

Queensland  
Law Reform Commission

**A review of the defence of  
provocation**

Discussion Paper

WP No 63  
August 2008

The short citation for this Discussion Paper is QLRC WP 63.  
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ISBN: 978 0 7242 7756 0

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# Chapter 1

## Introduction

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### INTRODUCTION

1.1 This is the second Discussion Paper published by the Commission as part of its review of the excuse of accident and the defences of provocation. The first Discussion Paper was published in June 2008<sup>1</sup> and considered the excuse of accident. This Discussion Paper considers the partial defence of provocation (which reduces murder to manslaughter) and the complete defence of provocation to an assault.

### THE REVIEW

1.2 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:<sup>2</sup>

- Section 23(1)(b), the excuse of accident;
- Section 304, the partial defence of provocation, which reduces murder to manslaughter; and
- Sections 268 and 269, the complete defence of provocation to an assault.

---

<sup>1</sup> Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008).

<sup>2</sup> The Terms of Reference are contained in Appendix 1 to this Discussion Paper.

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

- the results of the Attorney-General's recent 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;
- 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 has taken 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 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; 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 is to provide a report on the results of the review by 25 September 2008.

## THE PROVISIONS UNDER REVIEW

### Provocation reducing murder to manslaughter

1.6 Section 304 provides a partial defence of provocation in murder cases. If accepted by a jury, or accepted by the prosecution as the basis of a plea of guilty to manslaughter, the defence reduces what would otherwise constitute murder to the crime of manslaughter:

#### **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

1.7 Provocation under sections 268 and 269 is different from provocation under section 304. Provocation under section 304 draws its definition from the common law, and applies only to murder. The 'other' provocation is defined by section 268 of the Criminal Code, and applies to offences which contain assault as an element (for example, assault itself and 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.<sup>3</sup>

## BACKGROUND TO THE REVIEW

1.8 The use of the defence of provocation under section 304, and the excuse of accident, prompted recent debate in the community in the wake of three homicide trials which were held in 2007: *R v Little*, *R v Moody* and *R v Sebo*.<sup>4</sup>

1.9 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. These cases are considered in detail in the Commission's review of the excuse of accident.<sup>5</sup>

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

<sup>4</sup> 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.

<sup>5</sup> Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008) Chapter 5.



1.10 Sebo was charged with murder. He committed a violent assault upon a teenage girl which killed her. He was convicted of manslaughter on the basis of provocation.<sup>6</sup> This case is considered in detail in this review.

## THE DJAG AUDIT

1.11 The community concern about these outcomes caused the Attorney-General in May 2007 to commission 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.<sup>7</sup> The audit, conducted by the Department of Justice and Attorney-General, examined a selection of murder and manslaughter trials finalised in the period between July 2002 and March 2007.<sup>8</sup>

1.12 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').<sup>9</sup> As well as outlining the results of the audit, the DJAG 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.

1.13 The Department of Justice and Attorney-General received a number of submissions in response to its 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 will consider these submissions (as well as other submissions received in response to this Discussion Paper) in forming its final recommendations.

1.14 The audit and the DJAG Discussion Paper are considered in Chapter 4.

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<sup>6</sup> *R v Sebo; Ex parte Attorney-General (Qld)* [2007] QCA 426.

<sup>7</sup> 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.

<sup>8</sup> The audit examined 80 murder trials and 20 manslaughter trials over the nominated period. The audit considered only those 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.

<sup>9</sup> Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007).

## **ABOUT THIS DISCUSSION PAPER**

### **Methodology**

1.15 This Discussion Paper provides information about the current law relating to provocation under sections 304, and sections 268 and 269, and raises issues for consideration.

## **CALL FOR SUBMISSIONS**

1.16 The Commission invites submissions on its review.

1.17 Details on how to make a submission are set out at the beginning of this Discussion Paper.

1.18 The closing date for submissions is **8 September 2008**.

1.19 These submissions will be taken into consideration when the Commission is formulating its recommendations. At the conclusion of the review, the Commission will publish its recommendations in its final report, which will be presented to the Attorney-General for tabling in Parliament.

# Chapter 2

## Overview of homicide

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### INTRODUCTION

2.1 This chapter contains a general overview of the homicide provisions in the Criminal Code (Qld) to provide background for the discussion of the partial defence of provocation. It briefly discusses the operation of the partial defence of provocation, and the provisions which provide for the punishment of murder or manslaughter.

### HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)<sup>10</sup>

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.<sup>11</sup>

2.4 A person is taken to have killed another if they cause death directly or indirectly, by any means whatever.<sup>12</sup>

2.5 A killing is unlawful unless it is authorised, justified or excused by law.<sup>13</sup>

---

<sup>10</sup> In Queensland, the source of the criminal law is the Criminal Code (Qld).

<sup>11</sup> 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 operation of a vehicle) and s 313 (Killing unborn child).

<sup>12</sup> Criminal Code (Qld) s 293.

<sup>13</sup> 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).

## Murder

2.6 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.

2.7 Most commonly, a charge of murder is based on section 302(1)(a), alleging that the defendant killed another<sup>14</sup> intending to kill the other person, or

<sup>14</sup>

It is immaterial that the offender did not intend to hurt the particular person who was killed: s 302(2).

at least intending to do grievous bodily harm to that person.<sup>15</sup>

## Manslaughter

2.8 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*.

2.9 For example, the crime of manslaughter is committed where the offender has killed another without an intention to kill the other person or to do grievous bodily harm to that person.

2.10 The partial defence of provocation under section 304 operates to reduce a crime, *which would otherwise be murder*, to manslaughter. Provocation is only relevant if the jury are satisfied beyond reasonable doubt that the defendant acted with an intention to kill or do grievous bodily harm. If the jury are not so satisfied, they must convict of manslaughter and have no need to consider provocation.

2.11 If the jury are satisfied beyond reasonable doubt that the fatal act was accompanied by an intention to kill or do grievous bodily harm, and if provocation is raised on the evidence, they must consider it.

2.12 Because of the operation of the onus of proof, for a conviction of murder the prosecution must negate the defence of provocation beyond reasonable doubt. To return a verdict of guilty of murder, a jury must be satisfied beyond reasonable doubt that the defendant killed with an intention to kill (or do grievous bodily harm) and also be satisfied beyond reasonable doubt that the defendant did *not* act in the heat of passion caused by sudden provocation before there was time for passion to cool.

2.13 If the jury are satisfied beyond reasonable doubt that the defendant killed with an intention to kill or do grievous bodily harm but are not satisfied beyond reasonable doubt that the defendant did not act under provocation, then the jury must return a verdict of guilty of manslaughter.

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<sup>15</sup>

'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.

2.14 Apart from avoiding conviction for the crime of murder, a manslaughter verdict means that a judge has discretion in determining an appropriate sentence, up to a maximum of life imprisonment.

## SENTENCING FOR HOMICIDE

2.15 Under the Criminal Code (Qld), an adult convicted of murder must be sentenced to life imprisonment ('mandatory life imprisonment'). An adult convicted of manslaughter may be sentenced to punishment up to a maximum of life imprisonment, at the discretion of the sentencing judge.<sup>16</sup>

2.16 Mandatory life imprisonment is the most serious penalty available under the Criminal Code (Qld).

### Sentencing for murder

2.17 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
  - (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 must 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 the paragraph.

<sup>16</sup>

A different sentencing regime applies under the *Juvenile Justice Act 1992* (Qld). Under s 176, upon conviction for murder or manslaughter, a juvenile may be sentenced up to a period of 10 years' detention. If the sentencing court considers the crime 'particularly heinous', then the juvenile may be sentenced up to imprisonment for life.

2.18 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,<sup>17</sup> 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.<sup>18</sup>

2.19 An offender sentenced to mandatory life imprisonment is not eligible to apply for release on parole until they have served 15 years' imprisonment.<sup>19</sup>

2.20 The sentencing judge 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.<sup>20</sup>

2.21 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.<sup>21</sup>

## Sentencing for manslaughter

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

## Conviction for a serious violence offence

2.23 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'.

2.24 Under Part 9A of the *Penalties and Sentences Act 1992* (Qld), an offender is deemed to have committed a serious violent offence if he or she is convicted of an offence mentioned in the schedule<sup>22</sup> and sentenced to imprisonment for 10 years or more.

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

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

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

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

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

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

2.25 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.

2.26 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 becoming eligible to apply for parole.<sup>23</sup>

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*R v Sebo; Ex parte Attorney-General (Qld)* [2007] QCA 426.



## Chapter 3

# Historical development and the current position in Queensland

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### INTRODUCTION

3.1 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 escape the mandatory life sentence for murder.

3.2 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.

3.3 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

3.4 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.<sup>24</sup>

3.5 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.<sup>25</sup>

3.6 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*:<sup>26</sup>

- Angry words followed by an assault;<sup>27</sup>
- Seeing a friend or relative being attacked;<sup>28</sup>
- Seeing a citizen being unlawfully deprived of his liberty;<sup>29</sup> and
- Seeing another man committing adultery with his wife.<sup>30</sup>

3.7 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.<sup>31</sup>

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24 MJ Allen, ‘Provocation’s Reasonable Man: A Plea for Self-Control’ (2000) 64 *Journal of Criminal Law* 216, 217.

25 Ibid.

26 (1707) Kel 119; 84 ER 1107.

27 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.

28 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.

29 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.

30 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.

31 MJ Allen, ‘Provocation’s Reasonable Man: A Plea for Self-Control’ (2000) 64 *Journal of Criminal Law* 216, 218.

3.8 To reduce the crime from murder to manslaughter, provocation had to arouse:<sup>32</sup>

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.

3.9 In other words, a successful plea of provocation required an unpremeditated killing while passion was heated and had not had time to cool. At the same time the concept of proportionality was also developing:<sup>33</sup>

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.

3.10 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.'<sup>34</sup> It also regulated killing in response to infidelity,<sup>35</sup> 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.<sup>36</sup>

3.11 Provocation was viewed as a concession to human frailty which partially excused a man for his loss of self-control.<sup>37</sup>

3.12 An example of a classic direction to the jury on provocation may be found in *Hayward*.<sup>38</sup> 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.

3.13 The idea of a loss of self-control distinguished between premeditated revenge and provoked killing.

32 Ibid citing *Oneby* (1727) 2 Ld Raym 1485, 1496; 92 ER 465, 472.

33 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.

34 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.

35 Ibid.

36 AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 294.

37 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 218.

38 Ibid citing (1833) 6 C & P 157, 159 (Tindal CJ).

3.14 In the 19th century, an objective standard developed to measure the degree of provocation and the defendant's reaction to it.<sup>39</sup> 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.<sup>40</sup> This standard was explained by Coleridge J in *Kirkham*:<sup>41</sup>

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.

3.15 By the mid-19th century, the objective standard was expressed in terms of the reasonable or ordinary man.<sup>42</sup> So, in *Welsh*,<sup>43</sup> the jury were directed that:<sup>44</sup>

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 ... [I]n 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.

3.16 The application of the ordinary or reasonable man test did not take into account different degrees of mental ability in defendants;<sup>45</sup> rather, it was about the level of self-control demanded of citizens:<sup>46</sup>

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.

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39 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 218.

40 Ibid footnote 21.

41 Ibid 218–219 citing (1837) 8 C & P 115, 119; 173 ER 422, 424.

42 Ibid 219.

43 (1869) 11 Cox CC 336.

44 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).

45 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216, 219.

46 Ibid 220 citing *Mancini* [1942] AC 1, 9 (Viscount Simons, affirming *Lesbini* [1914] 3 KB 1116).

## THE PARTIAL DEFENCE OF PROVOCATION IN QUEENSLAND

3.17 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.

3.18 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'<sup>47</sup>). 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'.<sup>48</sup>

3.19 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.<sup>49</sup>

3.20 The tension between these ideas lies at the heart of the issues which arise on this review.

## SECTION 304 OF THE CRIMINAL CODE (QLD)

3.21 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.

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<sup>47</sup> *Parker v The Queen* (1962) 111 CLR 610, 651 (Windeyer J).

<sup>48</sup> *Parker v The Queen* (1962) 111 CLR 610, 652 (Windeyer J) citing Blackstone's *Commentaries IV* 190.

<sup>49</sup> *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.

3.22 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'.

3.23 The word 'passion' where it is used 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.

3.24 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.

3.25 Gleeson CJ in *R v Chhay*<sup>50</sup> commented that 'even at common law however, this requirement has been interpreted with a degree of flexibility'.<sup>51</sup> 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.

3.26 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 provision<sup>52</sup> has been amended to remove the requirements that the killing occur suddenly<sup>53</sup> and immediately after the provocation,<sup>54</sup> with the intention of facilitating claims by battered women; however, it is unlikely the words of the Queensland provision are open to a similar interpretation.

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50 (1994) 72 A Crim R 1. For a detailed discussion of this case see [7.101]–[7.118] below.

51 Ibid 9 citing *R v Ahluwalia* (1993) 96 Cr App R 133, 138–39.

52 *Crimes Act 1900* (NSW) s 23.

53 *Crimes Act 1990* (NSW) s 23(3)(b).

54 *Crimes Act 1990* (NSW) s 23(2)(b).

## PROVOCATION

3.27 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,<sup>55</sup> and not to the definition of provocation as a complete defence to assault elsewhere in the Code.<sup>56</sup> 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.<sup>57</sup>

3.28 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*,<sup>58</sup> 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:<sup>59</sup>

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 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

55 *R v Callope* [1965] Qd R 456; *R v Buttigieg* (1993) 69 A Crim R 21.

56 Criminal Code (Qld) s 268.

57 *R v Buttigieg* (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.

58 (1990) 171 CLR 312.

59 *Ibid* 325–6.

(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'.

3.29 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.<sup>60</sup>

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'.

3.30 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 defendant apart from age.<sup>61</sup> Instead, the hypothetical ordinary person embodies 'contemporary conditions and attitudes'<sup>62</sup> in so far as those values bear on self-control.

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60 Ibid 326–7.

61 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.

62 *Stingel v The Queen* (1990) 171 CLR 312, 327.



3.31 *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.

3.32 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'<sup>63</sup> and, if attributed to the hypothetical ordinary person, would similarly detract from the ordinary person's powers of self-control.

3.33 The hypothetical ordinary person of the test is not an average person, but is a construct intended to represent a minimum standard of conduct.<sup>64</sup> 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*.<sup>65</sup> Despite the difficulties in explaining the concept to a jury,<sup>66</sup> 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

3.34 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.

3.35 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 (or former partner) of her right to personal autonomy and the man's denial of her right to autonomy.<sup>67</sup>

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63 Ibid 336.

64 Ibid 329.

65 (1986) 1 SCR 313 [66].

66 In *R v Yasso* (2004) 148 A Crim R 369 at 374 [16], Charles JA noted that 'the application of this test cannot be easy for a jury to understand, let alone apply'.

67 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.

3.36 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.

