



# briefing paper



## NSW Parliamentary Research Service

**Provocation and self-defence in intimate  
partner and sexual advance homicides**

**Briefing Paper No 5/2012**

by Lenny Roth and Lynsey Blayden

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homicides

by

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## SUMMARY

**The partial defence of provocation [2]:** Provocation is a partial defence to murder. If the prosecution or jury accepts the defence, it results in a conviction for manslaughter instead of murder. The defence developed in English courts in the 16<sup>th</sup> and 17<sup>th</sup> centuries. At that time, the death penalty was mandatory for persons convicted of murder. In addition, it was considered virtuous for a man of honour to respond with controlled violence to certain forms of offensive behaviour. If he overreacted to some degree, but not disproportionately, such overreaction was considered to be natural human frailty. The current statutory version of the defence in NSW applies where: (a) the act causing death was the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased 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.

**Debate about the provocation defence [3]:** Several criticisms have been made about the defence including that provocation and a loss of self-control is an inappropriate basis for a partial defence; that the defence is gender-biased; that the test for the defence is conceptually confused and difficult for juries to understand; and that, as there is no longer a mandatory sentence for murder, provocation should be taken into account in sentencing. Concerns have, in particular, been expressed about the acceptance of the defence in cases where men have killed their female partners; and in cases where men have killed in response to a non-violent sexual advance by a homosexual person. Some argue that the provocation defence should be reformed, and others, that it should be abolished. Arguments for retaining the defence include that provoked killers are not 'murderers'; that juries should decide questions of culpability; that abolishing the defence would lead to increased sentences and uncertainty, and that it would also increase community dissatisfaction with sentencing.

**Statistics on use of provocation defence [4]:** A report by the Judicial Commission of NSW contains data on the use of provocation in NSW in the period from 1990 to 2004. The report found that provocation was raised in 115 cases and it was successful in 75 of these cases. Other findings included that:

- there were 11 male offenders that successfully relied on provocation in the context of infidelity or the breakdown of an intimate relationship;
- there were 3 male offenders that successfully relied on provocation in the context of an alleged violent confrontation with his female partner;
- there were 11 offenders who successfully relied on provocation in the context of an alleged homosexual advance; and
- there were 10 cases where a woman successfully relied on provocation after killing her violent male partner.

Kate Fitz-Gibbon conducted a review of convictions for manslaughter on the basis of provocation in the NSW Supreme Court in the period from January 2005 to December 2012. This review identified 15 cases where the provocation defence was successful. It was noted that five of these cases involved a non-

violent confrontation. In three of these cases the victim was the current or estranged female partner of the male defendant; and in two of these cases, the killing resulted from an allegation of infidelity by the defendant.

**Recent provocation defence cases in NSW [5]:** A recent provocation defence case is *Singh v R*. In that case, Mr Singh had moved to Australia on a spousal visa, his wife having already moved to Australia on a study visa. Their relationship began to deteriorate from the time of his arrival in Australia. During an argument, Mr Singh killed his wife, strangling her and cutting her throat at least eight times with a Stanley knife. According to the offender, during their confrontation, his wife had slapped him several times, and told him that she had never loved him, that she only loved another man, and that she would make sure he was kicked out of the country. The offender was charged with murder but the jury convicted him of manslaughter on the basis of provocation. He was sentenced to eight years imprisonment with a non-parole period of six years.

**Provocation reform proposals in NSW [6]:** In 1997, the NSW Law Reform Commission published a report on provocation, which recommended retaining the defence but reformulating it. The Commission rejected the option of specifically excluding the operation of the defence in cases where men killed female partners after a relationship breakdown, or in cases of killings in response to homosexual advances. It also rejected the option of removing the "loss of self-control" requirement in the defence to make it more available to women who kill their violent partners. In 1998, a Working Party published its report on killings in response to homosexual advances, which recommended amending the defence. The recommendations that were made by the Commission and the Working Party have not been implemented.

