannot look into the penalty for murder also severely limits reform in this area and is very disappointing. Coss and others make compelling arguments for the abolition of the defence of provocation in murder cases. There is clearly significant support for the abolition of the provocation defence — however abolition has ultimately only occurred where there is a maximum penalty of life for murder in place.

20.76 This respondent was in favour of a 'rebuttable presumption' of mandatory life imprisonment as the penalty for murder:

This may be more palatable for the community and the Government but would provide the possibility of a reduction in sentence if the presumption [were] rebutted; for example in situations where a battered woman shot her husband after years of abuse.

1378 Provocation Discussion Paper Submission 10.

1379 Provocation Discussion Paper Submission 4.

OPTION 1: ABOLITION OF THE PARTIAL DEFENCE OF PROVOCATION

20.77 The Commission will now discuss the submissions received in response to the questions posed for each option discussed in the Provocation Discussion Paper.

20.78 The primary question in any review of the law of murder provocation is whether the partial defence should be abolished. A similar question was raised in the DJAG Discussion Paper where respondents were asked whether the defence of provocation to murder was 'appropriate'.

Submissions in response to the DJAG Discussion Paper

20.79 These have been grouped into those that favour retention of the partial defence and those that favour its abolition.

Submissions in favour of retaining the partial defence

20.80 The Aboriginal and Torres Strait Islander Legal Service submitted that the partial defence should remain in its present form because it enabled juries to determine what was appropriate in the circumstances of individual cases.¹³⁸⁰

20.81 The Bar Association of Queensland, with which the Queensland Law Society agreed,¹³⁸¹ considered the partial defence necessary and appropriate for cases involving death where there is a mandatory life sentence for murder. It considered that the current formulation of the defence had worked well for many years and that the results of the Department's audit did not suggest otherwise.¹³⁸²

20.82 A respondent barrister submitted that the partial defence of provocation played an 'integral part in the rich fabric of the Criminal Code', which included a mandatory sentence of imprisonment for life for murder:¹³⁸³

One need not go past the fact of abusive domestic relationships to appreciate the need for the retention of provocation as a partial defence. It has been said in the High Court:

What is at stake in reflecting the reality which may accompany long-term abusive relationships of dependence is not 'gender loyalty or sympathy' but ethical and legal principle.¹³⁸⁴

1380 DJAG Submission 22.

1381 DJAG Submission 23.

1382 DJAG Submission 24.

1383 DJAG Submission 9.

1384 *Osland v The Queen* (1998) 197 CLR 316, 371 (Kirby J).

In a Queensland context, anyone who reads the judgment of the Court of Appeal in the Attorney-General's reference to that Court, five years after Robyn Bella Kina was convicted and sentenced to life imprisonment for murdering her partner, would be in no doubt as to the relevance and importance of provocation's place in our law.¹³⁸⁵

20.83 The respondent considered that the defence in its current form was 'just and fair to the stakeholders in the criminal justice system'.

20.84 A respondent law firm argued that provocation should be retained to differentiate between those who murder with intent and without provocation and those who kill in a less culpable state of mind because they have been provoked and have lost self-control. The respondent argued that, even if provocation could be taken into account upon sentence, it failed to recognise the 'social stigma' that attached to the label 'murderer'. The same respondent also referred to the serious injustice that removal of the defence might cause a chronically abused person.¹³⁸⁶

20.85 The Department of Child Safety and Office for Women suggested that the defence of provocation should continue to provide a partial excuse for murder in domestic violence homicides 'unless Queensland law recognise[d] continuing long-term abuse as a precipitating factor in homicide'.¹³⁸⁷ The Commission understands the last part of this suggestion as advocating for reform of self-defence laws for 'battered women'.

Submission arguing for abolition of the partial defence

20.86 Queensland Homicide Victims' Support Group sought the abolition of the partial defence:¹³⁸⁸

It is commonly accepted that all individuals must accept personal responsibility for our actions. We are taught from a young age to use words not our fists, and to deal with difficult situations in a non-violent manner.

It seems ludicrous that contemporary law should in fact reward people for losing their temper, as the provocation defence does. We fear that the Sebo case sets a frightening precedent to future jurors that the alleged infidelity of a partner is reason enough to take the life of another in a fit of rage.

From a victim's perspective, there is a significant difference between the charge of murder versus manslaughter. There is also a significant difference between life imprisonment and ten years. For victims' families, it often feels as if the victim is put on trial, and their behaviour questioned and shunned as a means of securing a defence for the accused.

1385 *R v Kina; ex parte Attorney-General* CA 221 of 1993; 29 November 1993.

1386 DJAG Submission 10.

1387 DJAG Submission 26.

1388 DJAG Submission 15.

If the law of provocation is not removed, this trend will continue. Leaving the community confused, bitter and sceptical regarding our judiciary; leaving perpetrators with the confidence of concocting stories after the event; and leaving victims' families with a lifetime sense of injustice.

20.87 A respondent law student argued that the partial defence of provocation should be abolished and that the law should not excuse a person's inability to control his or her emotions.¹³⁸⁹

Submissions in response to the Provocation Discussion Paper

20.88 This issue was raised in Chapter 12 of the Provocation Discussion Paper. Respondents were asked the following question:¹³⁹⁰

12-1 Should the Criminal Code (Qld):

- (a) be amended to remove the partial defence of provocation for murder; or
- (b) continue to include a partial defence of provocation to allow murder to be reduced to manslaughter in those cases in which provocation applies?

20.89 Again, submissions have been divided into those that are in favour of retaining the partial defence and those that argue for its abolition.

Submissions in favour of retaining the partial defence

20.90 Legal Aid Queensland did not support any change to the Criminal Code (Qld) that would remove the partial defence of provocation:¹³⁹¹

Provocation should be maintained as a means of distinguishing levels of criminal responsibility and culpability.

20.91 Legal Aid Queensland endorsed the views expressed by Windeyer J in *Parker v the Queen*:¹³⁹²

there are differing degrees of moral responsibility in homicide, that for what a man does on a sudden and serious provocation he is less to blame morally than for what he does deliberately and in cold blood.

Thus it was that Blackstone said that the difference between manslaughter and murder 'principally consists in this, that manslaughter arises from the sudden heat of the passions, murder from the wickedness of the heart'.¹³⁹³

1389 DJAG Submission 7.

1390 Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 216.

1391 Provocation Discussion Paper Submission 6.

1392 (1963) 111 CLR 610, 651.

20.92 Legal Aid Queensland argued that a 'fair system' recognised human frailty and different levels of culpability, even when someone had been killed:¹³⁹⁴

The current law recognises that circumstances arise in which even the prudent individual may be unable to control his or her behaviour. The effect of ignoring such factors would be to pitch legal standards beyond the reach of the ordinary individual.

20.93 Legal Aid Queensland supported the position as expressed by Allen J, with whom Gleeson CJ and Sperling J agreed, in *R v Khan*¹³⁹⁵ in which his Honour stated that the courts have 'over the decades gradually manifested a willingness to recognise factual contexts which provide some basis for understanding the human tragedies that can lead to the taking of a life'. Legal Aid Queensland supported a system that 'fairly and appropriately' punished people for their wrongdoing having regard to their degree of culpability.¹³⁹⁶

20.94 A respondent academic submitted that, while the mandatory life imprisonment penalty for murder remained, the partial defence of provocation had to remain.¹³⁹⁷

Submissions arguing for abolition of the partial defence

20.95 As explained above, the Queensland Police Service did not support the abolition of the partial defence of provocation unless mandatory life imprisonment for murder was replaced with presumptive life imprisonment. The Service's preference was for removal of the defence accompanied by a sentencing discretion for murder:¹³⁹⁸

The Service is of the view that the Criminal Code (Qld) should be amended to remove the partial defence of provocation for murder. The Service accepts that provocation should militate against the harshness of a sentence for murder. However, provocation is only one particular circumstance that should have this effect. For example, the Service accepts that an intentional killing on compassionate grounds or in the context of the so-called battered wife syndrome is arguably less culpable than where provocation is involved. Attempts to recast the provocation defence to accommodate some of these other circumstances are disingenuous. A preferable outcome is to adapt the law to make allowance for the range of circumstances that the community would ordinarily consider as lessening the gravity of an intentional killing.

1393 Blackstone, *Commentaries* IV 190.

1394 Provocation Discussion Paper Submission 6.

1395 (1996) 86 A Crim R 552, 556–7.

1396 Provocation Discussion Paper Submission 6.

1397 Provocation Discussion Paper Submission 4.

1398 Provocation Discussion Paper Submission 10.

20.96 The Service appreciated that this required transferring the responsibility for determining whether the killing was on provocation from a jury to a judge and considered this outcome preferable to the continuation of the partial defence. The Service favoured presumptive life imprisonment for murder.

20.97 The Service submitted that such a change would address concerns about a jury's difficulty with the partial defence, which carried with it a risk of compromise verdicts:

This transfer of responsibility from the jury to the judge also has the advantage of addressing some of the concerns relating to jury difficulties with the partial defence in its current form. The leading case in the common law development of the partial defence is *Stingel v The Queen* (1990) 171 CLR 312. The test espoused by the Court (at page 327) is objective:

Subject to a qualification in relation to age, the extent of the power of control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. It will, however, be affected by contemporary conditions and attitudes.

However confusion has followed in the subsequent cases which have sought to apply the test laid down in that decision. As McHugh J noted in dissent in *Masciantonio v The Queen* (1995) 183 CLR 58 at p 73,

... a curious dichotomy exists. The personal characteristics and attributes of the accused are relevant in determining the effect of the provocative conduct but they are not relevant in determining the issue of self-control ...

No doubt this dichotomy is difficult for jurors to conceptualise. Of concern, given these difficulties in applying the test is the possibility of compromise verdicts.

20.98 A respondent member of the public argued that provocation should be abolished as a partial defence to murder, and that the only killings that ought to be justified or excused were those in self-defence or those that occurred by accident.¹³⁹⁹

20.99 Another respondent member of the public considered provocation a 'loophole' that enabled killers to escape murder convictions. The respondent referred, with approval, to the opinion expressed by the Victorian Law Reform Commission:¹⁴⁰⁰

The Victorian Law Reform Commission's report (p 56) reads in part ' ... One of the recognised roles of the criminal law is to set appropriate standards of behaviour and to punish those who breach them. The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or to seriously injure a person. ... In our view, anger and loss of self-control,

¹³⁹⁹ Provocation Discussion Paper Submission 2.

¹⁴⁰⁰ Provocation Discussion Paper Submission 1.

regardless of whether such anger may be understandable, is no longer a legitimate excuse of the use of lethal violence. People should be expected to control their behaviour, even when provoked'.

...

The sections of the Criminal Code on sudden provocation should be abolished as they provide a loophole for the very worst kinds of people to try and get out of the murder convictions. The provocation law also promotes a culture of blaming the victim.

There can be no excuse for taking another person's life on sudden provocation and I believe the community as a whole believes this. People need to have sufficient self-discipline to control the way in which they behave.

20.100 Notwithstanding these views, this respondent suggested that there may need to be an exception in cases of domestic violence:

Perhaps there could be a loophole in cases of domestic violence which has continued over a long period and the defendant then kills the perpetrator but this should be taken on a case by case basis.

OPTION 2: RECASTING THE PARTIAL DEFENCE OF PROVOCATION

Introduction

20.101 If the partial defence of provocation is to be retained, the next question is whether it should remain in its present form or be recast.

20.102 In the Provocation Discussion Paper, the Commission asked:¹⁴⁰¹

- whether the conduct that may amount to provocation should be defined;
- whether the requirement of suddenness should be removed from section 304 of the Criminal Code (Qld); and
- whether the objective test should be changed.

Redefining the conduct that may amount to provocation

20.103 The conduct that may amount to provocation is not defined in the Code. In the absence of a statutory definition the courts have accepted that the reference to provocation in section 304 of the Code is a reference to the common law meaning of provocation as it is expounded from time to time.

20.104 The old categories of conduct identified in *R v Mawgridge*¹⁴⁰² have been superseded by the ordinary person test of provocation as the determinant

¹⁴⁰¹

Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 218, 219, 221.

of conduct that may amount to provocation. Under the ordinary person test a claim of provocation may be founded on any conduct that in fact provokes a deadly reaction in the defendant, and that also could have caused the hypothetical ordinary person to kill.

20.105 The ordinary person test is intended to establish an objective and uniform standard of self-control expected from all members of the community. However, because of the absence of any definition or overall concept of what conduct may amount to provocation, the ordinary person test also determines what conduct amounts to provocation and what conduct does not amount to provocation.

20.106 In functioning as a determining concept for provocation, the ordinary person test has had mixed success. From the review of the case law¹⁴⁰³ it is clear that defendants have been able to base claims of provocation on no greater wrong than the exercise of a choice by their partner to leave a relationship. If it is wrong in principle that a person's exercise of a lawful right of autonomy should give rise to a claim of provocation, is there a broader principle that lawful conduct should not be regarded as capable of supporting a claim of provocation?

20.107 The historical categories of provocation were all seen as examples of serious wrongs. And in *R v Mawgridge*¹⁴⁰⁴ the court said that the conduct of servants and children could not support a claim of provocation, nor, it was said, could offensive words, or the infidelity of a wife (unless caught in the act of adultery), providing limits to the concept. However all of this is conduct that in some circumstances could arguably amount to provocation today.

20.108 As the modern law of provocation has developed there is no separate legal requirement that the conduct must amount to a serious wrong before it may be regarded as provocation. But the idea is built into the concept of the ordinary person in the sense that it is not to be contemplated that the ordinary person could be provoked to kill another human being except in response to a very serious wrong.

20.109 Arguably, any perceived problems with the operation of the partial defence of provocation identified in the course of the Provocation Discussion Paper may have arisen partly because of the lack of definition about what conduct may constitute provocation.

1402 (1707) Kel 119; 84 ER 1107.

1403 See Chapter 13 of this Report.

1404 (1707) Kel 119; 84 ER 1107.

Submissions in response to the DJAG Discussion Paper

20.110 These issues were not raised, or not raised in these terms, in the DJAG Discussion Paper, although, as noted above, respondents to it were asked to nominate the circumstances in which provocation should provide a partial excuse for murder. The submissions to the Department that responded to that question have been divided into one that favours no change, two that suggest certain conduct should be excluded from the partial defence, and one that suggests reframing it.

Submission in favour of no change

20.111 A respondent law firm referred to the arguments for abolishing the partial excuse of provocation where the provocation alleged was based on:¹⁴⁰⁵

- the deceased's challenging the power and control of the offender;
- the deceased's leaving, attempting to leave or threatening to leave a relationship;
- infidelity; and
- a non-violent sexual advance.

20.112 The respondent did not favour this approach:

every case has its own individual facts and issues to be considered. Injustices may be done where otherwise deserving defendants are denied the right to argue provocation because it fits within one of those cases. For example, the non-violent sexual advance may occur in the context of domestic violence and long-term emotional abuse.

Specific exclusions like this will also lead to increased appeals as to whether a particular case falls within those categories or not.

It is better to leave determination as to what provocation would cause an ordinary person to lose control to juries. Their common sense and experience of community expectations at that time can be applied to individual facts of the case at hand. The law of provocation has been described as being 'articulated in an organic and evolutionary fashion as part of a dynamic social process'.¹⁴⁰⁶ Juries are much better suited to this organic process than legislatures. They are the representatives of the community and as community values shift and conduct that was formerly acceptable becomes unacceptable they will be able to deliver the appropriate verdicts.

1405 DJAG Submission 10.

1406 J Tolmie 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' (2005) *New Zealand Law Review* 25, 46.

Submissions suggesting excluding certain conduct from the defence

20.113 One respondent member of the public suggested that certain types of conduct were more readily acceptable as founding a provocation defence than others:¹⁴⁰⁷

The community differentiates to some extent depending on the nature and extent of the provocation. There is a perceived difference between a few insulting words, or some aggressive body language, and the long-term, on-going physical or verbal harassment associated with the so-called battered wife syndrome. In the case of the latter, there is some degree of community acceptance when provocation is used as a defence. However, in the former instance, provocation is seen as providing little, if any, justification for a violent response. After all, life today is complex, stressful, demanding and often distressing. A provocative comment, an insulting gesture, personal criticism — these are all part of life in these busy times. Most of us have had to learn to ignore, de-fuse or respond with dignity to these events. We expect others to also show restraint and self-control in these situations.

Accepting provocation as a defence implies that there was no other choice but to kill a fellow human being because he or she was annoying, hurtful, antagonistic or confrontational. There is, though, always a choice, always another way of dealing with a situation that is distressing. If the accused has exercised a choice that results in the death of another, particularly when the act of provocation has been momentary, then provocation is not an appropriate defence.

In a situation where the provocation has been sustained, and can be shown to have caused long-term psychological or physical suffering, it may provide a partial excuse for murder. I do believe, however, that all members of society need to exercise their choices for action with consideration for the sanctity of human life.

20.114 Another respondent member of the public argued that provocation should not include circumstances in which men were defending their 'honour':¹⁴⁰⁸

We should not tolerate defence of honour as a reasonable provocation ... Honour killings are allowed in other machismo cultures ... We should not encourage this machismo garbage, such as occurred in the Sebo case. That girl was barely out of her childhood and the age difference there provided fertile ground for an exploitative relationship. The message sent from this case is that women don't have the right to choose.

Submission suggesting reframing the partial defence

20.115 A respondent academic made the following suggestion about reframing the partial defence (although the respondent's primary position was that

1407 DJAG Submission 6.

1408 DJAG Submission 2.

the partial defence, and mandatory life imprisonment for murder, should be abolished):¹⁴⁰⁹

Rather than asking whether the accused lost self-control, ask, 'what were the features of the accused's rage, or fear, reaction that caused their judgment to be overwhelmed with such devastating consequences'.¹⁴¹⁰ Brookbanks argues, 'the defence should be recast, not as a concession to human frailty, but as a statutory recognition of the disabling effects of uncontrolled rage of a *particular individual*'.¹⁴¹¹ Without scientific evidence given by experts establishing a causal connection between the disorder and the behaviour, loss of self-control becomes no more than an abuse excuse.¹⁴¹²

Submissions in response to the Provocation Discussion Paper

20.116 More detailed questions about the issues referred to at [20.102] above were posed in Chapter 12 of the Provocation Discussion Paper.¹⁴¹³ They are set out below, followed by a summary of the responses to them.

- 12-2 Should the law be amended to provide that any of the following cannot amount to provocation:
- (a) any conduct which is not unlawful;
 - (b) words unless the words are an admission of, or a threat to commit, a serious criminal offence;
 - (c) a non-violent sexual advance.
- 12-3 Should any other conduct be excluded as capable of amounting to provocation?
- 12-4 Should the law be amended to widen the scope of provocation to facilitate claims by those in seriously abusive and violent relationships?
- 12-5 As an alternative to 12-4, should the law be amended to include a new form of provocation based on the existence of a seriously abusive and violent relationship?
- 12-6 Should what amounts to provocation be defined?

20.117 Because there are several questions under this heading and because of the complexities of the responses to these questions, rather than group the submissions together on the basis of their general approach, the Commission has presented extracts from the submissions of each of the respondents.

1409 DJAG Submission 14.

1410 W Brookbanks, 'I lost it — rage and other excuses' (2006) 31(4) *Alternative Law Journal* 186, 192.

1411 Ibid.

1412 Ibid 191.

1413 Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 217–18.

The Queensland Police Service

20.118 The Queensland Police Service did not support recasting the existing defence:¹⁴¹⁴

The Service does not believe that a recasting of the partial defence of provocation is an efficacious means of eliminating the concerns raised in the [Provocation] Discussion Paper.

20.119 Nevertheless, the Service responded to each of the options raised. In response to question 12-2, the Service supported removing apparently trivial conduct from the ambit of the partial defence:

While this should be accomplished by the 'ordinary person' test, it is apparent that the lack of definition has led to seemingly inconsistent outcomes.

20.120 However, the Service was concerned that excluding conduct that was 'not unlawful' might unduly limit the operation of the partial defence:

The Service prefers a more flexible approach. In some instances, lawful conduct may nevertheless be highly provocative and may be instigated expressly for the purposes of provoking a response.

20.121 A similar view about lawful conduct being, in some contexts, highly provocative was expressed by one of the Justices of the Supreme Court of Queensland at the consultation meeting.¹⁴¹⁵

20.122 The submission from the Queensland Police Service continued:¹⁴¹⁶

The nature of 'unlawful' conduct is also apt to cause confusion. It is not entirely clear what standard of 'unlawful' should apply, that is, whether unlawful would include an actionable wrong in tort as well as criminal conduct. Moreover, some difficulties may arise where a 'lawful' act is the final act in a series. A restriction to 'unlawful' conduct may have the effect of undermining the accepted concept of cumulative provocation (see *Stingel v The Queen* (1990) 171 CLR 312, 325–6).

20.123 The Queensland Police Service considered that, other than in exceptional cases, words should not constitute provocation, noting that that principle had already been established at common law and was accepted by the Queensland Court of Appeal in *Buttidgeig v R*:¹⁴¹⁷

The consideration of this issue in the [Provocation] Discussion Paper supports the suggestion that juries have had considerable difficulty in applying the defence where words are said to constitute the provocation. The Service questions whether a recasting of the defence to exclude from the definition of

1414 Provocation Discussion Paper Submission 10.

1415 Consultation meeting 4 September 2008.

1416 Provocation Discussion Paper Submission 10.

1417 (1993) 69 A Crim R 21, 37.

provocation ‘words unless the words are an admission of, or a threat to commit, a serious criminal offence’ would be effective in alleviating this concern.

20.124 The Service considered that non-violent sexual advances should not constitute provocation ‘subject to considerations of cumulative conduct’:

the ‘ordinary person’ test should be capable of excluding this type of conduct. The failure to do so reaffirms the Service view that juries have difficulty with the defence and supports abolition rather than recasting the defence.

20.125 In response to the questions at 12-4 and 12-5, the Service did not support recasting the partial defence to widen its scope to facilitate claims by those in seriously abusive and violent relationships:

The Service accepts that intentional killing by persons in seriously abusive and violent relationships should militate against the harshness of a murder conviction in appropriate cases. However amending the current provisions to accommodate these case changes the nature of the provocation defence. As the [Provocation] Discussion Paper notes, it is not clear whether this enlargement of the scope of the provision may bring less meritorious groups within the ambit of s 304. Consequently, whilst the Service maintains its view that the defence of provocation should be abolished,¹⁴¹⁸ the Service prefers the enactment of a separate defence designed to cater to the specific issues arising in seriously abusive and violent relationships to a reframing of s 304 to accommodate these issues.

20.126 The Queensland Police Service did not support any attempt to define provocation in a positive way. It preferred definition by exclusion:

A definition that seeks to define the limits of provocation is unlikely to be sufficiently flexible to address the variety of circumstances that might arise. Alternatively, a sufficiently flexible definition would necessarily be so wide that its efficacy is questionable.

Office of the Director of Public Prosecutions

20.127 The Office of the Director of Public Prosecutions did not favour a change that would limit provocative conduct to something unlawful:¹⁴¹⁹

Should the triggering event be “unlawful”?

7.3 Whether the triggering provocative act should be an unlawful one is presently problematic because of the problem of defining “unlawful” (ie, should it mean any act not expressly made unlawful by statute or only any act affirmatively made lawful by statute.) As a general observation, distinguishing between unlawful acts and lawful acts creates more problems than it solves. Suppose a man walks in on his wife unexpectedly having sex with another man, and then kills one or other (or both) of them. (Leave aside for the moment issues arising from the wife’s entitlement to sexual autonomy.) The availability of the husband’s defence could turn on the question of whether what was occurring was rape or not. Having a trial effectively about whether the wife was

¹⁴¹⁸ Accompanied with the abolition of the mandatory life sentence for murder.

¹⁴¹⁹ Provocation Discussion Paper Submission 12.

raped seems remote from the issues, particularly when only one or perhaps neither of the parties to the sexual intercourse may have survived.

7.4 The consequent s 24 issues which arise about whether the accused honestly and reasonably thought it was without consent complicates matters further. While a mistake of law is not generally an excuse, a mistake about whether what was occurring was consensual is a mistake of fact, which (if not demonstrated to be unreasonable) has the effective consequence of raising provocation when prima facie it would not be raised under the proposal to allow only unlawful acts to amount to provocation.