3.37 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*<sup>68</sup> who had been sodomised by the deceased, then abused verbally, may be able to claim provocation under the Code.

3.38 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 pre-planning.

## LOSS OF SELF-CONTROL

3.39 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 control is a matter of degree<sup>69</sup> — a decision to kill made in a state of intense emotion.

3.40 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.<sup>70</sup> On this view, even acting with uncontrolled aggression 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.<sup>71</sup>

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68 [1978] AC 705.

69 *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.

70 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.

71 *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.

3.41 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).<sup>72</sup> 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.

3.42 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:<sup>73</sup>

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.

3.43 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. 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.

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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.

73

Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.28].

## FURTHER ANALYSIS OF THE HYPOTHETICAL ORDINARY PERSON TEST

3.44 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.<sup>74</sup>

3.45 A number of criticisms are made of the test: first, 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.

3.46 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.<sup>75</sup>

3.47 This dichotomy was developed by Elias CJ in a detailed critique of the test in *R v Rongonui*.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

3.48 The difficulties of explanation are not assisted by the circumstance that the ideas of 'a loss of self-control', or the 'power of self-control' are difficult concepts, remembering that self-control is not a single characteristic of a person,<sup>79</sup> like stoicism or strength of will, but is in itself a consequence of other characteristics and beliefs of the person.

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<sup>74</sup> *Stingel v The Queen* (1990) 171 CLR 312, 329.

<sup>75</sup> Where the characteristic may affect the power of self-control, it is not to be attributed to the ordinary person of the test.

<sup>76</sup> [2000] 2 NZLR 385.

<sup>77</sup> *Ibid* 420.

<sup>78</sup> *Ibid* 421–422.

<sup>79</sup> See the discussion in *Jeffrey v The Queen* (1982) Tas R 199, 232–3 (Cosgrove J).

3.49 McHugh J in *Masciantonio*<sup>80</sup> argued that the defendant's ethnicity should be attributed to the hypothetical ordinary person:<sup>81</sup>

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.

3.50 Australia is a multi-cultural society. Not all of the cultures represented within the Australian community share the same norms of behaviour. In *Yasso*,<sup>82</sup> for example, evidence was led by the defendant at trial that in Chaldean tradition<sup>83</sup> 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 in conflict with accepted norms within the broader society should be recognised within the level of self-control expected of its members is a very serious question.

3.51 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.<sup>84</sup> 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.

3.52 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.<sup>85</sup> 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.<sup>86</sup> An example given by Ashworth relates to children. He argues that no-one should be provoked into a

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80 (1995) 183 CLR 58.

81 Ibid 74.

82 (2004) 148 A Crim R 369.

83 Both the defendant and his deceased wife belonged to the Melbourne Chaldean community, a small expatriate Iraqi Christian community.

84 *Stingel v The Queen* (1990) 171 CLR 312, 329.

85 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).

86 AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 318

deadly rage by a young child, and the defence of provocation should not be available to a person who kills in such circumstances.

3.53 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

3.54 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.<sup>87</sup> Certainly, some reasonable basis should appear from the evidence for the defendant's belief for the provocative conduct.

3.55 At the time Lord Holt CJ in *R v Mawgridge*<sup>88</sup> 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.<sup>89</sup> The rule only partially survives today. In *Holmes*<sup>90</sup> 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

87 *R v Quartly* (1986) 11 NSWLR 332.

88 (1707) Kel 119; 84 ER 1107.

89 *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 ...

90 [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),<sup>91</sup> it remains part of the common law.

3.56 The position in Queensland is summarised in *Buttigieg*:<sup>92</sup>

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.

3.57 A third limiting rule found in the early texts prevents reliance on any act of provocation which was invited or induced by the defendant.<sup>93</sup>

3.58 Finally, the rule that lawful conduct cannot amount to provocation no longer limits the scope of manslaughter provocation.

3.59 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

3.60 On 25 July 2008, the Court of Appeal delivered a judgment about provocation.<sup>94</sup> 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.

3.61 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

<sup>91</sup> *Homicide Act 1957* (UK) s 3.

<sup>92</sup> *R v Buttigieg* (1993) 69 A Crim R 21, 37.

<sup>93</sup> 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.

<sup>94</sup> [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.

3.62 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).

3.63 McMurdo P said:<sup>95</sup>

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*:<sup>96</sup> ‘... 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.’<sup>97</sup>

[The trial judge’s] further statement to the jury,<sup>98</sup> 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*:<sup>99</sup> ‘... 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:

95 [2008] QCA 205, [6]–[7].

96 (1990) 171 CLR 312, 318.

97 Ibid 332–3.

98 ‘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].’

99 (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.

3.64 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 4

## Data on intimate partner homicide

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### INTRODUCTION

4.1 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.

4.2 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.<sup>100</sup>

4.3 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.

4.4 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

4.5 In Australia between 1989 and 2002 there were, on average, 77 intimate partner homicides each year.<sup>101</sup>

4.6 In 2003–2004<sup>102</sup> there were 71 intimate partner homicides.<sup>103</sup> There were 66<sup>104</sup> in 2004–2005,<sup>105</sup> and 74<sup>106</sup> in 2005–2006.<sup>107</sup> This is more than one a week.

### Intimate partner homicides as a percentage of all homicides

4.7 In 2005–2006, 21 per cent of all homicides in Australia were intimate partner homicides.<sup>108</sup>

4.8 In Queensland, in 2005–2006, 29 per cent of all homicides were intimate partner homicides.<sup>109</sup>

### Gender of offender

4.9 A study examining national homicide data from 1989 to 2002 found that 75 per cent of intimate partner homicides involved men killing women.<sup>110</sup>

4.10 In 2005–2006, 80 per cent of intimate partner homicides involved men killing women.<sup>111</sup>

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101 J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 2.

102 1 July 2003–30 June 2004.

103 J Mouzos, *Homicide in Australia: 2003–2004 National Homicide Monitoring Program Annual Report* (2004) 16.

104 J Mouzos and T Houliaras, *Homicide in Australia: 2004–05 National Homicide Monitoring Program Annual Report* (2005) 20.

105 1 July 2004–30 June 2005.

106 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 24.

107 1 July 2005–30 June 2006.

108 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 23.

109 Ibid.

110 J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 2.

111 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006), 24.

## History of violence

4.11 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.<sup>112</sup>

4.12 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.<sup>113</sup>

## Place at which offence committed

4.13 In 2005–2006, consistent with earlier data,<sup>114</sup> 78 per cent of the intimate partner homicides occurred in private homes.<sup>115</sup>

## Reason for killing

4.14 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.<sup>116</sup>

4.15 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.<sup>117</sup>

## Alcohol and drugs

4.16 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

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112 Ibid.

113 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 25.

114 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.

115 M Davies and J Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (2006) 24.

116 J Mouzos and C Rushforth, *Family Homicide in Australia: Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2003) 3.

117 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.<sup>118</sup>

## THE USE OF THE DEFENCE

### Queensland and the DJAG Audit

4.17 In its review of the defence of provocation to murder,<sup>119</sup> the Commission is 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.<sup>120</sup> 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.

4.18 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.

4.19 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;<sup>121</sup>
- The remaining three were acquitted of manslaughter;
- In two of the 25 cases in which provocation was raised, it was the *only* defence raised;

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<sup>118</sup> 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).

<sup>119</sup> The Terms of Reference are contained in Appendix 1 to this Discussion Paper.

<sup>120</sup> Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, October 2007.

<sup>121</sup> Presumably at the commencement of the trial, a plea which was not accepted by the prosecution.

- One of those cases was *R v Sebo*,<sup>122</sup> who was acquitted of murder but convicted of manslaughter. The other defendant was convicted of murder.

4.20 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 manslaughter<sup>123</sup> or a manslaughter verdict.<sup>124</sup> 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.<sup>125</sup>

4.21 In the three cases in which there was a complete acquittal of murder and manslaughter:

- Self-defence explained the acquittal in MU 9;
- Self-defence explained the acquittal in MU 45 (the defendant pleaded guilty to interfering with a corpse);
- The acquittal in MU 59 was probably based on the accident excuse.<sup>126</sup>

4.22 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 MU 28;
- Provocation, self-defence and intoxication were raised as defences to the murder charge in MU 65. 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.

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122 [2007] QCA 426.

123 Indicating the success of a defence other than provocation.

124 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.

125 Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, October 2007, 39.

126 MU 59 is the case of *R v Little*, one of the cases which prompted the Department's audit, and which is discussed in more detail in the Commission's Discussion Paper about the excuse of accident: Queensland Law Reform Commission, *A review of the excuse of accident*, Discussion Paper, WP 62 (June 2008).

- Provocation and intoxication were raised as defences in MU 74. 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.<sup>127</sup>
- In MU 87, 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 MU 88, 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.<sup>128</sup>

4.23 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.<sup>129</sup>

## New South Wales

### ***Provocation based on infidelity or the breakdown of a relationship 1990–2004***

4.24 The Judicial Commission of New South Wales conducted an extensive study of homicide cases which were finalised between 1 January 1990 and 21

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127 This is the case of *R v Perry*, which is discussed at [5.51]–[5.55] below.

128 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 [5.113]–[5.127] below.

129 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.<sup>130</sup>

4.25 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).<sup>131</sup>

4.26 Provocation was raised in 115 murder cases.<sup>132</sup> 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).<sup>133</sup> Provocation was successfully claimed as a defence in the context of infidelity or the breakdown of a relationship in 11 murder cases:<sup>134</sup>

- 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***

4.27 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:<sup>135</sup>

- 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;<sup>136</sup>

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130 Judicial Commission of New South Wales, *Partial Defences to Murder in New South Wales 1990–2004*, 2006, 36–8.

131 Ibid 6.

132 Ibid.

133 Ibid 37.

134 Ibid 42. There is no data on the number of times the defence was unsuccessful in the same factual context during that period.

135 Ibid 38.

136 Ibid 43–4.



- In two of the 11 cases, the defendant successfully raised provocation on the basis of a non-violent sexual advance,<sup>137</sup> although more recently a New South Wales jury rejected provocation on that same basis.<sup>138</sup>

### ***Provocation claimed by women on the basis of a partner's violence***

4.28 In New South Wales, between 1994 and 2004, there were 13 cases in which a defendant successfully relied upon provocation in the context of violence committed by the victim against the offender in a domestic setting.<sup>139</sup>

4.29 Ten female defendants who had killed their husbands after a history of physical abuse successfully claimed provocation.<sup>140</sup>

4.30 Three male defendants who each claimed that their wife hit him during an argument successfully claimed provocation.<sup>141</sup>

## **Victoria**

4.31 The Victorian Law Reform Commission (VLRC) published a study of homicide prosecutions<sup>142</sup> in Victoria over the period 1 July 1997 to 30 June 2001,<sup>143</sup> although the VLRC acknowledged that the information it collected about the defences to homicide was far from complete.

4.32 The VLRC found:

- Provocation was raised as a defence in 14 of 38 sexual intimacy homicide trials;<sup>144</sup>
- In 12 of those 14 cases, the defendant was male;<sup>145</sup>
- 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;<sup>146</sup>

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137 Ibid 44.

138 *R v Hodge* [2000] NSWSC 897 [13].

139 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

140 Ibid.

141 Ibid 45–6.

142 Which had proceeded beyond committal.

143 Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003).

144 Ibid [3.36].

145 Ibid [3.25] Table 14.

146 Ibid [3.26].

- The defence was successfully raised in four of the 14 cases;<sup>147</sup>
- 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.<sup>148</sup>

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147 Ibid [2.93] Table 13.

148 Ibid [3.30].

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### INTRODUCTION

5.1 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.

5.2 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.<sup>149</sup>

5.3 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.<sup>150</sup>

5.4 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.<sup>151</sup> Later, in Chapter 7, the Commission considers more closely the position of the battered person who kills their abuser.

5.5 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.<sup>152</sup>

## **CASES IN WHICH PROVOCATION REDUCED MURDER TO MANSLAUGHTER**

5.6 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.

5.7 In determining whether there is sufficient evidence of provocation to leave the issue to the jury, the evidence is considered from the point of view most favourable to the defendant.<sup>153</sup> 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.

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149 See [5.6]–[5.145] below.

150 See [5.156]–[5.171] below.

151 See [5.173]–[5.245] below.

152 See [5.250]–[5.273] below.

153 *Stingel v The Queen* (1990) 171 CLR 312, 318. See also [3.63] above.

5.8 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.<sup>154</sup> The defendant will be guilty of manslaughter unless the jury is satisfied beyond reasonable doubt that the prosecution has negated provocation.

5.9 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)***<sup>155</sup>

5.10 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'.

5.11 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.

5.12 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.

5.13 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:<sup>156</sup>

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

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154 Criminal Code (Qld) s 304.

155 [1996] QCA 321.

156 Ibid 3–4.

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 (sic) going for more money too. I’ll take your super. So I can set me and the kid up.’

5.14 Auberson then strangled his wife, beat her over the head with bathroom scales at least twice and cut her throat with a Stanley knife.

5.15 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’.

5.16 Auberson then attempted suicide by driving his car over a 40 metre cliff, but he sustained only minor injuries.

5.17 He was sentenced to imprisonment for nine years.

5.18 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.

5.19 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’.<sup>157</sup>

5.20 Auberson’s appeal against conviction was dismissed. In considering his appeal against sentence, Fitzgerald P and de Jersey J observed:<sup>158</sup>

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.

5.21 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.

5.22 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.

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157 Ibid 6.

158 Ibid.

**R v Smith (sentenced 23 November 1999)**

5.23 Smith was convicted by a jury of manslaughter. He killed his pregnant partner.

5.24 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 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.

5.25 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'.

5.26 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'.

5.27 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?'

5.28 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.

5.29 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.

5.30 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.

5.31 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 Smith***<sup>159</sup>

5.32 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)**

5.33 De Salvo was convicted by a jury of manslaughter.

5.34 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.

5.35 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.

5.36 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.

5.37 The provocation relied upon was the aggression of the deceased.

**On appeal: *R v De Salvo***<sup>160</sup>

5.38 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.

5.39 McPherson JA, with whom Williams JA agreed, Byrne J dissenting, considered that there was no special feature of this 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)**

5.40 Dhoother was convicted of manslaughter by a jury. He killed his wife.

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159 [2000] QCA 169.

160 [2002] QCA 63.



5.41 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.

5.42 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.

5.43 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 birth of their first child.

5.44 In 1997 the deceased obtained a domestic violence order against Dhoother, 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.

5.45 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. Dhoother and the deceased went to bed angry.

5.46 The deceased woke Dhoother 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.

5.47 Dhoother 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.

5.48 The brown liquid left in the coffee cup Dhoother 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. Dhoother'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.

5.49 Dhoother 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.

5.50 The provocation relied upon was Dhoother's belief that the deceased was trying to poison him.

***R v Perry (sentenced 6 February 2004)***<sup>161</sup>

5.51 Perry was convicted by a jury of manslaughter. He killed his father.

5.52 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'.

