

Review of particular criminal defences

Killing on provocation information sheet

Version November 2023

Provocation as a partial defence to murder is in section 304 of the Criminal Code.

Provocation has been explained as ‘a concession to human frailty’, by recognising circumstances when a person loses self-control and is not acting ‘deliberately and in cold blood’ when they kill.¹ The law aims to balance this concession to human weakness and the need for objective standards of behaviour to protect human life.²

Section 304 applies if the elements of murder are met. It offers a partial defence if the person was provoked by the victim to such an extent that the person lost and acted without self-control, ‘in the heat of passion’. The common law definition of provocation applies to section 304. This means conduct will not amount to provocation unless it was **serious enough to cause an ordinary person to lose self-control**. Section 304 qualifies the meaning of provocation for this defence by excluding some types of conduct. Unless there are exceptional circumstances, provocation cannot be based on:

- words alone,
- anything done, or believed to be done, by the deceased to end or change their domestic relationship with the person, or
- an unwanted sexual advance.

Usually the prosecution must exclude a defence. However, the defence under section 304 must be proved by the defendant on the balance of probabilities. The defence reduces the person’s criminal liability so that they are guilty of manslaughter, not murder. This gives the court a wider sentencing discretion as murder carries a mandatory sentence of life imprisonment.³

304 Killing on provocation

- (1) 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.
- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of an exceptional character.
- (3) Also, subsection (1) does not apply, other than in circumstances of an exceptional character, if—
 - (a) a domestic relationship exists between 2 persons; and
 - (b) one person unlawfully kills the other person (the **deceased**); and
 - (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

304 Killing on provocation cont.

- (4) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.
- (5) For subsection (3)(a), despite the Domestic and Family Violence Protection Act 2012, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.
- (6) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.
- (7) For proof of circumstances of an exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.
- (8) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.
- (9) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.
- (10) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.
- (11) In this section—
 - (a) **unwanted sexual advance**, to a person, means a sexual advance that—
 - (a) is unwanted by the person; and
 - (b) if the sexual advance involves touching the person—involves only minor touching.

Examples of what may be minor touching depending on all the relevant circumstances—

patting, pinching, grabbing or brushing against the person, even if the touching is an offence against section 352(1)(a) or another provision of this Code or another Act

Section 304 was based on earlier common law and included in the Code when it first came into force in 1901. It was substantively amended in 2011 and 2017.⁴