7.5 Similarly, on the issue of whether only threats to commit crimes are sufficient, suppose an accused says, in a suitably provocative and sneering tone, 'I'm going to rape your wife, and she's going to love it.' The insult technically offers with one breath an assertion of rape, and then (again speaking technically) appears to withdraw or modify the threat to one of consensual intercourse. Of course in reality, the threat of rape is made more provocative (not less) by the accompanying implied assertion that the wife's affections are so readily alienated from the husband. Compare that case with a different threat, "I'm going to fuck your wife and she's going to love it". The difference in provocative power of the two versions is negligible, yet technically the second version does not threaten rape, as opposed to seduction (which is not unlawful). It is easy to imagine any number of similar scenarios creating unsatisfactory arguments at the margin.

7.6 Shortly put, there is a wide array of threats and conduct which are technically lawful but which can have great provocative power. Making the lawfulness of the triggering event or threat the desideratum does not reflect reality. That position is not altered whether one construes "lawfulness" as anything not expressly unlawful or as anything expressly approved as lawful.

20.128 The submission from the ODPP offered some alternative suggestions for restricting the partial defence:

Removing the excuse of provocation altogether in murder cases

7.7 There are good arguments for removing the excuse of provocation altogether, and they are set out in the discussion paper without the need to repeat them. However, in the absence of any flexibility in sentencing, there will always be extreme situations where the victim's conduct was so provocative that most people would think it unjust to inflict a life sentence on a person who kills in that situation. For that reason, unless there is some alteration in the sentencing regime, provocation should remain. But there are good arguments for restricting its availability, and/or restricting the occasions when juries will be called upon to consider it.

Potential restrictions — definition of the nature of the triggering event

7.8 Assuming retention of the excuse in a general sense, modification of the excuse should include defining the triggering event with greater emphasis on the extreme nature of an event required to justify taking another life.

7.9 It is tempting to suggest adding to the definition to make clear that the mere case of the victim's seeking to leave an unsatisfactory relationship or to exercise sexual autonomy will not suffice, but that becomes problematic. There is a difference between a case where one partner to a relationship simply wishes to leave, does so, and moves on with their romantic life to the extreme

displeasure of the partner left behind on the one hand, and a case where an unfaithful spouse flaunts their infidelity deliberately to humiliate and mock the other party.

7.10 Similarly, adding some examples of what does not amount to provocation invites finding other examples as well, such as non-violent homosexual advances, “honour” killings, and the like. The creation of an ad hoc list of things which will not amount to provocation risks creating boundary issues of the sort mentioned in the paragraph immediately above, and will almost certainly be unwieldy.

7.11 For that reason, rather than define in advance cases that will not amount to provocation, it is respectfully suggested that the onus of proof should be reversed as suggested below.

20.129 The ODPP also suggested a modification of the objective test, which is discussed at [20.51] above. Its submission about reversing the onus of proof is discussed among other like submissions at [20.222] below.

Legal Aid Queensland

20.130 Legal Aid Queensland did not support amending the law to exclude specific circumstances from provocation.¹⁴²⁰

20.131 In its view, the test for a jury as it currently stands is reasonably complex. To include categories of behaviour for exclusion and require further definition of such categories will complicate things further.

20.132 Referring to question 12-2(b) above, Legal Aid Queensland said:

The limitation on words referred to ... is essentially aligning the partial defence more with self-defence. Whilst it is acknowledged [that] often the partial and complete defences can in certain factual circumstances appear intertwined, we are of the view that provocation should not be limited in this way.

20.133 In Legal Aid Queensland’s view, the limitation on words as provocation prescribed by *Buttigieg v The Queen*,¹⁴²¹ namely that words alone cannot amount to provocation ‘except perhaps in circumstances of a most extreme and exceptional character’, was appropriate.

20.134 In response to the questions in the Provocation Discussion Paper about widening the scope of provocation to facilitate claims by those in seriously abusive and violent relationships or to include a new form of provocation based on such a relationship (see questions 12-4 and 12-5 above), Legal Aid Queensland said that it did not:

advocate the extension of the defence or inclusion of another that would reduce the culpability of a premeditated cold blooded killer nor the introduction of specific defences to cater for specific genders, races or cultures.

1420 Provocation Discussion Paper Submission 6.

1421 (1993) A Crim R 31, 37.

20.135 However, Legal Aid Queensland appreciated that:

the current wording of section 304 and the self defence provisions often exclude individuals who may have lived for considerable periods of time in imminent threat of serious harm due to the abusive nature of the relationship, but at the time of the killing may react when looked at in isolation unreasonably and beyond the scope of the existing defences ...

20.136 Legal Aid Queensland's preference was for an extension of the defence of duress.¹⁴²²

Academics and lawyers

20.137 A respondent academic argued that rather than abolition, the defence should be recast to reflect normative standards:¹⁴²³

As stated in the Discussion Paper many of the arguments in favour of abolishing the partial excuse of provocation do not stand close scrutiny. For example, the argument that provocation favours the 'hot blooded' killer over the mercy killer or the battered person who kills is not reflected in the application of the law. With respect to the battered person syndrome the cases referred to in the Discussion Paper demonstrate that in most cases juries' decisions will require the stretching of the existing law if it is to apply to the decision or the verdict may correctly be described as perverse. The same applies to the mercy killer as it is unlikely that such a killer will face the full consequence of a murder conviction. Furthermore the fact that commentators and law reform bodies have consistently linked the abolition of the partial excuse with the abolition of mandatory life sentences for murder indicates an acceptance that in at least some instances of killing on provocation, the defendant should receive differential treatment. Intuitively it seems that any reform that limits the capacity to differentiate in terms of criminal responsibility is a retrograde move.

I support arguments made by Bernadette McSherry¹⁴²⁴ and the Law Reform Commission of England and Wales¹⁴²⁵ in its 2004 report that having judges consider evidence of provocation at the time of sentencing (an option that the Queensland Government will not accept) merely relocates the potential problems with the excuse and undermines the role of the jury in determining criminal responsibility. Most if not all of the substantive criticisms of the excuse can be addressed by reforming the law to reflect normative standards. (one note omitted)

20.138 Another respondent academic was in favour of amending the law to provide that certain categories of conduct could not amount to provocation:¹⁴²⁶

1422 See [20.178] below.

1423 Provocation Discussion Paper Submission 13.

1424 Referred to in the Commission's Provocation Discussion Paper: Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) [8.21]–[8.24]. See [16.21]–[16.24] above.

1425 Referred to in the Commission's Provocation Discussion Paper: *Ibid* [6.40]–[6.44]. See [14.39]–[14.43] above.

1426 Provocation Discussion Paper Submission 4.

Separation from a partner and sexual jealousy should not be understood as provocative acts. Similarly a non-violent sexual advance should not be sufficient for provocative conduct. However, it is possible to imagine that a non-violent sexual advance may be the last straw for a battered woman who knows what usually comes next. Similarly it is possible that something lawful, such as a battering husband returning home drunk, may be sufficient provocation in the particular context of a life of abuse. Words also in the context of a battered woman's experience may operate as the last straw and be highly provocative. If these matters were excluded from provocation there may be significant ramifications for those who claim provocation in the context of on-going abuse. Excluding specific conduct may be a risky approach without more.

Perhaps if the matters were to be excluded it may be worth considering the introduction of an alternative offence of defensive homicide, as has occurred in Victoria ... The only concern about taking this direction is that it will also widen the scope for men who kill in situations where previously no defence was available or the application of provocation/self-defence was uncertain. This seems to be what is happening in Victoria ... (notes omitted)

20.139 However, this respondent did not think it appropriate to define provocation:

Although it may be appropriate to limit the use of provocation, it would not be appropriate to define the conduct that is acceptable as provocation. The role of provocation is to recognise human frailty. Any definition may risk neglecting a potentially relevant form of provocation. The judge maintains a gatekeeper role in relation to this matter.

20.140 In response to the question whether the law ought to be amended to facilitate claims by those in a seriously abusive and violent relationship, the academic responded that such an amendment may not be necessary:

A better approach may be to improve evidence law so that important evidence can be given in trials of battered women. The existing [section] 132B(2) *Evidence Act* (Qld) is far too limited ... Domestic violence workers with significant experience should be able to give [social framework evidence] as they are familiar with abuse patterns and victims' responses.

20.141 The respondent academic supported an amendment to the law to provide for a new form of provocation based on a seriously violent and abusive relationship.

20.142 However, another respondent academic thought an amendment to include a new form of serious abuse or violent relationship provocation was 'undesirable':¹⁴²⁷

The risk in introducing such a targeted partial excuse is that juries would apply the excuse, as a compromise, in circumstances where a full excuse of self-defence would be open to the jury.

20.143 This respondent academic did not support an amendment that excluded certain conduct from provocation: its scope was not well defined:

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The problem with the type of exclusion suggested above is that the scope is not well defined. Is the exclusion a reference to the so called trigger or does the exclusion apply to the entire circumstances that give meaning to the trigger? Is it suggested, for example, that by defining provocation to exclude non-violent sexual advances the excuse will have no application whenever it is determined that the trigger was such an advance? Alternatively would the exclusion only apply where the only relevant conduct fell within the exclusion. To express it another way, would a jury be required to exclude consideration of the partial defence on facts similar to that in *R v Green*¹⁴²⁸ and in so doing ignore the significance of the abuse of authority and the accused's sensitivity to sexual advances that coloured the impact of the unwanted sexual advances? If so the proposal is consistent with the undesirable approach taken by the majority in the Canadian Supreme Court decision of *R v Thibert*.¹⁴²⁹ In that decision the majority of the Court ignored the context in which the alleged provocative behaviour occurred. As demonstrated by the minority judgment of Major J the alleged provocative behaviour can only be fully understood when placed in its broader context.

20.144 The same respondent suggested a different approach, which would involve instructing the jury that it was to consider community standards in determining whether conduct amounted to provocation.¹⁴³⁰

Perhaps a preferable approach to simply identifying certain conduct that cannot amount to provocation is to instruct the jury that its decision with respect to provocation is to reflect community standards and to provide the context in which provoked conduct could not generally be said to comply with those standards. This approach would be less proscriptive and would enable judges to tailor their instructions according to the facts before them. For example, in applying the categories set out at the beginning of Chapter [12] [of the Provocation Discussion Paper],¹⁴³¹ a jury could be instructed that a Group A defendant¹⁴³² should not readily be found to have been provoked. This is particularly the case where the accused has a history of domestic violence. In reference to a Group A defendant the jury should be informed that a finding that he was motivated by the desire to control is not consistent with the requirement of a loss of control.

Consideration should also be given to the situation where the accused is entirely or largely responsible for the circumstances that give rise to the alleged provocative behaviour. Accordingly a jury should be informed that community standards do not allow the excuse to be applied in circumstances where the provocation was self induced. Community standards would also generally not condone the application of the excuse of provocation in circumstances where the accused has deliberately placed him/herself in a situation where he/she knew or should have known that they would be subjected to behaviour that they found to be provocative.

1428 (1997) 191 CLR 334.

1429 [1996] 1 SCR 37. Discussed in the Commission's Provocation Discussion Paper: Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) [8.48]–[8.63]. See [16.48]–[16.63] above.

1430 Provocation Discussion Paper Submission 13.

1431 See Chapter 19 above.

1432 A defendant who kills a partner (or former partner) at or around separation.

Perhaps for the purpose of simplification an approach similar to that advocated by the Law Commission of England and Wales in its 2004 report should be adopted. Accordingly, the excuse should only apply where there is evidence of 'gross provocation'.¹⁴³³

20.145 A respondent lawyer suggested amendment of section 304 by adding a paragraph to define provocation:¹⁴³⁴

Words or conduct ... [should not be] sufficient to establish the defence of provocation if those words or that conduct is within the bounds of normal behaviour in the context of a modern, multi-cultural, plural, broad minded society, which values the right of freedom of expression and the right of the individual to personal autonomy.

20.146 This respondent suggested another amendment by adding a paragraph that elaborated upon how a jury might determine the meaning of acting 'in the heat of passion' and the other elements of the defence:

In determining whether an accused acted in the heat of passion, and before there was time for the passion to cool, or whether the accused acted out of a desire for vengeance, over which the accused retained control, and which the accused chose to act upon, regard must be had to all of the circumstances of the case including the relative positions of strength or disadvantage or vulnerability of the accused and the deceased and all parties involved in the setting of the unlawful killing.

20.147 The Hon JB Thomas made the following submissions, addressing each of the possibilities for amendment of the definition of provocation referred to in the Provocation Discussion Paper. Of the suggestion of excluding conduct that was 'not unlawful', he said:¹⁴³⁵

Unlawfulness of the provocation is not really a relevant factor. The primary criterion is its degree of offensiveness.

20.148 Of the suggestion of limiting words to those that amounted to certain admissions, he said:

This is concerned with defining the type of verbal expression that is to be capable of amounting to provocation. Some formula is possible, but the suggested one has problems. For example it is difficult to see why an 'admission of ... a serious criminal offence' should qualify. Perhaps a more general provision is necessary, along the lines 'words that are so offensive that no ordinary person could in such circumstances be expected to avoid responding with physical violence'.

20.149 He also supported the suggestion that a non-violent sexual advance not be available as provocative conduct. He said that, generally speaking:

¹⁴³³ Discussed in the Commission's Provocation Discussion Paper: Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) [6.42]. See [14.41] above.

¹⁴³⁴ Provocation Discussion Paper Submission 3.

¹⁴³⁵ Provocation Discussion Paper Submission 9.

There is potential merit in these proposed amendments that prescribe at least some instances or situations of conduct that cannot amount to provocation. This would make it a little easier for trial judges to rule (in an appropriate case) that the evidence is incapable of showing such a situation; and it would also give juries a test to apply in cases of the prescribed kinds.

20.150 In response to the question whether the law should be amended to facilitate claims by those in a seriously abusive and violent relationship, the Hon JB Thomas said 'possibly'. He continued:

If this suggestion were to be adopted it would be necessary to place the onus on the defendant. Where a victim has been eliminated, there would be at least some traces of exaggeration or lying that would be almost impossible for the prosecution to disprove beyond reasonable doubt. In effect the whole matrimonial (or other relationship) situation is put into issue in such cases. It is difficult enough for the prosecution to gather evidence of events immediately preceding a violent act, and it is virtually impossible to do so in relation to those of a whole relationship. It would be forensically dangerous to introduce into the criminal law issues of the kind that are litigated in the family courts.

I am therefore wary of supporting the invention of a new form of provocation of this kind, though I could support such a provision if it could be confined to obviously meritorious cases. Further comment is pointless unless a draft provision is put forward.

20.151 The Hon JB Thomas was not in favour of defining positively the meaning of provocation beyond the existing definition.

Submission from Commission for Children and Young People and Child Guardian

20.152 The Commission for Children and Young People and Child Guardian argued that the partial defence of provocation should not be available to offenders in cases where a homicide victim is under 18 years of age. Its argument is set out in full below:¹⁴³⁶

The Commission [for Children and Young People] has significant concerns that it is open to a jury to find that a child is capable of provoking a lethal reaction from an adult. *Sebo's* case has confirmed the continuing availability of the provocation defence in such circumstances. An adult should be subject to a higher duty to control his or her emotions in response to a child, irrespective of how provocative a child's conduct is said to be, on the basis that a child is neither morally culpable for, nor capable of fully understanding the significance or effect of their actions on themselves or others.

This approach is consistent with the preamble of the *United Nations Convention on the Rights of the Child*¹⁴³⁷ insofar as it provides that '*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*' and Article 3.1, which provides that '*In all actions concerning children, whether undertaken by ... courts of law or legislative bodies, the best interests of the child shall be a primary consideration*'. In the Commission's view, anger and a loss of self-

1436 DJAG Submission 13; Provocation Discussion Paper Submission 5.

1437 Australia ratified the Convention on 22 August 1999.

control in response to a child, regardless of whether they are arguably understandable, are not legitimate excuses for the use of lethal violence against a child. The availability of the provocation defence for homicides involving children amounts to a breach of the *United Nations Convention on the Rights of the Child*. (note as it appears in original; emphasis in original; one note omitted)

20.153 The Commission for Children and Young People and Child Guardian argued that, at the very least, the defence should be reformulated:

to legislatively mandate a consideration of proportionality and a victim's personal circumstances to determine whether the victim was actually capable of provoking a lethal response, including the victim's youth, immaturity and vulnerability.

20.154 Elaborating upon this argument, the Commission for Children and Young People and Child Guardian observed that prior to *R v Sebo* provocation had not been successfully relied upon to reduce a charge of murder to manslaughter where a child has been said to provoke a homicide (presumably in Queensland). However, the Commission for Children and Young People and Child Guardian noted that judges must leave provocation to the jury even if in the least doubt that the evidence is sufficient to raise the defence, which may include circumstances in which a child is said to have provoked an adult.

20.155 The Commission for Children and Young People and Child Guardian considered that Australian courts had provided limited guidance on the issue of a child's capacity to provoke murder, and was concerned that:

the lack of any mandatory consideration by a jury of proportionality or a victim's age or vulnerability means that a jury must arbitrarily decide whether such things are relevant in determining whether the defence of provocation will succeed. The Commission is extremely concerned that juries are not bound to consider these as factors relevant to the applicability of the defence and does not consider a mere assumption that '*the common sense of juries can be relied upon not to bring in perverse verdicts where the facts do not justify the conclusion*'¹⁴³⁸ is adequate protection for child victims. This assumption certainly cannot be true of adolescent provokers, the gravity of whose provocation is likely to be more difficult to assess without some specific guidance from a judicial officer, as has clearly been demonstrated in *Sebo*'s case. (emphasis in original)

20.156 The Commission for Children and Young People and Child Guardian also considered that recourse to the defence against child victims was inconsistent with the law's treatment of children in Queensland and elsewhere. One example given was the presumption of incapacity contained in section 29 of the Criminal Code (Qld).

20.157 The Commission for Children and Young People and Child Guardian also submitted that enabling offenders who killed children to rely upon the defence breached Australia's international obligations:

1438 *Stephen Clifford Doughty* (1986) 93 Cr App R 319, 326.

The ongoing availability of the provocation defence for homicides involving children contravenes the following parts of the *United Nations Convention on the Rights of the Child*, to which Australia is a signatory:

- The preamble which provides ‘as indicated in the Declaration of the Rights of the Child, “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,*”’
- Article 4 which provides that ‘*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*’;
- Article 19.1 which provides that ‘*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*’; and
- Article 36 which states that: ‘*States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare*’.

20.158 The Commission for Children and Young People and Child Guardian argued that the availability of the partial excuse to adults who had the child who allegedly provoked them in their care was contrary to the duty created by section 286 of the Criminal Code (Qld).¹⁴³⁹

20.159 Referring to *R v Sebo* the Commission for Children and Young People and Child Guardian expressed its concern that an offender could rely upon his emotional or sexual relationship with a child as a basis for provocation:

The Commission considers that the existence of a criminal and sexually exploitative relationship with a child should not be capable of forming the basis of a defence for an adult who kills a child and in fact, constitutes a violation of Article 19 of the *United Nations Convention on the Rights of the Child*. Article 19 of the Convention provides: ‘*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child*

1439

Criminal Code (Qld) s 286 provides:

286 Duty of person who has care of child

- (1) It is the duty of every person who has care of a child under 16 years to—
- (a) provide the necessities of life for the child; and
 - (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child’s life, health or safety; and
 - (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;

and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.

- (2) In this section—

person who has care of a child includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.

from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.

Consultation meeting with Justices of the Supreme Court of Queensland

20.160 Those Justices who attended were not in favour of any definition by exclusion of the behaviour that may amount to provocation. One Justice made the point that lawful behaviour might, in certain circumstances, be very offensive and that, without experiencing the atmosphere of a particular trial, it was impossible to judge the merits of a claim of provocation simply by categorising the behaviour alleged as 'mere words' or 'lawful conduct'. Another Justice suggested that the difficulty with creating defined exclusions was that one could always think of examples in which the defined conduct amounted to a serious wrong in response to which violent retaliation was justified. In those circumstances it would be unjust to deprive the defendant of the availability of the defence.

Seminar at Legal Aid Queensland

20.161 In response to the suggestion that mere words should not be capable of amounting to provocation, a barrister gave an example of racists taunts that in certain circumstances could be extremely offensive to make the point that it was unwise to be categorical about excluding words from the partial defence of provocation.

Removal of the requirements of 'suddenness' from section 304 of the Code

20.162 The Commission considered whether the requirements of 'suddenness' in section 304 of the Code ought to be removed. The DJAG Discussion Paper did not raise this issue.

20.163 Section 304 of the Code imposes two separate requirements of 'immediacy' or 'suddenness'. The section requires the act of killing be done in 'the heat of passion' and 'before there is time for the person's passion to cool'. These requirements reflect the strictures of the common law doctrine and together impose a requirement of immediacy between the provocation and the fatal act of retaliation. Additionally, the section requires the provocation be 'sudden'. This latter requirement is not reflected in the common law doctrine of provocation.

20.164 In Chapter 15 of this Report it is noted that the common law has developed to accommodate a delay between the provocation and the fatal act of the defendant.

20.165 The express requirements of immediacy in section 304 of the Code, if the words are to be given their natural meaning, inhibit a similar development in Queensland, and introduce an inconsistency between the limiting words in

section 304 Code and the developing interpretation of provocation at common law.

20.166 As explained earlier in this Report,¹⁴⁴⁰ section 23 of the *Crimes Act 1900* (NSW) was amended to remove the requirements that the killing occur suddenly (section 23(3)(b)) and immediately after the provocation (section 23(2)(b)). These changes were introduced to facilitate claims by battered persons, and they anticipated the development in the common law.

20.167 The changes have enabled some battered persons to successfully rely on the partial defence of provocation. In this review, they prompt questions: Should the limiting requirements of suddenness in section 304 of the Code be removed? If they are removed, it may assist those who have killed an abusive and violent partner. Or, should provocation be confined to sudden retaliation to a serious wrong, and the special claim of those in seriously abusive and violent relationships be accommodated under a paradigm of provocation appropriate for their circumstances?

20.168 The dilemma in widening the circumstances in which provocation may operate for the benefit of one group is that the defence is, as a result, widened for all the other groups. If the basic definitions are changed for all groups will the concept of provocation, as a sudden retaliation to a serious wrong, also be changed?

20.169 In the Provocation Discussion Paper, the Commission sought submissions on the following question:¹⁴⁴¹

12-7 Should section 304 be amended to remove the requirement of suddenness?

Submissions in response to the DJAG Discussion Paper

20.170 Although this issue was not raised in the DJAG Discussion Paper, a law student gave consideration to removing the requirements of suddenness but submitted, essentially, that it was an artificial response.¹⁴⁴²

20.171 The respondent law student favoured the abolition of provocation but acknowledged that its abolition may work to the detriment of the battered person who killed his or her abuser. The respondent considered the removal of the requirement of suddenness from the New South Wales legislation but referred, with implicit approval, to a statement by the Attorney-General of

¹⁴⁴⁰ See [15.99]–[15.103] above.

¹⁴⁴¹ Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 219.

¹⁴⁴² DJAG Submission 7.

Tasmania when introducing legislation to remove the partial defence in that State.¹⁴⁴³

It is better to abolish the defence than try to make a fictitious attempt to distort its operation to accommodate the gender behavioural differences.

20.172 The respondent continued:

It is far more appropriate to consider gender responses in their entirety in sentencing, rather than within the artificial constraints of a male-oriented defence such as provocation.

Submissions in response to the Provocation Discussion Paper

20.173 The Commission has grouped like submissions together: those that oppose the removal of the requirements of suddenness and those that are in favour of it.

Submissions opposing removal of the requirement of suddenness

20.174 The Queensland Police Service did not support removal of the requirement of ‘suddenness’, which it considered ‘integral’ to the defence. Removing it, the Service submitted:¹⁴⁴⁴

changes the essence of the defence to something very different.

20.175 The Office of the Director of Public Prosecutions considered such a change ‘unwise’:¹⁴⁴⁵

Modification of the law to remove the “suddenness” element in provocation is unwise. For the reasons set out in the [Provocation] discussion paper, this will serve as a charter for those who stalk their ex-wives. The conceptual origin of the excuse is dependent upon the concept of loss of control, which in turn is inextricably linked with the idea that such states are necessarily transitory.

20.176 The Hon JB Thomas was not in favour of removing the requirement of suddenness from the section:¹⁴⁴⁶

I am not sure what this would achieve. Its removal would leave behind words such as ‘provocation ... before there is time for the person’s passion to cool’ which would seem to leave in doubt the so-called ‘slow burn’ cases. The removal of ‘sudden’ would be likely to open the way for psychologists and other experts to confound the system with their opinions on the level of maintained heat, and other related issues. Changing the law in a way that permits the domination of issues by expert witnesses is not a desirable objective.