5.53 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 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.

5.54 He had offered a plea to manslaughter, which was not accepted by the prosecution. He was sentenced to imprisonment for nine years.

5.55 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)***

5.56 Folland was convicted of manslaughter after a trial.

5.57 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.

5.58 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.

5.59 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

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Indictment No 312 of 2003.

light pole. The jury were entitled to conclude that Folland intentionally drove his car at the deceased.

5.60 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.

5.61 The provocation relied upon was the deceased's attack upon Folland.

***On appeal: R v Folland***<sup>162</sup>

5.62 Folland unsuccessfully appealed against his conviction and sentence. Williams JA, with whom de Jersey CJ and Philippides J agreed, found that the 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)***<sup>163</sup>

5.63 Schubring bashed and strangled his wife to death during an argument.

5.64 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.

5.65 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.

5.66 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.

5.67 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.

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<sup>162</sup> [2004] QCA 209.

<sup>163</sup> Indictment No 381 of 2002.

5.68 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.

5.69 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'.

5.70 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 diminished responsibility under section 304A of the Criminal Code (Qld).<sup>164</sup>

5.71 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.

5.72 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).

5.73 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.

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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.

**On appeal: *R v Schubring; ex parte Attorney-General (Qld)*<sup>165</sup>**

5.74 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.

5.75 Schubring also appealed against the sentence imposed, arguing that it was manifestly excessive.<sup>166</sup> 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).

5.76 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.

5.77 de Jersey CJ said:<sup>167</sup>

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.

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165 *R v Schubring; ex parte A–G (Qld)* [2004] QCA 418.

166 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.

167 *R v Schubring; ex parte A–G (Qld)* [2004] QCA 418, [22]–[23].

5.78 The Chief Justice then considered matters particularly relevant to sentence:<sup>168</sup>

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 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 ...

5.79 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:<sup>169</sup>

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

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168 Ibid [24]–[26].

169 Ibid [27], [30]–[31].

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.

5.80 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 of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997*.<sup>170</sup>

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

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Ibid [32]–[38].

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.

#### 5.81 Schubring's sentence was increased:<sup>171</sup>

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.

5.82 Williams JA, in dissent, considered that the sentencing judge was wrong to treat the verdict as one based on provocation rather than diminished responsibility. Williams JA 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)**

5.83 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.

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Ibid [38]–[39].



5.84 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.

5.85 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.

5.86 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.

5.87 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'.

5.88 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.

5.89 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.

5.90 The provocation accepted in this case was the deceased's violence towards Mirasol.

### ***R v Middleton (sentenced 3 December 2004)***<sup>172</sup>

5.91 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.

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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.

5.92 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.

5.93 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.

5.94 Middleton had a long-term problem with drugs and alcohol. He had previous convictions. He was sentenced to imprisonment for nine years.

5.95 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)**

5.96 Budd was convicted of manslaughter by a jury. He was a courier of illicit drugs for the deceased.

5.97 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.

5.98 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).

5.99 The provocation in this case was mocking and taunting against the background of prior shameless treatment.

***R v Dunn (sentenced 26 February 2007)***<sup>173</sup>

5.100 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.

5.101 The events occurred on the night of 6 October 2004 at Bonesia 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.

5.102 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.

5.103 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.

5.104 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.

5.105 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.

5.106 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.

5.107 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.

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Indictment No 82 of 2006.

5.108 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.

5.109 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.

5.110 The provocation in this case was the aggressive and violent behaviour and threats of Gilbert and his associates.

***On appeal: R v Dunn***<sup>174</sup>

5.111 Dunn appealed against his sentence, arguing that the declarations that he had been convicted of a serious violent offence should not have been made.

5.112 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)***<sup>175</sup>

5.113 This was one of the cases which prompted the Attorney-General's audit of homicide trials, and a matter which received significant publicity.

5.114 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.

5.115 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.

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174 [2007] QCA 153.

175 Indictment No 977 of 2006.

5.116 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***

5.117 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*

5.118 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. 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*

5.119 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***

5.120 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 sex<sup>176</sup> 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 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.

5.121 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.

5.122 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.

5.123 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.

5.124 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.

5.125 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.

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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 [9.4] below. The Court of Appeal's decision in [2008] QCA 205 is discussed at [3.60]–[3.64] above.

***On appeal: R v Sebo; ex parte Attorney-General (Qld)***<sup>177</sup>

5.126 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.

5.127 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:<sup>178</sup>

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 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)***

5.128 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.

5.129 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.

5.130 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.

5.131 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.

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<sup>177</sup> [2007] QCA 426.

<sup>178</sup> Ibid [18].

5.132 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.)

5.133 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'.

5.134 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.

5.135 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.

5.136 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.

5.137 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.

5.138 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.

5.139 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)*,<sup>179</sup> the sentencing judge took to be 10

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[2007] QCA 426.

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.

5.140 The provocation in this case was the deceased's admission of infidelity, her statement that she had given Mills AIDS and her violence towards him.

**On appeal: *R v Mills***<sup>180</sup>

5.141 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 provocation<sup>181</sup> and re-sentenced Mills. As discussed above, the Court of Appeal in *Sebo* stated that the appropriate sentencing range was between nine and 12 years' imprisonment.

5.142 It fell to the Court of Appeal to re-sentence Mills. In arriving at the appropriate sentence, Keane JA said:<sup>182</sup>

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)*,<sup>183</sup> 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.

5.143 Keane JA considered the circumstances of the killing, and in particular the extent of the provocation:<sup>184</sup>

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 ...

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180 [2008] QCA 146.

181 *Ibid* [22].

182 *Ibid* [24].

183 [2005] 1 Qd R 515.

184 [2008] QCA 146, [25]–[26].

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.

5.144 In considering the appropriate penalty, Keane JA said:<sup>185</sup>

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.

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 footnotes omitted]

5.145 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.

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Ibid [27]–[31].

## OBSERVATIONS

5.146 Many important questions arise from this review of the cases.

5.147 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?

5.148 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?

5.149 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?

5.150 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?

5.151 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.

5.152 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?

5.153 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?

5.154 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?

5.155 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 THE DEFENCE OF PROVOCATION HAS NOT BEEN SUCCESSFUL**

5.156 In the following cases, the defence of provocation did not succeed. The defendant was convicted of murder, and sentenced to life imprisonment.

#### ***R v Corcoran***<sup>186</sup>

5.157 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.

5.158 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.

5.159 He told police they argued continually and she criticised him about not having a job and there being no money.

5.160 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.

5.161 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.

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<sup>186</sup>

[2000] QCA 114.



5.162 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.

5.163 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)*<sup>187</sup>**

5.164 Poonkamelya was convicted of murder and attempted murder.

5.165 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.

5.166 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.

5.167 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.

5.168 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 sentence<sup>188</sup> of six years' imprisonment, with a declaration that Poonkamelya had been convicted of a serious violent offence.

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187 Indictment No 112 of 2003.

188 That is, it ran concurrently with the sentence of life imprisonment.

***R v Exposito (sentenced 4 July 2006)***<sup>189</sup>

5.169 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.

5.170 Exposito unsuccessfully appealed his conviction. He did not raise any issue about provocation in argument on appeal.<sup>190</sup>

***R v Abusoud (sentenced 17 April 2008)***<sup>191</sup>

5.171 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**

5.172 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

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189 Indictment No 340 of 2005.

190 [2007] QCA 53.

191 Indictment No 47 of 2007.

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**

5.173 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.

5.174 Not all of these women relied on provocation in their defence.

### ***R v Benstead* (offence occurred 29 December 1993)<sup>192</sup>**

5.175 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.

5.176 She was sentenced to imprisonment for 11 years, with a recommendation that she be eligible for parole after serving four years.

5.177 Benstead appealed against that sentence, arguing that it was manifestly excessive.

5.178 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.

5.179 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'.<sup>193</sup>

5.180 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.

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192 [1995] QCA 195.

193 Ibid 3.

**R v Babsek (sentenced 4 June 1999)<sup>194</sup>**

5.181 Babsek was convicted of manslaughter after a re-trial. She killed her former de facto partner. She was 24 years old.

5.182 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.

5.183 On the day of the killing (18 May 1996) 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.

5.184 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.)

5.185 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. 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'.

5.186 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.

5.187 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'.

5.188 The bullet entered behind the deceased's ear, which is consistent with his fleeing or retreating when he was shot.

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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.

5.189 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).

5.190 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.

5.191 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.

5.192 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'.<sup>195</sup>

5.193 Babsek was sentenced to nine years' imprisonment, with a recommendation that she be eligible for parole after serving three years.

5.194 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:<sup>196</sup>

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195 Ibid [11].

196 Ibid [13]–[14].

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*:<sup>197</sup>

‘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.

5.195 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:<sup>198</sup>

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 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.

5.196 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).

5.197 As Babsek admitted, she could not accept the deceased was leaving her: this is a case of a woman killing out of possessiveness.

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197 [1999] QCA 076.

198 [1999] QCA 364 [24].

5.198 Babsek did not rely upon provocation as her defence. To reduce the charge to manslaughter, she relied upon a lack of intention to kill.

5.199 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.

5.200 The Commission considered the sentences imposed upon these women in their various circumstances below at [5.247]–[5.249]. 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)*<sup>199</sup>**

5.201 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.

5.202 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.

5.203 Bob was in her twenties when she killed the deceased, who was 59. They had lived together since 1993.

5.204 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.

5.205 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.

5.206 The Chief Justice, with whom Davies JA and Atkinson J agreed, said.<sup>200</sup>

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199 [2003] QCA 129.

200 Ibid 2.

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.

5.207 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).

5.208 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.<sup>201</sup>

5.209 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)<sup>202</sup>**

5.210 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 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.

5.211 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.

5.212 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.

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201 Ibid 5.

202 Indictment No 20 of 2002.



5.213 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.

5.214 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.

5.215 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.

5.216 She was sentenced to six years' imprisonment.

5.217 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***<sup>203</sup>

5.218 Brown unsuccessfully appealed against sentence. The Chief Justice, with whom Williams JA and Mackenzie J agreed, said:<sup>204</sup>

[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 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<sup>205</sup> ...

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203 [2004] QCA 4.

204 Ibid 2–3.

205 The maximum period of imprisonment which would have applied had she been sentenced as a juvenile.

***R v Saltner (sentenced 28 October 2004)***<sup>206</sup>

5.219 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.

5.220 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.

5.221 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.

5.222 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.

5.223 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)***<sup>207</sup>

5.224 The prosecution accepted Griffin's plea of guilty to manslaughter on a charge of murdering her de facto partner.

5.225 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'.

5.226 They argued over the deceased's use of the phone to make expensive phone calls. The argument escalated, and the deceased became abusive. 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.

5.227 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.

5.228 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

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206 Indictment No 8 of 2004.

207 Indictment No 710 of 2004.

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.

5.229 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.

5.230 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)***<sup>208</sup>

5.231 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.

5.232 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.

5.233 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.

5.234 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.

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Indictment No 104 of 2005.

5.235 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.

5.236 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.

5.237 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'.

5.238 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.

5.239 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:<sup>209</sup>

[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 ...

5.240 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.

5.241 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

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Ibid 3.

to negate, beyond reasonable doubt, the possibility that Pivar feared for her life and believed she had to use fatal force in self-defence.<sup>210</sup>

### **R v Knox (sentenced 31 July 2006)**

5.242 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.

5.243 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.

5.244 They were in the kitchen. She took a knife and stabbed him once in the area of the heart.

5.245 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**

5.246 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*).

5.247 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.

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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.

5.248 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* — 8 years' imprisonment, with a recommendation that she be eligible for parole after three years.

*Saltner* — 5 years' imprisonment, wholly suspended for five years.

*Pivar* — 5 years' imprisonment, suspended after one year, for five years.

5.249 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

5.250 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*<sup>211</sup> and *R v Miguel*.<sup>212</sup> 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.

### ***R v Whiting* (sentenced July 1994)<sup>213</sup>**

5.251 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.

5.252 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.

5.253 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

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211 *R v Whiting; ex parte Attorney-General* [1995] 2 Qd R 199.

212 [1994] QCA 512.

213 *R v Whiting; ex parte Attorney-General* [1995] 2 Qd R 199.

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.<sup>214</sup>

5.254 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.

5.255 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*<sup>215</sup> to suggest that in cases of 'domestic' manslaughter 'arising out of the frustrations engendered by close relationships'<sup>216</sup> six years' imprisonment was the upper level of sentencing.

5.256 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.

5.257 For completeness, the facts of *Green* appear below.

### ***R v Green***<sup>217</sup>

5.258 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.

5.259 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.

5.260 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:<sup>218</sup>

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214 Ibid 200.

215 [1986] 2 Qd R 406

216 Ibid 407 (Connolly J).

217 [1986] 2 Qd R 406.

218 Ibid 407 (Connolly J).

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.

5.261 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.

5.262 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.<sup>219</sup>

5.263 As noted above, in *Whiting*<sup>220</sup> 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<sup>221</sup>)**

5.264 Miguel killed his wife. He was convicted by a jury of manslaughter, and sentenced to 12 years' imprisonment.

5.265 Miguel and his wife had been together for ten years. Their relationship was 'turbulent'.<sup>222</sup> Miguel had had an affair five years before the killing, and their relationship never recovered from it.

5.266 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.

5.267 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.

5.268 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.

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<sup>219</sup> To one of five years' imprisonment, with a recommendation that he be considered for parole after serving 18 months.

<sup>220</sup> *R v Whiting ex parte Attorney-General* [1995] 2 Qd R 199, 202.

<sup>221</sup> [1994] QCA 512.

<sup>222</sup> *Ibid* 2.



5.269 He killed her in the presence of their two young children using a hunting knife. The killing was 'brutal and cold-blooded'.<sup>223</sup> 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.

5.270 As noted above, he was convicted of manslaughter after a trial. McPherson JA said:<sup>224</sup>

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.

5.271 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.

5.272 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.

5.273 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 6

# A survey of the law of provocation in other jurisdictions and recent developments

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### INTRODUCTION

6.1 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.

6.2 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.

6.3 In South Australia, the common law defence of provocation applies.

6.4 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

6.5 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.<sup>225</sup> In the Northern Territory, the offence of murder attracts a

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*Crimes Act 1900* (ACT) s 13; *Crimes Act 1900* (NSW) s 23; Criminal Code (NT) s 158.

mandatory life sentence.<sup>226</sup>

6.6 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.

6.7 In the ACT and the Northern Territory, the legislation was amended, in 2004 and 2006 respectively, to provide additionally that a non-violent sexual advance is not, on its own, to be regarded as provocation.<sup>227</sup> However, together with other conduct, a non-violent sexual advance may be taken into account in deciding whether the defendant was provoked.

6.8 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
  - (ii) as to be recklessly indifferent to the probability of causing the deceased's death;

<sup>226</sup> Criminal Code (NT) s 157(2).