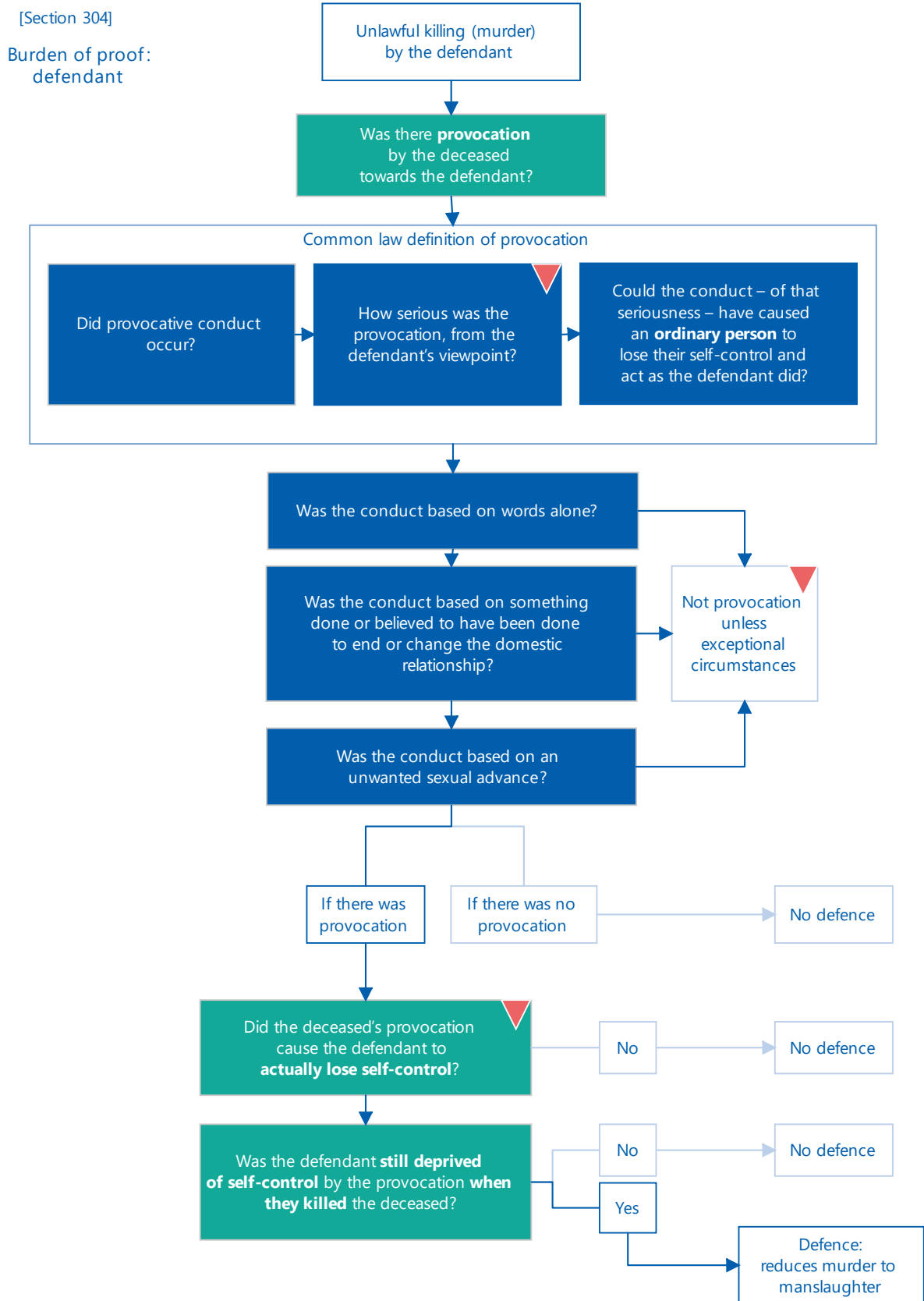
In 2011, the defence was limited so that it does not apply if the provocation is based on words alone (such as an insult) or on anything done by the deceased to end or change their domestic relationship with the defendant, other than in exceptional circumstances. The 2011 amendments also provided for any relevant history of violence to be considered in proof of exceptional circumstances, and shifted the burden of proof from the prosecution to the defendant. The changes were intended to 'recast the partial defence ... to address its bias and flaws'.⁵

In 2017, the defence was limited so that it does not apply if the provocation is based on an unwanted sexual advance, other than in exceptional circumstances. This reflected 'changes in community expectations that such conduct should not be able to establish a partial defence of provocation to murder'.⁶

The defence has been considered in many reviews and applied in some controversial cases.⁷ Criticisms of the defence include concerns that it:⁸

- is outdated and gender-biased, having developed at a different time when violent retaliation by men to particular conduct was tolerated more by society
- is complicated, difficult to understand and difficult for judges to direct juries on
- may operate unfairly or inconsistently.

Figure 1: killing on provocation provision in Queensland



▼ Taking into account all the circumstances, including any history between the defendant and deceased

As part of their duty to ensure a fair trial, judges in criminal trials are required to sum up the case and give the jury directions about the law and how to apply it, and how to assess the evidence. To help judges with this, suggested directions in the Queensland Supreme and District Courts Criminal Directions Benchbook offer guidance on the directions that should be given.

The following extracts are from the suggested directions in the benchbook on the partial defence of provocation under section 304, for offences committed after and before the amendments made in 2011. View the full text on the [Queensland Courts website](#).⁹

Suggested directions for section 304: provocation (for offences post-4 April 2011)

... Our law recognises that a person may be killed in circumstances where the defendant was so provoked by something done by that person as to lose the power of self-control, such that this provides an explanation for his/her actions which should be taken into account.

Under our law if a person acts under provocation, he/she is not guilty of murder but is guilty of manslaughter only. Provocation is therefore something which operates only as a partial defence, not a complete defence, because it reduces what otherwise would be a verdict of murder to one of manslaughter.

In this context, provocation has a particular legal meaning. It consists of conduct which causes a loss of the power of self-control on the part of the defendant and which might have caused an ordinary person to lose the power of self-control and to act in the way in which the defendant did.

There are three questions of fact that are involved here. ...

The defendant must satisfy you that, more probably than not:

1. There was provocation by [V] towards the defendant,
2. The defendant was provoked by [V] and
3. The defendant was acting, while still provoked, when he/she did the act (or acts) by which [V] was killed.