1443 Tasmania, *Parliamentary Debates* 20 March 2003, 59.

1444 Provocation Discussion Paper Submission 10.

1445 Provocation Discussion Paper Submission 12.

1446 Provocation Discussion Paper Submission 9.

I do not think that it would achieve very much by removing the word ‘sudden’. The issue of suddenness is one for juries, and they are capable of giving it an elastic application. I doubt that there is any substantial distinction between this and the slight accommodation adopted by the common law in this respect. The downside of removing ‘sudden’ is that it would unnecessarily widen the availability of the defence to, say, a violent male offender where the requirement of suddenness and immediacy ought obviously to be present.

On the whole I would prefer not to see the word ‘sudden’ removed.

Submissions supporting removal of the requirement of suddenness

20.177 Legal Aid Queensland said that it would not oppose broadening the scope of provocation in the same manner as has occurred in New South Wales:¹⁴⁴⁷

in particular the focus being on the loss of control and the removal of the need for the act to be done suddenly ...

20.178 Legal Aid Queensland felt that such a change may address the current gender bias in the operation of section 304. However, Legal Aid Queensland suggested that the ‘better course — less artificial and founded in principle — would be to amend section 31 [of the Criminal Code (Qld)] to provide for a verdict of manslaughter when an act done within the meaning of section 31(1)(d) would otherwise constitute murder’.

20.179 Section 31 of the Code provides for a defence known as ‘duress’ in certain circumstances:

31 Justification and excuse—compulsion

(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say—

...

(d) when—

- (i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and
- (ii) the person doing the act or making the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and
- (iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

¹⁴⁴⁷

Provocation Discussion Paper Submission 6.

- (2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or any of the crimes defined in sections 81(2)¹⁴⁴⁸ and 82,¹⁴⁴⁹ or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

...

20.180 A respondent academic suggested that the risk associated with removing the requirement of suddenness was that it would allow more provocation claims by men as well. However, the academic continued:¹⁴⁵⁰

if the requirement for suddenness is removed along with including limitations to what amounts to provocation this mischief of extending availability may be appropriately dealt with while still allowing greater access for battered women to the defence.

20.181 Another respondent academic supported removal of the requirements of 'sudden provocation' and a reaction 'before there was time for ... passion to cool'.¹⁴⁵¹

20.182 A respondent lawyer suggested that section 304 should not be restricted to 'sudden provocation' and should include a reference to provocation that had 'gradually accumulated over time'.¹⁴⁵²

Women in such a situation of oppression and despair must be given clear access to the provocation defence.

20.183 The Bar Association of Queensland did not respond to each of the questions posed formally in the Provocation Discussion Paper. Instead, it provided submissions on certain issues, one of which was the position of battered women who kill. The Bar Association of Queensland considered this issue in detail and was in favour of amending section 304 to read in terms of section 23 of the *Crimes Act 1900* (NSW). Its complete submission on this issue is reproduced below:¹⁴⁵³

The Association welcomes the detailed and thoughtful consideration of the case of Robyn Bella Kina.

1448 Piracy with circumstances of aggravation.

1449 Attempted piracy with personal violence.

1450 Provocation Discussion Paper Submission 4.

1451 Provocation Discussion Paper Submission 13.

1452 Provocation Discussion Paper Submission 3.

1453 Provocation Discussion Paper Submission 11.

Chapter 7 of the [Provocation Discussion Paper] considers the difficulties of applying the requirements of the defence to the circumstances of “the battered woman who kills her abuser”.

It makes two points:

- a) The language of s 304 with its requirement of immediacy of response to sudden provocation was drafted at a time when this terrible phenomenon was not within the experience and knowledge of anyone except the victim and those close to her. Thus it fails to recognise that a response to such long term conduct is not always immediate to any particular event.
- b) Its requirement for loss of self control can be a barrier to successfully raising the defence in such situations.

These points are well made and the Association agrees with them, particularly the first.

The issue of getting a defence of provocation to a jury in “battered women” cases has been a troubling one for many years. This is a rare opportunity to make the defence more readily available to those people (mainly women, occasionally with their children) who have been the victims of long term abuse from which they cannot, for whatever reason, escape. To broaden the “defence” of provocation, to give some protection to the victims of brutal abuse will not lead to the wholesale slaughter of men “unprotected by the law”.

The first of the two problems referred to above may properly be overcome either by amending the definition of “provocation” to bring it into line with the common law, or, more usefully and with greater certainty of outcome, by amending s 304 of the Criminal Code to read in terms of s 23 of the *Crimes Act 1900* (NSW). This provision is set out at page 122 of the Discussion Paper. Justification for a provision in such terms is found in the clearly expressed analysis of the law of provocation in relation to murder in the judgment of Gleeson CJ in *R v Chhay* (1994) 72 A Crim R 1 where he considered and explained the application of s 23 — salient passages from the judgment are set out in the Discussion Paper at paragraphs [7.105], [7.106] and [7.117]. The Association considers that what Gleeson CJ said provides a clear justification for amending the provision to the terms of s 23.

Insofar as there is a concern that loss of self control creates a problem for people who have been the subject of long term violence raising provocation — if this is a real concern, it seems that little can realistically be done about it. The central requirement of the concept of provocation as a defence must, of necessity, be based around a loss of control. Otherwise the defence would rapidly develop into one based around more pragmatic considerations ending up with the concept of “he got what he deserved”. This requirement is well summarised in a statement by Gleeson CJ at page 13 of the judgment in *Chhay* (supra) where His Honour said:

With all its theoretical imperfections, and practical roughness, the law of provocation is still only a limited concession to a certain type of human frailty, and is not intended to allow a jury to reduce what would otherwise be murder to manslaughter on a view that the deceased person received his or her just desserts. The law is not intended to encourage resort to self help through violence.

It will probably remain the case that, for many people, loss of self control is a concept that is most easily understood, and distinguished from, a deliberate act of vengeance in the factual context of a sudden eruption of violence.

The Association supports an extension of the concept of provocation so that it includes situations which so often prove a barrier to the raising of the defence on behalf of “battered women”.

A sensible way to do this is by adopting a new s 304 in terms of s 23 of the *Crimes Act 1900* (NSW).

Reform of the objective test

20.184 A review of the objective test involves both a technical and conceptual assessment of it.

20.185 The purpose of the hypothetical ordinary person test is to establish an objective and uniform standard of self-control to be expected from all members of the community.¹⁴⁵⁴ In theory, the ordinary person test allows relevant moral distinctions to be drawn. Without an objective standard, provocation would be available to reduce murder to manslaughter whenever an individual lost self-control and killed.

20.186 In order to satisfy the principle of equality before the law, the High Court in *Stingel* selected the lowest common level of self-control as the standard of self-control required for the ordinary person test. In selecting the lowest level of self-control as the standard, the test is one that inevitably reflects society’s minimum standard. The ordinary person test applies this standard by asking the jury to determine how the ‘ordinary’ person, the person with the lowest common level of self-control, could have behaved in the circumstances.

20.187 The test is sometimes criticised because it is thought to be difficult to understand and apply in practice.¹⁴⁵⁵ There are two parts to the test. In the first part of the test, which determines the gravity of the provocation to the defendant, the personal characteristics and history of the defendant are taken into account. In the second part of the test, which considers how the hypothetical ordinary person could have reacted when faced with provocation of that gravity, the personal characteristics (apart from age) and history of the defendant are not attributed to the hypothetical ordinary person. It has been argued that juries would find the dichotomy conceptually difficult to understand and apply.

1454 *Stingel v The Queen* (1990) 171 CLR 312, 329.

1455 See [11.46] above.

20.188 Another problem identified is that members of the jury may tend to regard themselves as the hypothetical ordinary person in the test and apply their own personal standards within the objective test.¹⁴⁵⁶

20.189 The Commission has noted that an even more subtle identification may occur in the application of the ordinary person test if the jury identifies the defendant as an ordinary person. The identification of the defendant as an ordinary person could lead the jury to suppose that, as the defendant lost self-control, an ordinary person in the same situation as the defendant could also lose self-control. This chain of reasoning would undercut the use of the hypothetical ordinary person test as an objective standard.

20.190 An alternative is a reasonable person test, which applies a standard by asking the jury to determine how a 'reasonable' person could have behaved in the circumstances, thereby making a normative judgment informed by its knowledge of society and human nature.¹⁴⁵⁷

20.191 In England, the reasonable person test emerged at common law as the successor to the categories of provocation earlier recognised by the law.¹⁴⁵⁸ In 1957 the 'reasonable person' was written into a statutory formulation of the test in England.¹⁴⁵⁹ The recent proposal for change to the law of provocation in the United Kingdom suggests, rather than an 'ordinary person', a person of the defendant's sex and age with a normal degree of tolerance and self-restraint.¹⁴⁶⁰

20.192 The High Court has preferred to formulate the test in terms of the 'ordinary person' rather than the 'reasonable person', regarding the ordinary person more reflective of actual standards of self-control in the community.

20.193 In Chapter 12 of the Provocation Discussion Paper, the Commission asked the following question:¹⁴⁶¹

12-8 If the partial defence of provocation is retained, should the ordinary person test be replaced by:

(a) a reasonable person test; or

¹⁴⁵⁶ However, the notes accompanying the model direction on provocation contained in the Supreme and District Court Benchbook suggest that the trial judge should avoid an instruction to the jury that the jury put themselves in the defendant's shoes.

¹⁴⁵⁷ The notes accompanying the model direction on provocation contained in the Supreme and District Court Benchbook suggest that the trial judge should not refer to the reasonable person as to do so is to suggest a requirement of a higher level of control.

¹⁴⁵⁸ AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292.

¹⁴⁵⁹ *Homicide Act 1957* (UK) s 3.

¹⁴⁶⁰ See [14.41] above.

¹⁴⁶¹ Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 221.

- (b) a 'person of ordinary tolerance and self-restraint' test?

20.194 This issue was not raised in the DJAG Discussion Paper. However, some respondents referred to it.

Submissions in response to the DJAG Discussion Paper

20.195 One submission supported no change. Others were critical of the ordinary person test.

Submission supporting no change to the 'ordinary person' test

20.196 A respondent barrister considered that the current formulation of the partial defence of provocation had worked well for many years, and that the Department's audit did not disclose any endemic problem with the use of the provision.¹⁴⁶²

Submissions critical of the 'ordinary person' test

20.197 A respondent academic submitted that there was a problem generally with the 'idea/concept' of an objective test:¹⁴⁶³

Such a test implies consistency in approach and application that is difficult in practice to achieve. (note omitted)

20.198 A respondent law student considered the ordinary person test too difficult for juries to comprehend.¹⁴⁶⁴ The respondent submitted that, in a multi-cultural society, there was no such thing as an ordinary Australian.

20.199 Another respondent academic considered in detail the ordinary person test of *Stingel* and McHugh J's position in *Masciantonio*.¹⁴⁶⁵ Of the *Stingel* test, the respondent said:¹⁴⁶⁶

The 'hypothetical ordinary person' referred to therein was intended to be the paradigm 'normal' person of the common law test, and the clear intention of the Court was to impose upon all Australian jurisdictions employing this test a 'one size fits all' approach, whereby 'personal characteristics or attributes of the particular accused' would not be added into the equation.

There are powerful reasons why such a rule should be adopted, not the least of which is that it prevents those with a 'short fuse' ... being afforded a privileged position in the law of homicide. It also preserves future juries from the unenviable — and arguably impossible — task of applying subjective factors to an objective test ...

1462 DJAG Submission 9.

1463 DJAG Submission 14.

1464 DJAG Submission 7.

1465 (1995) 183 CLR 58, 73.

1466 DJAG Submission 20.

20.200 The respondent discussed the disadvantage of such a standpoint, namely that unless one factored in additional characteristics such as race and culture, the law of provocation was ‘likely to result in discrimination and injustice’. The respondent continued:

This observation is to be found in the dissenting judgment of McHugh J in *Masciantonio* ... [at 73]. His Honour had been a member of the unanimous court in *Stingel* but seems to have begun a retreat from the strict objectivity (subject to age) of that ruling, principally, it seems, because (at 74):

I have concluded that, unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. 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.

20.201 The choice appeared to the respondent to be between (1) maintaining a system that smacks of injustice in failing to take into account gender, ethnicity, cultural imperatives and other ‘origin factors’ on the one hand and (2) allowing the previous history of the accused to be factored into the equation.

20.202 The respondent suggested that the second approach had been factored into recent case law and referred to *R v Chhay*,¹⁴⁶⁷ which is discussed in detail at [15.100]–[15.117] above.

20.203 The respondent academic noted that in *R v Chhay* Gleeson CJ ruled that the ‘ordinary person in question must be a person in the position of the appellant, in that case: a “battered wife”’. The respondent said that the same point had been made in *Barton*¹⁴⁶⁸ in respect of a man who eventually murdered the person who had been threatening and blackmailing him, and in *Green*,¹⁴⁶⁹ in which the jury were entitled to take into account the defendant’s history of sexual abuse of his sisters by his father (not the deceased) in considering his response to the homosexual advances made by the deceased upon him. The deceased was his mother’s partner, who had been something of a father figure to him.

20.204 The respondent suggested an amendment to section 304 that would allow a jury to ignore the personal characteristics or attributes of the accused but to take into account the external background factors leading up to the death:¹⁴⁷⁰

Such an approach will have the additional advantage of allowing juries to bring contemporary societal standards to bear on the facts of what, in many cases, is a tragic finale to an even more tragic history.

1467 (1994) 72 A Crim R 1.

1468 [2007] NSWSC 651.

1469 (1997) 191 CLR 334.

1470 DJAG Submission 20.

The test will thereby become one of whether or not 'a person who is in all respects normal for a person of the [defendant's] age, but who had experienced the prior events experienced by the [defendant], would be likely to have reacted in the way in which the [defendant] in this case reacted, to the events preceding the death of the deceased'.

Submissions in response to the Provocation Discussion Paper

20.205 One submission supported no change; others discussed the 'reasonable person' test; and the submission from the ODPP suggested a change to the ordinary person test that would limit the successful application of the partial defence.

Submission supporting no change to the 'ordinary person' test

20.206 Legal Aid Queensland supported the existing ordinary person test:¹⁴⁷¹

A person who kills wilfully while having lost self-control should not be compared with a 'reasonable person'.

The terms 'ordinary tolerance and self-restraint' may simply add further, unnecessary levels of complexity to an already difficult moral decision.

... the ... audit does not reveal an overuse, abuse nor a great deal of success in the application of the partial defence ...

Submissions discussing the 'reasonable person' tests

20.207 One respondent academic considered that the expression 'a person of ordinary tolerance and self-restraint' might be more appropriate terminology because it:¹⁴⁷²

probably was what the concept of 'ordinary' is attempting to encapsulate in the context of loss of control in response to provocation. The ordinary person test attempts to provide a 'uniform standard of the minimum powers of self-control', clarification of exactly what characteristics (ie self-restraint and tolerance) of the ordinary person test is focused on what may assist juries, however in most cases such a shift would probably not change results.

The current two-pronged test enunciated in *Stingel* is difficult to explain. However somehow the test needs to ensure that when juries consider the response of the ordinary person they are able to take into account the context of years of abuse and battering if it has occurred ... (notes omitted)

20.208 Another respondent academic considered that the adoption of a 'reasonable person' test would overly restrict the application of the excuse.¹⁴⁷³

1471 Provocation Discussion Paper Submission 6.

1472 Provocation Discussion Paper Submission 4.

1473 Provocation Discussion Paper Submission 13.

20.209 The Queensland Police Service thought that the replacement of the ordinary person test with a ‘reasonable person’ test or a ‘person of ordinary tolerance and self-restraint’ test was unlikely to bring about any meaningful change:¹⁴⁷⁴

Whilst the Service acknowledges that each of the proposed replacement tests creates a textually higher threshold for the operation of the partial defence, it is questionable whether either would have the desired effect in practice. Arguably a reasonable person would never intentionally kill another since the loss of self control sufficient to kill another is, by its nature, inherently unreasonable. A test that asks a jury to consider how a reasonable person *could* have responded requires the jury to apply a lesser standard. Such a test suffers from the same concerns raised in relation to the ordinary person test and addressed in the [Provocation] Discussion Paper at paragraphs [12.64]–[12.66].¹⁴⁷⁵ The same difficulties apply to a ‘person of ordinary tolerance and self-restraint’ test.

20.210 A respondent member of the public thought it inappropriate to compare the reaction of a person who had suffered years of abuse and killed his or her abuser against the standards expected of the ordinary person.¹⁴⁷⁶

20.211 The Hon JB Thomas considered the present test ‘extraordinarily complex’:¹⁴⁷⁷

Confusion engendered by it is the likely explanation of some of the inappropriate results which have excited community concern (eg *Sebo*). It is too esoteric a test for juries, and it requires them (if they understand it) to engage in considerable hypothetical musing and speculation. I would support the suggestion from the UK that [there] be a ‘reasonable person’ test, based on a person of the defendant’s sex and age with a normal degree of tolerance and self-restraint. This is far simpler than *Stingel* and is less likely to lead to miscarriages. It is true that it lacks the refined metaphysics of *Stingel*, but it would give juries a reasonable area in which to ensure fair play within the ambit of community standards.

Submission from the ODPP suggesting modification of the objective test

20.212 The submission from the Office of the Director of Public Prosecutions suggested a modification of the objective test that would operate to limit the circumstances in which provocation was available as a partial defence to those that were truly exceptional:¹⁴⁷⁸

Potential restrictions — modification of the objective test

1474 Provocation Discussion Paper Submission 10.

1475 These paragraphs discussed problems with the dichotomy in the ordinary person test; that jurors might regard themselves as ‘ordinary persons’ and apply their own standards; and that jurors might consider the defendant an ‘ordinary person’.

1476 Provocation Discussion Paper Submission 7.

1477 Provocation Discussion Paper Submission 9.

1478 Provocation Discussion Paper Submission 12.

7.12 The present objective test is, for the reasons outlined in paragraph 5.4,¹⁴⁷⁹ inapt to reflect the point made above about the excuse being a concession to frailty rather than a vindication of right. The test should be modified so as to reflect the proposition that behaviour is excused only to the extent that it reflects how an ordinary person would act rather than could act. Such a change reflects the extreme nature of the triggering event necessary to justify the taking of life, and more appropriately sets the bar at the standard of the ordinary person, not the least restrained, least tolerant person still capable of being described as 'ordinary'. For reasons expressed above, the latter test amounts to no objective test at all, and is born of a misplaced concept of 'equality before the law'. The word 'would' suitably marks the appropriate level without setting the bar too high — language suggesting that the ordinary person must respond in the same way as the accused or would inevitably respond in that way is unsatisfactorily restrictive.

7.13 It seems tautological to expressly provide that the ordinary person is a person of ordinary tolerance and self-restraint, but that is not an objection to so defining the ordinary person where, as here, historically there has been a reduction of emphasis on those issues.

OPTION 3: CHANGE TO THE ONUS OF PROOF

20.213 Whether section 304 of the Criminal Code (Qld) is retained in its present form or is reformulated, another issue that arises for consideration is whether the onus of proof of the partial defence should be changed. This was not an issue raised in the DJAG Discussion Paper, although some respondents commented upon it. The Provocation Discussion Paper asked the following question:¹⁴⁸⁰

12-9 Should the defendant carry the onus of establishing the partial defence of provocation on the balance of probabilities?

Submissions to the DJAG Discussion Paper

20.214 The two submissions to the Department that referred to this issue supported a change to the onus of proof.

20.215 The Queensland Homicide Victims' Support Group argued that the current onus was unsatisfactory:¹⁴⁸¹

As the onus is on the prosecution to *disprove* the offender was provoked, rather than on the defence to prove they were, it becomes difficult to prosecute in the absence of the victim's testimony. Essentially, the offender can claim their spouse was unfaithful, without being asked to bring forward any evidence.

As an advocate for victims of homicide, we fear this encourages and sets a precedent for violent offenders [who] kill their partners in any scenario, to later

¹⁴⁷⁹ Set out at [20.51] above.

¹⁴⁸⁰ Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 222.

¹⁴⁸¹ DJAG Submission 15.

secure partial defences to murder on the allegation that their partner was unfaithful. (emphasis in original)

20.216 The Commission for Children and Young People and Child Guardian argued that the present onus upon the prosecution to exclude provocation beyond a reasonable doubt breached the *United Nations Convention of the Rights of the Child*.¹⁴⁸²

Submissions to the Provocation Discussion Paper

20.217 Some submissions to the Commission opposed any change to the onus of proof; others supported such a change.

Submissions opposed to reversing the onus of proof

20.218 The Bar Association of Queensland did not support a change to the onus of proof:¹⁴⁸³

Given that the defence has been successful on so few occasions, a change to the onus of proof is not justified.

20.219 On this issue, Legal Aid Queensland took the view that it was unnecessary to impose upon either party the onus of proving or excluding provocation (if it were considered appropriate to relieve the prosecution of the onus):¹⁴⁸⁴

The current jury directions ... are complex but workable ... the onus being on the Crown is workable as well as supported by authority.

Should it be considered prudent to relieve the Crown of the onus of proving beyond reasonable doubt that a killing was not done under provocation, we submit a reasonable and simple mechanism would be as follows:

- (a) where there is some evidence which raises provocation as an issue, it is for the trial judge to decide whether, as a matter of law, there is sufficient evidence to leave the issue to the jury;
- (b) the judge then directs the jury that if it is satisfied the Crown has proved murder, it should consider whether it is satisfied the killing occurred as described in section 304;
- (c) if satisfied (on the balance of probabilities) the killing was done under provocation, it should convict the accused of manslaughter instead of murder.

1482 Entry into force 2 September 1990, in accordance with Article 49 <<http://www2.ohchr.org/english/law/crc.htm>>.

1483 Provocation Discussion Paper Submission 11.

1484 Provocation Discussion Paper Submission 6.

20.220 A respondent academic did not think that placing the burden upon the defendant to establish provocation would be an appropriate development:¹⁴⁸⁵

The pragmatic concern that provocation may be difficult for the prosecution to negative beyond a reasonable doubt should not trump the accused's rights to the presumption of innocence.¹⁴⁸⁶

20.221 Another respondent academic did not find the arguments in favour of reversing the onus compelling:¹⁴⁸⁷

Most matters that require proof are not readily available to the prosecution. Take for example the element of intent, the accused will deny that he/she intended to kill and the prosecution will be required to point to evidence that establishes beyond reasonable doubt that the accused did in fact intend to kill. There would seem to be little difference with respect to the assertions of provocation. The arguments that the reversal would result in greater clarity of any claim of provocation and ensure judges had an increased capacity to act as gatekeepers are not convincing. Although these arguments may have some credence with respect to the law as it currently stands, reform of the excuse would surely address the need for clarity and provide for judicial exclusion of the excuse where the defendant's argument lacked merit. The gate keeping function of a judge could be ensured by adopting the approach advanced by the Law Commission of England and Wales in its 2004 report that the legislation should state that provocation should not be left to a jury 'unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply'.

...

... the reversal of the onus could have the perverse effect that only those that commit the most horrific of killings could successfully rely on a defence of provocation. In most cases it would be difficult for the defence to prove all the elements of provocation on the balance of probabilities, in particular the requirement that the accused lost his/her self control may be difficult to prove. For example, evidence that the accused inflicted multiple stab wounds in a frenzied fashion may go a long way to prove a loss of control. On the other hand, one fatal blow may not support such a conclusion. The outcome therefore of reversing the onus of proof may well be to reinforce the existing gender bias application of provocation. The frenzied attack may be consistent with a male's response to provocation whilst a single decisive blow delivered with all the energy that the accused could muster may be more consistent with a female's response to provocation.

Submissions in favour of reversing the onus of proof

20.222 The Office of the Director of Public Prosecutions was in favour of reversing the onus of proof, which it considered would enable the partial defence to be appropriately restricted in its application:¹⁴⁸⁸

1485 Provocation Discussion Paper Submission 4.

1486 D Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *Cambridge Law Journal* 142, 149.

1487 Provocation Discussion Paper Submission 13.

Potential restrictions – reversal of onus of proof

7.14 The discussion paper expresses a series of good reasons why the onus of proof in provocation cases should be reversed. To those, I would add the point made above that the onus being on an accused is more consonant with an excuse which is conceived of as a concession to frailty. This is a justification at the level of principle for distinguishing provocation from other common excuses. I would also add the pragmatic point that the problem of defining negatively those matters that do not amount to provocation is reduced if the onus is reversed so that an accused must positively establish that a particular matter does amount to provocation. This point is advanced to underline the power of the court to act as gatekeeper when the onus is reversed.