<sup>227</sup> *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.

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.

6.9 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.<sup>228</sup> 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.<sup>229</sup>

6.10 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.<sup>230</sup>

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228 New South Wales Law Reform Commission, *Partial Defence to Murder — Provocation*, Report No 83 (1997) [2.23], [2.39].

229 *Ibid* [2.81]–[2.83].

230 New South Wales Attorney General's Department, Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party* (1998) [6.7].

6.11 As yet, that recommendation has not been implemented.<sup>231</sup>

6.12 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.<sup>232</sup> 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.<sup>233</sup>

## TASMANIA AND VICTORIA

6.13 In Tasmania, the partial defence of provocation to murder contained in the Criminal Code (Tas) was repealed in 2003.<sup>234</sup> When the amending legislation was introduced into parliament, the Minister for Justice gave four reasons for the abolition of the defence:<sup>235</sup>

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.

...

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'. ...

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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.

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*Criminal Reform Amendment Act (No 2) 2006* (NT) s 17.

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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.

234

*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) s 4(b), repealing Criminal Code (Tas) s 160.

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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).

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.

6.14 In Victoria, the partial defence of provocation was removed in 2005.<sup>236</sup> 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.'

6.15 The abolition of the defence was recommended by the Victorian Law Reform Commission in its report on homicide defences in 2004.<sup>237</sup> In its view, provocation is more appropriately a matter for sentencing:<sup>238</sup>

[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.

6.16 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.<sup>239</sup> 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.<sup>240</sup>

## WESTERN AUSTRALIA

6.17 Until very recently, the position in Western Australia was similar to the position in Queensland.

6.18 Before 1 August 2008, the Criminal Code (WA) provided a partial defence of provocation to murder (in section 281). It also 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.

<sup>236</sup> *Crimes (Homicide) Act 2005* (Vic) s 3.

<sup>237</sup> Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 58, Recommendation 1.

<sup>238</sup> *Ibid* [2.93]. Also see [2.100].

<sup>239</sup> *Ibid* [2.94]–[2.98].

<sup>240</sup> *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.

6.19 However, there had been some uncertainty about whether ‘provocation’ for the partial defence was defined by section 245 of the Criminal Code (WA)<sup>241</sup> or by the common law, as it is in Queensland.<sup>242</sup>

6.20 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 murder<sup>243</sup> was replaced with a ‘presumptive life sentence’.<sup>244</sup>

6.21 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.<sup>245</sup>

6.22 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.<sup>246</sup> The Criminal Law Amendment (Homicide) Bill 2008 (WA) repealed section 281 of the Criminal Code (WA), containing the partial defence of provocation.<sup>247</sup>

6.23 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 mandatory life imprisonment for murder.<sup>248</sup> A new section 279 defines the crime of murder and the punishment for it:

241 *Mehemet Ali v The Queen* (1957) 59 WALR 28; *Sreckovic v The Queen* [1973] WAR 85.

242 *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).

243 Under s 282 of the Criminal Code (WA).

244 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.

245 Ibid 218, 220–1.

246 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209 (Mr James McGinty, Attorney General).

247 Criminal Law Amendment (Homicide) Bill 2008 (WA) cl 12.

248 It also abolished the previous distinction between wilful murder and murder.

**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.

6.24 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).

6.25 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.<sup>249</sup>

6.26 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.

(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.

<sup>249</sup>

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.

- (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.

6.27 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'.<sup>250</sup>

## SOUTH AUSTRALIA

6.28 In South Australia, the partial defence of provocation is available at common law to reduce murder to manslaughter.<sup>251</sup> In that State, the offence of murder attracts a mandatory penalty of life imprisonment.<sup>252</sup>

6.29 As noted above, the High Court set out the parameters of the common law defence in *Masciantonio v The Queen*.<sup>253</sup>

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.

6.30 The defence involves both a subjective and objective test.<sup>254</sup>

[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.

<sup>250</sup> Explanatory Memorandum, *Criminal Law Amendment (Homicide) Bill 2008*, 4.

<sup>251</sup> See, for example, *R v R* (1981) 28 SASR 321; *R v Singh* (2003) 86 SASR 473; *R v Lem* [2005] SASC 405.

<sup>252</sup> *Criminal Law Consolidation Act 1935* (SA) s 11.

<sup>253</sup> (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ).

<sup>254</sup> *Ibid* 67. Also see *Stingel v The Queen* (1990) 171 CLR 312, 327.

## THE MODEL CRIMINAL CODE AND THE COMMONWEALTH

6.31 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.<sup>255</sup>

6.32 The Model Criminal Code Officers Committee considered a number of arguments for and against the abolition of the partial defence of provocation.<sup>256</sup> 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.<sup>257</sup>

6.33 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:<sup>258</sup>

the 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.

6.34 The Model Criminal Code Officers Committee also recommended that the offence of murder should be punishable by a maximum penalty of life imprisonment.<sup>259</sup>

6.35 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.<sup>260</sup>

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255 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).

256 Ibid 87–101.

257 Ibid 103–4.

258 Ibid 105, 107.

259 Ibid 65.

260 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.'

## RECENT DEVELOPMENTS IN NEW ZEALAND

6.36 The partial defence of provocation to murder has recently been reviewed by the Law Commission of New Zealand.<sup>261</sup>

6.37 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.<sup>262</sup> 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.<sup>263</sup>

6.38 Subsequently, mandatory life imprisonment for murder in New Zealand was replaced with a presumptive life sentence.<sup>264</sup> However, there was some 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.<sup>265</sup>

6.39 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'.<sup>266</sup> 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.<sup>267</sup>

## RECENT DEVELOPMENTS IN ENGLAND AND WALES

6.40 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.<sup>268</sup>

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<sup>261</sup> The partial defence of provocation to murder in New Zealand is provided in *Crimes Act 1961* (NZ) s 169.

<sup>262</sup> Law Commission (New Zealand), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) [120], [164].

<sup>263</sup> *Ibid* [151], [154].

<sup>264</sup> See *Sentencing Act 2002* (NZ) s 102.

<sup>265</sup> See Law Commission (New Zealand), *The Partial Defence of Provocation*, Report No 98 (2007) [7]–[8].

<sup>266</sup> Law Commission (New Zealand), *The Partial Defence of Provocation*, Report No 98 (2007) [183], Recommendation 1.

<sup>267</sup> *Ibid* [208], Recommendation 2.

<sup>268</sup> The partial defence of provocation to murder in the United Kingdom is provided in *Homicide Act 1957* (UK) s 3.

6.41 It noted a number of theoretical and practical difficulties with the defence of provocation,<sup>269</sup> 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’.<sup>270</sup> It also noted that, if the defence were abolished, the problems raised by the defence would simply be deferred to the sentencing stage.<sup>271</sup> It recommended, therefore, that the partial defence of provocation be retained, but reformulated.<sup>272</sup>

6.42 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);<sup>273</sup> 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).<sup>274</sup>

6.43 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.<sup>275</sup>

6.44 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’.<sup>276</sup>

6.45 In 2006, the Law Commission of England and Wales completed a review of the law of homicide in its jurisdiction.<sup>277</sup> 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,

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269 Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.20].

270 Ibid [3.41].

271 Ibid [3.42].

272 Ibid [1.13].

273 Ibid [3.66]–[3.68].

274 Ibid [3.109].

275 Ibid [3.135], [3.138].

276 Ibid [3.141].

277 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].

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.<sup>278</sup>

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.

6.46 The Law Commission of England and Wales also confirmed its earlier recommendations as to the reformulation of the provocation defence.<sup>279</sup>

6.47 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').<sup>280</sup> The paper explains the Government's plans and seeks submissions in response.<sup>281</sup>

6.48 The UK Consultation Paper summarises its proposals for reform of partial defences to murder. The proposals for reform of provocation follow:<sup>282</sup>

- To abolish the existing partial defence of provocation and replace it with new partial defences of:
  - 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'.

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278 Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No 304 (2006) [5.8]. Also see [2.158].

279 Ibid [5.11].

280 Ministry of Justice Consultation Paper CP 19/08, *Murder, manslaughter and infanticide: proposals for reform of the law* (July 2008).

281 Consultation will end on 20 October 2008.

282 Ibid 2.

- 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.

6.49 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

6.50 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.<sup>283</sup> The Law Reform Commission of Ireland explained its general approach to the issue of provocation:<sup>284</sup>

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.

6.51 It noted that, if the defence were abolished, the mandatory penalty for murder would need to be replaced with a discretionary sentence.<sup>285</sup> 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.<sup>286</sup> It considered that the moral boundary marked by the distinction between murder and manslaughter would be undermined if provocation were abolished.<sup>287</sup>

6.52 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').<sup>288</sup> It proposed a draft provocation provision loosely based on the statutory

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283 Law Reform Commission of Ireland, *Homicide: The Plea of Provocation*, Consultation Paper No 27 (2003) [7.28].

284 Ibid [7.02].

285 Ibid [7.03], [7.05].

286 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].

287 Law Reform Commission of Ireland, *Homicide: The Plea of Provocation*, Consultation Paper No 27 (2003) [7.06].

288 Ibid [7.30].

provocation defence in New Zealand.<sup>289</sup> It has not yet released a final report on these matters.

# Chapter 7

## Battered women who kill

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### TERMINOLOGY

7.1 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.<sup>290</sup>

7.2 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 manuals<sup>291</sup>).

7.3 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.

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290 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

291 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

7.4 This chapter begins with a discussion of the case of *R v Kina*<sup>292</sup> to provide a graphic example of the reality of life for some battered women.

7.5 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.

7.6 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,<sup>293</sup> 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.

7.7 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.

7.8 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.

7.9 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.<sup>294</sup> This chapter discusses the views expressed by the Taskforce at paragraphs [7.133]–[7.134]. Briefly, after undertaking consultation, having regard to the arguments for and against retention of the defence and noting that the concept of excessive self-defence may be more appropriate to

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292 [1993] QCA 480.

293 See [7.43] below.

294 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

the circumstances of a woman who kills in response to violence the Taskforce said it was:<sup>295</sup>

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.

7.10 The Taskforce noted that one of its members supported the abolition of the defence.

7.11 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'.<sup>296</sup>

7.12 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.<sup>297</sup> 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.

7.13 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

7.14 This case graphically illustrates the circumstances in which a battered woman may be provoked to kill her abuser.

7.15 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'<sup>298</sup> towards her and had injured her in the past.

7.16 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.

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295 Ibid 195.

296 Ibid 196.

297 See Appendix 1 to this Discussion Paper.

298 [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).

7.17 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.

7.18 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'.<sup>299</sup>

7.19 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'.<sup>300</sup>

7.20 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.

7.21 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.

7.22 Kina's life had been filled with 'abuse, trauma and hardship'.<sup>301</sup> The Court of Appeal considered in detail her experiences as an abused child and a battered woman.

7.23 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.

7.24 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.

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299 Ibid 5.

300 Affidavit, Theresa Hamilton, then Principal Solicitor, Aboriginal Legal Service, paragraph 18: [1993] QCA 480, 22.

301 [1993] QCA 480, 6 (Fitzgerald P and Davies JA).

7.25 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.

7.26 Kina's mother died in late 1983. In November 1984, Kina started working as a prostitute. She suffered health problems, including depression.

7.27 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.

7.28 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.

7.29 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'.<sup>302</sup> 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.

7.30 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.

7.31 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.

7.32 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.

7.33 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.

7.34 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.

7.35 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 week-ends.

7.36 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.

7.37 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.

7.38 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.

7.39 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.

7.40 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.

7.41 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.

7.42 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.

7.43 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.

7.44 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.

7.45 There was independent corroboration of Kina's description of the violence she suffered.

7.46 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:<sup>303</sup>

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.

7.47 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.

7.48 On 11 December 1993, the then Attorney-General announced that there would not be a second trial in this case.

7.49 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 THEIR ABUSERS AFTER A LAPSE OF TIME**

7.50 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'.

7.51 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 R***<sup>304</sup>

7.52 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.

7.53 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.

7.54 R and the deceased married in 1954. They had six children: five girls and one boy. The deceased was 'violent, domineering and manipulative'.<sup>305</sup> 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.

7.55 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

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304 (1981) 28 SASR 321.

305 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'<sup>306</sup> the girls and their mother.

7.56 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.

7.57 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'.<sup>307</sup> R persuaded the girls to return home.

7.58 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.

7.59 R did not sleep that night. The next morning, she obtained a rifle (from the house next door) and bullets.

7.60 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'.<sup>308</sup> 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:<sup>309</sup>

'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

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306 Ibid.

307 Ibid 329 (Zelling J).

308 Ibid 323 (King CJ).

309 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.

7.61 Her evidence continued:<sup>310</sup>

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.

7.62 After considering this version of the facts, King CJ made the following observations about what did not constitute provocation in law:<sup>311</sup>

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.

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Ibid 325–6.

7.63 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:<sup>312</sup>

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*,<sup>313</sup> '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*.<sup>314</sup> 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*<sup>315</sup> 'passion and emotion were mounting not declining'.

7.64 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.

7.65 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.

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312 Ibid 326.

313 (1936) 111 CLR 610, 630.

314 [1967] VR 467, 484.

315 (1963) 111 CLR 610, 663.

7.66 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.

7.67 Jacobs J agreed with the Chief Justice.

7.68 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'.<sup>316</sup> 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.<sup>317</sup> 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'.<sup>318</sup> Also, his Honour considered that the killing was done pursuant to an intention to kill formed before the provocation.

7.69 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.<sup>319</sup> The Taskforce also noted that R was acquitted upon her re-trial 'despite the jury having no perceivable legal basis for doing so'.<sup>320</sup>

### ***R v Bradley***

7.70 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.<sup>321</sup>

7.71 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

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316 (1981) 28 SASR 321, 328.

317 Ibid 337.

318 Ibid 338.

319 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 173, 174.

320 Ibid 174.

321 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.

7.72 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.

7.73 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.

7.74 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.

7.75 In 1983, after his release from prison, he shattered Bradley's right arm with a chain.

7.76 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.

7.77 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.

7.78 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.



7.79 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.

7.80 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.

7.81 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.

7.82 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.

7.83 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.

7.84 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.

7.85 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.

7.86 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.

7.87 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.

7.88 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.

7.89 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.

7.90 Coldrey J said:<sup>322</sup>

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.

7.91 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.

7.92 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.

7.93 *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.

7.94 This case raises the issue of the implication of the abolition of the defence of provocation for battered women.

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Ibid.

7.95 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.<sup>323</sup>

7.96 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.

7.97 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.

7.98 Commentators have argued that the partial defence of provocation must be retained because it is used by battered persons who kill their

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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.

abusers.<sup>324</sup> 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 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.

7.99 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 THE REALITY OF KILLINGS BY WOMEN IN THE CONTEXT OF DOMESTIC VIOLENCE

7.100 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 Chhay***<sup>325</sup>

7.101 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.