... You have [to] assess the conduct of [V] from the viewpoint of the defendant. Unless you understand the defendant's personal circumstances and any history between the defendant and [V], you may not understand how serious was the conduct of [V] from the defendant's perspective. ...

With that understanding of the conduct of [V] towards the defendant, you have to ask whether that conduct could have caused an **ordinary person** to lose his/her self-control and act as he/she did. An ordinary person is simply a person who has the minimum powers of self-control expected of an ordinary citizen [who is sober/not affected by drugs]. An ordinary person has the ordinary human weaknesses and emotions which are common in the community.

Particular conduct, when considered in isolation, might not amount to provocation but might, in combination with other conduct by the person who was killed, be enough to cause a loss of self-control.

Suggested directions for section 304: provocation (for offences post-4 April 2011) cont.

[In a case where the provocation is based on **words alone**, the following direction should be added:

... The law is that this defence of provocation does not usually apply in a case where the provocation is based on words alone, because usually an ordinary person would not lose self-control, and act with an intention to kill or do grievous bodily harm, in response to mere words. However, the defence can be available if you are satisfied that circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances, including any history of violence between the defendant and [V]. ...]

... [In a case where provocation was based upon **something done by the deceased, or believed to have been done by him/her, in respect of a domestic relationship**, the following direction could be given:

... The law is that this defence of provocation does not usually apply where the provocation is based on something done by the person who was killed to [end a domestic relationship between them], because usually an ordinary person would not lose self-control, and act with an intention to kill or do grievous bodily harm, in response to that conduct. However, the defence is available here if you are satisfied that the circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances, including any history of violence between the defendant and [V]. ...]

[In a case where the provocation is based on an **unwanted sexual advance** by the person who was killed to the defendant, the following may be added:

... The law is that this defence of provocation does not usually apply in a case where the provocation is based on an unwanted sexual advance, because usually an ordinary person would not lose self-control and act with an intention to kill or do grievous bodily harm, in response to an unwanted sexual advance. An unwanted sexual advance means a sexual advance that is unwanted and, if it involves touching, involves only minor touching. ... If you find that the conduct by [V] was an unwanted sexual advance, then the defence is available if you are satisfied that the circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances [including any history of violence, or of sexual conduct, between the defendant and [V]. ...]

... Provocation is not necessarily excluded simply because there is an interval between the provocative conduct and the defendant's emotional response to it. So you have to consider whether the defendant remained deprived of his/her self-control and killed [V] whilst still without that self-control.

...

Suggested directions for section 304: provocation (for offences pre-4 April 2011)

The final thing that the prosecution must establish, in order to prove that the defendant is guilty of murder, is that he/she was not acting under provocation when he/she killed [V]. It is not for the defendant to prove that he/she was acting whilst provoked; it is for the prosecution to prove to you, beyond reasonable doubt, that he/she was not doing so.

... The prosecution will have proved that matter if the prosecution satisfies you, beyond reasonable doubt, of any of these things:

1. That the conduct upon which the defendant relies as provocation did not occur.
2. That the conduct upon which the defendant relies as provocation could not have caused an ordinary person [where relevant: of the defendant's age] to lose his/her self-control and to act as the defendant did, with an intent to cause death or grievous bodily harm.
3. That the conduct on which the defendant relies did not cause the defendant to lose his/her self-control.
4. That when the defendant killed [V], he/she was [not] still deprived of his/her self-control, by [V's] provocative conduct.

If you are satisfied beyond reasonable doubt as to any of those matters, then the prosecution has proved that the defendant did not kill [V] under provocation, and if you are satisfied beyond reasonable doubt as to all of the elements of murder, to which I have earlier referred, then the appropriate verdict is 'guilty of murder'.

... For this defence to apply it must be caused by a 'sudden' provocation. But there may [be] a sudden provocation in this sense although there is an interval between the provocative conduct and the defendant's response to it [where appropriate, add this: the loss of self-control can develop after a lengthy period of abuse, and without the necessity for a specific triggering incident].

...

Provocation is a partial defence to murder in Queensland, the Australian Capital Territory, New South Wales and the Northern Territory. However, the Model Criminal Code does not include the defence and many jurisdictions have abolished it, including Western Australia and New Zealand.¹⁰ Legislation in the United Kingdom abolished the common law defence in England, Wales and Northern Ireland and created a new partial defence of 'loss of control' based on particular qualifying triggers.¹¹

Where it applies, the scope of the defence differs between jurisdictions. In some places, like the Northern Territory, provocation includes 'grossly insulting words or gestures'.¹² While in New South Wales, provocation is limited to conduct that amounts to a serious indictable offence, excludes non-violent sexual advances, or excludes conduct incited by the defendant.¹³ Queensland is the only Australian jurisdiction where the defendant has the legal burden of proof.