20.223 A respondent lawyer was of the view that the defendant should bear the onus of proof of provocation and be required to give evidence of it and thereby expose himself or herself cross-examination by the prosecution ‘in the absence of exceptional reasons’.¹⁴⁸⁹

20.224 The Hon JB Thomas considered the case for reversing the onus was strong — but so too was the ‘attachment of criminal lawyers to retention of the *Woolmington* test’.¹⁴⁹⁰

20.225 The Queensland Police Service supported a change to the onus of proof, adopting the arguments in favour of that change contained in paragraph [12.71] of the Provocation Discussion Paper:¹⁴⁹¹

The Service accepts the proposition that ‘it would not be unjust or unfair to place upon the accused the satisfaction of the jury on a balance of probabilities’ of the partial defence since it is likely to be within the defendant’s capacity to prove the defence, but not within the prosecution’s category to disprove. Where the prosecution has the capacity to disprove the defence, it will often be the case that evidence of this matter will be circumstantial. This places the prosecution in a distinct disadvantage in the vast majority of cases since a jury is more likely to exhibit some preference for the direct evidence of the defendant. Moreover, increasingly sophisticated investigative techniques are likely to place more complex evidence before the jury in an effort to negate the direct evidence of accused persons relating to the provocation said to have

1488 Provocation Discussion Paper Submission 12.

1489 Provocation Discussion Paper Submission 3.

1490 Provocation Discussion Paper Submission 9.

1491 Those arguments were:

- (1) The prosecution will very often not be in a position to contest the factual detail of the claim, as the only other possible witness will have been killed by the defendant.
- (2) If the party who wishes to rely on provocation bears the onus of proof, the claim of provocation is likely to be articulated more clearly.
- (3) If the party who wishes to rely on provocation bears the onus of proof, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims of provocation being advanced before juries.
- (4) A reversal of the onus of proof for provocation would be consistent with the onus of proof for diminished responsibility.

been given by the victim. The difficult evidentiary issues coupled with the difficult legal test are likely to increase the advent of compromise verdicts.

THE BATTERED PERSON WHO KILLS HIS OR HER ABUSER

20.226 The Commission received many submissions that concentrated on the position of the battered person who killed his or her abuser. The Commission has discussed the position of such a person in Chapter 15 of this Report.

20.227 Several respondents sought the creation of a new defence, or partial defence, that would accommodate the exceptional circumstances of the battered person who killed his or her abuser.¹⁴⁹² Some of the discussion above refers to these submissions. In the following paragraphs, the Commission has reported the additional comments it received about this issue.

20.228 The submission from the Office of the Director of Public Prosecutions considered the issues raised in the context of the prosecution of the battered person who kills his or her abuser were issues separate from, and unable to be resolved within, consideration of the partial defence of provocation:¹⁴⁹³

6.1 The founding premise of the defence of provocation (flawed though that premise may be) is the concept of loss of control, with which necessarily comes such features as suddenness (on the basis that such an extreme state can only exist for a brief period).

6.2 Accepting for the moment that it is unjust to sentence to life imprisonment those who kill as the subservient partner in the classic battered spouse case, the question is how the law should best reflect this. For the reason mentioned immediately above, there is open a fundamental objection to trying to shoe-horn battered spouse cases into the provocation excuse. A further practical problem with this is that identified in the discussion paper at various points — any relaxation in such strictures in the defence as remain also work to favour batterers.

6.3 Respectfully, considerations raised by battered spouse cases are distinct from the prime problems with the excuse of provocation in its present form, and it is better to think of them as raising separate issues. If the issues affecting battered spouses are to be dealt with, they should be dealt with by creating a completely separate excuse which expressly reflects the specific scientific learning in the area, or by creating flexibility in sentencing. In this context, further attention should be paid to ss 93B and 132B of the *Evidence Act 1977*. The development of authority in the area is becoming increasingly restrictive of the use of s 93B, a consequence of which is a distortion of the jury's understanding of the relationship. The survivor gets to write its history.

20.229 Legal Aid Queensland observed that the Department's audit revealed that the partial defence was used more frequently by men than women and that

1492 DJAG Submissions 7, 21, 25.

1493 Provocation Discussion Paper Submission 12.

it was less likely to reflect the way in which women might respond violently to physical violence or personal threat.¹⁴⁹⁴

To the degree that it might be said that the defence of provocation is gender-biased in its operation Legal Aid Queensland would suggest that the Criminal Code needs to include a defence which adequately accommodates the experience of women who have been abused and who act to protect themselves. This has been achieved in various ways in other jurisdictions such as in Victoria with the introduction of the defence of excessive self-defence. We also note several submissions to the Taskforce on Women and the Criminal Code suggest expanding self-defence to deal with these circumstances.

Legal Aid Queensland would also suggest that a review of section 31 'Justification and Excuse — Compulsion' (duress) might also achieve this end. This defence could take into account the actions of a woman acting to protect herself or her children and does not require the element of immediacy or response that the defence of provocation requires.

20.230 In its submission to the Department, the Women's Legal Service observed that the issues about the gendered nature of the partial defence of provocation had been canvassed many times in the past 15 years. The Women's Legal Service argued that the fundamental problem with the provocation defence was that it failed to understand or reflect women's experiences:¹⁴⁹⁵

Requirements such as suddenness, objective reasonableness and couching the issue in terms of a loss of self-control, distort the circumstances of women who kill in response to domestic violence. Their circumstances may well be more accurately covered in a partial defence of excessive self-defence.

20.231 In its submissions to the Department and to the Commission, the Women's Legal Service urged consideration of a new defence in the context of a broader scheme that acknowledged the reality of the circumstances of the battered person:¹⁴⁹⁶

20.232 In its response to the Department, the Women's Legal Service complained that the audit commissioned by the Attorney-General was too limited:¹⁴⁹⁷

The feedback we have had from those who work with vulnerable people who often encounter the criminal justice system (such as the workers in women's refuges and domestic violence services) has been that there is too little information in the [DJAG] discussion paper, particularly about the broader issues at stake in matters like these. These workers report that they would like to have participated in this debate but needed different information and context to make that possible. This paper is inadequate and far too narrow in its scope.

1494 DJAG Submission 25.

1495 DJAG Submission 21.

1496 Ibid; Provocation Discussion Paper Submission 8.

1497 DJAG Submission 21.

For example, these defences are sometimes used in cases involving domestic violence yet there is no discussion about it in the [DJAG Discussion Paper].

20.233 The Women's Legal Service recommended the referral of the entire issue of defences to homicide to the Commission and pointed to the recent reviews in Victoria and Western Australia. The submission to the Department continued:

We are not sure why the [DJAG Discussion Paper] was confined to accident and provocation. We do not believe that they can be considered in isolation. We would welcome the inclusion of all defences to homicide, especially self-defence — particularly as the trend in other States seems to be to enact a partial defence of excessive self-defence. Similarly, we would welcome discussion of the use of expert evidence, and what, if any, changes should be made to the *Evidence Act*.

The 1999 Report of the Taskforce on Women and the Criminal Code ... recommended that this defence of excessive self-defence be investigated further but [that recommendation] was never implemented.

...

We do not believe it is possible to review either provocation alone or the criminal law generally without reference to domestic violence. Violence impacts on every aspect of some women's lives and, although here we are specifically looking at provocation and accident, domestic violence can also be relevant to other criminal offences. As far as we are aware, no relevant statistics are kept in this area ...

... The [Law Reform Commission of Western Australia] devotes a whole chapter to domestic violence and homicide ... We commend that approach to you ...

20.234 In its submission to the Department, the Women's Legal Service made its arguments in favour of allowing domestic violence workers to give expert evidence about the experience of women in violent and abusive relationships. It also outlined its hopes for the criminal justice system's future treatment of women who have suffered domestic violence. The submission concluded:

We would appreciate your Department taking this matter seriously and undertaking a proper assessment of the issues with the clear purpose of reforming this area of the law as nearly every other jurisdiction in the country has done, together with New Zealand, the United Kingdom, Ireland and Canada. The community clearly expects legislative reform. All the issues have been canvassed many times since the Criminal Law Review Committee was first given the task in April 1990 with precious little improvement by 2007 for women who are killed by a violent partner or who kill their violent partners and have to face our Supreme Court.

20.235 The Women's Legal Service made similar points in its submission to the Commission.¹⁴⁹⁸ In the context of considering the prosecution of 'battered women' it said:

The basic need is for a fair process that enables the full social context of the killing to be admitted and placed before the jury.

...

better statistics need to be kept by the Departments of Justice and Attorney-General and Corrective Services to enable accurate assessment and monitoring [of women who kill, or are killed by, a violently abusive partner];

changes need to be made to the *Evidence Act* ... to enable and ensure that evidence of the social context is put before the jury;

... it would be preferable to have a clearer and simpler definition of provocation based on the reasonableness of the actions and conduct in all the circumstances;

20.236 In its joint submission to the Department of Justice and Attorney-General, the Department of Child Safety and the Office for Women said:¹⁴⁹⁹

Given the relationship that exists between the defence of murder provocation and self-defence in domestic violence situations, and given that self defence is not discussed in the discussion paper, the Office of Women suggests that before any substantial changes to the law in regards to the defence of provocation, a similar review be considered of self-defence law in Queensland. This should aim to ensure that the current law does not require a threat be 'immediate' in self-defence cases, and that a jury is permitted to hear evidence of prolonged and cumulative abuse.

1498 Provocation Discussion Paper Submission 8.

1499 DJAG Submission 26.

Chapter 21

The partial defence of provocation: conclusions

INTRODUCTION	465
TERMS OF REFERENCE.....	468
THE PARTIAL DEFENCE OF PROVOCATION	468
ABOLITION OF PROVOCATION?.....	469
Philosophical arguments for abolishing provocation.....	469
Arguments for abolition because of flaws and bias.....	471
RECASTING THE DEFENCE	474
Limiting provocation to serious wrongs.....	474
Words.....	476
The deceased who asserts a right to personal or sexual autonomy.....	479
The non-violent sexual advance	481
Removing the requirements of suddenness from section 304.....	483
Defining 'provocation'	485
The ordinary person test	485
The position of the battered person	489
The onus of proof.....	491
MANDATORY LIFE IMPRISONMENT FOR MURDER	497
RECOMMENDATIONS.....	500

INTRODUCTION

21.1 The previous chapters of this Report reveal inconsistency and inequality in the operation of the partial defence of provocation. To adapt the words of Coleridge J,¹⁵⁰⁰ on occasions the defence appears to indulge human ferocity.

21.2 The defence operates in favour of those in positions of strength at the expense of the weaker. The application of the defence has produced different outcomes in cases that involve comparable circumstances. In accordance with authority, trial judges play their role as 'gate-keeper' with caution. And it is at least arguable that the defence has been left to the jury, contrary to authority, in those cases in which the provocative conduct consisted only of words.

21.3 Generally, those who respond to provocation with sudden and violent rage are those who can, namely, those with the capacity to overpower the deceased because of their size or strength.

1500

Regina v Kirkham (1837) 8 C & P 115, 119; 173 ER 422, 424.

21.4 In favour of the powerful, the defence has been allowed where the provocative conduct alleged is not wrong in any sense — for example, where the deceased has chosen to end a relationship with the defendant. But the defence is unavailable in Queensland if there has been some delay before retaliation in response to unbearable wrongs — for example, in the case of the battered person who kills their abuser as they sleep.

21.5 As the Commission pointed out in the Discussion Paper,¹⁵⁰¹ it is difficult to reconcile outcomes in cases in which the defence has been relied upon by a defendant.

21.6 One of the starkest examples of inconsistent outcomes is provided by a comparison of *R v Pookamelya*¹⁵⁰² and *R v Auberson*.¹⁵⁰³

21.7 Pookamelya was convicted of murder. He unexpectedly came home to find his wife having sexual intercourse with a friend in the lounge room of his home. In retaliation he beat his wife, dragged her through the house and cut her throat with a Stanley knife.

21.8 Auberson was convicted of manslaughter. His wife had left him two weeks before he killed her. At a meeting he arranged, and responding to his questions, she confirmed that their relationship was over and that she had a boyfriend. According to Auberson, she threatened to ‘go for’ his superannuation. In retaliation, he strangled her, beat her and cut her throat with a Stanley knife.

21.9 Pookamelya was sentenced to life imprisonment for murder; Auberson was sentenced to nine years’ imprisonment for manslaughter.

21.10 Pookamelya’s murder conviction is also difficult to reconcile with convictions for manslaughter where the provocation alleged was words or taunts, such as in *R v Auberson*,¹⁵⁰⁴ *R v Smith*,¹⁵⁰⁵ *R v Perry*,¹⁵⁰⁶ *R v Schubring*,¹⁵⁰⁷ *R v Sebo*,¹⁵⁰⁸ and *R v Mills*.¹⁵⁰⁹ Those cases are also difficult to

1501 Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) [5.172].

1502 Indictment No 112 of 2003.

1503 [1996] QCA 321.

1504 [1996] QCA 321.

1505 [2000] QCA 169.

1506 Indictment No 312 of 2003.

1507 Indictment No 381 of 2002; *R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515.

1508 Indictment No 977 of 2006; [2007] QCA 426.

1509 [2008] QCA 146.

reconcile with the decision of the High Court in *Stingel v The Queen*¹⁵¹⁰ and the decision of the Queensland Court of Appeal in *Buttigieg v The Queen*.¹⁵¹¹

21.11 In Queensland, the partial defence has been left to the jury in a case in which the trial judge described it as 'minimal'¹⁵¹² and in another where it was 'barely arguable'.¹⁵¹³ In accordance with authority, if raised on the evidence, the defence is left to the jury, even if the defendant does not wish to rely upon it.¹⁵¹⁴

21.12 A claim of provocation has been successful in a case in which the nature of the provocation was not articulated, the reaction to it was not particularly immediate and the killing was attended by deliberation.¹⁵¹⁵

21.13 Those cases in which the provocation consisted of words (including admissions of infidelity or a new relationship), taunts, insults and silence¹⁵¹⁶ (for example, *R v Auberson*,¹⁵¹⁷ *R v Smith*,¹⁵¹⁸ *R v Perry*,¹⁵¹⁹ *R v Schubring*,¹⁵²⁰ *R v Sebo*¹⁵²¹ and *R v Mills*¹⁵²²) and was successful in reducing murder to manslaughter are, arguably, irreconcilable with the authoritative statement of the Queensland Court of Appeal in *R v Buttigieg*¹⁵²³ that:¹⁵²⁴

the use of words alone, no matter insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character' ... A confession of adultery, even a sudden confession to a person unprepared for it, is never sufficient without more to sustain this defence ... It is however the combination of circumstances that needs to be evaluated.

1510 (1990) 171 CLR 312.

1511 (1993) 69 A Crim R 21.

1512 *R v Perry*, Indictment No 312 of 2003.

1513 *R v Exposito*, Indictment No 340 of 2005.

1514 *Van Den Hoek v The Queen* (1986) 161 CLR 158.

1515 *R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515.

1516 *R v Perry*, Indictment No 312 of 2003.

1517 [1996] QCA 321.

1518 [2000] QCA 169.

1519 Indictment No 312 of 2003.

1520 Indictment No 381 of 2002; *R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515.

1521 Indictment No 977 of 2006; [2007] QCA 426.

1522 [2008] QCA 146.

1523 (1993) 69 A Crim R 21.

1524 *Ibid* 37.

21.14 In addition, the ordinary person test has been regularly criticised, in academic writings and in judgments, because of its complexity¹⁵²⁵ and because it sets the bar too low.

21.15 In the context of intimate partner killings, it has been argued that, contrary to reality, juries accept that lethal rage is the response of an 'ordinary person' to the end of a relationship. It has also been argued that the concept of loss of self-control is artificial.

TERMS OF REFERENCE

21.16 The Commission was asked to review the partial defence of provocation contained in section 304 of the Criminal Code (Qld) and to have particular regard to whether it should be abolished or recast to 'reflect community expectations'.¹⁵²⁶

21.17 Other law reform commissions have reviewed the partial defence of provocation as part of a complete review of the law of homicide and all defences to it. The Commission was required to review accident and provocation only and to make its recommendations within the constraint of the Government's stated intention to make no change to the existing penalty of mandatory life imprisonment for murder.

THE PARTIAL DEFENCE OF PROVOCATION

21.18 The partial defence of provocation evolved as a concession to human frailty, which originally served to enable someone who killed another, without premeditation, to escape the death penalty.

21.19 In theory, the defence recognises that there are situations in which the words or behaviour of another could cause any one of us to kill intentionally in a state of extreme emotion. It anticipates an unpremeditated, spontaneous act of retaliation to provocation by the deceased, which, when judged objectively, is how an ordinary person in the same circumstances could have reacted.

21.20 Just as, historically, provocation enabled a defendant to escape the death penalty for an intentional killing, in Queensland, provocation functions essentially in mitigation of sentence. By the device of reducing murder to manslaughter, it enables a defendant, against whom a charge of murder has been proved, to escape the mandatory sentence of life imprisonment and allows discretion in sentencing.

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See, for example, *R v Yasso* (2004) 148 A Crim R 369, 374, where Charles JA noted that 'the application of this test cannot be easy for a jury to understand, let alone apply'. For an academic criticism see B McSherry, 'It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides' (2005) 29(3) *Melbourne University Law Review* 905, 919.

¹⁵²⁶

The terms of reference are set out in Appendix 1 to this Report.

21.21 The reduction to manslaughter is artificial because it masks the fact that the killing under provocation was an intentional one.

21.22 In Western Australia, Tasmania and Victoria, where provocation has been abolished and where there is no mandatory life sentence for murder, the circumstances that would otherwise be the foundation of a plea of provocation are considered in mitigation of the sentence for murder.¹⁵²⁷ Of course, in those States, any circumstance that reduces the culpability of a defendant for an intentional killing may be taken into account at sentence. It does not depend on the circumstances satisfying the description of a killing upon sudden provocation. So the battered person who kills his or her sleeping abuser or the loving spouse who gives in to the pleas of his or her terminally ill partner may receive the benefit of a merciful sentence that properly reflects the circumstances in which he or she acted.

ABOLITION OF PROVOCATION?

21.23 The first question for the Commission was whether the partial defence of provocation should be abolished, bearing in mind that the mandatory life sentence for murder would be retained.

21.24 That constraint made the consideration of this issue very difficult. The Commission is aware that the abolition of provocation could mean that those who truly deserved compassion in sentencing for an intentional killing would instead be punished by the heaviest penalty known to the law in Queensland.

21.25 The main arguments for the abolition of provocation fell into two categories: first, philosophical or ethical arguments that such a defence was unacceptable in modern society; and, secondly, arguments that its operation was so biased and flawed that it should cease to exist.

Philosophical arguments for abolishing provocation

21.26 The philosophical argument emphasises that a killing in provocation was intentional and committed in circumstances of unrestrained violence. The argument is that such a killing should not be 'rewarded' by conviction of a lesser crime and punishment by a lesser sentence. It has been suggested that the partial defence of provocation is 'ethically untenable'.¹⁵²⁸

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In New South Wales, which has a discretionary sentence of life imprisonment for murder, the New South Wales Law Reform Commission recommended that the partial defence of provocation be retained because it considered that the label of manslaughter was more appropriate for a person who killed during a period of loss of self-control and because it believed the community's involvement, through the jury, ultimately enhanced the community acceptance of sentences that reflected the mitigating effect of provocation.

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MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *The Journal of Criminal Law* 216.

21.27 This argument appealed to the Tasmanian Government, which abolished provocation in 2003. Similarly, the Victorian Government and the Government of Western Australia adopted the views of their law reform commissions that the only lawful justification for an intentional killing was protection of oneself or others. Both States abolished provocation: Victoria in 2005, Western Australia in 2008.

21.28 Importantly, at the time of the abolition of provocation neither Tasmania nor Victoria punished murder by mandatory life imprisonment. And at the same time as provocation was abolished in Western Australia, the sentence of mandatory life imprisonment for murder was replaced by a 'presumptive' life sentence — murder is punishable by life imprisonment, unless such a sentence would be clearly unjust and the offender unlikely to be a threat to the safety of others upon his or her release from imprisonment.¹⁵²⁹

21.29 The Queensland Homicide Victims' Support Group suggested that the present law of provocation is 'ludicrous':¹⁵³⁰

It seems ludicrous that contemporary law would in fact reward people for losing their temper, as the provocation defence does.

21.30 Other respondents submitted that the loss of self-control should not be the basis for a defence¹⁵³¹ and that the law should not excuse a person's inability to control his or her emotions.¹⁵³²

21.31 According to these arguments all intentional killings should be treated and punished alike.

21.32 However, the majority of respondents recognised that there were some intentional killings that were less culpable than others. For example, it was said:¹⁵³³

In dealings between human beings, it occasionally happens that a person is so grossly affected by the conduct of another that he or she is pushed beyond ordinary human endurance and over-reacts to a stressful situation. The law recognises that when this results in human death, juries should have the power, not to forgive, but to recognise that the offender may be less culpable on that account ... The law is not blind to human frailty.

21.33 And:¹⁵³⁴

1529 Criminal Code (WA) s 279.

1530 DJAG Submission 15.

1531 DJAG Submission 14.

1532 DJAG Submission 7.

1533 DJAG Submission 17.

1534 DJAG Submission 18.

The notion that provocation has no place in the criminal law on the basis that persons should always, whatever the consequences, exercise and act with self-control is unrealistic and reflects a poor understanding of the inherent weaknesses in human nature.

21.34 And:¹⁵³⁵

The current law recognises that circumstances arise in which even the prudent individual may be unable to control his or her behaviour. The effect of ignoring such factors would be to pitch legal standards beyond the reach of the ordinary individual.

21.35 Consideration of this argument for abolition is complicated by the retention of the sentence of mandatory life for murder. Almost all of the respondents to both the DJAG Discussion Paper and the Provocation Discussion Paper linked their arguments in favour of retention of the partial defence to the mandatory sentence of life imprisonment for murder. The retention of the plea of provocation was considered necessary if the mandatory sentence of life imprisonment was retained, but unnecessary if it was replaced by a discretionary sentence of life imprisonment. Arguments to that effect recognise that some intentional killings are less culpable than others and should be punished accordingly — whether that was achieved via provocation or by discretion in sentencing.

The Commission's view

21.36 In the Commission's view, the weight of the philosophical arguments for abolition of the partial defence is exceeded by the need to preserve the defence for those who genuinely deserve relief from mandatory life imprisonment, for example, the battered woman who loses control after discovering that her abuser has been raping their infant child.

Arguments for abolition because of flaws and bias

21.37 Arguments have been made that the defence should be abolished because it operates with gender bias and fails to achieve substantive gender equality or because, without justification, it privileges an out-of-control intentional killing over an intentional killing committed for a less blameworthy reason, such as a mercy killing.

21.38 The Commission has extensively canvassed the arguments about gender bias and lack of substantial gender equality in Chapter 16 of this Report and will not repeat them here.

21.39 Provocation's gender bias was one of the matters that persuaded the Governments of Tasmania and Victoria to abolish it.

1535

Provocation Discussion Paper Submission 6.

21.40 During the second reading speech of the Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003 (Tas), the Minister for Justice of Tasmania described the defence as ‘gender biased and unjust’. The Minister said:¹⁵³⁶

The third reason supporting abolition is that the defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the ‘battered women syndrome’. While Australian courts and laws have not been insensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences.

21.41 Launching the Crimes (Homicide) Bill 2005 (Vic), the Attorney-General of Victoria said:¹⁵³⁷

[T]he two most significant areas of our reform are the defences of provocation and self-defence. Both these defences evolved in very specific contexts, steeped in misogynist assumptions about what response was acceptable when confronted with an assault on one’s honour, on the one hand, and one’s personal safety on the other. ...

[P]rovocation will no longer be a partial defence to murder in Victoria. This Government will not support a mechanism that, implicitly, blames the victim for a crime—one that has been relied upon by men who kill partners or ex-partners out of jealousy or anger; by men who kill other men who they believed were making sexual advances towards them; and even by men who kill their own daughters because they believe they have dishonoured them. We cannot retain a defence that condones and perpetuates male aggression. People who kill having lost self-control in this manner will now, if found guilty, be convicted of murder rather than manslaughter, the question of provocation simply taken into account, if relevant, alongside a range of other factors in the sentencing process.