**Provocation reforms in other States [7]:** In 2003, Tasmania became the first Australian jurisdiction to abolish the provocation defence. Since then, two other States have also abolished the defence: Victoria in 2005 and Western Australia in 2008. In Queensland, the defence was recently amended to reduce the scope of it being available to those who kill out of sexual possessiveness or jealousy. The Queensland Law Reform Commission had recommended amending, rather than abolishing, the defence but the mandatory life sentence for murder weighed heavily in coming to this conclusion. The Queensland Government has recently stated that, at this stage, it will not amend the defence to expressly exclude cases involving non-violent sexual advances. This is a reform that has been enacted in the ACT and Northern Territory.

**Provocation reforms in other countries [8]:** The defence of provocation was abolished in New Zealand in 2009. In the United Kingdom, provocation was replaced in 2009 with a new partial defence known as "loss of control". This defence only applies if the defendant's loss of self-control had a "qualifying trigger". One of the triggers is that the loss of self-control was attributable to a thing done or said which constituted circumstances of an extremely grave character; and which caused the defendant to have a justifiable sense of being wronged. However, "the fact that a thing done or said constituted sexual infidelity is to be disregarded". The other trigger is if the defendant's loss of self-control was due to the defendant's fear of serious violence from the victim or another person. In 2009, the Law Reform Commission of Ireland



recommended retaining but reformulating the partial defence.

**Self-defence and excessive self-defence [9]:** The defence of self-defence is a complete defence to murder. If the jury accepts the defence it results in an acquittal. Previously, the defence was defined by the common law. In 2001, the defence was codified in legislation in NSW. The defence applies if: (a) a person believed that their conduct was necessary to defend themselves or another person; and (b) the person's conduct was a reasonable response in the circumstances as they perceived them. In 2001, the partial defence of excessive self-defence was also reintroduced in NSW (as with the defence of provocation, this partial defence reduces murder to manslaughter). The partial defence of excessive self-defence applies if a person believed that their conduct was necessary to defend themselves but this conduct was not to a reasonable response in the circumstances as they perceived them.

**Self-defence and women who kill their violent partners [10]:** Longstanding concerns have been held about the difficulties women face in relying on self-defence when they have killed male partners in the context of a prolonged period of domestic violence and for reasons of self-preservation. The difficulties have arisen, in part, because of the traditional association of self-defence with a one-off spontaneous encounter, such as a pub brawl. The legal test for self-defence has evolved over time and may be broad enough to accommodate women's experiences. The current provision does not require that the threat be imminent or that the response be proportionate. However, the application of the defence in this context is still problematic because these continue to be significant factors in determining whether the defence has been made out.

In response to the difficulties that women have faced in relying on self-defence, defence lawyers have attempted to call expert evidence showing that a woman who killed her abusive partner was suffering from "battered woman syndrome". One part of this "syndrome" is that women find it difficult to break out of a cycle of violence because of "learned helplessness". In the 1998 decision of *Osland v The Queen*, the High Court affirmed that this evidence was admissible but Justice Kirby noted that the syndrome was controversial. More recently, reliance on the battered woman syndrome has been criticised, and researchers have called for an acceptance of expert evidence which places greater emphasis on the social realities of a woman's situation and which reflects the current state of knowledge about the dynamics of abusive relationships.

The reintroduction of the partial defence of excessive self-defence may assist women who have killed their abusive partner but who cannot satisfy all of the elements of self-defence. However, a concern has been raised that the availability of this defence may prevent women from being acquitted on the basis of self-defence, due to the existence of an 'easy' middle option. A Judicial Commission of NSW study on partial defences found that between 2002 and June 2005, two women had successfully relied on the partial defence of excessive self-defence after killing their male partners. In both cases, the woman was under attack when she killed her partner.

**Self-defence reforms in other States [11]:** Since 1987, most Australian jurisdictions have enacted new statutory provisions on the complete defence of

self-defence. Some jurisdictions have also reintroduced the partial defence of excessive self defence. This paper focused on developments in three States: Victoria, Western Australia, and Queensland.

Victoria (in 2005) and Western Australia (in 2008) both enacted new provisions on the complete defence of self-defence and they also both reintroduced the partial defence of excessive self-defence (in Victoria, this was achieved by enacting a new provision on "defensive homicide"). Victoria also introduced special provisions that apply when family violence is alleged. The provisions state that a person may have reasonable grounds for believing that their conduct was necessary to defend themselves even if they were responding to harm that was not immediate, or their response involved the use of excessive force. The provisions also set out a non-exhaustive list of the kinds of evidence that might be relevant to determining whether the person had the requisite belief and whether there were reasonable grounds for the belief. The way in which the defensive homicide provision has operated in Victoria (being mainly used by men) has attracted criticism and it is currently under review.