Crimes Act 1900 (NSW)

- 23 Trial for murder—partial defence of extreme provocation
- (1) If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.
 - (2) An act is done in response to extreme provocation if and only if—
 - (a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
 - (b) the conduct of the deceased was a serious indictable offence, and
 - (c) the conduct of the deceased caused the accused to lose self-control, and
 - (d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.
 - (3) Conduct of the deceased does not constitute extreme provocation if—
 - (a) the conduct was only a non-violent sexual advance to the accused, or
 - (b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.
 - (4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.
 - (5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.
 - (6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negated merely because the act causing death was done with intent to kill or inflict grievous bodily harm.
 - (7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.
 - (8) This section does not exclude or limit any defence to a charge of murder.
 - (9) The substitution of this section by the Crimes Amendment (Provocation) Act 2014 does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act.
 - (10) In this section—
act includes an omission to act.

Criminal Code (NT)

158 Trial for murder – partial defence of provocation

- (1) A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.
- (2) The defence of provocation applies if:
 - (a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and
 - (b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.
- (3) Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.
- (4) A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.
- (5) However, conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant:
 - (a) is not, by itself, a sufficient basis for a defence of provocation; but
 - (b) may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.
- (6) For deciding whether the conduct 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 conduct causing death and the conduct of the deceased that induced the conduct causing death; or
 - (b) the conduct causing death did not occur suddenly; or
 - (c) the conduct causing death occurred with an intent to take life or cause serious harm.
- (7) The defendant bears an evidential burden in relation to the defence of provocation.

Note for subsection (7)

Under section 43BR(2), the prosecution bears a legal burden of disproving a matter in relation to which the defendant has discharged an evidential burden of proof. The legal burden of proof on the prosecution must be discharged beyond reasonable doubt – see section 43BS(1).
- (8) A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.

Coroners and Justice Act 2009 (UK)

54 Partial defence to murder: loss of control

- (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.

Coroners and Justice Act 2009 (UK) cont.

- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
- (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
- (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
- (8) 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.

55 Meaning of 'qualifying trigger'

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) 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.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
 - (a) constituted circumstances of an extremely grave character, and
 - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) In determining whether a loss of self-control had a qualifying trigger—
 - (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
 - (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
 - (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.
- (7) In this section references to 'D' and 'V' are to be construed in accordance with section 54.

Table 1: provocation to murder provisions in Queensland and other jurisdictions

Act name and jurisdiction	Partial defence of provocation to murder	Exclusions from the defence	Burden of proof
Criminal Code (Qld)	✓ killing on provocation (where act done in the heat of passion caused by sudden provocation): s 304	✓ unless exceptional circumstances, does not apply to words alone, anything done to end or change the domestic relationship, or an unwanted sexual advance	defendant
Crimes Act 1900 (ACT)	✓ trial for murder–provocation (where act done as result of loss of self-control induced by the deceased’s conduct, including ‘grossly insulting words or gestures’): s 13	✓ does not apply to a non-violent sexual advance alone (but this may be taken into account with other conduct of the deceased)	prosecution
Crimes Act 1900 (NSW)	✓ trial for murder–partial defence of extreme provocation (where the provocation by the deceased was a serious indictable offence): s 23	✓ does not apply to a non-violent sexual advance, or if defendant incited the deceased’s conduct	prosecution
Criminal Code (NT)	✓ trial for murder–partial defence of provocation (where act done as result of loss of self-control induced by the deceased’s conduct, including ‘grossly insulting words or gestures’): s 158	✓ does not apply to a non-violent sexual advance alone (but this may be taken into account with other conduct of the deceased)	prosecution
Criminal Law Consolidation Act 1935 (SA)	* the common law defence of provocation abolished in 2021: s 14B	-	-
Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas)	* the partial defence of provocation in former s 160 of the Criminal Code (Tas) repealed in 2003: s 4(b)	-	-
Crimes Act 1958 (Vic)	* the partial defence of provocation abolished in 2005: s 3B	-	-
Criminal Law Amendment (Homicide) Act 2008 (WA)	* the partial defence of killing on provocation in former s 281 of the Criminal Code (WA) repealed in 2008: s 12	-	-
Criminal Code (Cth)	* no defence of provocation	-	-
Crimes Act 1961 (NZ)	* the partial defence of provocation in former s 169 of the Crimes Act (NZ) repealed in 2009	-	-