7.102 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:—

<sup>324</sup> For example, by the Taskforce discussed at [7.130] below, by Forell at [8.19] below and by McSherry at [8.22] below.

<sup>325</sup> (1994) 72 A Crim R 1.

- (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,
- (c) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life.

7.103 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’.<sup>326</sup>

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*:<sup>327</sup>

‘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*.<sup>328</sup> 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.<sup>329</sup>

7.104 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

326 Ibid 11.

327 *Reg v Ahluwalia* (1993) 96 Cr App R 133; D Nicholson and R Sanghvi, ‘Battered Women and Provocation’ [1993] *Criminal Law Review* 728, 730.

328 (1990) 76 CR (3d) 329.

329 Ibid 352.

provocation. As a result of that report, section 23 of the *Crimes Act 1900* (NSW) was amended, and now provides:

**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.

7.105 In introducing the amending legislation, the Attorney-General said:<sup>330</sup>

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New South Wales, *Parliamentary Debates*, 11 March 1982, 2485.

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.

...

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.

7.106 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:<sup>331</sup>

[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.

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*R v Chhay* (1994) 72 A Crim R 1, 13–14.

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 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.

7.107 In the case in which these comments were made, the defendant, Chhay, had been convicted of murder.

7.108 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.

7.109 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.

7.110 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.

7.111 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.

7.112 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.

7.113 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.

7.114 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.



7.115 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.

7.116 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.

7.117 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:<sup>332</sup>

[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.

7.118 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 CODE<sup>333</sup>

7.119 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.<sup>334</sup>

7.120 The Taskforce considered the current law in Queensland, and its interpretation by the High Court.<sup>335</sup> It referred to the case of *R v R*<sup>336</sup> (discussed above) as the case which tested the applicability of the defence to women who kill violent partners.<sup>337</sup>

7.121 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:<sup>338</sup>

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.

7.122 The Taskforce also referred to the similar results of a New South Wales study.<sup>339</sup>

7.123 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:<sup>340</sup>

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

333 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

334 Ibid 171–2.

335 Ibid 172–3.

336 (1981) 28 SASR 321.

337 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 173–4.

338 Ibid 175; Canadian Department of Justice, *Reforming Criminal Code Offences: Provocation, Self-defence and Defence of Property* (1988) 4–5.

339 H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990–1993: A Legal and Sociological Study* (1995) Judicial Commission of NSW 46.

340 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.

7.124 Of the requirement of an immediacy of reaction, the Taskforce said:<sup>341</sup>

[Provocation] anticipates and excuses quick, unthinking responses that are often outside the capacity, or standard behaviour patterns, of women.

7.125 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*,<sup>342</sup> developments in England and academic commentary, the Taskforce said:<sup>343</sup>

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'.<sup>344</sup> 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'.<sup>345</sup>

7.126 On the question of whether the defence was gender-biased, the Taskforce considered the results of an analysis by the New South Wales Judicial Commission<sup>346</sup> 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:<sup>347</sup>

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).

341 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 176.

342 (1994) 72 A Crim R 1.

343 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 178.

344 Canadian Department of Justice, *Reforming Criminal Code Offences: Provocation, Self-defence and Defence of Property* (1988) 10.

345 Ibid.

346 H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990–1993: A Legal and Sociological Study* (1995) Judicial Commission of NSW 59.

347 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).

7.127 A study conducted by the Law Reform Commission of Victoria produced a similar result.<sup>348</sup>

7.128 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:<sup>349</sup>

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.’<sup>350</sup>

7.129 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?

7.130 It considered the arguments for and against reform, which, briefly put, are:<sup>351</sup>

348 B Naylor, Law Reform Commission of Victoria, *Homicide Prosecutions Study: the importance of context* (1991).

349 Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 180.

350 D Kirkwood, *Submission to the Model Criminal Code Officers’ Committee — Fatal Offences Against the Person Women Who Kill in Self-Defence Campaign* 14.

351 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.<sup>352</sup>

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.<sup>353</sup>

Women use provocation — it is becoming more available to women with genuine claims. (note added)

7.131 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.<sup>354</sup>

7.132 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.

7.133 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

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352 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.

353 Again, the Commission notes that this argument is irrelevant to the current review.

354 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.<sup>355</sup> In considering this difference, the Taskforce said:<sup>356</sup>

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.

7.134 The Taskforce made formal recommendations accordingly.<sup>357</sup>

#### **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.

7.135 The Commission notes that its terms of reference are similar to recommendations 57.1 and 57.2.

### **FLEXIBILITY IN THE EXISTING COMMON LAW WHICH MAY BE CALLED IN AID OF THE BATTERED WOMAN**

7.136 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

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355 Ibid 193.

356 Ibid 195.

357 Ibid 196.

situation where there has been some time between the provocative conduct and the lethal reaction to it.

7.137 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:<sup>358</sup>

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*,<sup>359</sup> *Van Den Hoek v The Queen*,<sup>360</sup> and *Stingel v The Queen*.<sup>361</sup>

As Windeyer J pointed out in *Parker*,<sup>362</sup> 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'.<sup>363</sup> 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*,<sup>364</sup> cited with approval by the English Court of Appeal in *Reg v Ahluwalia*<sup>365</sup> 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-

358 *R v Chhay* (1994) 72 A Crim R 1, 7–8.

359 (1963) 111 CLR 610.

360 (1986) 161 CLR 158.

361 (1990) 171 CLR 312.

362 (1963) 111 CLR 610, 650.

363 *Ibid* 651.

364 On appeal at [1949] 1 All ER 932.

365 (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*,<sup>366</sup> 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.

7.138 Gleeson CJ made the point that the defence under the Criminal Code (Qld) drew upon the common law.<sup>367</sup>

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*.<sup>368</sup> 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.’

7.139 Of the language of the defence, his Honour said:<sup>369</sup>

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

<sup>366</sup> (1986) 161 CLR 158, 166–7.

<sup>367</sup> *R v Chhay* (1994) 72 A Crim R 1, 8–9.

<sup>368</sup> (1833) 6 Car & P 157; 172 ER 1188.

<sup>369</sup> *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.

7.140 And of the concept of loss of self-control, his Honour said:<sup>370</sup>

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*<sup>371</sup> 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*<sup>372</sup> 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 ... '.

7.141 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:<sup>373</sup>

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*.<sup>374</sup> 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

370 Ibid.

371 (1981) 28 SASR 321, 325.

372 [1981] 1 NSWLR 126, 140.

373 *R v Chhay* (1994) 72 A Crim R 1, 9–10.

374 (1993) 96 Cr App R 133.

provocation to the jury, but the jury found the appellant guilty of murder. The 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'.

7.142 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:<sup>375</sup>

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.

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*R v Chhay* (1994) 72 A Crim R 1, 10.

## PROVOCATION AT COMMON LAW

7.143 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.

7.144 However, the language of provocation under the Code requires immediacy of response to a greater degree than the language of the common law.

7.145 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)

7.146 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.

7.147 The language of the defence is different at common law:<sup>376</sup>

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.

7.148 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'.<sup>377</sup>

376

*Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane Dawson and Gaudron JJ).

377

S Yeo 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 314–15.

## THE MODEL DIRECTION

7.149 Chapter 9 sets out the model direction for the partial defence of provocation contained in the Supreme and District Court Benchbook.

7.150 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.

7.151 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.

7.152 A battered woman who kills after a delay will struggle to bring herself within the language of the current provision.

# Chapter 8

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### INTRODUCTION

8.1 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.

8.2 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.

8.3 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

8.4 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.

8.5 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.<sup>378</sup>

8.6 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’.<sup>379</sup> Substantive equality requires that the laws, themselves, treat individuals as substantive equals.<sup>380</sup>

8.7 Data<sup>381</sup> show that for intimate partner homicides (also referred to in the literature as ‘domestic killings’) there is little commonality between men and women. 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.

8.8 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.

8.9 The Commission acknowledges that there are women too who are provoked by jealousy into a rage and kill,<sup>382</sup> 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).

378 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.

379 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.

380 The Honourable Claire L’Heureux-Dubé, ‘A Conversation about Equality’ (2000) 29 *Denver Journal of International Law and Policy* 65, 69.

381 See Chapter 4.

382 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

8.10 Allen asks whether the defence of provocation is 'ethically tenable'.<sup>383</sup> 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.<sup>384</sup>

8.11 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:<sup>385</sup>

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.

8.12 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.<sup>386</sup>

8.13 Eastal considers the position of the battered woman who ultimately kills her partner:<sup>387</sup>

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

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383 MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *The Journal of Criminal Law* 216.

384 Ibid 242.

385 A Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320, 355.

386 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).

387 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 ...

8.14 Of the defence of provocation in particular, Easteal says:<sup>388</sup>

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.'<sup>389</sup> 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

8.15 Forell<sup>390</sup> asks whether it is necessary to abolish the defence of provocation and considers Lee's arguments<sup>391</sup> 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:<sup>392</sup>

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.

8.16 Forell ultimately concludes that abolition is the wrong response.<sup>393</sup> 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:<sup>394</sup>

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388 Ibid 47.

389 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.

390 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.

391 C Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003).

392 Ibid 247–50.

393 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.

394 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.

8.17 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.

8.18 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.

8.19 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.<sup>395</sup>

8.20 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.'<sup>396</sup> Forell continues:<sup>397</sup>

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 Territory<sup>398</sup> and New South Wales,<sup>399</sup> may have

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395 Ibid 68.

396 Ibid 69.

397 Ibid.

398 See the *Crimes Act 1900* (ACT) s 13, which is set out at [6.8] above.

399 See the *Crimes Act 1900* (NSW) s 23, which is set out at [7.104] 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.

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]

8.21 McSherry<sup>400</sup> 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. (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?<sup>401</sup>

8.22 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.<sup>402</sup> 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*:<sup>403</sup>

'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.'

8.23 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'.<sup>404</sup>

8.24 To further imbue the defence with a 'substantive moral context', McSherry suggests that legislation should provide that 'mere words' cannot amount to provocation.<sup>405</sup> The circumstances in which provocation may be

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400 B McSherry, 'It's a Man's World: Claims of Provocation and Automatism in 'Intimate' Homicides' (2005) 29(3) *Melbourne University Law Review* 905.

401 Ibid 918.

402 Ibid 919.

403 [1986] 1 SCR 313, 343.

404 B McSherry, 'It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides' (2005) 29(3) *Melbourne University Law Review* 28, 919.

405 Ibid.

raised should be limited to exclude those where the deceased has left, attempted to leave or threatened to leave an intimate sexual relationship.<sup>406</sup>

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

### 8.25 Substantive gender equality:<sup>407</sup>

'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'.<sup>408</sup> 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]

8.26 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.<sup>409</sup>

8.27 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'.<sup>410</sup>

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406 Ibid 920.

407 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.

408 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.')

409 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.

410 Ibid 34.

8.28 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,<sup>411</sup> 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.<sup>412</sup> 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.

8.29 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.<sup>413</sup>

8.30 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*.<sup>414</sup>

[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'<sup>415</sup>

8.31 Forell observes that there had been vigorous criticism of the traditional provocation doctrine in all three countries.<sup>416</sup> 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.<sup>417</sup>

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411 Discussed in the following paragraph.

412 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.

413 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.

414 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.

415 Ibid.

416 Ibid.

417 Ibid 41.

***United States provocation law***

8.32 American judges have very little sentencing discretion.<sup>418</sup>

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)

8.33 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.<sup>419</sup>

*Traditional provocation*

8.34 The four elements of the typical, traditional provocation defence as it applies in the United States are:<sup>420</sup>

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.

8.35 Another commentator suggests that the modern provocation test contains objective elements:<sup>421</sup>

the defendant was actually provoked into a heat of passion;

the reasonable person in the defendant's shoes would have been so provoked;

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418 Ibid 43.

419 Ibid 43–44.

420 *State v Viera*, 787 A 2d 256, 264 (NJ Super Ct App Div 2001).

421 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*

8.36 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.

8.37 Both of these defences are available to men who kill women who leave, or seek to leave, the relationship, or who are unfaithful.

8.38 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.<sup>422</sup> 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.<sup>423</sup>

8.39 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'.<sup>424</sup> 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.<sup>425</sup>

8.40 The role of the jury in provocation was considered significant by the New South Wales Law Reform Commission and the Victorian Law Reform Commission.

8.41 The New South Wales Law Reform Commission said:<sup>426</sup>

The jury has traditionally been and remains the appropriate arbiter of community values. To remove fundamental issues of culpability from the jury

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422 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.

423 Ibid.

424 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.

425 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.

426 New South Wales Law Reform Commission, 'Provocation, Diminished Responsibility and Infanticide', Discussion paper 31 (1993) 3.133.

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.

8.42 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'.<sup>427</sup>

8.43 The reports of these and other law reform commissions are considered in Chapter 6 of this Discussion Paper.

### **Canadian provocation law**

8.44 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.

8.45 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'.<sup>428</sup>

8.46 In Canada, murder carries mandatory life imprisonment.<sup>429</sup> Manslaughter using a firearm is punishable by a minimum sentence of four years' imprisonment. There is no minimum for manslaughter by other means.<sup>430</sup> Forell notes that the sentencing differences between murder and manslaughter are 'extreme', and that the abolition of provocation would result in

<sup>427</sup> Victorian Law Reform Commission, 'Defences to Homicide', Options paper (2003) 251.

<sup>428</sup> 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.

<sup>429</sup> 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)).

<sup>430</sup> Canadian Criminal Code s 236.

lengthy sentences for women who killed out of fear, as well as for men who killed in the heat of passion:<sup>431</sup>

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)

8.47 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*<sup>432</sup> (discussed below), the facts of which are similar to those in the Australian case of *Stingel v The Queen*.<sup>433</sup>

*R v Thibert*<sup>434</sup>

8.48 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.<sup>435</sup>

8.49 Thibert appealed against his conviction to the Alberta Court of Appeal.<sup>436</sup> 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.

8.50 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.

8.51 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.

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431 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.

432 [1996] 1 SCR 37.

433 (1990) 171 CLR 312.

434 The following discussion of this case is based on the judgment, not on Forell's summary of it.

435 According with a finding that the killing was provoked and impulsive rather than planned and deliberate: [1996] 1 SCR 37 [58].

436 (1994) 157 AR 316.



8.52 Cory J gave this brief description of the facts:<sup>437</sup>

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.

8.53 A reader may be left with the impression of an unfaithful wife and a husband only wanting to talk to her.

8.54 Major J gave a much more detailed description.<sup>438</sup> The Thiberts married in 1970 and had two children who were adults at the time of the trial.<sup>439</sup>

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 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.

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437 [1996] 1 SCR 37 [23].

438 Ibid [37].

439 Ibid [38]–[50].

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.'

8.55 This detailed description reveals planning and a recurring desire in Thibert to kill the deceased.

8.56 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.<sup>440</sup> 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.