In Queensland, the provisions on self-defence have not been reformed but in 2011 a new partial defence to homicide was enacted: "killing for preservation in an abusive relationship". This implemented, in part, the recommendations by two academics, who were commissioned by the Attorney-General in 2009 to consider the development of a separate defence for battered persons who kill their abusers. The report by the academics noted that there was a strong preference from within the legal community for a separate defence rather than for reform of the general law of self-defence. The report also noted that there was insufficient support for a separate complete defence. Commentators have been critical of the new partial defence which, they say, is very similar to the defence of self-defence but leads to a different result.

**Self-defence reports in other countries [12]:** There have been no legislative reforms to self-defence in other countries such as New Zealand, the United Kingdom, Ireland and Canada. Of these countries, only in New Zealand and Ireland has the relevant law reform commission considered the issue of self-defence for women who kill their violent partners. In 2001, the New Zealand Law Reform Commission recommended amending the law of self-defence to make it clear that there can be situations in which the use of force is reasonable where the danger is not imminent but is inevitable. A 2009 report by the Law Reform Commission of Ireland did not recommend any major reforms.

**National report on legal responses to family violence [13]:** In October 2010, the Australian Law Reform Commission and the NSW Law Reform Commission jointly published a comprehensive report on family violence. One section of the report examined defences to homicide, including provocation and self-defence. The report made some general recommendations including: that governments should ensure that defences to homicide accommodate the experiences of family violence victims who kill; that governments should review their defences; and also that legislation should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide (along the lines of the Victorian model).

## 1. INTRODUCTION

This paper is an updated version of a 2007 briefing paper which examined the defences of provocation and self-defence in the context of homicides involving intimate partners as well as homicides in response to sexual advances by homosexual men.<sup>1</sup> The impetus for updating the earlier briefing paper is the establishment in June 2012 of a Legislative Council Select Committee to inquire into the defences of provocation and self-defence. The inquiry was set up in response to public concern about a recent case in which a man who killed his wife successfully relied on the defence of provocation and was sentenced to eight years imprisonment with a non-parole period of 6 years. This paper includes a summary of that case and it incorporates recent law reform reviews and legislative initiatives in Australian and overseas jurisdictions.

## 2. THE PARTIAL DEFENCE OF PROVOCATION

### 2.1 A partial defence

Provocation is a partial defence to the offence of murder. If the prosecution or jury accepts the defence, it results in a conviction for manslaughter instead of murder. It should be noted that the partial defence of provocation:

...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.<sup>2</sup>

The significance for the offender of being convicted of manslaughter rather than murder is that the maximum penalty for manslaughter is 25 years imprisonment whereas the maximum penalty for murder is life imprisonment.<sup>3</sup>

### 2.2 Historical note

The partial defence of provocation developed in English courts in the 16<sup>th</sup> and 17<sup>th</sup> centuries.<sup>4</sup> At that time, the death penalty was mandatory for persons convicted of murder. The UK Law Commission has described the historical context in which the provocation defence arose:

It was considered *virtuous* for a man of honour to respond with *controlled* violence to certain forms of offensive behaviour. If he overreacted to some degree, but not to a disproportionate extent, such overreaction was natural

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<sup>1</sup> L Roth, *Provocation and self-defence in intimate partner and homophobic homicides*, NSW Parliamentary Library Research Service, Briefing Paper No. 3/07

<sup>2</sup> Queensland Law Reform Commission, [A Review of the Excuse of Accident and the Defence of Provocation](#), Report No 64, September 2008, p208

<sup>3</sup> Sections 19A, 24, *Crimes Act 1900* (NSW)

<sup>4</sup> NSW Law Reform Commission, [Partial Defences to Murder: Provocation and Infanticide](#), Report 83, October 1997, p10

human frailty. If death resulted from this overreaction, it should be regarded as manslaughter rather than a hanging offence. Limits were implied by the notion itself, such that not every trifling insult would turn a retaliatory killing into a provoked killing. These limits related to the nature of the conduct of the person causing the provocation and the nature of the defendant's response.<sup>5</sup>