21.42 During the second reading speech of this Bill, the Attorney-General referred to the Homicide Report of the Victorian Law Reform Commission and said:¹⁵³⁸

The Commission found that the law of provocation has failed to evolve sufficiently to keep pace with a changing society. By reducing murder to manslaughter, the partial defence condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.

21.43 There is little doubt that the law of provocation, as it presently works in Queensland, does not achieve substantial gender equality. However, rather

¹⁵³⁶ Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judith Jackson, Minister for Justice and Industrial Relations).

¹⁵³⁷ The Attorney-General, the Honourable Rob Hulls, Speech at the Crimes (Homicide) Bill launch, Melbourne, 4 October 2005.

¹⁵³⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).

than focusing on gender, the Commission considers it more accurate to say that the current law of provocation does not achieve substantial equality as between those who explode with rage and intentionally kill (more often men) and those who intentionally kill out of desperation (more often women).

21.44 The Commission acknowledges the high proportion of intimate partner homicides in which there was a previous history of domestic violence¹⁵³⁹ and the unacceptability of a defence that operates in favour of the stronger party in a relationship at the expense of the weaker. The cases, particularly those from interstate, illustrate that the strong, violent and possessive man can rely on the defence of provocation if he kills his partner because she has left him. But, knowing that he will kill her if she attempts to leave and unable to bear the abuse any more, the woman who kills her abuser while he sleeps cannot rely upon the defence because there has been no 'sudden' provocation.

21.45 There is some force in the argument that the bias of the provocation defence is enough to warrant its abolition. However, constrained by the retention of mandatory life imprisonment for murder, the Commission fears that abolition of the defence may deprive those who deserve it of leniency in punishment for a killing. Therefore the Commission considers that the better response to this argument is a recasting of the defence to remove bias, if that is possible,¹⁵⁴⁰ or a tightening of its operation.

21.46 The Commission also considers that there may be force in the argument that it is incongruous to privilege an intentional killing committed in a state of intense rage over other intentional killings, particularly those motivated by compassion or desperation.

21.47 In a comparison of individual cases, such as a killing with gratuitous violence in a prolonged fit of jealous rage and a killing out of compassion at the request of the terminally ill deceased and by painless means, the privileged position of the first murder is unpalatable. But not every provoked killing is one committed out of jealous rage. Some of the groups that may raise the claim are discussed in Chapter 19 of this Report. Fear may contribute to the loss of self-control that causes the defendant to kill¹⁵⁴¹ (as in Group B). The battered person who has endured a seriously violent relationship may finally lose control upon hearing their abuser admit to raping their children¹⁵⁴² (as in Group F).

1539 In 2005–06, there was a history of domestic violence in 53 per cent of the 74 intimate partner killings. This was an increase from 39 per cent in 1989–2002: see [12.11]–[12.12] above.

1540 And consideration of a new defence to accommodate the circumstances of the battered person who kills out of fear and desperation which is discussed further below.

1541 *Van Den Hoek v The Queen* (1986) 161 CLR 158.

1542 See *R v R* (1981) 28 SASR 321.

The Commission's view

21.48 Constrained by the retention of mandatory life imprisonment for murder, and acknowledging that presently the privilege of a provoked killing is difficult to understand in some cases, the Commission considers that preservation of the defence provides at least some avenue for compassionate treatment in deserving cases. Abolishing the partial defence will not improve the position of those who intentionally kill with lesser culpability and who are currently denied access to the partial defence of provocation, or any other basis of mitigation.

21.49 Accordingly, the Commission does not recommend abolition of the defence of provocation on the grounds that it operates with bias and unequally. Because of the retention of mandatory life imprisonment, it must be preserved for deserving cases.

RECASTING THE DEFENCE

21.50 Having determined that provocation should not be abolished because of the retention of the punishment of murder by mandatory life imprisonment, but acknowledging bias and flaws in the application and operation of the partial defence, the Commission considered ways in which it could be recast.

21.51 The Commission's goal was a partial defence that:

- recognised that, in certain extreme situations, common human frailty could cause any person to react with lethal violence and that such a person should be treated with some compassion at sentencing;
- was limited in its availability to retaliations to serious wrongs;
- operated without gender or other bias;
- required a jury to recognise the sanctity of human life; and
- required a jury to assess the circumstances in which the killing was committed by reference to principles of equality and individual responsibility, with a view to setting standards of self-control for the community.

Limiting provocation to serious wrongs

21.52 The Commission began by attempting to address particular flaws in the operation of the partial defence that it identified in the course of its review.

Conduct that is 'not unlawful'

21.53 As illustrated in many cases, the partial defence has been successfully relied upon in circumstances in which the only provocation by the deceased consisted of the choice to end his or her relationship with the defendant or to form a relationship with another person.¹⁵⁴³ The Commission considered this wrong in principle.

21.54 The Commission reflected on an article by Nourse, an American academic, discussed in Chapter 16 of this Report. Nourse asked why we distinguish intuitively the rapist killer from the departing wife killer, and offered this explanation:¹⁵⁴⁴

In the first case, we feel 'with' the killer because she is expressing outrage in ways that communicate an emotional judgment (about the wrongfulness of rape) that is uncontroversially shared, indeed, that the law itself recognizes. Such claims resonate because we cannot distinguish the defendant's sense of emotional wrongfulness from the law's own sense of appropriate retribution. The defendant's emotional judgments are the law's own. In this sense, the defendant is us. By contrast, the departing wife killer cannot make such a claim. He asks us to share in an idea that leaving merits outrage, a claim that finds no reflection in the law's mirror. In fact, the law tells us quite the opposite: that departure, unlike rape and battery and robbery, merits protection rather than punishment.

21.55 The Commission considered whether, in principle, basing provocation on a victim's exercise of a lawful right of autonomy to leave a relationship or to form a new relationship was inconsistent with society's recognition and protection of individual freedoms.

21.56 In dealing with that question, the Commission struggled with the fact that juries frequently treated a victim's lawful choice about a relationship as affording provocation to reduce murder to manslaughter. It is impossible to know whether this was because the ordinary person test sets the bar too low, or because jealousy-inspired violence was tolerated.¹⁵⁴⁵

21.57 This led the Commission to consider whether provocation ought to be defined by exclusion.

21.58 The Commission did not wish to limit its consideration to lawful conduct in the context of one person's ending a relationship with another or forming a new relationship. Accordingly, the Commission considered the broader question of whether, to protect individual freedoms, conduct that was not unlawful should not be available as the basis of a claim of provocation.

¹⁵⁴³ For example, *R v Auberson* [1996] QCA 321; *R v Schubring*; Indictment No 381 of 2002; *R v Sebo*; Indictment No 977 of 2006; *R v Mills* [2008] QCA 146; *R v Ramage* [2004] VSC 508; *R v Khan* (1996) 86 A Crim R 552.

¹⁵⁴⁴ V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) 106 *Yale Law Journal* 1331, 1333.

¹⁵⁴⁵ As discussed in Chapter 16, studies reveal a tolerance to male violence.

21.59 However, almost upon formulation of that question the Commission recognised difficulties with it, many of which were identified by respondents to the Provocation Discussion Paper.¹⁵⁴⁶ For example, was the exclusion to be limited to acts that were unlawful because they were criminal offences or unlawful in another sense? Would the defendant's mistaken belief that the act was unlawful be relevant? Wasn't the real issue, one respondent suggested, the offensiveness of the behaviour to the defendant rather than its lawfulness or otherwise?¹⁵⁴⁷

21.60 In context, lawful conduct might be intensely provocative. The best examples are provided by cases in which battered women kill their abusers in response to a lawful act that is, in the context of violent abuse, intensely provocative. An example may be drawn from the case of *R v R*¹⁵⁴⁸ where the provocative conduct successfully relied upon might have seemed affectionate to an outsider but, in the context of the seriously abusive and violent relationship endured by R, was loaded with provocative meaning.

The Commission's view

21.61 The Commission is satisfied that the exclusion from provocation of conduct that is not unlawful would not ensure that provocation is confined to serious wrongs, and may remove the partial defence of provocation from those cases in which such a claim is compelling and meritorious. Accordingly, the Commission does not recommend that provocation exclude conduct that is 'not unlawful'.

Words

21.62 In many cases, the provocation relied upon consisted only of words — for example, insults during an argument, admissions of infidelity, confirmation that a relationship was over or threats of physical abuse.

21.63 Historically, words were not capable of amounting to provocation. Indeed, in 1707, words fell into the first excluded category of conduct:¹⁵⁴⁹

First, no words of reproach or infamy ... are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword; or throw a bottle at him, or strike him with any weapon that may kill him; but if the person provoking be thereby killed, it is murder.

¹⁵⁴⁶ In particular, by the Office of the Director of Public Prosecutions (Provocation Discussion Paper Submission 12) and by the Queensland Police Service (Provocation Discussion Paper Submission 10).

¹⁵⁴⁷ Provocation Discussion Paper Submission 9.

¹⁵⁴⁸ (1981) 28 SASR 321.

¹⁵⁴⁹ *R v Mawgridge* (1707) Kel 119; ER 1107, 112–13.

21.64 By 1946, in accordance with the authority of the House of Lords, words could amount to provocation only if they were ‘violently provocative’.¹⁵⁵⁰

21.65 As explained earlier in this chapter, currently in Australia, and more particularly, in Queensland, the authority of *Buttigieg* provides that only in circumstances of a most extreme and exceptional character are words alone a sufficient foundation for the partial defence of provocation:¹⁵⁵¹

It seems now to be accepted in the cases that the use of words alone, no matter insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in ‘circumstances of an extreme and exceptional character’ ... A confession of adultery, even a sudden confession to a person unprepared for it, is never sufficient without more to sustain this defence ... It is however the combination of circumstances which is to be evaluated.

21.66 Despite this statement of authority, there are many Queensland cases in which provocation was based on words alone. *R v Sebo* is the obvious example. *R v Auberson*,¹⁵⁵² *R v Smith*,¹⁵⁵³ *R v Schubring*¹⁵⁵⁴ and *R v Budd*¹⁵⁵⁵ are others.

21.67 The cases referred to immediately above contained no reference to what was considered extreme and exceptional about the circumstances in which the words were spoken such as to warrant their availability as provocation. The Commission was unable to tell whether the authority of *Buttigieg* had simply been overlooked or whether, when confronted with other authority requiring trial judges to leave the defence to the jury if there is the least doubt that the defence is raised on the evidence,¹⁵⁵⁶ trial judges had decided to leave the defence to the jury rather than risk an appeal on the basis that the failure to allow the defence was in error.

21.68 As well as providing a ‘test’ for the availability of words as provocation, *Buttigieg* is also authority for the proposition that a trial judge should act with caution in deciding whether the partial defence of provocation ought to be left to the jury:¹⁵⁵⁷

(c) The trial judge should withhold the issue of provocation from the jury if it is such that no reasonable jury could hold the evidence sufficient to raise a reasonable doubt: *Rose* [1967] Qd R 186 at 192; *Stingel* [(1990) 171 CLR 312]

1550 *R v Holmes* [1946] AC 588, 600.

1551 (1993) 69 A Crim R 21, 37.

1552 [1996] QCA 321.

1553 [2000] QCA 169.

1554 *R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515.

1555 Sentenced 19 October 2006.

1556 *Van Den Hoek v The Queen* (1986) 161 CLR 158.

1557 (1993) 69 A Crim R 21, 27.

(at 333 ...). However, a trial judge should leave the issue to the jury if in the least doubt whether the evidence is sufficient: *Callope* [[1965] Qd R 456] (at 462–463); *Van Den Hoek* [(1986) 161 CLR 158] (at 161–2); *Stingel* (at 334 ...)

21.69 The Commission considered that words that threatened physical violence were in a different category to insults thrown in the course of an argument and statements made about relationships. Intending to remove ‘mere words’ such as insults and statements about relationships from the scope of the partial defence, the Commission considered whether some limitation should be placed upon the availability of words as provocation.

21.70 The Commission was aware that one option was to insert the limitation in *Buttigieg* about words into legislation, but wished to test another option.

21.71 The Commission sought to categorise words or statements that were sufficiently offensive to provoke an intention to kill. Drawing inspiration from some of the cases, the Commission considered whether it would be appropriate to exclude words from provocation unless they amounted to a threat to commit, or an admission of, a serious criminal offence. The Commission had in mind statements by the deceased admitting to the crime of incest, or threatening to commit sodomy or rape — examples drawn from the cases.

21.72 Again, almost as soon as the category was described problems with it became apparent. Words that did not contain the nominated threat or admission could be just as offensive as those that did. What if the defendant mistook the words as containing a threat or admission? What if the words were ambiguous? What was a ‘serious criminal offence’? The Commission ultimately acknowledged that the proposed limitation, or any variation of it, was arbitrary and unworkable.

21.73 The Commission was attracted to the ‘*Buttigieg* option’. The ‘test’ for the availability of words as provocation expressed in *Buttigieg* has the advantage of flexibility. Rather than excluding any words in any context, the test allows for the use of words alone as provocation only in circumstances of an extreme and exceptional character.

21.74 Upon further consideration of this issue, the Commission decided that the *Buttigieg* limitation should apply not only to ‘words alone’ but also to circumstances in which the provocation relied upon consisted *substantially* of words. The Commission’s intention is to apply the same limitation to those circumstances in which words are accompanied by gestures, actions or mild acts of violence.

21.75 The Commission acknowledged that often it was not so much the words spoken, but the fact that the words indicated that a relationship was over, that provoked the killing. This led the Commission to consider whether there was any validity in excluding from provocation a decision to end a relationship which was conveyed in words but not a decision to end a relationship conveyed by conduct, such as, the deceased’s packing his or her bags in silence, or

closing the door on the defendant refusing him or her entry, or dancing with another.

21.76 The Commission wished to limit the availability of words as provocation for two reasons. The first was to reinforce the expectation of a peaceful modern community that individuals will take appropriate steps to maintain self-control in all but the most extreme and exceptional circumstances. The second was to recognise the right of all people to sexual and personal autonomy.

21.77 The Commission recognised that the *Buttigieg* limitation may have some effect in reinforcing expectations of self-control in the face of taunts and insults and a stated intention to exercise a right of personal or sexual autonomy. However, the *Buttigieg* limitation would have no effect where the right to sexual or personal autonomy was asserted non-verbally.

21.78 Nevertheless, the Commission considered that the fact that the *Buttigieg* limitation did not address the situation where a person asserted, by non-verbal means, a right to sexual or personal autonomy was not a reason to abandon the option of inserting the limitation into legislation.

The Commission's view

21.79 For the reasons discussed above, the Commission recommends that the *Buttigieg* limitation be inserted into the legislation. The Commission recommends that section 304 of the Criminal Code (Qld) be amended to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence of provocation cannot be based on words alone or conduct that consists substantially of words.

The deceased who asserts a right to personal or sexual autonomy

21.80 As a matter of principle, the Commission was concerned that those who killed out of sexual possessiveness or jealousy had available to them the partial defence of provocation.

21.81 The Commission was particularly concerned about the position of women in seriously abusive relationships who wished to leave or who needed to leave for their own safety or for the safety of their children. Women in seriously abusive relationships who left or attempted to leave had a 75 per cent greater chance of being killed by their abusers than those who stayed.¹⁵⁵⁸ The Commission found it affronting that, if a woman were killed in those circumstances, her abuser might have available to him the partial defence of provocation.

21.82 The Commission recognises that men, parents and children may be the victims of seriously abusive relationships at the hands of a woman, but cannot

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BJ Sadock and VA Sadock, *Kaplan & Sadock's Synopsis of Psychiatry* (10th ed, 2007) 882.

ignore the fact that overwhelmingly, in intimate partner homicides, it is men who kill women. In the financial year 2005–06, 80 per cent of intimate partner homicides involved men killing women, and in more than half of those cases there was a history of domestic violence in the relationship.¹⁵⁵⁹ The Commission considers it valid therefore to give special consideration to the battered woman who seeks to leave an abusive relationship and is killed for doing so. Should her killer be entitled to rely upon provocation to ameliorate his punishment?

21.83 The Commission considered the arguments of Coss set out in Chapter 16 and the statements made by Coldrey J in *R v Yasso*.¹⁵⁶⁰ In that case, Coldrey J said:

In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it.

What is abnormal is the reaction to this conduct in a small percentage of instances where that former partner (almost inevitably a male) loses self-control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury.

In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the twenty-first century. Significant additional provocative factors would normally be required before the ordinary person test could be met.

21.84 This argument has even more force in the case of a woman seeking to leave a seriously abusive relationship.

21.85 The Commission agrees with both aspects of the remarks of Coldrey J, namely that in principle it is wrong that making a choice about a relationship could amount to provocation, but that it is possible that, taken with other unusual factors, the test could be met.

21.86 The Commission's view is that those additional factors should be 'circumstances of an extreme and exceptional character'. This achieves consistency with the recommendation regarding the additional circumstances that would be required before words could amount to provocation.

21.87 The Commission considers that such a limitation has sufficient flexibility to be workable, and, in combination with the *Buttigieg* limitation for words, would remove the defence of provocation from undeserving cases.

1559 See Chapter 12 of this Report.

1560 (2002) 6 VR 239, 243–4.

The Commission's view

21.88 For the reasons discussed above, the Commission recommends a limitation on the circumstances in which the deceased's exercise of choice about a relationship may provide a sufficient foundation for the defence of provocation. The Commission recommends that section 304 of the Criminal Code (Qld) be amended to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based on the deceased's choice about a relationship.

The non-violent sexual advance

21.89 As discussed in Chapter 14 of this Report, other jurisdictions have amended their law of provocation to provide that a 'non-violent sexual advance' is not sufficient of itself to amount to provocation.

21.90 The Commission considers the immediate difficulty with such an amendment is in the definition of 'non-violent sexual advance'. Does 'non-violent' mean gentle touching or is it intended to mean an advance without physical contact at all? What is the boundary between a non-violent sexual advance and a sexual assault? Bearing in mind that the evidence of sexual behaviour, which ordinarily occurs in private, is likely to come from the defendant alone, how may the law protect against exaggeration?

21.91 The Commission agrees with the statements of Kirby J (in the minority) in *Green v The Queen*:¹⁵⁶¹

No jury acting reasonably could fail to be satisfied beyond reasonable doubt of the relevant matters. These were that the conduct of the deceased [which consisted of a homosexual advance with some persistence], however unwanted and offensive to the appellant, was not of such a nature as to be sufficient, objectively, to deprive a hypothetical ordinary 22 year-old Australian male in the position of the appellant of the power of self-control imputed to him by law to the extent of inducing him to form an intent to kill or to inflict grievous bodily harm on the deceased. Adapting what was said unanimously by this Court in *Stingel*,¹⁵⁶² no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to the hypothetical ordinary 22 year-old Australian male in the position of the appellant.

That standard of self-control remains, in this country, objective. Both Mr Stingel and the appellant stated that they were provoked more than they could bear by a confronting sexual challenge. No lesser standard of self-control is demanded by our society in the case of the appellant than of Mr Stingel, simply because sexual conduct of the deceased was homosexual in character. To condone a lesser standard is to accept an inequality before the law which this Court has previously, repeatedly and rightly rejected. The ultimate foundation of

1561 (1997) 191 CLR 334, 415–16.

1562 (1990) 171 CLR 312.

adherence to the objective test was explained in Stingel ... in the terms of Wilson J's reasons, in the Supreme Court of Canada, in *R v Hill*¹⁵⁶³ ... :

'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.'

If every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended. A neutral and equal response to the meaning of the section requires the application of the same objective standard to the measure of self-control which the law assumes, and enforces, in an unwanted sexual approach by a man to a man. Such an approach may be 'revolting' to some ... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands. Even allowing for the appellant's alleged memories of his father's sexual conduct many years earlier directed to his sisters, there is no way that this could have induced an ordinary person in his position to have so far lost self-control as to have formed the intention to kill or inflict grievous bodily harm on the deceased.

Assuming that it was appropriate to leave provocation to the jury in his case (a proposition which I doubt), the jury's verdict [of guilty of murder] was not only proper. It was inevitable. There was therefore no substantial miscarriage of justice. The proviso was therefore correctly applied.

21.92 The Commission considered whether it should exclude non-violent sexual advances from the provocation defence.

21.93 Responses to the Provocation Discussion Paper that discussed this option were wary of it. One respondent acknowledged that a non-violent sexual advance should not be sufficient for provocative conduct, but added:¹⁵⁶⁴

it is possible to imagine that a non-violent sexual advance may be the last straw for a battered woman who knows what usually comes next ... If these matters [a non-violent sexual advance, words or lawful conduct] were excluded from provocation there may be significant ramifications for those who claim provocation in the context of ongoing abuse. Excluding specific conduct may be a risky approach without more.

1563 [1986] 1 SCR 313, 342.

1564 Provocation Discussion Paper Submission 4.

21.94 The problem with defining absolutely by exclusion is always one of context. Conduct cannot be categorised as sufficient or insufficient to amount to provocation in the absence of a consideration of the circumstances in which it occurred.

21.95 The Commission has attempted to build flexibility into its recommendations about limitations on provocation in the cases of words and choice about a relationship. The Commission considered excluding a non-violent sexual advance from provocation other than in circumstances of an extreme or exceptional character. The Commission was however dissatisfied with the description ‘non-violent sexual advance’ and concerned that a homosexual advance might be considered extreme or exceptional.

21.96 The Commission’s preference was for the availability or not of a ‘non-violence sexual offence’ as provocation to be determined by the trial judge as gate-keeper.

The Commission’s view

21.97 For the reasons discussed above, the Commission does not recommend any amendment of section 304 of the Criminal Code (Qld) about the availability of a non-violent sexual advance as sufficient foundation for the defence of provocation. Whether a sexual advance of any kind is capable of amounting to provocation falls to be resolved by the trial judge as a matter of law as is presently the case.

Removing the requirements of suddenness from section 304

21.98 As explained in Chapter 15 of this Report, the requirements of suddenness in section 304 — the requirement that the defendant must react to ‘sudden provocation’ and ‘before there is time for ... passion to cool’ — appear to have made the partial defence unavailable to persons in Queensland who kill their abusive partners when it is ‘safe’ for them to do so, usually some time after the act of provocation by their abuser.

21.99 The Commission considered following the approach taken in New South Wales of removing the requirements of suddenness from section 304 to provide access to the defence to the weaker party in violent and abusive relationships.

21.100 None of the respondents to the Provocation Discussion Paper disputed the claim to mitigation of persons such as Robyn Kina¹⁵⁶⁵ or the defendant in *The Queen v R.*¹⁵⁶⁶ However, the dilemma in removing the requirements of suddenness and widening the circumstances in which provocation may operate for the benefit of battered persons is that the defence would also be widened for

¹⁵⁶⁵ [1993] QCA 480.

¹⁵⁶⁶ (1981) 28 SASR 321.

others, including those who fall within the other groups identified in Chapter 19 of this Report. This includes those who kill a partner or former partner at or around separation.

21.101 While some respondents favoured amendments to remove the requirements that the killing occur suddenly and immediately after the provocation ('before there is time for the person's passion to cool')¹⁵⁶⁷ to facilitate claims by battered persons and to reflect similar developments in the common law,¹⁵⁶⁸ other respondents preferred the creation of a special provision specific to the situation of those in seriously abusive relationships.

21.102 The Commission's view is that the development of a special provision to accommodate the unique circumstances of battered persons is the better approach.

21.103 Although it is true that some women have been able to successfully bring claims for sentence mitigation on the basis of provocation, to do so involves straining the limits of provocation, with a risk that the claim may fail because of the difficulty in framing it within the traditional limits of provocation.¹⁵⁶⁹

21.104 Removing the requirements of suddenness from section 304 may not improve the position of the battered person who faces other obstacles in convincing a jury that the defence is applicable to his or her circumstances. A particular problem for the battered person lies in the ordinary person test, which prevents the jury taking into account the distinctive features of a battered person in objectively assessing the defendant's reaction to provocation. In other words, the hypothetical ordinary person of the test is a very different person from the reality of the battered person at the time he or she kills.¹⁵⁷⁰

21.105 However, the Commission considers that the main problem in removing the requirement of 'suddenness' is that it will unacceptably widen the scope of the partial defence of provocation and change the nature of the defence. As it was put in the submission by the Queensland Police Service,¹⁵⁷¹ the requirement of suddenness is 'integral' to the defence, and its removal:¹⁵⁷²

changes the essence of the defence to something very different.