8.57 Cory J then considered whether the deceased's acts were ones which he had a 'legal right' to do:<sup>441</sup>

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*<sup>442</sup> ... by Brooke JA:<sup>443</sup>

'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.'

8.58 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.

8.59 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.<sup>444</sup>

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440 Ibid [24].

441 Ibid [29].

442 [1972] 2 OR 630 (CA).

443 Ibid 649.

444 [1996] 1 SCR 37 [63]–[65].

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;<sup>445</sup> 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-martial 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.

8.60 Major J concluded that the defence should not have been left to the jury, and that the error did not therefore prejudice the appellant.

8.61 Forell is critical of the majority judgment and, in particular, of its interpretation of a ‘legal right’:<sup>446</sup>

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.<sup>447</sup> 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.’<sup>448</sup>

8.62 Other comments by Cory J provide further material for contemplation in this review. Of the ordinary person test, Cory J said:<sup>449</sup>

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

445 Those adjectives reflected the definition of ‘insult’ in the Oxford Dictionary.

446 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.

447 [1996] 1 SCR 37 [29].

448 Ibid [65].

449 Ibid [4], [14].

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.

8.63 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, race<sup>450</sup> or the background of the relationship between the defendant and the deceased<sup>451</sup>).

### **Australian provocation law**

8.64 Forell considers Australia the 'trend-setter'<sup>452</sup> 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.<sup>453</sup> 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.<sup>454</sup>

8.65 Forell refers to *Stingel v The Queen*<sup>455</sup> 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.

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450 Ibid [11].

451 Ibid [15].

452 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.

453 Ibid 50.

454 Ibid.

455 (1990) 171 CLR 312.

8.66 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*.

8.67 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'.<sup>456</sup> Forell considers Tasmania's abolition of provocation 'a positive step on behalf of women',<sup>457</sup> but is uncertain how battered women will fare without this defence.

8.68 Forell predicts that those Australian jurisdictions that have mandatory life sentences for murder will not abolish provocation.

### THE AMERICAN 'EXTREME EMOTIONAL DISTURBANCE' DEFENCE

8.69 The re-statement of provocation as 'extreme emotional disturbance' in the Model Penal Code<sup>458</sup> 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 Nourse<sup>459</sup> supports Forell's argument that the 'extreme emotional disturbance' treatment of domestic homicide, based on rage and jealousy, is unjust.

8.70 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.<sup>460</sup>

8.71 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

456 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.

457 Ibid 57.

458 (USA). This was developed by the American Law Institute in 1962.

459 V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) 106 *Yale Law Journal* 1331.

460 '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.

emotional disturbance. Nourse poses the question ‘which losses of self-control merit the law’s compassion?’<sup>461</sup> — and suggests that the answer entails a moral judgment.

8.72 The article ventures a re-examination of the relationship between emotion and reason before returning to a ‘fundamental question’:<sup>462</sup>

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.

8.73 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

8.74 An Australian article by Coss entitled ‘The Defence of Provocation: An Acrimonious Divorce from Reality’<sup>463</sup> 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 to raise the defence of provocation in murder are often proprietary, violent men who are least deserving of the law’s ‘understanding’.

8.75 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’

8.76 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

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461 Ibid 1333.

462 Ibid 1392.

463 (2006–2007) 18 *Current Issues in Criminal Justice* 51.

historical foundation of the defence<sup>464</sup> provides no justification for the continuation of the defence.<sup>465</sup>

8.77 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.<sup>466</sup>

8.78 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.<sup>467</sup>

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.<sup>468</sup> 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 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.

8.79 Additionally, Coss argues that the 'ordinary person' test is incomprehensible to the ordinary person.<sup>469</sup>

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464 That it arose to express tolerance for human frailty at a time when men bore arms and retaliated to affronts to their honour.

465 (2006–2007) 18 *Current Issues in Criminal Justice* 51, 52.

466 *Ibid.*

467 *Ibid* 52–3.

468 The Commission acknowledges that there may be overstatement in this claim.

469 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 53.



## Analysis of non-legal literature

8.80 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 wife<sup>470</sup> killing,<sup>471</sup> citing two cases in which ‘proprietary males’ pleaded provocation after killing their wives: *R v Ramage* and *R v Butay*.

### *R v Ramage*<sup>472</sup>

8.81 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.

8.82 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:<sup>473</sup>

[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.

...

[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.

470 ‘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.

471 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.

472 [2004] VSC 508.

473 Ibid [35], [38], [40], [42].

8.83 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.

8.84 Ramage was sentenced to 11 years’ imprisonment.

*Other commentary on R v Ramage*

8.85 *Ramage* was considered by McSherry in ‘Men Behaving Badly: Current Issues in Provocation, Automatism, Mental Impairment and Criminal Responsibility’.<sup>474</sup> 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?<sup>475</sup>

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 Butay***<sup>476</sup>

8.86 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:<sup>477</sup>

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.

8.87 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.

474 B McSherry, ‘Men Behaving Badly: Current Issues in Provocation, Automatism, Mental Impairment and Criminal Responsibility’ (2005) 12 (1) *Psychiatry, Psychology and Law* 15.

475 Ibid 17.

476 [2001] VSC 417.

477 Ibid [8].

8.88 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:<sup>478</sup>

[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.

8.89 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.'<sup>479</sup>

### 'Asymmetrical killings'

8.90 Coss identifies a finding of crucial differences between male and female violence as 'fundamental' and 'complementary' to the finding that proprietariness motivates wife killing:<sup>480</sup>

[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.

8.91 Other studies have similarly illustrated the contrast between the circumstances in which men and women usually kill.<sup>481</sup> Of the international

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478 Ibid [22], [25], [26].

479 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 56.

480 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.

481 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).

research, Coss notes:<sup>482</sup>

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.’<sup>483</sup> (notes omitted)

### Key predictors of men killing women

8.92 Coss identifies as key predictors of the men killing women: (1) prior violence committed upon the deceased, (2) separation by the deceased (and stalking) and (3) an affront to male ‘honour’.<sup>484</sup>

#### **Prior violence**

8.93 Coss notes that major studies have found that everywhere in the world women are beaten before they are killed.<sup>485</sup> He refers to the most recent study in Britain examining intimate partner homicide, which found that:<sup>486</sup>

[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)

482 G Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006–2007) 18 *Current Issues in Criminal Justice* 51, 58.

483 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.

484 G Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’, (2006–2007) 18 *Current Issues in Criminal Justice* 51, 58.

485 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.

486 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.

8.94 Having regard to that finding, Coss considered the Victorian case of *R v Kumar*<sup>487</sup> decided by the Victorian Court of Appeal in September 2002.<sup>488</sup>

8.95 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.

8.96 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.<sup>489</sup>

8.97 In November 1998, Mani moved from Queensland to Victoria to end her relationship with Kumar.

8.98 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.

8.99 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:<sup>490</sup>

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.

8.100 His Honour added:<sup>491</sup>

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.

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487 (2002) 5 VR 193.

488 The facts are taken from the judgment, rather than from Coss's summary of the case.

489 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.

490 (2002) 5 VR 193, 196.

491 Ibid.

8.101 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.

8.102 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.

8.103 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.

8.104 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.

8.105 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:<sup>492</sup>

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.

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Ibid 199.

8.106 Evidence of provocation came almost entirely from Kumar's interview with police.<sup>493</sup> 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.

8.107 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:<sup>494</sup>

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.<sup>495</sup>

A: Yeah. And everything came in my mind and I was mad to do something wrong.

8.108 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.

8.109 Eames JA analysed the evidence from the perspective most favourable to Kumar:<sup>496</sup>

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 hyperbole<sup>497</sup> 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

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493 Ibid.

494 Ibid 203.

495 Kumar had an accident during his drive to Melbourne.

496 (2002) 5 VR 193, 224.

497 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*,<sup>498</sup> (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.

8.110 Coss refers to the following passage from Eames JA's judgment:<sup>499</sup>

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.

8.111 Coss then makes this argument:<sup>500</sup>

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.

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498 (1990) 171 CLR 312, 331.

499 (2002) 5 VR 193, 219–20.

500 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.

8.112 Coss contrasts Eames JA's comments with those of O'Bryan AJA. Coss refers to the italicised part<sup>501</sup> of the following extract from the judgment of O'Bryan AJA.<sup>502</sup>

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

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501 Ibid 59.

502 (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 ...

8.113 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.<sup>503</sup> However, earlier in his judgment, O'Bryan AJA clearly appreciates that Kumar did not react immediately to the insults with violence.<sup>504</sup> 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.

8.114 Eames JA recognised this in his judgment:<sup>505</sup>

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.

503 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.

504 (2002) VR 193, 229.

505 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**

8.115 Coss considers that the non-legal literature 'conclusively established' that the most dangerous time for a woman in an intimate relationship is separation.<sup>506</sup> 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.<sup>507</sup> Separation is a key predictor of homicide.<sup>508</sup>

8.116 The same point is made in Kaplan & Sadock's *Synopsis of Psychiatry*.<sup>509</sup>

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 ...

8.117 Stalking, a 'key controlling behaviour',<sup>510</sup> 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 America<sup>511</sup>) who had been killed by their intimate partner or had been the victim of intimate partner violence between 1994 and 2000.<sup>512</sup> 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.<sup>513</sup> Almost half (49%) of the women killed or surviving an attempt on

506 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 59.

507 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.

508 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.

509 BJ Sadock and VA Sadock, *Kaplan & Sadock's Synopsis of Psychiatry* (10th ed, 2007) 882.

510 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 60.

511 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.

512 Ibid 56.

513 Ibid.

their life had been stalked by their killer (or would-be killer), although they were not previously physically abused.<sup>514</sup>

8.118 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,<sup>515</sup> particularly those women 'tied inextricably to a cultural group threatening reprisals should she abandon her family'.<sup>516</sup> Coss refers to the case of *R v Denney*<sup>517</sup> 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'.<sup>518</sup>

*R v Denney*<sup>519</sup>

8.119 *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.

8.120 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.

8.121 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.

8.122 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'. Coldrey

514 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.

515 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 60.

516 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.

517 [2000] VSC 323.

518 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61.

519 [2000] VSC 323.

J was satisfied that Denney was subject to psychologically demoralising physical and mental abuse.

8.123 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.

8.124 The deceased wanted to go shooting with a friend and, to appease him, Denney obtained a gun and ammunition from the deceased's friend.

8.125 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:<sup>520</sup>

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.

8.126 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.

8.127 Her younger son drowned in 1986, aged 11. Denney told the jury she believed God took him because of what she had done.

8.128 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.

8.129 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'.

8.130 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'<sup>521</sup>

8.131 Coss observes that many commentators consider the concept of 'male honour' of paramount importance. This concept centres on:<sup>522</sup>

- (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'

8.132 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'<sup>523</sup> and, in particular, whether proprietariness attracts condemnation or sympathy. Coss considers the cases of *R v Yasso*,<sup>524</sup> *R v Khan*<sup>525</sup> and *R v Conway*,<sup>526</sup> and contrasts those cases with those of *R v King*<sup>527</sup> and *R v Mankoa*.<sup>528</sup>

521 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61.

522 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.

523 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61.

524 *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).

525 (1996) 86 A Crim R 552.

526 [2002] VSC 383; [2002] VSC 486; [2004] VSCA 181; [2005] VSC 205.

527 [1998] NSWSC 289.

528 [1998] NSWSC 295; [2001] NSWCCA 52; No S61 of 2001 (before Gleeson CJ and Callinan J).

**R v Yasso**

8.133 Hermiz was stabbed to death by her estranged husband, Yasso. Coss summarises the facts of the case in this way:<sup>529</sup>

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:<sup>530</sup>

‘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.’

8.134 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’.<sup>531</sup> He referred to the comments of other academics about the relevance of ethnicity in provocation:<sup>532</sup>

Although long championed by some, the ‘ethnicity argument’ in provocation has been roundly condemned, Howe<sup>533</sup> 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.’<sup>534</sup>

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529 G Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006–2007) 18 *Current Issues in Criminal Justice* 51, 61–62.

530 Yasso [2002] VSC 468, [53].

531 G Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006–2007) 18 *Current Issues in Criminal Justice* 51, 62.

532 Ibid.

533 A Howe, ‘Provoking Polemic — Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition’ (2002) 10 *Feminist Legal Studies* 39, 46.

534 L Neal and M Bagaric, ‘Provocation: The Ongoing Subsistence of Principle to Tradition’ (2003) 67 *Journal of Criminal Law* 237, 251–2.

8.135 In *R v Yasso*, Coldrey J refused to leave provocation to the jury.<sup>535</sup> His Honour observed that the relevant legal principles were those contained in *Masciantonio v the Queen*<sup>536</sup> 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'.<sup>537</sup> His Honour accepted that the act of spitting constituted a 'serious affront'.<sup>538</sup>

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.

8.136 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.<sup>539</sup>

8.137 Coldrey J also made some 'general comments' (also quoted by Coss):<sup>540</sup>

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.

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535 (2002) 6 VR 239.

536 Ibid 240. See *Masciantonio v The Queen* (1995) 183 CLR 58.

537 Ibid 242.

538 Ibid.

539 Ibid 243.

540 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.

8.138 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.<sup>541</sup>

8.139 Yasso successfully appealed against his conviction. The Court of Appeal, by majority, held that provocation should have been left to the jury.

8.140 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.<sup>542</sup>

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].

8.141 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.<sup>543</sup>

8.142 In response to Coldrey's comments, Charles JA said:<sup>544</sup>

[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* ...<sup>545</sup>

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541 The sentencing remarks are at [2002] VSC 468.

542 *R v Yasso (No 2)* (2004) 10 VR 466, 477.

543 *Ibid* 481.

544 *Ibid* 481–2.

545 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.

8.143 In dissent, Vincent JA said:<sup>546</sup>

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.<sup>547</sup>

8.144 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.<sup>548</sup> Vincent JA also said:<sup>549</sup>

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.

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546 *R v Yasso (No 2)* (2004) 10 VR 466, 483.

547 *Masciantonio v R* (1995) 183 CLR 58.

548 *R v Yasso (No 2)* (2004) 10 VR 466, 484.

549 *Ibid* 486.

8.145 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.

8.146 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):<sup>550</sup>

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.

8.147 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.

8.148 Coss is 'heartened'<sup>551</sup> 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'.<sup>552</sup>

### ***R v Khan***<sup>553</sup>

8.149 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.

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550 [2005] VSC 75, [48]–[50] (Hollingworth J).

551 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 63.

552 Ibid.

553 (1996) 86 A Crim R 552.

8.150 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'.<sup>554</sup>

8.151 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.<sup>555</sup> The Crown appealed against that sentence, arguing that it was manifestly inadequate.

8.152 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:<sup>556</sup>

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

554 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 63.

555 (1996) 86 A Crim R 552.

556 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.<sup>7</sup>

8.153 Allen J then considered the criminality in the present case:<sup>557</sup>

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.