In its early form, there were three essential elements to the defence: (1) there was provocative conduct by the deceased; (2) this caused the defendant to respond in anger (i.e. in hot temper); and (3) there was a reasonable relationship between the provocation and the response.<sup>6</sup> Over time, the defence of provocation evolved and one key change was that:

By the early 19<sup>th</sup> century, the defence of provocation had shifted from being based on the idea of anger as a justified response in some situations, to being based on the idea of 'anger as loss of self-control'.<sup>7</sup>

In the mid 19<sup>th</sup> century, the courts also adopted a different approach to the proportionality requirement and they introduced a "reasonable man" test:

Whereas, initially, proportionality had been employed to test whether or not the killing had been perpetrated with the "wickedness" associated with malice prepensed [i.e. with premeditation], over time it was transformed into an objective test. Where there was no reasonable relationship between the provocation and the response, and the "reasonable man" would not have reacted to the provocation as the defendant did, the defence failed.<sup>8</sup>

Another historical point worth noting is that, for a long time, the common law approach was that words alone could not be relied upon to establish provocation. In a 1946 decision in the House of Lords, this rule was modified to the effect that words alone could be relied upon but only if they were of a "violently provocative character".<sup>9</sup> In NSW, the rule had been modified earlier by statute. The *Criminal Law Amendment Act 1883* stated (s 370) "where....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".

The history of the provocation defence in its statutory form in NSW has been described by the NSW Law Reform Commission as follows:

...the partial defence of provocation was adopted under legislation in [1883] and later reproduced in the *Crimes Act 1900* (NSW).<sup>4</sup> That statutory formulation of the defence required a killing committed under provocation to occur suddenly and in the heat of passion, in a state of lost self-control in circumstances where an ordinary person could also have lost self-control. If the accused established the

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<sup>5</sup> UK Law Commission, [Partial Defences to Murder](#), Consultation Paper No. 173, 2003, p6

<sup>6</sup> UK Law Commission, note 5, p6-7

<sup>7</sup> Victorian Law Reform Commission, [Defences to Homicide](#), Final Report, October 2004, p23

<sup>8</sup> UK Law Commission, note 5, p35

<sup>9</sup> *Holmes v DPP* (1946) AC 588; followed in *Moffa v The Queen* (1977) 138 CLR 601

defence of provocation, he or she was convicted of manslaughter instead of murder. The sentence for manslaughter was discretionary; that is, the sentencing judge could impose a sentence which was considered appropriate to the circumstances of the case. In contrast, the sentence for murder was mandatory at that time, meaning that the sentencing judge must impose the statutory sentence regardless of any mitigating circumstances.

In 1982, the old statutory formulation of provocation in the *Crimes Act 1900* (NSW) was replaced by a new provision dealing with the defence of provocation.<sup>5</sup> The 1982 amendments were the result of recommendations by a Government Task Force on Domestic Violence, which was established to examine, amongst other things, the operation of the defence of provocation in the context of domestic killings by women of their abusive partners. There was a perception that the defence of provocation was too restrictive to accommodate killings of this type.<sup>6</sup> The new provision dealing with the defence of provocation under the 1982 amendments was intended to broaden the definition of provocation in order to make it more appropriate for women who kill in situations of domestic violence, particularly for women who kill in response to a culmination of long-term abuse rather than immediately following a single act of provocation...<sup>10</sup>

The same 1982 legislation also removed the mandatory sentence for murder by providing the judge with discretion to give a sentence other than life imprisonment where it appeared that "the person's culpability for the crime is significantly diminished by mitigating circumstances".<sup>11</sup> The current sentencing legislation provides that if the maximum sentence is life imprisonment "a court may nevertheless impose a sentence of imprisonment for a specified term".<sup>12</sup> No changes have been made to the provocation defence since 1982.

### 2.3 Current statutory provision

Section 23 of the *Crimes Act 1900* (NSW) provides (in part):

- (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

<sup>10</sup> NSW Law Reform Commission, note 4, p11-12

<sup>11</sup> *Crimes (Homicide) Amendment Act 1982* (NSW)

<sup>12</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21

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.