1567 These changes are based on the 1992 amendments to s 23 of the *Crimes Act 1900* (NSW).

1568 See *R v Chhay* (1994) 72 A Crim R 1.

1569 And, why should a person with a genuine claim for sentence mitigation be forced to frame the claim in concepts that are not appropriate to the real claim advanced?

1570 What the test requires to meet the situation of the battered person is an ordinary person who has been affected in the same ways and to the same extent as the battered person has been affected by the seriously violent and abusive relationship.

1571 Provocation Discussion Paper Submission 10.

1572 Ibid.

21.106 As noted in the previous chapter, the Office of the Director of Public Prosecutions considered such a change 'unwise'. The Commission accepts the view expressed that removal of the requirements of suddenness:¹⁵⁷³

will serve as a charter to those who stalk their ex-wives. The conceptual origin of the excuse is dependent upon the concept of loss of control, which in turn is inextricably linked with the idea that such states are necessarily transitory.

The Commission's view

21.107 Removing the requirements of suddenness from section 304 of the Criminal Code (Qld) distorts the nature of the defence. Accordingly, the Commission does not recommend their removal. The Commission considers the position of the battered person separately below.

Defining 'provocation'

21.108 The respondents who considered this option generally thought that any attempt to define conduct that may amount to provocation involved a risk of neglecting a potentially relevant form of provocation. Under the existing test, the partial defence of provocation may be based on any conduct that in fact caused the defendant to lose self-control and intentionally kill, and will be successful if that conduct could have caused an ordinary person to lose self-control and intentionally kill. Subject to *Buttigieg*,¹⁵⁷⁴ the existing test does not limit the conduct upon which the partial defence may be based.

21.109 Defining categories or adequately composing a definition that applies to the full range of possible provocative conduct, but that does not lead to unforeseen consequences (including category widening), is so difficult a task as to be inappropriate to attempt.

The Commission's view

21.110 The Commission was unable to construct a definition of provocation that contained the requisite flexibility but that did not prove inappropriately wide. Accordingly, the Commission does not recommend any other definition of provocation.

The ordinary person test

21.111 In earlier chapters of this Report, the Commission has discussed the criticisms made of the ordinary person test.¹⁵⁷⁵ Those criticisms assert that the test is difficult to understand and difficult for juries to apply.

1573 Provocation Discussion Paper Submission 12.

1574 (1993) 69 A Crim R 21.

1575 See Chapters 11, 14, 16 and 19 in particular.

21.112 A particular criticism concerns the two parts of the test. A jury is to attribute the defendant's personal characteristics and history to the hypothetical ordinary person for the purposes of assessing the gravity of the provocation, but not when assessing whether provocation of such gravity could cause an ordinary person to lose self-control and act as the defendant did. It is argued that this dichotomy is confusing.

21.113 In the Commission's view, a careful analysis of *Stingel v The Queen*¹⁵⁷⁶ shows that a two-part test is not called for in all circumstances. In the Commission's view, *Stingel* makes it plain that the ultimate question is whether the provocation could produce in the hypothetical ordinary person the same reaction it produced in the defendant. In some cases, to ensure that the gravity of the provocation is understood, the jury may have to assess it by reference to the personal characteristics of the defendant, but that assessment will not be required in every case. For example, ordinarily it would be unnecessary to assess the gravity of provocation based on an act of violence by reference to the personal characteristics of the defendant.

21.114 In the Commission's view, it is only in those cases where a characteristic or attribute of the defendant is *necessary* to understand the implications and the gravity of the provocation that a two-stage test is required. Some behaviours are, universally, gravely provocative. Others may require context or explanation by reference to the history between the parties or something particular about the defendant. In those cases, the ordinary person test may become more complex, but the Commission does not consider it so complex as to be unworkable.

21.115 The Commission notes that a similar point was made in the submission from the Office of the Director of Public Prosecutions:¹⁵⁷⁷

Stingel makes heavy weather of an issue which can generally be resolved by common sense. It is obvious that calling an Aborigine a 'boong' is insulting whereas calling a Swedish backpacker a 'boong' is most likely simply bizarre. The Aborigine might be thought likely to react with indignation in the way the other might not ... Similarly, there are hand signals which have significance as insults in some minority subgroups in the community which would pass unnoticed by the majority. But the analysis in *Stingel* is far too elaborate, and prompts general directions which are far too elaborate for the vast majority of cases, particularly of homicide. The great majority of cases involve provocative acts which can be understood as an affront of universal significance. There is no necessity in those cases for the abstract explanation from *Stingel* to be given at all.

21.116 The Commission makes no response to the suggestion that the High Court made 'heavy weather' of the issue, but agrees with the significant point in the submission that juries should be required to consider both parts of the *Stingel* test only in those cases in which characteristics or attributes of the

¹⁵⁷⁶ (1990) 171 CLR 312.

¹⁵⁷⁷ Provocation Discussion Paper Submission 12.

defendant must be considered to assess the gravity of the provocative conduct alleged.

21.117 *Stingel* itself provides an example of the two-part test:¹⁵⁷⁸

[T]he ultimate question for [the jury] in relation to the objective test would have been whether they were persuaded beyond reasonable doubt that the relevant words and conduct of the deceased were not of such a nature that they could or might cause an ordinary nineteen-year-old, that is to say, a hypothetical or imaginary nineteen-year-old with powers of self-control within the range or limits of what is ordinary for a person of that age, to do what the accused did. The provocative words and conduct consisted of the remark 'Piss off you cunt' viewed with, and in the context of, the sexual activities which the deceased and A were allegedly engaging in a parked car late at night. The jury would have been entitled to identify the implications and assess the gravity of that provocative conduct in the context of relevant attributes and relationships, present and past, of the appellant. That being so, the jury might have viewed the remark made to the appellant as an insulting, profane and dismissive comment made to a person who had had a past relationship with A, who obviously (and to the knowledge of the deceased) remained infatuated with her, who had assumed and was maintaining a protective attitude towards her and who was convinced that she had been, and was then being 'used' by the deceased for his own sexual gratification. So to say seems to us to put the implications and the gravity of the provocative conduct as its highest from the accused's point of view.

21.118 In the circumstances of *Stingel*, the words of the deceased as he sat in the car with A would not have had the same 'sting' to a person who was a stranger to both the deceased and A. Assessing the words from the defendant's perspective was essential to assessing the gravity of the provocation.

21.119 The High Court explained that, while *Stingel*'s infatuation with A and his jealousy of the deceased were relevant to assessing the gravity of the remarks made to him, they were not to be attributed to the hypothetical ordinary person. The High Court concluded that no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including the insulting remarks and the sexual activities in which he and A were allegedly engaged, was not of such a nature as to be sufficient to deprive an ordinary nineteen-year-old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it.¹⁵⁷⁹

21.120 While the test is complex, in the Commission's view it is understandable and workable, particularly so in the context of a trial where a trial judge is available to provide assistance to the jury about the test.

1578 (1990) 171 CLR 312, 335–6.

1579 Ibid 336.

21.121 The Commission also considered the argument that the ordinary person test sets the bar too low. The test requires the reaction of the defendant to the provocation to be evaluated by reference to an objective and uniform standard of the minimum powers of self-control that are required of an ordinary person of the age (where immaturity is relevant) of the defendant. It was argued by the Office of the Director of Public Prosecutions that, because the objective standard, against which the retaliation of the defendant was to be assessed, was ‘as low as’ behaviour that an ordinary person of minimum powers of self-control *could* undertake, the law had come close to abandoning the objective test altogether.¹⁵⁸⁰

21.122 Certainly the outcomes in some of the cases, particularly those in which the provocation consisted of insults in the course of an argument or other relatively mild conduct, suggest that the bar has been set too low. But to raise it somehow, perhaps by reference to a reasonable person, runs the risk of setting the bar too high: it might be thought that a reasonable person could never be provoked to kill. As it was said in *Stingel*:¹⁵⁸¹

it is all but impossible to envisage circumstances in which a wrongful act or insult would so provoke the circumspect and careful reasonable man of the law of negligence that, not acting in self-defence, he would kill his neighbour in circumstances which would, but for the provocation, be murder.

21.123 The submission from the Office of the Director of Public Prosecutions suggested that the ordinary person test should be modified by referring to what an ordinary person ‘would’ do, rather than what an ordinary person ‘could’ do:¹⁵⁸²

The test should be modified so as to reflect the proposition that behaviour is excused only to the extent that it reflects how an ordinary person would act rather than could act. Such a change reflects the extreme nature of the triggering event necessary to justify the taking of a life, and more appropriately sets the bar at the standard of the ordinary person, not the least restrained, least tolerant person still capable of being described as ‘ordinary’.

21.124 In the Commission’s view, this proposed change may have some benefits in those cases in which the defendant killed out of possessiveness or jealousy. However, the Commission is concerned about how such a test would operate in the case of a battered person who kills his or her abuser.¹⁵⁸³ As explained above, such a defendant already struggles enough with the ordinary person test because no personal characteristics or attributes may be taken into account in determining how an ordinary person could have reacted to the provocation alleged. To ‘raise the bar’ and require a jury to be satisfied that an

¹⁵⁸⁰ Provocation Discussion Paper Submission 12.

¹⁵⁸¹ (1990) 171 CLR 312, 328.

¹⁵⁸² Provocation Discussion Paper Submission 12.

¹⁵⁸³ This issue is considered separately at [21.129]–[21.138] below.

ordinary person *would* have reacted as the battered person did¹⁵⁸⁴ is, in the Commission's view, too difficult a conclusion to reach.

21.125 In the Commission's view, for all types of defendants, such a change introduces concepts of probability into the assessment, which unnecessarily complicate matters and fundamentally change the nature of the inquiry.

21.126 In the submissions received in response to the Provocation Discussion Paper there was some support for the alternative formulation 'the person of ordinary tolerance and self-restraint'¹⁵⁸⁵ but also some scepticism about whether a change in wording would make a difference.¹⁵⁸⁶

The Commission's view

21.127 The Commission acknowledges that the ordinary person test is a test of some difficulty in those cases in which the personal characteristics and attributes of the defendant may be taken into account in assessing the gravity of the provocation but not the defendant's reaction to it. However, the Commission is of the view that both parts of the test are not necessary in all cases. The Commission does not consider the test to be so complex as to be unworkable. The Commission recommends that trial judges confine the 'full' two-part *Stingel* test to those cases that require it, and that a note to this effect be included in the Benchbook.

21.128 For the reasons discussed above, the Commission does not favour a change to the test that would require the defendant's conduct to be assessed by reference to the reasonable person, or by reference to what an ordinary person *would* do. Nor, on balance, does the Commission recommend a change to the test that would require the defendant's conduct to be assessed by reference to a 'person of ordinary tolerance and self-restraint'.¹⁵⁸⁷

The position of the battered person

21.129 The Commission is concerned that the battered person who intentionally kills his or her abuser, in circumstances in which the partial defence of provocation cannot apply, is unable to have his or her situation taken into account in mitigation of the mandatory life penalty for murder.

1584 Or, assuming the current onus of proof, to require a jury to be satisfied that the prosecution had not satisfied them beyond reasonable doubt that an ordinary person in the circumstances would not react as the defendant did.

1585 Provocation Discussion Paper Submission 4.

1586 Provocation Discussion Paper Submission 10.

1587 See [21.126] above.

21.130 This concern led the Commission to consider whether the requirements of suddenness ought to be removed from section 304 of the Code. This option was rejected for the reasons mentioned above.¹⁵⁸⁸

21.131 The Commission also considered whether there should be some change to the law of provocation that would make it available to those in seriously abusive and violent relationships or whether some new form of provocation should be created.

21.132 The problem with any such amendment or new provision is that the circumstances in which battered persons killed their abuser are unlikely to resemble in any sense a provoked killing. The Commission considered that it was artificial to attempt to amend the existing, or construct a new, provocation defence to accommodate the circumstances in which a battered person is driven to kill his or her abuser.

21.133 The battered person receives no assistance from the law of self-defence, which requires an assault. As it was graphically put by Wilson J in the Canadian case of *Lavellee*:¹⁵⁸⁹

The requirement imposed in *Whynot* that a battered woman wait until the physical assault is 'underway' before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to 'murder by installment': *State v Gallegos*, 719 P 2d 1268 (NM 1986), at p 1271. I share the view expressed by Willoughby in 'Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer' (1989), 38 Kan L Rev 169, at p 184, 'that society gains nothing, except perhaps the additional risk that the battered woman will herself be killed, because she must wait until her abusive husband instigates another battering episode before she can justifiably act'.

21.134 Just as the law of provocation developed as a concession to human frailty, and provided amelioration of punishment, the Commission considers that the reality of life for those in seriously violent and abusive relationships may also call for some concession to ameliorate their punishment for the intentional killing of their abusers.

21.135 As discussed above, unlike other law reform commissions that have considered the law of homicide and defences to it in full, the Commission's terms of reference are limited. Accordingly, the Commission did not research domestic violence or review the law of homicide as it applies to battered women generally. Some of the submissions were critical of the limits placed on the Commission's review and many of the submissions called for a 'special' full or partial defence to accommodate the circumstances of the battered person who is charged with murder. For example, Legal Aid Queensland suggested modification of the law of duress.¹⁵⁹⁰ The Office of the Director of Public

¹⁵⁸⁸ See [21.98]–[21.107] above.

¹⁵⁸⁹ [1990] 1 SCR 852, 883.

¹⁵⁹⁰ DJAG Submission 25.

Prosecutions suggested a separate excuse that expressly reflected expert understanding of the area.¹⁵⁹¹ The Department of Child Safety and Office for Women suggested consideration of an excuse that was based on self-defence.¹⁵⁹² The Women's Legal Service urged consideration of a new defence in the context of a broader scheme that acknowledged the reality of the circumstances of the battered person.¹⁵⁹³

21.136 The Commission observes that the position of battered women in particular was considered in detail in the report of the Taskforce on Women and the Criminal Code.¹⁵⁹⁴

The Commission's view

21.137 The terms of reference of the Commission's review did not extend to a review of all defences to homicide and, accordingly, the Commission has not reviewed the position of the person in a seriously abusive and violent relationship who kills his or her abuser in circumstances in which the defence of provocation cannot apply. It is the Commission's view that such a person may be as deserving of the law's compassion as the provoked killer.

21.138 Rather than distort the defence of provocation in an attempt to accommodate the position of a battered person who kills in desperation, the Commission recommends that consideration be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is applicable to an adult or a child and is not gender-specific. In coming to this view, the Commission recognises the importance of addressing this issue in a proper and considered way. The question whether battered persons should have a complete defence or a partial defence is a significant one, and warrants specific consideration, a careful evaluation of legislative reforms in other jurisdictions,¹⁵⁹⁵ and consultation with individuals and organisations with experience and expertise in the area of family violence.

The onus of proof

21.139 A claim of provocation is not a defence to murder in the sense that it negates any element of murder, but instead it affords a defendant 'a means of avoiding the extreme penalty'.¹⁵⁹⁶ For that reason, Sir Garfield Barwick

¹⁵⁹¹ Provocation Discussion Paper Submission 12.

¹⁵⁹² DJAG Submission 26.

¹⁵⁹³ DJAG Submission 21; Provocation Discussion Paper Submission 6.

¹⁵⁹⁴ Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

¹⁵⁹⁵ For example, the *Crimes Act 1958* (Vic) ss 9AC, 9AD, 9AE, 9AH, which were inserted in 2005.

¹⁵⁹⁶ *Johnson v The Queen* (1976) 136 CLR 619, 643.

suggested that the administration of justice would be aided and not impaired by placing the onus on the defendant.¹⁵⁹⁷

21.140 In the Provocation Discussion Paper, the Commission set out four arguments in favour of a reverse persuasive onus on a defendant seeking sentence mitigation through a claim of provocation.¹⁵⁹⁸

21.141 First, the prosecution will very often not be in a position to contest the factual detail of the claim as the only other potential witness will have been killed by the defendant. Once the prosecution has established, beyond reasonable doubt, all the elements of the offence of murder against the defendant, it is not unreasonable to require the defendant to establish, on the balance of probabilities, the essential facts on which the claim of mitigation is based as normally the defendant will be the only witness with knowledge of all the relevant facts.

21.142 Secondly, if the onus of proof is placed on the party who wishes to rely on provocation, it is likely to result in more clearly articulated claims of provocation. At the moment, the onus is placed on the party who does not wish to rely on provocation and may not be in possession of all the relevant facts.

21.143 Under the current law a trial judge is required to direct the jury on provocation, even if not requested by the defence, if, on any reasonably possible view of the evidence, a claim of provocation is raised.¹⁵⁹⁹ A trial judge, it has been said, 'is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and is, therefore, likely to tilt the balance in favour of the defence.'¹⁶⁰⁰ An example is provided by *Schubring*¹⁶⁰¹ in which the precise nature of the provocation advanced for the defence was never articulated.

21.144 The more clearly defined a claim of provocation, the fairer it is to all concerned in the trial (including the jury). Generally, the administration of justice will be enhanced if the onus of proof is on the party who wishes to rely on the claim.

21.145 Thirdly, if the onus of formulating the claim of provocation is placed on the party who wishes to rely on the claim, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims being advanced before juries. Under current authority requiring a trial judge to leave provocation

¹⁵⁹⁷ *Moffa v The Queen* (1977) 138 CLR 601, 608.

¹⁵⁹⁸ Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) [12.71].

¹⁵⁹⁹ *Stingel v The Queen* (1990) 171 CLR 312, 333–4.

¹⁶⁰⁰ *Lee Chun-Chuen v The Queen* [1963] AC 220, 230.

¹⁶⁰¹ *R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515.

to the jury if 'in the least doubt whether the evidence is sufficient',¹⁶⁰² the trial judge has a limited capacity to stop unmeritorious claims. This capacity is essential if the parameters of provocation are to be redrawn in a way that is more consistent with current community expectations.

21.146 Fourthly, a strong analogy exists to the partial defence of diminished responsibility.¹⁶⁰³ A successful claim of diminished responsibility, like provocation, reduces murder to manslaughter. Diminished responsibility, like provocation, need only be considered after the prosecution has proved that the defendant is guilty of murder. Defendants who wish to avail themselves of the mitigating effect of diminished responsibility carry the onus, on the balance of probabilities, of establishing diminished responsibility at the time of the killing. It is difficult to see why a different rule should apply to each of the partial defences.¹⁶⁰⁴ However, the Commission acknowledges the argument that the onus is placed on the defendant to prove diminished responsibility because that partial defence rebuts the presumption of sanity contained in section 26 of the Criminal Code (Qld).¹⁶⁰⁵

21.147 A proposal to place a persuasive onus on a defendant in criminal proceedings invites consideration of Queensland's statement of fundamental legislative principles.

21.148 Section 4 of the *Legislative Standards Act 1992* (Qld) requires that legislation have sufficient regard to the rights and liberties of individuals. In particular, the Act requires adequate justification for a reversal of the onus of proof in criminal proceedings.¹⁶⁰⁶

1602 *Buttigieg v The Queen* (1993) 69 A Crim R 21, 27.

1603 Criminal Code (Qld) s 304A.

1604 Another relevant analogy exists to the sentence mitigation provisions in the *Drugs Misuse Act 1986* (Qld). Under that Act, depending upon the type and quantity of the drug, on a charge of producing a dangerous drug, if the defendant, after conviction, satisfies the judge that he or she is a drug dependent person, he or she becomes liable to a reduced level of penalty (*Drugs Misuse Act 1986* (Qld) ss 8(b)(i), 9(b)(i)). The onus under these provisions rests on the defendant. When these sentence mitigation provisions were first introduced they operated to reduce mandatory life sentences under the *Drugs Misuse Act 1986* (Qld) to discretionary sentences of life imprisonment.

1605 Criminal Code (Qld) s 26 provides:

26 Presumption of sanity

Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

1606 *Legislative Standards Act 1992* (Qld) s 4 provides:

4 Meaning of fundamental legislative principles

- (1) For the purposes of this Act, **fundamental legislative principles** are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
- (2) The principles include requiring that legislation has sufficient regard to—
 - (a) rights and liberties of individuals; and
 - (b) the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

21.149 The Commission has considered the guidance provided in the *Queensland Legislative Handbook* about the circumstances in which a reverse onus may be justified.¹⁶⁰⁷

21.150 The Commission has also taken guidance from recent English case law in its consideration of this option.

21.151 Under Article 6(2) of the *European Convention on Human Rights*:¹⁶⁰⁸

everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

21.152 Since that Convention was incorporated into the domestic law in England by the *Human Rights Act 1998* (UK) a body of case law has explored the circumstances in which a reverse onus may be justified as compatible with the presumption of innocence.¹⁶⁰⁹

21.153 The following principles relevant to the discussion here may be extracted from the English cases:

- The rights listed or implied in Article 6, although important, are not absolute, and when considering questions of justifiability the Convention

...

- (d) does not reverse the onus of proof in criminal proceedings without adequate justification; ...

1607

State of Queensland, Department of Premier and Cabinet, *Queensland Legislation Handbook Governing Queensland* (2nd ed, August 2004) 7.2.4:

Generally, reversal of the onus of proof in criminal proceedings is opposed. However, justification for the reversal is sometimes found in situations where the matter that is the subject of proof by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult, or very expensive, for the State to prove (Alert Digest 1997/2, p 11).

Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the defendant would be particularly well positioned to disprove guilt.

A provision making a person guilty of an offence committed by someone else with whom the person is linked, and providing defences allowing the person to disprove connection with the offence, is an apparent reversal of onus of proof and must be justified. Common situations where these concerns arise are when executive officers of a corporation are taken to be guilty of offences committed by the corporation, or a corporation is taken to be guilty of offences committed by its executive officers.

A provision should not provide that something is conclusive evidence of a fact, without the highest justification. However, frequently a provision may facilitate the process of proving a fact by providing for a certificate or something else to be evidence (not conclusive) of a fact, giving a party affected an opportunity to challenge the fact.

1608

See <<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>> (25 September 2008).

1609

The underlying rationale of the presumption of innocence, both at common law and in the Convention, is that it is unfair for a prosecutor to accuse a defendant of a crime and for the defendant to be required to disprove the accusation, on pain of conviction if he fails to disprove the accusation: *Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

requires a fair balance to be struck between the rights of the individual and the wider interests of the community.¹⁶¹⁰

- In analysing the compatibility of a reverse persuasive onus, attention should be paid to the substance, not the form, of an enactment.¹⁶¹¹
- The question is whether the reverse persuasive onus affects the gravamen (or essence) of the offence.¹⁶¹² Normally the presumption of innocence will be infringed if the gravamen of an offence includes a defence provision for which the defendant has the legal burden of proof.

21.154 The Commission has reflected on these principles. Murder is the intentional killing of another human being. In Queensland the only penalty for murder is mandatory life imprisonment. However, intentional killings are not equally culpable. For example, a victim of a seriously abusive and violent relationship who murders his or her abuser may be considered less culpable than a person who murders motivated by greed.

21.155 Although a temporary failure to exercise self-control is an essential element in all provocation cases, a loss of self-control is by no means confined to provoked killings. Why a provoked killing is thought to be less culpable is not because of the loss of self-control but because a provoked killing is *understandable* in the limited sense that any ordinary person could have reacted to the provocation in the same way as the defendant reacted. It is in this sense that provocation is spoken of as a concession to human frailty.

21.156 The gravamen of a charge of murder is the killing of another with intent to kill or to do grievous bodily harm. In the Commission's view, a reverse persuasive onus on a defendant claiming the benefit of provocation is not incompatible with a presumption of innocence about murder. Under a reverse persuasive onus, the defendant is not required to prove that he or she is innocent of murder but instead that, because of the circumstances in which the offence was committed, the offence should be reclassified as manslaughter.

21.157 Other less culpable types of murder (for example, mercy killings or killings by battered persons) must be dealt with as murder. Therefore, the Commission considers it not unreasonable for society to insist that a defendant who wishes to claim the benefit of provocation establish, on the balance of probabilities, his or her entitlement to provocation. And, combined with the

¹⁶¹⁰ *Brown v Stott* [2003] 1 AC 681; *Sheldrake v DPP* [2005] 1 AC 264.

¹⁶¹¹ *R v Lambert* [2002] 2 AC 545, 571 (Lord Steyn):

the distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of the definition of the crime and case as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance.

¹⁶¹² *R v Lambert* [2002] 2 AC 545, 571; *Sheldrake v DPP* [2005] 1 AC 264.

practicalities of proof referred to above, the Commission believes that a transfer of the persuasive onus to the defendant represents a fair balance between the rights of the individual and the wider interests of the community.