8.154 Allen J considered the approach of the trial judge to sentence, and in particular, the relevance of Khan's religious beliefs:<sup>558</sup>

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

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557 Ibid 557.

558 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.

8.155 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).

8.156 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.<sup>559</sup>

### ***R v King***<sup>560</sup>

8.157 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:<sup>561</sup>

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.

8.158 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.

8.159 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.

8.160 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.

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559 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 63.

560 [1998] NSWSC 289.

561 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 64.

8.161 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.

8.162 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.

8.163 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.

8.164 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.

8.165 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.

8.166 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).

8.167 The Commission's review of Queensland cases in Chapter 5 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 Mankotia***<sup>562</sup>

8.168 Coss contrasts *Khan* with *Mankotia*. He argues that Khan was treated with 'empathetic inverse racism'<sup>563</sup> 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.

8.169 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*.

8.170 The relevant facts of *Mankotia* are stated in the judgment of the New South Wales Court of Criminal Appeal:<sup>564</sup>

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.

8.171 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.

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562 (2001) 120 A Crim R 492.

563 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 64.

564 (2001) 120 A Crim R 492, 493.



8.172 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*<sup>565</sup> and *Green v The Queen*,<sup>566</sup> 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.<sup>567</sup>

8.173 On the hearing of the appeal, Mankotia conceded that the trial judge had directed the jury according to law. Accordingly, the appeal was dismissed.<sup>568</sup> He was told that, if he wished the High Court to reconsider *Stingel*,<sup>569</sup> he should apply for special leave, which he did. Special leave was refused.<sup>570</sup>

8.174 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.

8.175 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 [3.44]–[3.53] above.

### ***R v Conway***

8.176 Conway was convicted of murder, and sentenced to 19 years' imprisonment.

8.177 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 said he told her that he would kill himself. He pulled out the knife, he said, and

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565 (1995) 183 CLR 58.

566 (1997) 191 CLR 334.

567 *Masciantonio v The Queen* (1995) 183 CLR 58, 73; *Green v The Queen* (1997) 191 CLR 334, 368.

568 (2001) 120 A Crim R 492.

569 (1990) 171 CLR 312.

570 *Mankotia v The Queen* (2002) 23(1) Leg Rep C 18.

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.

8.178 The trial judge refused to leave provocation to the jury: provocation required something ‘beyond laughter and words of a scornful, derisive or taunting kind’.<sup>571</sup> The trial judge said:<sup>572</sup>

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*<sup>573</sup> at para 147. Lord Hoffman in *Smith (Morgan)*<sup>574</sup> said, at 169: ‘Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide ...’

8.179 In the trial judge’s sentencing remarks, his Honour said:<sup>575</sup>

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.

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571 [2002] VSC 383, [7] (Teague J)

572 Ibid.

573 [2001] VSCA 149.

574 [2001] 1 AC 146.

575 [2002] VSC 486, [5] (Teague J).

8.180 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:<sup>576</sup>

[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'.<sup>577</sup> [some notes omitted]

8.181 Coss makes the following comments about the outcome of this appeal:<sup>578</sup>

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.

8.182 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

8.183 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.

8.184 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.

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<sup>576</sup> (2004) 149 A Crim R 206, 209–10.

<sup>577</sup> *R v Tuncay* [1988] 2 VR 19, 30 (Hedigan AJA).

<sup>578</sup> 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*.<sup>579</sup>

8.185 In *Buttigieg*, the Queensland Court of Appeal listed a number of propositions about provocation which were ‘generally accepted’,<sup>580</sup> 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:<sup>581</sup>

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 ...).

8.186 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’

8.187 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.<sup>582</sup>

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579 (1993) 69 A Crim R 21.

580 *Ibid* 26.

581 *Ibid* 27.

582 *Ibid* 69.

8.188 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:<sup>583</sup>

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.

8.189 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.<sup>584</sup> 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.<sup>585</sup>

8.190 Other studies revealed tolerance of jealousy-inspired violence,<sup>586</sup> which Coss suggests is consistent with the verdicts rendered in *Ramage* and *Khan*.

8.191 Coss argues that '[s]ympathy for the accused leads inexorably to attributing blame to the victim'<sup>587</sup> and notes that certain observers of the *Ramage* trial believed it was the deceased on trial, not her husband.<sup>588</sup>

### Coss's final argument

8.192 Coss concludes with this argument for the abolition of the defence:<sup>589</sup>

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 await a legislative response. Victoria has now abolished provocation, enacting

583 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.

584 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.

585 AM McMurray et al 'Post-Separation Violence: The Male Perspective' (2000) *Journal of Family Studies* 6, 89–105.

586 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.

587 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51, 70.

588 Ibid.

589 Ibid 71.

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*'.<sup>590</sup>

... 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?

8.193 Many articles consider whether there is something wrong with the idea that an ordinary person can lose self-control and kill another human being.

8.194 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.<sup>591</sup> Yule refers to the argument that the idea of loss of control is a fallacy:

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.<sup>592</sup>

8.195 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.

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590 Victorian Law Reform Commission, Report (2004) Executive Summary, xxi.

591 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).

592 L Neal and M Bagaric, 'Provocation: The Ongoing Subservience of Principle to Tradition' (2003) 67 *Journal of Criminal Law* 237, 247.

# Chapter 9

## Jury directions: the partial defence of provocation

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### INTRODUCTION

9.1 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.

9.2 After an introduction, the model direction explains to the jury what provocation is. Then it 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 explains how the prosecution might negative or overcome the defence.

9.3 The Benchbook also contains further information about the law of provocation for the benefit of the trial judge.

### THE MODEL DIRECTION ON PROVOCATION

9.4 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.<sup>593</sup> 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.<sup>594</sup>

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.<sup>595</sup>

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

<sup>593</sup> 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.

<sup>594</sup> *Stingel*, 326.

<sup>595</sup> *Stingel*, 326.



deprived of self-control and killed the deceased whilst so deprived.<sup>596</sup>  
[Summarise the competing defence and prosecution cases.]

Could an ordinary person have been so provoked?<sup>597</sup>

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.<sup>598</sup>

An 'ordinary person' is simply one who has the minimum powers of self control<sup>599</sup> expected of an ordinary citizen [who is sober, not affected by drugs] of the same age as the defendant.<sup>600</sup> 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, could<sup>601</sup> 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 family<sup>602</sup>] 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].

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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.)

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*Stingel*, 327–32.

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See *Masciantonio*, 69; also *Johnson v The Queen* (1976) 136 CLR 619, 639, 642.

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*Stingel*, 327.

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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.

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*Stingel*, 329.

602

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.<sup>603</sup>

### 9.5 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.<sup>604</sup> 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.<sup>605</sup> 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*

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603 *R v Rae* [2006] QCA 207, [37].

604 *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162.

605 *Stingel*, 334; *Masciantonio*, 67–68; *Buttigieg*, 27, *Rae*, [29].

enough). The cases are usefully reviewed in *Buttigieg*.<sup>606</sup> Note that in *Buttigieg*<sup>607</sup> 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',<sup>608</sup> even if it is not requested by the defence and is in fact inconsistent with a defence raised.<sup>609</sup>

#### 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.'*<sup>610</sup> 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.<sup>611</sup> 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.*<sup>612</sup>

*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'.<sup>613</sup> It is to be noted that the reference is to the ordinary person and not to the average person.<sup>614</sup> 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.<sup>615</sup> An instruction that the jury put themselves, as the embodiment of the ordinary person, in the defendant's shoes should be avoided.*

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606 *Buttigieg*, 26–35.

607 *Buttigieg*, 37.

608 *Pangilinan*, 64, *Van Den Hoek*, 161–2, 169.

609 *Pangilinan*, 64. See also *R v Cowan* [2005] QCA 424, [21], [22].

610 *Stingel*, 326.

611 *Osland* (1998) 197 CLR 316, 337.

612 *Van Den Hoek*, 168; *Pangilinan*, 64.

613 *Stingel*, 329, 331; *Mogg* (2000) 112 A Crim R 417.

614 *Stingel*, 322.

615 *Stingel*, 326–8; *Vidler* (2000) 110 A Crim R 77.

## DISCUSSION

9.6 The subjective/objective test of provocation has been criticised for its complexity. Consider the summing up in the trial of *Sebo*, set out at [5.120] 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’?.

9.7 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.

9.8 *Buttigieg*<sup>616</sup> is discussed above at [3.56] and [8.184]–[8.185]. As noted above, it is a decision of the Queensland Court of Appeal which sets out certain ‘generally accepted’ propositions about provocation.<sup>617</sup> 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 hold the evidence of provocation sufficient to raise a reasonable doubt. But that statement 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.<sup>618</sup>

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616 (1993) 69 A Crim R 21.

617 Ibid 26.

618 Ibid 27.

# Chapter 10

## The onus of proof for the partial defence of provocation

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### INTRODUCTION

10.1 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 negative 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.

10.2 Until *Woolmington's case*<sup>619</sup> 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.

10.3 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 the onus of proof placed on a defendant who wishes to claim the benefit of provocation.

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[1935] AC 462.

## SIGNIFICANT CASES

### *Woolmington v DPP*<sup>620</sup>

10.4 In *Woolmington's* case the trial judge directed the jury that, once the prosecution proved that the defendant had killed the deceased, the law presumed the element of malice,<sup>621</sup> unless the defendant satisfied the jury that the killing was excused as an accident, or mitigated by provocation to manslaughter.<sup>622</sup> The following extract sets out the trial judge's direction to the jury:<sup>623</sup>

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.'<sup>624</sup> 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.

10.5 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 stating the onus of proof rule the court acknowledged only two exceptions: the rule that proof of insanity rests on the defendant, and any exception created by statute.

10.6 In applying the general rule to the charge of murder, Viscount Sankey LC said:<sup>625</sup>

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.)

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620 Ibid.

621 Malice is the mental element of murder at common law.

622 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.

623 *Woolmington v DPP* [1935] AC 462, 465.

624 *Foster's Crown Law* (1762) 255.

625 *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.

10.7 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 a verdict of manslaughter.

10.8 The decision of the House of Lords to apply the general rule to provocation was no doubt thought to rest in principle.

10.9 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, 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.<sup>626</sup>

### ***Johnson v The Queen***<sup>627</sup>

10.10 In *Johnson v The Queen*, a question before the High Court was whether section 23 of the *Crimes Act 1900* (NSW)<sup>628</sup> placed the onus on the

<sup>626</sup> 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.

<sup>627</sup> (1976) 136 CLR 619.

<sup>628</sup> 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;
- (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.

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:<sup>629</sup>

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 Queen***<sup>630</sup>

10.11 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,<sup>631</sup> the onus lay on the prosecution to exclude any claim of provocation. Barwick CJ said:<sup>632</sup>

In my reasons for judgment in *Johnson v The Queen*<sup>633</sup> 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.

10.12 The comments made in both cases were obiter.

## **DISCUSSION**

10.13 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.

10.14 Sir Garfield Barwick's point in the passages cited is that a claim of provocation engages the second principle, and not the first; and that,

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629 (1976) 136 CLR 619, 643.

630 (1977) 138 CLR 601.

631 *Woolmington v DPP* [1935] AC 462.

632 *Moffa v The Queen* (1977) 138 CLR 601, 608.

633 (1976) 136 CLR 619.



additionally, considerations of policy justify legislative intervention to place the onus of proof on a defendant.

10.15 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 responsibility<sup>634</sup> to establish diminished responsibility on the balance of probabilities.<sup>635</sup> 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.

10.16 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 occupied<sup>636</sup> by the defendant is conclusive evidence 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.

10.17 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.<sup>637</sup>

10.18 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.

10.19 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

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634 Criminal Code (Qld) s 304A.

635 Criminal Code (Qld) s 304A(2).

636 Or concerned in the management or control of the place (*Drugs Misuse Act* (Qld) s 129(1)(c)).

637 Alternatively, it may be said that the relevant fact is likely to be within the defendant's capacity to prove, but not within the prosecution's capacity to disprove.

based, as normally the defendant will be the only witness with knowledge of all the relevant facts.

10.20 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.'<sup>638</sup> 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.

10.21 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.

10.22 Fourthly, a strong analogy exists to the partial defence of diminished responsibility.<sup>639</sup> A successful claim of diminished responsibility, like provocation, reduces murder to manslaughter. Diminished responsibility, like provocation, only becomes necessary to consider 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.

10.23 These arguments do not apply to provocation as a defence to assault.

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<sup>638</sup> *Lee Chun-Chuen v The Queen* [1963] AC 220, 230.

<sup>639</sup> Criminal Code (Qld) s 304A.

# Chapter 11

## Assault provocation: Criminal Code (Qld) sections 268, 269

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### INTRODUCTION

11.1 While provocation under section 304 of the Criminal Code (Qld) is a partial defence to murder, provocation<sup>640</sup> under sections 268 and 269 of the Code is a complete defence to any offence of which assault is an element.

11.2 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.

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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.

- (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.

11.3 An example of a wrongful act or insult which 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.

11.4 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 *Reprint Act 1992* (Qld). Judge Robin QC, in *Hodgens v Williams*,<sup>641</sup> 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.

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[2005] QDC 257.

11.5 Although editorial changes under the *Reprints Act 1992* (Qld) have effect in law,<sup>642</sup> the editorial power cannot be exercised to change the effect of a provision.<sup>643</sup>

## THE POSITION IN OTHER JURISDICTIONS

11.6 At common law, provocation is not recognised as a complete defence to an assault.

11.7 Western Australia is the only other Australian jurisdiction to provide a complete defence of provocation in relation to assault.

11.8 The Criminal Code (WA) provides a complete defence of provocation in relation to assault offences in section 246. 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).

11.9 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.<sup>644</sup> However, it considered 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 Australian recommended that a review should be conducted to consider whether the defence should be retained and, if so, to which offences it should apply.<sup>645</sup>

## THE UNDERLYING RATIONALE

11.10 Provocation as a complete defence to assault is the invention of Sir Samuel Griffith. In his explanatory letter to the Attorney-General,<sup>646</sup> which

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642 *Reprints Act 1992* (Qld) s 8.

643 *Reprints Act 1992* (Qld) s 7.

644 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 223.

645 *Ibid*, Recommendation 30.

646 Dated 29 October 1897.

accompanied the draft Code, he wrote:<sup>647</sup>

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.

11.11 In the note to sections 268 and 269 as they appeared in the Draft Code (1897), Sir Samuel Griffith wrote:<sup>648</sup>

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.

11.12 Sir Samuel Griffith's summary explanation that the sections express a 'rule of life' requires some further analysis.

11.13 In confining the scope of the rule to offences of which consent is an element<sup>649</sup> 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 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.<sup>650</sup>

11.14 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

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647 Reported in (1911) 5 QJP 129, 131.

648 Ibid.

649 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.

650 Alternatively, it may be said, A, by inducing the assault by B, has impliedly consented to the induced assault.

of whether provocation should be retained as a defence to assaults may now be considered.