Act name and jurisdiction	Partial defence of provocation to murder	Exclusions from the defence	Burden of proof
Coroners and Justice Act 2009 (UK) (England, Wales and Northern Ireland)	✓ provocation replaced with partial defence to murder-‘loss of control’ (where act done as result of loss of self-control that has a qualifying trigger i.e. fear of serious violence from the deceased, or something done or said of ‘an extremely grave character’ that causes ‘a justifiable sense of being seriously wronged’): ss 54-55 ✗ the common law defence of provocation abolished and former s 3 of the Homicide Act 1957 (UK) repealed in 2010: s 56	✓ does not apply if defendant acted in ‘considered desire for revenge’ or incited the triggering conduct, or to a thing done or said that constituted sexual infidelity	prosecution
Scotland ¹⁴	✓ common law defence of provocation by physical violence or discovery of sexual infidelity of partner	✓ does not include words, however abusive or insulting, in cases of murder	prosecution
Canada Criminal Code RSC 1985 c C-46	✓ murder reduced to manslaughter (where act done in the heat of passion caused by sudden provocation, and the provocation by the victim is an indictable offence punishable by 5 or more years imprisonment): s 232	✓ does not apply to conduct the deceased had a legal right to do, or if defendant incited the deceased’s conduct	prosecution

References

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- ¹ *R v Chhay* (1994) 72 A Crim R 1 at 11; *Parker v The Queen* (1963) 111 CLR 610 at 651–2. See also *McGhee v The Queen* (1995) 183 CLR 82 at 90, 103, 106.
- ² *Johnson v The Queen* (1976) 136 CLR 619 at 656.
- ³ See the ‘Penalty for murder information sheet’ on our website [https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences](https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences).
- ⁴ See Criminal Code and Other Legislation Amendment Act 2011 (Qld) s 5; Criminal Law Amendment Act 2017 (Qld) s 10.
- ⁵ Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2010 (Qld) 1–3.
- ⁶ Explanatory Notes, Criminal Law Amendment Bill 2016 (Qld) 4. See also *R v Jansen* [2021] QSCPR 5 at [28].
- ⁷ See e.g. Report of the Taskforce on Women and the Criminal Code, February 2000, ch 6 pt 5; Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008; *R v Sebo; Ex parte Attorney-General (Qld)* (2007) 179 A Crim R 24; *Peniamina v The Queen* (2020) 271 CLR 568. See also the ‘Timeline of legislative reforms and proposals in Queensland’ on our website [https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences](https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences).
- ⁸ See e.g. Report of the Taskforce on Women and the Criminal Code, February 2000, ch 6 pt 5; Law Reform Commission of Western Australia, Review of the Law of Homicide, Final report 97, September 2007, pp 210–16; The Hon Justice Peter Davis, ‘Ongoing issues with the defence of provocation’, Country Special Continuing Professional Development Conference, 25 February 2023, pp 10–11, [https://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/pdavis/papers](https://www sclqld.org.au/judicial-papers/judicial-profiles/profiles/pdavis/papers).
- ⁹ Queensland Courts, Queensland Supreme and District Courts Criminal Directions Benchbook, 14 September 2021, <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>. See chs 97, 98 on killing on provocation (notes omitted; emphasis added).
- ¹⁰ See e.g. Criminal Code (WA) s 281, repealed by the Criminal Law Amendment (Homicide) Act 2008 (WA) s 12; Crimes (Provocation Repeal) Amendment Act 2009 (NZ); Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code: Chapter 5 fatal offences against the person, Discussion paper, June 1998, pp 107, 113, viewed 14 June 2023 <https://www.ag.gov.au/crime/publications/model-criminal-law-officers-committee-reports>. The Model Criminal Code is not in force as legislation, but is a draft of suggested provisions developed in the 1990s with the aim of providing for uniform or consistent criminal laws around Australia.
- ¹¹ See Coroners and Justice Act 2009 (UK) ss 54–56.
- ¹² See e.g. Criminal Code (NT) s 158(3).
- ¹³ See e.g. Crimes Act 1900 (NSW) s 23(2)(b), (3).
- ¹⁴ See generally Judicial Institute for Scotland, ‘Provocation’ in Jury Manual, 15 August 2023, pp 38.1–38.8, <https://judiciary.scot/home/media-information/publications/judicial-institute-publications>.