21.158 In its submission in response to the Provocation Discussion Paper, the Office of the Director of Public Prosecutions argued that reversing the onus of proof would provide for an appropriate restriction on the application of the partial defence:¹⁶¹³

The discussion paper expresses a series of good reasons why the onus of proof in provocation cases should be reversed. To these, I would add ... that the onus on an accused is more consonant with an excuse which is conceived of as a concession to frailty. This is a justification at the level of principle for distinguishing provocation from other common excuses. I would also add the pragmatic point that the problem of defining negatively those matters that do not amount to provocation is reduced if the onus is reversed so that an accused must positively establish that a particular matter does amount to provocation. This point is advanced to underline the power of the court to act as gatekeeper when the onus is reversed.

21.159 Other respondents to the Provocation Discussion Paper were also in favour of reversing the onus of proof.¹⁶¹⁴

21.160 However, the Bar Association of Queensland, Legal Aid Queensland and legal academics did not support reversing the onus of proof.¹⁶¹⁵ The Bar Association did not consider a reversal of onus justified having regard to the few occasions on which the defence was successfully claimed.¹⁶¹⁶ A respondent academic made the point that:¹⁶¹⁷

The pragmatic concern that provocation may be difficult for the prosecution to negative beyond a reasonable doubt should not trump the accuseds' rights to the presumption of innocence.

21.161 Another respondent academic argued that reversal of the onus of proof could have the 'perverse effect that only those who commit the most horrific of killings could successfully rely upon a defence of provocation':¹⁶¹⁸

In most cases it would be difficult for the defence to prove all the elements of provocation on the balance of probabilities; in particular the requirement that the accused lost his/her self-control may be difficult to prove. For example, evidence that the accused inflicted multiple stab wounds in the frenzied fashion may go a long way to prove a loss of control. On the other hand, one fatal blow may not support such a conclusion. The outcome therefore of reversing the

1613 Provocation Discussion Paper Submission 12.

1614 Including the Queensland Police Service and the Hon JB Thomas AM QC.

1615 Provocation Discussion Paper Submissions 4, 6, 11, 13.

1616 Provocation Discussion Paper Submission 11.

1617 Provocation Discussion Paper Submission 4.

1618 Provocation Discussion Paper Submission 13.

onus of proof may well be to reinforce the existing gender biased application of provocation. The frenzied attack may be consistent with a male's response to provocation whilst a single decisive blow delivered with all the energy that the accused could muster may be more consistent with a female's response to provocation.

21.162 The Commission considered carefully this last argument and accepted that proof of loss of self-control may be difficult for a defendant. However, the defendant would not be required to prove physiologically a loss of control. Rather, the defendant would be required to prove that, confronted with provocation, he or she retaliated in a state of intense emotion and failed to exercise self-restraint.

The Commission's view

21.163 After careful consideration of the arguments for and against reversing the onus of proof of the partial defence of provocation, and having regard to the guidance of the authorities and fundamental legislative principles, the Commission has concluded that the interests of justice are best served by reversing the onus of proof. The Commission considers that reversing the onus strikes the right balance between the rights of the individual and the wider interests of the community and assists trial judges in their role as gatekeeper. Accordingly, the Commission recommends that section 304 of the Criminal Code (Qld) be amended by adding a provision to the effect that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities.

MANDATORY LIFE IMPRISONMENT FOR MURDER

21.164 As the Commission has explained in this chapter, its recommendations about provocation have been constrained by the Government's stated intention to make no change to the existing penalty for murder of mandatory life imprisonment.

21.165 A review without that constraint may have produced different recommendations.

21.166 In the absence of a complete review of mandatory life imprisonment for murder, the Commission must necessarily speak with caution about it. However, if mandatory life imprisonment for murder were replaced with presumptive life imprisonment, as has been recently done in Western Australia, then provocation could be taken into account upon sentencing for murder, just as it is in other crimes.¹⁶¹⁹

21.167 A number of respondents to the Provocation Discussion Paper argued for the adoption of a presumptive sentence of life imprisonment for murder. A

¹⁶¹⁹

Apart from assault, in which assault provocation is a complete defence.

presumptive sentence of life imprisonment for murder was recently introduced in New Zealand.¹⁶²⁰ The presumptive life sentence requires a person convicted of murder to be sentenced to life imprisonment unless, given the circumstances of the offence and the offender, a sentence for imprisonment for life would be manifestly unjust.¹⁶²¹ The provision in Western Australia is similar.¹⁶²²

21.168 In its submission in response to the Provocation Discussion Paper, the Queensland Police Service suggested that a presumptive sentence of life imprisonment was in substance a mandatory sentence of life imprisonment, but one that allowed mitigation of sentence in a limited number of situations in which a special claim for mitigation is available.¹⁶²³ The Commission agrees with that characterisation.

21.169 The Commission considers it significant that the primary position of the Queensland Police Service on the issue of reform of the law of provocation was that mandatory life imprisonment for murder should be abolished along with the partial defence of provocation. The Service submitted that murder should be punished by a presumptive sentence of life imprisonment and provocation would then become a matter relevant to penalty. The Queensland Police Service said:¹⁶²⁴

[It is] preferable to adapt the law to make allowance for the range of circumstances that the community would ordinarily consider as lessening the gravity of an intentional killing ... [by] ... transferring the responsibility from a jury to a judge by incorporating provocation and other circumstances rendering a person less culpable into the sentencing process ... Incorporating these circumstances into the sentencing process necessarily requires reforming the mandatory life imprisonment penalty for murder.

1620 *Sentencing Act 2002* (NZ) s 102.

1621 *Sentencing Act 2002* (NZ) s 102 provides:

102 Presumption in favour of life imprisonment for murder

- (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.
- (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.

1622 *Criminal Code* (WA) s 279(4) provides:

- (4) A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless—
 - (a) that sentence would be clearly unjust given the circumstances of the offence and the person; and
 - (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment,
 in which case the person is liable to imprisonment for 20 years.

1623 Provocation Discussion Paper Submission 10. The categories mentioned in the submission received from the Queensland Police Service were cases of mercy killings, killings by victims of seriously abusive relationships, and some killings committed in circumstances of provocation.

1624 Provocation Discussion Paper Submission 10.

21.170 As explained in the previous chapter, the Service did not resile from the position that life imprisonment was the only appropriate penalty for an intentional killing, but considered that:¹⁶²⁵

concessions should be made in some circumstances to militate against the harshness of a murder sentence. The Service therefore supports a presumptive life sentence for the crime of murder. The Service would not support the abolition of the partial defence [of provocation] in the absence of a presumptive life sentence for murder.

21.171 The Commission stresses that it has not reviewed this matter and acknowledges that it received other submissions that argued for the retention of mandatory life for murder. However, in the Commission's analysis, provocation operates essentially as a device to allow for amelioration of punishment in the case of an intentional killing. It is consistent with that analysis to transfer findings about provocation as a partial defence to findings about provocation as findings of fact upon sentence.

21.172 Also, the abolition of both mandatory life and the partial defence (as a defence) would allow meritorious claims for leniency to be taken into account at sentence, even if those claims would not amount to section 304 provocation. It would alleviate the need for the creation of a partial defence for the battered person, although the issue of whether such people were entitled to a full defence would still require consideration.

21.173 There are, of course, arguments for preserving the role of the jury in determining provocation. For example, the New South Wales Law Reform Commission has commented:¹⁶²⁶

The jury has traditionally been and remains the appropriate arbiter of community values. To remove fundamental issues of culpability from the jury and to pass them on to the sentencing judge undermines its role. In addition, a jury finding of manslaughter enables the public to understand why a seemingly lenient sentence has been proposed. It therefore aids community understanding of the law.

21.174 The Commission also notes the observations of the Law Commission of England and Wales in its report, *Partial Defences to Murder*,¹⁶²⁷ and of McSherry¹⁶²⁸ that treating the issue as a sentencing issue merely relocates the issues of gender equality to the sentencing stage while, at the same time, the transfer removes the jury, and therefore the community, from any decision-making role in the assessment of the relative culpability of offenders claiming the mitigation of provocation.

1625 Ibid.

1626 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) [3.133].

1627 Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.20].

1628 B McSherry, 'It's a Man's World: Claims of Provocation and Automatism in 'Intimate' Homicides' (2005) 29(3) *Melbourne University Law Review* 905.

21.175 Other arguments in support of its retention are contained in the previous chapter and will not be repeated here.

The Commission's view

21.176 The Commission's recommendations about changes to provocation must be considered subject to the qualification that the Commission was unable to consider the alternative option of abolishing mandatory life imprisonment for murder and allowing provocation to be considered in mitigation of sentence.

21.177 The partial defence of provocation to murder contained in section 304 of the Criminal Code (Qld) should be abolished, but it must not be abolished while a conviction of murder is punishable by a mandatory sentence of imprisonment for life. Unless mandatory life imprisonment for murder is replaced with presumptive life imprisonment for murder, so that circumstances that might otherwise give rise to the partial defence could be taken into account on sentencing, then the partial defence of provocation to murder should remain.

RECOMMENDATIONS

21.178 The Commission makes the recommendations set out below. The terms of reference for this review did not request the Commission to prepare draft legislation and, in any event, the time frame for this review would not have permitted it to do so. However, in view of the fact that implementation of its recommendations will require legislative amendment, the Commission considers it essential that it be closely consulted on the drafting of any legislation that is prepared to give effect to its recommendations.

21-1 Given the constraint of the Government's stated intention to make no change to the existing penalty of mandatory life imprisonment for murder, the Commission recommends that the partial defence of provocation to murder contained in section 304 of the Criminal Code (Qld) remain, but recommends amendments to it.

21-2 Section 304 of the Criminal Code (Qld) should be amended to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the partial defence of provocation cannot be based on words alone or conduct that consists substantially of words.

21-3 Section 304 of the Criminal Code (Qld) should be amended to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship.

21-4 Additionally, the Commission recommends that consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.¹⁶²⁹

21-5 Section 304 of the Criminal Code (Qld) should be amended by adding a provision to the effect that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities.

1629

See the discussion of this recommendation at [21.137]–[21.138] above

Chapter 22

Assault provocation: Criminal Code (Qld) sections 268, 269

INTRODUCTION	18
THE POSITION IN OTHER JURISDICTIONS	19
THE UNDERLYING RATIONALE	505
ELEMENTS OF PROVOCATION (SECTION 268)	506
PROVOCATION AS A DEFENCE TO ASSAULT	507
THE REFERENCE	21
JURY DIRECTIONS	22
The opening direction	23
Whether there has been a wrongful act or insult	23
The ordinary person test	25
Whether the defendant was induced by the wrongful act or insult	26
Whether the defendant lost self-control	27
DISCUSSION	28
KEY QUESTIONS	29
SUBMISSIONS	30
Submissions in support of no change	31
Submissions in favour of expansion of the application of the defence	32
Submissions in favour of abolition	33
Submission in favour of abolition where victim was a child	516
OBSERVATIONS	517
THE COMMISSION'S VIEW	519
THE WORDING OF SECTIONS 268 AND 269	519
Submissions	35
The Commission's view	37
RECOMMENDATIONS	37

INTRODUCTION

22.1 While provocation under section 304 of the Criminal Code (Qld) is a partial defence to murder, provocation¹⁶³⁰ under sections 268 and 269 of the Code is a complete defence to any offence of which assault is an element.

22.2 The Commission was asked to review the complete defence of provocation and, in particular, to consider whether it ought to be abolished or recast to reflect community expectations.¹⁶³¹ It does not appear that there was

¹⁶³⁰ The concept of provocation in ss 268, 269 of the Criminal Code (Qld) will be referred to as 'assault provocation' at times in the text where it is necessary to distinguish provocation under ss 268 and 269 from provocation under s 304.

¹⁶³¹ The Commission's terms of reference are set out in Appendix 1 to this Report.

any particular case that called into question the appropriateness of the application of the complete defence of provocation.

22.3 The relevant provisions of the Code are in the following terms:

268 Provocation

(1) In this section—

provocation, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

269 Defence of provocation

(1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

22.4 An example of a wrongful act or insult that may constitute provocation is a highly offensive remark to the defendant (for example, racial vilification or

an accusation of criminal conduct) made at a time or in circumstances likely to cause an ordinary person to retaliate physically to the taunt.

22.5 The opening phrase of section 268, 'In this section', first appeared in Reprint No 1 of the Criminal Code when the original section was divided into five numbered subsections under the editorial powers in the *Reprints Act 1992* (Qld). Judge Robin QC in *Hodgens v Williams*¹⁶³² commented that the insertion of the phrase seemed to have been made in error and should be corrected. The phrase appears to confine the definition of provocation to section 268 only when clearly it is intended to provide the definition for section 269.

22.6 Although editorial changes under the *Reprints Act 1992* (Qld) have effect in law,¹⁶³³ the editorial power cannot be exercised to change the effect of a provision.¹⁶³⁴

THE POSITION IN OTHER JURISDICTIONS

22.7 At common law, provocation is not recognised as a complete defence to an assault.

22.8 Western Australia is the only other Australian jurisdiction to provide a complete defence of provocation in relation to assault. Section 246 of the Criminal Code (WA) provides a complete defence of provocation in relation to assault offences. The Criminal Code (WA) also includes a provision setting out the scope and meaning of 'provocation' (section 245). These provisions are in the same terms as sections 269 and 268 of the Criminal Code (Qld).

22.9 The Law Reform Commission of Western Australia has recently reviewed the law in relation to homicide in that State. In its Report, it briefly examined the complete defence of provocation in relation to assault offences. Having received submissions in favour of abolishing the complete defence as well as submissions to the contrary, the Law Reform Commission of Western Australia expressed a provisional view that the complete defence of provocation should be abolished given the ability for mitigating factors to be taken into account in discretionary sentencing.¹⁶³⁵ However, it considered that further consultation was required. Repeal of the complete defence of provocation would have significant practical implications. Importantly, sentencing practices and outcomes for the offences to which the defence currently applies (such as assault and assault occasioning bodily harm) would change. The Law Reform Commission of Western Australia recommended that a review should be

1632 [2005] QDC 257.

1633 *Reprints Act 1992* (Qld) s 8.

1634 *Reprints Act 1992* (Qld) s 7.

1635 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 223.

conducted to consider whether the defence should be retained and, if so, to which offences it should apply.¹⁶³⁶

THE UNDERLYING RATIONALE

22.10 Provocation as a complete defence to assault is the invention of Sir Samuel Griffith. In his explanatory letter to the Attorney-General,¹⁶³⁷ which accompanied the draft Code, he wrote:¹⁶³⁸

With respect, however, to provocation as an excuse for an assault, I have ventured to submit a rule ... which is not to be found in the Draft Code of 1879, nor so far as I know in a concrete form in any English book. At common law an assault is regarded as an offence, committed not against the individual person assaulted, but 'against the peace of Our Lady the Queen, her Crown and Dignity.' It is not, therefore, excused by anything short of the necessity for self-defence against actual violence, or some other positive conditions justifying the application of force. Provocation must, however, operate as a practical, if not in all cases as a formal, answer to a civil action for an assault. There is no doubt that in actual life some such rule as that stated (in s 269) is assumed to exist, although it is probably not recognised by law. The subject of provocation as reducing the guilt of homicide committed under its influence from murder to manslaughter is covered by authority. But I apprehend that it is of at least equal importance as applied to other cases of personal violence.

22.11 In the note to sections 268 and 269 as they appeared in the Draft Code (1897), Sir Samuel Griffith wrote:¹⁶³⁹

It is conceived that the two ... sections express what is in common life assumed to be a natural rule of action. It is submitted that the rule of law may with safety, and under the conditions stated in ... [s 269], be made to accord with the rules of life, so that juries may not be forced to strain their consciences in order to avoid giving verdicts in accordance with law, but repugnant to their sense of right.

22.12 Sir Samuel Griffith's summary explanation that the sections express a 'rule of life' requires some further analysis.

22.13 In confining the scope of the rule to offences of which consent is an element¹⁶⁴⁰ the underlying rationale can be restated as follows. If A deliberately, by some wrongful act or insult, provokes B into an assault on A when it was likely that the wrongful act or insult would have provoked a similar reaction by any person, then why should A be heard to claim he did not consent

¹⁶³⁶ Ibid, Recommendation 30.

¹⁶³⁷ Dated 29 October 1897.

¹⁶³⁸ Reported in (1911) 5 QJP 129, 131.

¹⁶³⁹ Ibid.

¹⁶⁴⁰ An assault is defined as an application of force to another without that other's consent: Criminal Code (Qld) s 245. However, absence of consent is not an element of unlawful wounding or of unlawfully doing grievous bodily harm. Accordingly, consent to a wounding or grievous bodily harm is not a defence to those offences and assault provocation is not a defence to unlawful wounding or unlawfully doing grievous bodily harm.

to B's assault? Provocation therefore negates a lack of consent, or, to put the proposition in terms of the onus of proof, disproof of provocation establishes a lack of consent.¹⁶⁴¹

22.14 It may be, as Sir Samuel Griffith noted, that in the 1890s in Queensland the provision captured a 'natural rule of action' for a society which was more robust than ours is, and in which deliberate insult was more likely to result in quick retaliation. As the nature of society has changed over time the question of whether provocation should be retained as a defence to an assault may now be considered.

ELEMENTS OF PROVOCATION (SECTION 268)

22.15 The elements of provocation under section 268 of the Code are largely self-explanatory. Provocation consists of a 'wrongful act or insult'. In *R v Stevens*¹⁶⁴² the Queensland Court of Criminal Appeal attempted to limit the scope of provocation, firstly, by holding that the word 'wrongful' should be construed to embrace matters that are unlawful under the criminal law, and matters that involve the infringement of some right, whether provided by law or by a court order;¹⁶⁴³ and secondly, by holding that 'wrongful' qualified both 'act' and 'insult' in the phrase 'wrongful act or insult'.

22.16 Whether *R v Stevens*¹⁶⁴⁴ remains good law in the light of *Stingel v The Queen*¹⁶⁴⁵ is doubtful.

22.17 *Stingel v The Queen* was an appeal concerning section 160 of the Criminal Code (Tas). The Court examined the term 'wrongful act or insult' as it appeared in the Tasmanian provision.¹⁶⁴⁶ The Court interpreted the words 'wrongful', 'act' and 'insult' as words of wide general import, which should be given their ordinary meanings. 'Wrongful', the Court said, simply imports the element of offensiveness in the phrase 'wrongful act'. Additionally, the Court held that the word 'wrongful' does not qualify 'insult'.¹⁶⁴⁷

22.18 In the daily administration of the law in Queensland the broad definitions in *Stingel* are routinely followed.

¹⁶⁴¹ Alternatively, it may be said that A, by inducing the assault by B, has impliedly consented to the induced assault.

¹⁶⁴² [1989] 2 Qd R 386.

¹⁶⁴³ Ibid 391.

¹⁶⁴⁴ [1989] 2 Qd R 386.

¹⁶⁴⁵ (1990) 171 CLR 312.

¹⁶⁴⁶ Section 160 set out the partial defence of provocation for murder, a provision that has since been repealed.

¹⁶⁴⁷ *Stingel v The Queen* (1990) 171 CLR 312, 321–2.

22.19 Section 268(3) of the Code provides that a lawful act is not provocation to any person for an assault. Kenny¹⁶⁴⁸ has suggested that the Queensland Court of Appeal in *Stevens* interpreted the term 'lawful', as used in that subsection, broadly, and contrasted that approach with the current view in Western Australia, where the word 'lawful' is understood in the sense of something that is lawful by virtue of a provision in the Code.¹⁶⁴⁹

PROVOCATION AS A DEFENCE TO ASSAULT

22.20 Section 269 of the Criminal Code (Qld) provides that a person is not criminally responsible for a provoked assault. The section sets out the parameters of assault provocation. Of interest are the requirements that the retaliation must not be disproportionate to the provocation, and must not be intended or likely to cause death or grievous bodily harm.

22.21 The requirement of proportionality attracted some criticism initially as it was thought illogical to expect an angry man to react proportionately.¹⁶⁵⁰ But that is exactly what the section does require. Assault provocation, therefore, implicitly recognises that loss of self-control is a question of degree. It must also be said that, in practice, the courts have not experienced problems in explaining the concept of proportionality to juries.

THE REFERENCE

22.22 As noted above, the Commission was asked to review whether provocation as a complete defence to assault should be abolished or whether it should be recast to reflect community expectations.

22.23 The terms of reference also require the Commission to consider whether the current provisions are readily understood by a jury and the community.

¹⁶⁴⁸ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (6th ed, 2004).

¹⁶⁴⁹ *Roche v The Queen* [1988] WAR 278, 280. A list of Code provisions that describe when conduct is lawful under the Code is set out in RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (6th ed, 2004) 276–7. It is of interest to note that, in *Hodgens v Williams* [2005] QDC 257, Judge Robin QC preferred the construction placed on the term by the Western Australian cases.

¹⁶⁵⁰ *R v Foxcroft* (1911) 5 QJPR 129, 130 (Real J).

JURY DIRECTIONS

22.24 The Supreme and District Court Benchbook for Queensland includes a model direction on the complete defence of provocation in relation to assault.¹⁶⁵¹

22.25 This direction shares some features with the model direction for the partial defence of provocation; for example, the explanation of what is meant by ‘an ordinary person’. The model direction is outlined here to the extent that it relates to the specific elements of the complete defence.

The opening direction

22.26 The model direction suggests the following opening:¹⁶⁵²

In order to convict the defendant you must be satisfied that the assault (or other offence charged) was unlawful.

An assault (or other offence charged) is unlawful unless it is authorized, justified or excused by law.

An assault (or other offence charged) is justified or excused if, at the time of the assault (or other offence charged), the defendant was acting under provocation.

Provocation is defined as:

‘... any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered ...’

Our law provides that:

‘When such an act or insult is done or offered by one person to another, the former is said to give the latter provocation for an assault.’

Whether there has been a wrongful act or insult

22.27 The model direction then moves to the issue of whether there was a relevant wrongful act or insult:¹⁶⁵³

At the outset, there must be a wrongful act or insult by the complainant.

...

¹⁶⁵¹ *Supreme and District Court Benchbook*, Provocation: ss 268, 269, [84].

See <<http://www.courts.qld.gov.au/Benchbook/SD-84-ProvocationSS268-269.pdf>> (25 September 2008).

¹⁶⁵² Ibid [84.1]. Note that provision is made throughout for the direction to be related to the evidence in the particular case.

¹⁶⁵³ Ibid [84.1]–[84.2].

The wrongful act or insult by the complainant to the defendant must be of such a nature as to be likely if done to an ordinary person to deprive the person of the power of self control.

Whether any particular act or insult is such as likely to provoke the person who offers it is a question for you to decide in light of the facts and circumstances as you find them to be.

The ordinary person test

22.28 The model direction then provides the following explanation of the ordinary person test:¹⁶⁵⁴

An ordinary person in this context is expected to have the ordinary human weaknesses and emotions common to all members of the community and to have the same level of self control as an ordinary person of the defendant's age. It means an ordinary person in the position of the defendant who has been provoked to the same degree of severity and for the same reason as the defendant. (note omitted)

You must consider the gravity of the provocation to the particular defendant. His race, colour, habits and relationship to the complainant may all be part of this assessment. Conduct which might not be insulting to one person may be extremely insulting to another because of that person's age, race, ethnic or cultural background, physical features, personal attributes personal relationships or past history. [Refer to special characteristics of the defendant raised on the evidence and relevant to the assessment of the wrongful act or insult.]

Whether the defendant was induced by the wrongful act or insult

22.29 The model direction continues, addressing the question whether the defendant was induced by the wrongful act or insult:¹⁶⁵⁵

If you are satisfied or you are left in a reasonable doubt about whether there was a wrongful act or insult of such a nature as to be likely, when done to a reasonable person, to deprive the ordinary person of the power of self control, you must consider whether that act or insult induced the defendant to assault the complainant.

A deliberate act of vengeance, hatred or revenge may not be induced by the wrongful act or insult despite the fact that such an act or insult was offered.

A person is not criminally responsible for an assault committed on a person who gives the defendant provocation for the assault if the person is in fact deprived by the provocation of the power of self control and acts upon it on the sudden and before there is time for the person's passion to cool and if the force is not disproportionate to the provocation ...

1654 Ibid [84.2].

1655 Ibid [84.2]–[84.3].

Whether the defendant lost self-control

22.30 The model direction then addresses the question of the defendant's loss of self-control:¹⁶⁵⁶

In considering whether the defendant was deprived of the power of self-control, you must view the words or conduct in question as a whole and also in light of any history or disputation between the defendant and the complainant, since particular acts or words which, considered separately, could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to lose self-control in fact.