## ELEMENTS OF PROVOCATION (SECTION 268)

11.15 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*<sup>651</sup> the Queensland Court of Criminal Appeal attempted to limit the scope of provocation by, first, holding that the word 'wrongful' should be construed to embrace matters which are unlawful under the criminal law, and matters which involve the infringement of some right, whether provided by law or by a court order;<sup>652</sup> and secondly, by holding that 'wrongful' qualified both 'act' and 'insult' in the phrase 'wrongful act or insult'.

11.16 Whether *R v Stevens*<sup>653</sup> remains good law in the light of *Stingel*<sup>654</sup> is doubtful.

11.17 *Stingel* 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.<sup>655</sup> 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'.<sup>656</sup>

11.18 In the daily administration of the law in Queensland the broad definitions in *Stingel* are routinely followed.

11.19 Section 268(3) of the Code provides that a lawful act is not provocation to any person for an assault. Kenny<sup>657</sup> has suggested 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 which is lawful by virtue of a provision in the Code.<sup>658</sup>

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651 [1989] 2 Qd R 386.

652 Ibid 391.

653 [1989] 2 Qd R 386.

654 (1990) 171 CLR 312.

655 Section 160 set out the partial defence of provocation, a provision which has since been repealed.

656 *Stingel v The Queen* (1990) 171 CLR 312, 321–2.

657 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (6th ed, 2004).

658 *Roche v The Queen* [1988] WAR 278, 280. A list of Code provisions which 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.

## PROVOCATION AS A DEFENCE TO ASSAULT

11.20 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.

11.21 The requirement of proportionality attracted some criticism initially as it was thought illogical to expect an angry man to react proportionally.<sup>659</sup> 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

11.22 The Commission is asked to review whether provocation as a complete defence to assault should be abolished or whether it should be recast to reflect community expectations.

11.23 Although technically outside the terms of reference, the Commission has noted the recommendation in the Report of The Taskforce on Women and the Criminal Code in favour of extending the defence to the offences of unlawful wounding and grievous bodily harm. If the existing theoretical basis of provocation is retained, it would not be appropriate to extend the defence to offences to which consent is not a defence.

11.24 The terms of reference also require the Commission to consider whether the current provisions are readily understood by a jury and the community.

## JURY DIRECTIONS

11.25 The Supreme and District Court Benchbook for Queensland includes a model direction on the complete defence of provocation in relation to assault.<sup>660</sup>

11.26 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.

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659 *R v Foxcroft* (1911) 5 QJPR 129, 130 (Real J).

660 *Supreme and District Court Benchbook*, Provocation: ss 268, 269, [84] <<http://www.courts.qld.gov.au/2265.htm>> at 16 April 2008.



## The opening direction

11.27 The model direction suggests the following opening:<sup>661</sup>

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

11.28 The model direction then moves to the issue of whether there was a relevant wrongful act or insult:<sup>662</sup>

At the outset, there must be a wrongful act or insult by the complainant.

...

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

11.29 The model direction then provides the following explanation of the ‘ordinary person’ test:

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661 Ibid [84.1]. Note that provision is made throughout for the direction to be related to the evidence in the particular case.

662 Ibid [84.1]–[84.2].

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**

11.30 The model direction continues, addressing the question whether the defendant was induced by the wrongful act or insult:<sup>663</sup>

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 ...

### **Whether the defendant lost self-control**

11.31 The model direction then addresses the question of the defendant's loss of self-control:

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.

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Ibid [84.2]–[84.3].

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.

11.32 The model direction also addresses the prosecution's onus.<sup>664</sup>

11.33 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

11.34 The options presented by the reference are abolition of provocation as a complete defence to assault, or recasting the defence 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. 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.

## KEY QUESTION

**11-1 Should the complete defence to assault in sections 268 and 269 of the Criminal Code (Qld) be abolished or retained?**

**11-2 If the complete defence to assault is retained, should sections 268 and 269 of the Criminal Code (Qld) be reworded in contemporary language?**

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Ibid [84.3]–[84.4].

# Chapter 12

## Discussion and key questions

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### INTRODUCTION

12.1 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.

12.2 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.

12.3 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.

12.4 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.

12.5 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.

12.6 Group C consists of situations where the killing is a response to a non-violent homosexual advance by the deceased.

12.7 Group D consists of defendants who are in seriously abusive and violent relationships. This group is discussed in Chapter 7. 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 men<sup>665</sup> 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.

12.8 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.

12.9 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

12.10 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 is examined in Chapter 8.

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That is, men in group A.

12.11 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.

12.12 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.

12.13 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 woman<sup>666</sup> 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

12.14 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,<sup>667</sup> 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.

12.15 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:<sup>668</sup>

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 us quite the opposite: that departure, unlike rape and battery and robbery, merits protection rather than punishment.

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666 Or man or parent or child.

667 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.

668 V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) 106 *Yale Law Journal* 1331.

12.16 This argument explains why one should be regarded as less culpable than the other.

12.17 Group C raises special considerations. The killer in *Green v The Queen*<sup>669</sup> claimed to have been provoked by a homosexual advance by the deceased. In the circumstances of *Green* three members of the Court<sup>670</sup> thought that the hypothetical ordinary person could have been so provoked as to form an intention to kill or do grievous bodily harm.<sup>671</sup> Two members did not.<sup>672</sup> Although the different conclusions reached may be explained at a factual level, the question of principle raised is whether a non-violent<sup>673</sup> homosexual invitation could ever justify killing the person making the advance.

12.18 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.

12.19 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.<sup>674</sup>

12.20 Group D also raises special considerations. In the discussion on battered women<sup>675</sup> 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.

12.21 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

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669 (1996) 191 CLR 334.

670 Brennan CJ, Toohey and McHugh JJ.

671 *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.

672 Gummow and Kirby JJ.

673 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).

674 *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.

675 Chapter 7.

evidentiary one. Her actions may involve elements of planning,<sup>676</sup> which may suggest premeditation rather than loss of control.<sup>677</sup>

## **MODIFICATION OF THE LAW TO OBTAIN SUBSTANTIVE GENDER EQUALITY**

12.22 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.<sup>678</sup>

12.23 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.

12.24 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.

12.25 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.<sup>679</sup> These changes in the common law have enabled some claims by battered women to be successfully advanced.

12.26 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.<sup>680</sup>

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676 The planning may involve obtaining a weapon and choosing the moment to strike.

677 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.

678 See [12.14] above.

679 See [3.26], [7.143]–[7.148] above.

680 See [7.149]–[7.152] above.



## GENERAL ISSUES IN REFORMING PROVOCATION

12.27 As explained earlier in this Report, section 23 of the *Crimes Act 1900* (NSW) was amended to remove the requirements that the killing occur suddenly<sup>681</sup> and immediately after the provocation.<sup>682</sup> At the same time the requirement of a loss of control at the time of the killing was retained as a safeguard against premeditated killings.

12.28 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.

12.29 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.

12.30 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

12.31 The categories defined in *R v Mawgridge*<sup>683</sup> 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'<sup>684</sup> 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.

12.32 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).

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681 *Crimes Act 1900* (NSW) s 23(3)(b).

682 *Crimes Act 1900* (NSW) s 23(2)(b).

683 (1707) Kel 119; 84 ER 1107.

684 *Buttigieg* (1993) 69 A Crim R 21, 37.

12.33 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.<sup>685</sup>

12.34 A third limiting rule found in the early texts prevents reliance on any act of provocation which was invited or induced by the defendant.<sup>686</sup> 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.

12.35 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.

## OPTION 1: ABOLITION OF THE PARTIAL DEFENCE OF PROVOCATION

### Introduction

12.36 Before consideration is given to reform of the law of provocation, the question of whether a partial defence of provocation should be retained as part of the law must be answered.

### Arguments for abolition of provocation

12.37 The first argument, which is an ethical one, is that a killing in unrestrained violence is murder and should not be 'rewarded' by conviction of a lesser crime and, consequently, a reduced sentence. Indeed, to reward unrestrained violence may weaken the respect in the general community for the value of human life.

12.38 The second argument is that the law of provocation is gender-biased. Using the idea of substantive gender equality for analysis, this criticism has wide acceptance among academic writers. However, if it is possible to reform

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<sup>685</sup> See [11.15] above.

<sup>686</sup> 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.

the law in a way which removes gender-bias this argument loses much of its force.

12.39 The third argument is that the test of the hypothetical ordinary person is difficult to understand and difficult for juries to apply. Some academic writers also argue the test has led to inconsistent decisions by juries,<sup>687</sup> a conclusion that finds support in the analysis of Queensland cases in Chapter 5.<sup>688</sup>

### Arguments for retention of provocation

12.40 The first argument for retention is that provocation acknowledges the imperfections in our common humanity and allows a sentence to be moderated if the defendant acted without premeditation and in a way in which any of us could have acted in the same circumstances.

12.41 Because Queensland still retains a mandatory sentence of life imprisonment for murder,<sup>689</sup> the abolition of the partial defence of provocation would mean that all those who kill in circumstances of provocation would not be able to have the circumstances in which they killed considered in possible mitigation of sentence. Instead, they would receive the mandatory sentence of life imprisonment.<sup>690</sup>

12.42 In this connection it should be noted that Victoria, Tasmania and Western Australia (the jurisdictions in which provocation has been abolished) no longer have a mandatory sentence of life imprisonment for murder. This has the consequence that the actual circumstances of each killing may be taken into account in mitigation of sentence for murder and the sentence reduced accordingly.

12.43 A second argument which follows from the mandatory life sentence for murder is that removing the option of a verdict of manslaughter may result in some acquittals because of jury unwillingness to convict if the defendant is to serve a life sentence.

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687 G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006–2007) 18 *Current Issues in Criminal Justice* 51.

688 See [5.172] above.

689 The terms of reference of the review require the Commission to assume the continuation of the mandatory life sentence for murder.

690 The research indicates that some female defendants who killed their abusers have been able to successfully plead provocation. Removing the possibility of provocation as a means of sentence mitigation may result in women receiving mandatory sentences of life imprisonment, when, if the true circumstances of their offences were able to be considered, substantially reduced sentences would have been imposed.

**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?

**OPTION 2: RECASTING THE PARTIAL DEFENCE OF PROVOCATION****Introduction**

12.44 If the partial defence of provocation is to be retained, it is necessary to consider whether the defence should remain in its present form or whether it should be recast.

12.45 The discussion at this point considers three separate issues:

- whether the conduct which may amount to provocation should be redefined;
- 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 which may amount to provocation**

12.46 The conduct which 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 expounded from time to time.

12.47 The old categories of conduct identified in *Mawgridge*<sup>691</sup> have been superseded by the ordinary person test of provocation as the determinant of conduct that may amount to provocation. Under the ordinary person test a claim of provocation may be founded on any conduct which in fact provokes a deadly reaction in the defendant, and which also could have caused the hypothetical ordinary person to kill.

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(1707) Kel; 119, 84 ER 1107.

12.48 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.

12.49 In functioning as a determining concept for provocation, the ordinary person test has had mixed success. From the review conducted 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, a result which is wrong in principle. 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?

12.50 The historical categories were all seen as examples of serious wrongs. In *R v Mawgridge*<sup>692</sup> 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). This is conduct that in some circumstances could amount to provocation today.

12.51 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. However, 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.

12.52 The problems with the operation of the partial defence of provocation identified in the course of the Discussion Paper have arisen partly because of the lack of definition about what conduct may constitute provocation. This is a situation which should be remedied.

12.53 The Commission therefore proposes to consider the following issues, both to give added definition to the concept of provocation and to ensure substantive gender equality is achieved in the operation of the law of provocation.

**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;**

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(1707) Kel; 119, 84 ER 1107.

(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?**

### **Removal of the requirement of 'suddenness' from section 304 of the Code**

12.54 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.

12.55 In Chapter 7 it is noted that the common law has developed to accommodate a delay between the provocation and the fatal act of the defendant.

12.56 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 a latent inconsistency between the limiting words in section 304 Code and the developing interpretation of provocation at common law.

12.57 As explained earlier in this Discussion Paper, 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 discussed in Chapter 7.

12.58 The changes have enabled some battered persons to successfully rely on the partial defence of provocation. Should the limiting requirements of suddenness in section 304 of the Code be removed? If the requirements of suddenness are removed it may assist those who have killed an abusive and violent partner. Or should provocation be confined to the original paradigm of a 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?

12.59 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?

**12-7 Should section 304 be amended to remove the requirement of suddenness?**

**Reform of the objective test**

12.60 A review of the objective test involves both a technical and conceptual appraisal of it.

12.61 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.<sup>693</sup> 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.

12.62 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.

12.63 The ordinary person test applies a 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.

12.64 The test is sometimes criticised because it is thought to be difficult to understand and apply in practice.<sup>694</sup> A particular problem in the test is the

<sup>693</sup> *Stingel v The Queen* (1990) 171 CLR 312, 329.

<sup>694</sup> See [3.45] above.

'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 to the defendant, and then not attributing those same characteristics to the ordinary person when assessing the ordinary person's power of self-control.

12.65 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.<sup>695</sup>

12.66 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.

12.67 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.<sup>696</sup>

12.68 In England, the reasonable person test emerged at common law as the successor to the categories of provocation earlier recognised by the law.<sup>697</sup> In 1957 the 'reasonable person' was written into a statutory formulation of the test in England.<sup>698</sup> The recent proposal for change to the law of provocation in the United Kingdom suggests the use of a person of the defendant's sex and age with a normal degree of tolerance and self-restraint.<sup>699</sup>

12.69 Over a period of time, 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. The 'ordinary person' formulation could now be displaced only by legislative reform.

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695 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.

696 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.

697 AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292.

698 *Homicide Act 1957* (UK) s 3.

699 See [6.49] above.



**12-8 If the partial defence of provocation is retained, should the ordinary person test be replaced by:**

- (a) a reasonable person test; or**
- (b) a 'person of ordinary tolerance and self-restraint' test?**

### **OPTION 3: CHANGE TO THE ONUS OF PROOF**

12.70 Whether section 304 of the Criminal Code (Qld) is retained in its present form or is reformulated, a further option that arises for consideration is whether the onus of proof should be changed.

12.71 The arguments for a possible change to the onus of proof for murder provocation are set out in detail in Chapter 10. Briefly, they are:

- (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.

12.72 The argument for change is one of both policy and principle.

12.73 In addition to the arguments already discussed the success of any reform to the law may be assisted by greater judicial oversight. The operation of the present onus of proof rule allows limited scope for trial judges to act as gatekeepers. A change in the onus of proof may allow a greater scope for judicial oversight.

12.74 The argument for the present onus of proof rule is that the principle in *Woolmington's* case means that very good reasons should be demonstrated before any change is made to the onus of proof.

**12-9 Should the defendant carry the onus of establishing the partial defence of provocation on the balance of probabilities?**

# 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.