The defendant must have acted upon the provocation and before there is time for his passion to cool.

The force used by the defendant must not be disproportionate to the provocation.

[An example may be useful to explain the concept of force being disproportionate, eg a push or punch as provocation where a person responds by shooting the other].

The question of whether force was disproportionate depends on all the circumstances of the case, including the physical attributes of the person offering the provocation, the nature of the attack, whether a weapon was used, what type of weapon and whether the person was alone or in company.

22.31 The model direction also addresses the prosecution's onus.¹⁶⁵⁷

22.32 The model directions contained in the Benchbook are not intended to limit the way in which a trial judge sums up a case to the jury. Ideally, the model directions would be adapted to the facts of a particular trial, and elaborated upon where necessary.

DISCUSSION

22.33 The options presented by the terms of reference were the abolition of provocation as a complete defence to assault, or the recasting of it to reflect community expectations. Society has changed since Sir Samuel Griffith saw a need for a defence of provocation to reflect the expectations and realities of colonial life. However, the underlying logic of the defence remains the same today. If the underlying logic is defensible, the question is simply whether the defence serves any useful function in contemporary Queensland.

¹⁶⁵⁶ Ibid [84.3].

¹⁶⁵⁷ Ibid [84.3]–[84.4].

KEY QUESTIONS

22.34 In its Provocation Discussion Paper, the Commission asked two questions:¹⁶⁵⁸

- Should the complete defence to assault in sections 268 and 269 of the Criminal Code (Qld) be abolished or retained?
- If the complete defence to assault is retained, should sections 268 and 269 of the Criminal Code (Qld) be reworded in contemporary language?

SUBMISSIONS

22.35 The DJAG Discussion Paper did not discuss assault provocation and, accordingly, it was not referred to in any submission to the Department.

22.36 Several, but not all, respondents to the Commission's Provocation Discussion Paper considered assault provocation and responded to the questions above.

22.37 Those respondents who provided the Commission with their views on assault provocation were:

- the Honourable JB Thomas AM QC;
- a lawyer;
- two law academics;
- legal Aid Queensland;
- the Bar Association of Queensland;
- the Women's Legal Service;
- the Queensland Police Service; and
- the Commission for Children and Young People and Child Guardian.

22.38 Some respondents submitted that there should be no change to the current operation of the defence. Some argued for its extension to other offences. Others sought its abolition.

¹⁶⁵⁸

Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) 207.

Submissions in support of no change

22.39 The Bar Association of Queensland submitted that there was no warrant for abolition of the defence of provocation to charges of which assault is an element:¹⁶⁵⁹

The wide formulation of the defence enunciated in *R v Stingel* constitutes a commonsense, every-day concept which is applied routinely by Queensland juries.

We take the force of the observation, at paragraph [11.14] of the [Provocation] Discussion Paper,¹⁶⁶⁰ that society has changed since Sir Samuel Griffith formulated the defence in the 1890s, in that his 'natural rule of action' was perhaps more suited to a more robust pioneering society. We are nevertheless of the view that the concepts and principles enunciated in s 268 Criminal Code (Q) remain relevant to modern society.

It is appreciated that the [Provocation] Discussion Paper has given a necessarily brief consideration to this issue. There is no sufficient justification demonstrated, in our view, for abolition or amendment of ss 268 and 269.

22.40 Legal Aid Queensland did not support any change to the Criminal Code (Qld) that would remove a defence that was currently available:¹⁶⁶¹

Whilst LAQ does not condone the use of violence as a response to any situation, the complete defence of provocation is only offered in regards to lower levels of violence, and has significant limitations placed on its application. Our experience is that the more serious the assault (particularly assaults involving circumstances of aggravation), the less likely the defence will be available.

22.41 However, Legal Aid Queensland suggested further investigations were required before any final recommendations were made:¹⁶⁶²

LAQ would suggest that before any final recommendations or decisions are made, further investigations be undertaken as to how often and in what circumstances this defence is raised and is successful.

22.42 The Hon JB Thomas did not consider the discussion of assault provocation in the Commission's Provocation Discussion Paper adequate but added:¹⁶⁶³

However public dissatisfaction does not seem to have ... emerged in that area as it has in the homicide cases. So far as I can tell the law of provocation (as a defence to cases of which assault is an element) functions satisfactorily ...

1659 Provocation Discussion Paper Submission 11.

1660 See [22.14] above.

1661 Provocation Discussion Paper Submission 6.

1662 Ibid.

1663 Provocation Discussion Paper Submission 9.

Submissions in favour of expansion of the application of the defence

22.43 The respondent lawyer said there was no reason to abolish assault provocation, and sought an expansion of its application.¹⁶⁶⁴ This respondent was particularly concerned about the limits of the required connection between the defendant and the person to whom the wrongful act or insult was directed under section 268¹⁶⁶⁵ and the position of the ‘Good Samaritan’ who responds with an assault to provocation upon a stranger.

22.44 One of the academics responding to the Provocation Discussion Paper referred to the report of the Queensland Taskforce on Women and the Criminal Code,¹⁶⁶⁶ which considered assault provocation, and agreed with its recommendation about this defence.¹⁶⁶⁷

22.45 In its report, the Taskforce stated that, by majority, it supported retention of the complete defence of provocation and sought its extension to other offences of violence such as wounding and doing grievous bodily harm.¹⁶⁶⁸ The Taskforce explained its process and its conclusions:¹⁶⁶⁹

First, the Taskforce considered whether the defence should be abolished, with the circumstances of provocation to be taken into account as a mitigating factor at sentence. This is consistent with women’s concerns about how the law excuses violence. Secondly, the Taskforce considered whether the defence should be extended to cover offences such as wounding or grievous bodily harm. Thirdly, the Taskforce considered whether the defence should be reformed, particularly with regard to the requirement that provocation occur in the presence of the accused.

The Taskforce, by majority, supports keeping the complete defence of provocation, and recommends extending the defence to other offences of violence such as wounding and grievous bodily harm. Members who did not favour the extension of the defence considered the fact that the defence was limited to offences of assaults reflected the necessity for the response to the provocation to be proportionate to the provocation. They considered that wounding and grievous bodily harm would not be a proportionate response. On the other hand, other Taskforce members pointed out that power imbalances between men and women mean that women would be more likely to respond to provocation with a knife (and therefore wound) than with a fist (and therefore commit an assault). Wounding might be a more proportionate response than an assault with a fist or an offensive weapon.

1664 Provocation Discussion Paper Submission 3.

1665 Namely, a person under the defendant’s immediate care, or one to whom the defendant stands in a conjugal, parental, filial or fraternal relationship, or in the relationship of master and servant.

1666 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

1667 Provocation Discussion Paper Submission 13.

1668 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 196.

1669 Ibid.

The Taskforce, by majority, do not think it appropriate to remove from the defence the current requirement that the provocative act must occur in the presence of the accused.

22.46 The formal recommendation of the Taskforce was to extend the complete defence of provocation to the offences of wounding and grievous bodily harm.

22.47 The respondent academic who discussed this report saw little justification for the abolition of the defence:¹⁶⁷⁰

In the absence of evidence that the excuse is applied in a manner that is inconsistent with notions of blameworthiness, there seems to be little justification for its abolition. As suggested in the [Provocation] Discussion Paper the abolition of the excuse may have little practical effect as it may simply result in the evidence of provocation being introduced in the context of consent rather than in the context of the excuse. Such a consequence may simply result in a period of uncertainty as the courts struggle to establish the parameters of consent. Furthermore the abolition of the excuse may have the undesirable consequence of increasing the importance of police discretion. As it stands the existence of the excuse and the corresponding low probability of a conviction may mitigate the tendency of police to bring charges against an accused in circumstances that could be described as trivial. Abolishing the excuse may increase the inequality in the application of the law as the likelihood of charges being brought against an individual may well depend on the individual police officer's approach to law enforcement. This may well be particularly relevant to certain communities, including Indigenous communities, where the abolition of the excuse may be accompanied by a substantial increase in prosecution rates.

22.48 The respondent academic agreed with the recommendation of the Taskforce on Women and the Criminal Code:¹⁶⁷¹

I strongly agree with the recommendations in the Report of The Taskforce on Women and the Criminal Code and those of the Law Reform Commission of Western Australia that the application of the excuse should be reviewed. As it currently stands there is no logical distinction between the offences where the excuse [applies] and those where it has no application. To argue that the distinction between the offences is based on the requirement that the Crown must establish an absence of consent merely begs the question as to whether there is a logical distinction between the offences where consent is relevant and those where consent is irrelevant. The well known English decisions of *Aitken*,¹⁶⁷² *Brown*¹⁶⁷³ and *Wilson*¹⁶⁷⁴ demonstrate the inadequacies of the law as it currently stands. In many circumstances whether an accused inflicts

1670 Provocation Discussion Paper Submission 13.

1671 Ibid.

1672 (1992) 95 Cr App R 304, which concerned consent (by members of the RAF) to rough horseplay and games that carried significant physical risk.

1673 [1994] 1 AC 212, which concerned consent to sadomasochistic practices that inflicted wounding for sexual pleasure. It was held that consent was irrelevant because the injuries caused were neither transient nor trivial.

1674 [1996] 2 Cr App R 241, in which it was held that a person could consent to deliberately inflicted bodily harm. In that case, a husband branded his initials with a hot knife on his wife's buttocks.

bodily harm or a wound is purely a matter of happenchance. Furthermore there is no logical distinction between the two types of injury in terms of their seriousness. There is a strong argument in favour of the approach taken by the dissenting judges, Lords Mustill and Slynn, in *Brown*¹⁶⁷⁵ that the absence of consent should be an element of any non-fatal offence against the person that does not involve the infliction of grievous bodily harm. There are perhaps, strong social welfare arguments as to why consent should remain irrelevant to the offence of grievous bodily harm.

Submissions in favour of abolition

22.49 The Queensland Police Service sought the removal of the complete defence of provocation to an assault, submitting that it ought to be a matter for sentence:¹⁶⁷⁶

The Service views a concession on the basis of human frailty as appropriate to assault based offences. However, the Service is of [the] view that, as in the case of murder, provocation for assault should be a matter of sentencing rather [than] providing a complete defence.

22.50 One of the respondent law academics argued in favour of the abolition of assault provocation, primarily because of the respondent's belief about the effect of the existence of the defence on the prosecution of acts of domestic violence.¹⁶⁷⁷

22.51 The academic in favour of abolition argued:¹⁶⁷⁸

The provocation defence in ss 268–269 should be abolished. This would bring Queensland into line with most other Australian jurisdictions. It is my view that many domestic violence assaults are not charged as assaults in part because of the existence of the defence. The defence is very broad and covers insults as well as acts so is easy to apply in the context of many domestic violence incidents. Queensland has a particularly low rate of charge and prosecution for domestic assaults despite police data which shows that many police identify domestic assault as criminal assaults but then charge a lesser offence such as 'breach of a domestic violence order'.¹⁶⁷⁹ Abolition of the provocation defence to assault may redress this situation. Provocation should be argued at the sentencing stage.

22.52 The Women's Legal Service also sought the abolition of the defence of provocation.¹⁶⁸⁰

1675 [1994] 1 AC 212.

1676 Provocation Discussion Paper Submission 10.

1677 As discussed above, the other law academic sought its extension to other offences.

1678 Provocation Discussion Paper Submission 4.

1679 This issue is discussed in a forthcoming article: H Douglas, 'The Criminal Law's Response to Domestic Violence: What's going on?' (2008) *Sydney Law Review*.

1680 Provocation Discussion Paper Submission 8.

Submission in favour of abolition where victim was a child

22.53 The Commission for Children and Young People and Child Guardian sought the abolition of the defence of assault provocation where it was alleged that a child had provoked the defendant.¹⁶⁸¹ This respondent was particularly concerned with adults charged with assaulting children with unreasonable force in the course of domestic discipline who might rely on the defence of provocation; and adults in sexual or emotional relationships with adolescents, who might rely on the defence of provocation for an assault upon the adolescent.

22.54 Its concerns about assault provocation were similar to those it raised for murder provocation. In particular, it was concerned that there was no specific requirement:¹⁶⁸²

for a jury to take into account factors such as the youth, immaturity, vulnerability or incapacity of the victim other than the requirement to determine whether an ordinary person *in the circumstances* would be deprived of the power of self-control.

The lack of any mandatory consideration by a jury of a victim's age or vulnerability means that a jury must arbitrarily decide whether such things are relevant in determining whether the defence of provocation will succeed ... In the Commission's view, this is inadequate protection for children and young people, particularly for adolescent provokers, the gravity of whose provocation is likely to be more difficult to assess without some specific legislative and/or judicial guidance. (emphasis in original)

22.55 The Commission for Children and Young People and Child Guardian argued that an adult should be under a higher duty to control his or her actions in response to the behaviour of a child or young person on the basis that the child or young person was neither morally culpable for, nor capable of fully understanding the significance of the effect of, their actions on themselves or others. In the opinion of the Commission for Children and Young People and Child Guardian, this approach was consistent with the preamble to the *United Nations Convention on the Rights of the Child*.

22.56 The Commission for Children and Young People and Child Guardian submitted that the complete defence of provocation should not be available to adult offenders in cases where a victim is under 18 years of age. Alternatively, the Commission for Children and Young People and Child Guardian submitted that section 269 should be amended to require a jury to specifically consider a victim's youth, immaturity and vulnerability in determining the victim's capacity to provoke an assault.

1681 Provocation Discussion Paper Submission 5.

1682 Ibid.

OBSERVATIONS

22.57 The Commission was unaware of a case in which the complete defence of provocation to an assault had produced an outcome that was said to be unjust. None was referred to in any submission received.

22.58 As noted above, one respondent academic submitted that the existence of the complete defence was one of the reasons why violence by a respondent¹⁶⁸³ to a domestic violence protection order upon the aggrieved¹⁶⁸⁴ was charged as a 'breach of a domestic violence order' rather than as an assault and suggested in a recent newspaper article¹⁶⁸⁵ that, because respondents were charged with a breach offence, 'victims did not have access to criminal compensation and offenders faced much lighter sentences'.

22.59 However, the respondent conceded that:¹⁶⁸⁶

It is difficult to know the effect of the availability of this excuse on police decisions to prosecute assaults in Queensland. Although provocation operates as a complete excuse for assault in Western Australia ... relevant analysis of the impact of this excuse on the discretion to prosecute assaults is not available. In the ACT where police discretion to charge in domestic violence matters has been extensively examined, provocation is not an excuse for assault, it is only a partial defence to murder ...

22.60 Accordingly, this point cannot be taken far.

22.61 Consistent with its view on the partial defence of provocation to murder, the Queensland Police Service sought abolition of the complete defence.¹⁶⁸⁷ However, the rationale underlying the partial defence and the complete defence are different.

22.62 The partial defence of provocation to murder is available as a concession to human frailty in extreme situations and allows for discretion in sentencing for murder. The complete defence of provocation to an assault essentially negates a claim of lack of consent to the assault, absolving a defendant of criminal responsibility for it.

22.63 Therefore, in the Commission's view there is nothing inconsistent in principle with abolishing the partial defence of provocation to murder but retaining the complete defence of provocation to an assault.

¹⁶⁸³ The person against whom a domestic violence protection order is in force: *Domestic and Family Violence Protection Act 1989* (Qld) s 12F.

¹⁶⁸⁴ The person for whose benefit a domestic violence protection order is in force: *Domestic and Family Violence Protection Act 1989* (Qld) s 12F.

¹⁶⁸⁵ M Christiansen, 'Law fails on home violence', *The Courier-Mail*, 23 September 2008, 11.

¹⁶⁸⁶ Attachment to Provocation Discussion Paper Submission 4: H Douglas 'The Criminal Law's Response to Domestic Violence: What's Going On?' *Sydney Law Review* forthcoming 2008, n 152.

¹⁶⁸⁷ Provocation Discussion Paper Submission 10.

22.64 Also, because the underlying rationale of assault provocation is tied to proof of consent (or, more accurately, lack of consent) it is not appropriate to extend assault provocation to offences which do not require proof of consent. For that reason the Commission does not consider that the defence of provocation should be extended to the offences of unlawful wounding or unlawfully doing grievous bodily harm.

22.65 The Commission for Children and Young People and Child Guardian has submitted that the conduct of a child under 18 should not be available as the basis of a claim for provocation to an assault.¹⁶⁸⁸

22.66 Juveniles from as young as 10¹⁶⁸⁹ regularly appear in the criminal courts convicted of serious offences, including unlawful killing. In the Commission's view, it is naive to base a decision about the abolition of provocation in the case of 'child' victims (ie, under 18) on the notion that a child victim is neither morally culpable nor capable of fully understanding the effect of their actions. There are many different levels of immaturity, vulnerability and incapacity within the age group from infancy to 17 years.

22.67 In the Commission's view, in the case of children or young people under 18, common sense and the limits upon the defence of provocation to an assault provide adequate safeguards and sufficient scope for the recognition of the special considerations that may affect children.

22.68 There are two significant safeguards in sections 268 and 269 of the Code that are not present in common law provocation. The first is a requirement that the provocative conduct be *likely* to cause a temporary loss of self-control (section 268(1)).¹⁶⁹⁰ The second is the requirement that any reaction be proportionate to the provocation (section 269(1)).¹⁶⁹¹ These safeguards give scope for recognition of the special position of children both as victims and as defendants.

22.69 Those respondents who supported retention of the complete defence of provocation to an assault considered it to accord with common sense and to function satisfactorily.

1688 Provocation Discussion Paper Submission 5.

1689 A child under the age of ten cannot be guilty of a criminal offence. Criminal Code (Qld) s 29 provides:

29 Immature age

- (1) A person under the age of 10 years is not criminally responsible for any act or omission.
- (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

1690 At common law it is only necessary that the conduct *could* cause a temporary loss of self-control.

1691 At common law no legal requirement of proportionality exists.

THE COMMISSION'S VIEW

22.70 There does not appear to have been any particular trigger for a review of the complete defence of provocation. It has a narrow area of operation because it is confined to offences of which assault is an element. In practice, its operation is virtually limited to the offences of assault and assault occasioning bodily harm.

22.71 The Commission considers the underlying rationale for the defence of provocation to an assault to be theoretically acceptable. There has been no suggestion that its application has led to unjust outcomes. In the Commission's view, it has sufficiently defined parameters and is sufficiently flexible to allow a jury (or magistrate) to make appropriate decisions about its application and success.

22.72 Accordingly, the Commission does not recommend the abolition of the complete defence of provocation to an assault contained in sections 268 and 269 of the Criminal Code (Qld).¹⁶⁹²

THE WORDING OF SECTIONS 268 AND 269

Submissions

22.73 Only two respondents commented on the wording of sections 268 and 269.

22.74 The Bar Association of Queensland considered that the problem identified earlier with the wording of section 268¹⁶⁹³ should be corrected, but that the sections did not otherwise need to be reworded.¹⁶⁹⁴

We do agree, however, that in s 268 the introductory words 'In this section ...' seem to have been made in error, and should be deleted.

The Association does not think that ss 268 and 269 need to be re-worded in contemporary language.

22.75 However, one of the law academics suggested two changes: (1) replacement of the ordinary person test and (2) amendment to achieve gender equality.¹⁶⁹⁵

¹⁶⁹² Because of this recommendation, there is no need to consider the impact of the abolition of the defence of provocation to an assault to the law of self-defence.

¹⁶⁹³ See [22.5] above.

¹⁶⁹⁴ Provocation Discussion Paper Submission 11.

¹⁶⁹⁵ Provocation Discussion Paper Submission 13.

As demonstrated by the rather lengthy Supreme and District Court Benchbook directions, the excuse of provocation is somewhat complicated in its application and therefore simplification of the excuse is desirable. However, as most assault charges are heard summarily there maybe little reason to reword the excuse unless some substantive changes are also made. In this respect two changes should be considered. First the ordinary person test should be replaced with a simplified test similar to that recommended by the New South Wales Law Reform Commission's *Partial Defence to Murder — Provocation* report.¹⁶⁹⁶ Secondly the same gender equality issues raised in respect to the partial excuse of provocation also apply to the complete excuse of provocation. Accordingly the complete excuse should be amended in line with any changes made to the partial excuse with respect to the need for a triggering incident and the element of immediacy

22.76 The report of the New South Wales Law Reform Commission referred to in this submission recommended, in the context of murder provocation, that the ordinary person test be replaced with a requirement to consider whether, having regard to his or her characteristics and circumstances, the defendant should be excused for having so far lost self-control as to have formed the requisite intention to murder as to warrant the reduction of murder to manslaughter.

The Commission's view

22.77 Generally the Commission is satisfied that provocation as a complete defence to assault is a well understood part of the criminal law, which operates in a commonsense way.

22.78 In the Commission's view, there is no reason to amend the wording of sections 268 and 269, with one small exception. The opening phrase of section 268 appears to incorrectly confine the definition of provocation to that section. The Commission recommends its removal.

RECOMMENDATIONS

22-1 The complete defence of provocation to an assault contained in sections 268 and 269 of the Criminal Code (Qld) should remain.

22-2 The opening phrase of section 268 of the Code ('In this section') should be removed.

¹⁶⁹⁶

Report No 83 (1997) [2.81]–[2.83] cited in Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper, WP 63 (August 2008) [6.9].

Appendix 1

Terms of reference

A REVIEW OF THE EXCUSE OF ACCIDENT AND THE DEFENCES OF PROVOCATION UNDER THE CRIMINAL CODE

I, Kerry Shine, Attorney-General and Minister for Justice and Attorney-General and Minister Assisting the Premier in Western Queensland, having regard to:

- the need for the Criminal Code to reflect contemporary community standards;
- the need for the Criminal Code to provide coherent and clear offences which protect individuals and society;
- the need for concepts of criminal responsibility to be readily understood by the community;
- the need for the criminal law to provide appropriate offences and penalties for violent conduct;
- the need for the criminal law to provide appropriate and fair excuses and defences for all types of assault offences as well as for murder and manslaughter; and
- the existence of a mandatory life sentence for murder and the Government's intention not to change law in this regard;

refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), a review of the excuse of accident (section 23(1)(b) of the *Criminal Code*) and the defences of provocation (sections 268, 269 and 304 of the *Criminal Code*).

In undertaking this reference, the Commission is to have particular regard to:

- (a) the results of the Attorney-General's audit of homicide trials on the nature and frequency of use of the excuse of accident and the partial defence to murder of provocation;
- (b) whether the current excuse of accident (including current case law) reflects community expectations;
- (c) whether the partial defence of provocation (section 304 of the Criminal Code) should be abolished, or recast to reflect community expectations;

- (d) whether the complete defence of provocation (sections 268 and 269 of the Criminal Code) should be abolished, or recast to reflect community expectations;
- (e) the use of alternative counts to charges of manslaughter (for example, assault or grievous bodily harm), including whether section 576 of the Code should be redrafted;
- (f) whether current provisions are readily understood by a jury and the community;
- (g) whether there is a need for new offences, for example assault occasioning grievous bodily harm or assault causing death (to apply where accident would otherwise be a complete defence to a murder or manslaughter charge); and
- (h) recent developments and research in other Australian and overseas jurisdictions, including reviews of the law of accident and provocation undertaken in other jurisdictions.

In undertaking this reference, the Commission is to, where possible and appropriate, consult stakeholders.

The Commission is to provide a report to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland on the results of the review by 25 September 2008.

Appendix 2

Respondents to the Accident Discussion Paper

Aboriginal & Torres Strait Islander Legal Services (Qld) Ltd

Anderson, Ms P

Bar Association of Queensland

Barrett, Mr M

Burgess, Mr C

Crighton, Ms L

Godsall-Smith, Mr K

Hayton, Mr T

Howard, Mr J

Kilvington, Mr K

Legal Aid Queensland

Martin SC, Mr R

Maurer, Ms D

Moynihan SC, Mr AW

Queensland Police Service

Thomas AM QC, the Hon JB

The Commission also received two confidential submissions.

Appendix 3

Respondents to the Provocation Discussion Paper

Bar Association of Queensland

Barrett, Mr M

Brodie, Mr J

Commission for Children and Young People and Child Guardian

Douglas, Dr H

Kilvington, Mr K

Legal Aid Queensland

Martin SC, Mr R

McLennan, Ms F

Queensland Police Service

Thomas AM QC, the Hon JB

Women's Legal Service

The Commission also received one confidential submission.