Subsection 23(3) states that the partial defence of provocation is not negated merely because the act causing death was not done suddenly; or because there was not a reasonable proportion between the act causing death and the conduct of the deceased that induced the act. Subsection 23(4) states that where there is any evidence that the act causing death was done under provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act was not done under provocation.

It can be seen that the provocation defence involves a subjective limb (that the provocation caused the accused to lose self-control), and an objective limb (that the provocation could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or inflict grievous bodily harm). The High Court has outlined the way in which the objective limb is to be applied.<sup>13</sup> When assessing the ordinary person's perception of the gravity of the provocation, the personal characteristics of the accused may be relevant. However, in determining whether an ordinary person could have so far lost self-control, the personal characteristics of the accused (e.g. an excitable temperament) are to be disregarded (except for immaturity due to youth).

It should also be noted that while section 23(2)(a) refers specifically to "grossly insulting words", it is not the case that words alone are only capable of giving rise to an issue of provocation if they are "grossly insulting". In a 1999 decision of the NSW Court of Criminal Appeal, Justice Wood noted that the subsection also referred to "any conduct" and he concluded:

It is not the case, in my view, that provocation is confined, in the case of words, to matters of insult strictly understood. Other kinds of words may qualify as provocative conduct, such as words of threatened violence, blackmail, and so on. They are equally capable of provoking strong feelings....They do, however, need to be of a sufficient violent, offensive or otherwise aggravating character to be capable of satisfying the third element of provocation.<sup>14</sup>

### **3. DEBATE ABOUT THE PROVOCATION DEFENCE**

#### **3.1 Criticisms of the defence**

The Victorian Law Reform Commission (VLRC) has noted that provocation is one of the most strongly criticised criminal defences and it listed the following criticisms that have been made in relation to the defence:

- provocation and a loss of self-control is an inappropriate basis for a partial defence—people should be able to control their impulses, even when angry;

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<sup>13</sup> *Stingel v The Queen* (1990) 171 CLR 312

<sup>14</sup> [R v Lees](#) [1999] NSWCCA 301 at para 37

- provocation is gender biased;
- provocation promotes a culture of blaming the victim;
- provocation privileges a loss of self-control as a basis for a defence;
- the test for provocation is conceptually confused, complex and difficult for juries to understand and apply;
- provocation is an anomaly—it is not a defence to any crime other than murder; and
- provocation is an anachronism—as we no longer have a mandatory sentence for murder, provocation should be taken into account at sentencing as it is for all other offences.<sup>15</sup>

The argument that provocation is gender biased is the one that has been the most prominent in academic commentary<sup>16</sup> and it is explored in more detail below. A number of the other criticisms are touched on in the sections of this paper that outline the conclusions of various law reform commissions.

### 3.2 Gender-bias

One aspect of this argument is that men and women rely on the defence in very different circumstances. According to the VLRC:

When many men who kill their partners successfully raise provocation, the provocation is often their partners' alleged infidelity and/or their partner leaving or threatening to leave. Their actions are therefore primarily motivated by jealousy and a need for control. In comparison, when women kill their partners and successfully raise the defence, there is often a history of physical abuse in the relationship.<sup>17</sup>

A second aspect of the argument is that "the way the test is framed makes it difficult for women to argue it successfully". The VLRC stated:

The association of provocation with typical male responses is said to make it a defence which is more suited to men than to women, even taking into account changes that have occurred over the past 50 years. A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male response to provocative conduct. Despite changes that have been made over time, this test remains very difficult for women to use.<sup>18</sup>

Graeme Coss has criticised the acceptance of the partial defence in cases where men have killed their female partners. He comments:

When men raise the provocation defence, it is invariably in circumstances where they allege they have been insulted, mocked, humiliated, or spurned. In intimate partner killings, the real 'loss of control' is that the men have lost control of their

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<sup>15</sup> Victorian Law Reform Commission, [Defences to Homicide](#), Final Report, October 2004, p26

<sup>16</sup> Queensland Law Reform Commission, note 2, p331

<sup>17</sup> Victorian Law Reform Commission, note 15, p29

<sup>18</sup> Victorian Law Reform Commission, note 15, p27-28

women. To have that control challenged is an affront to their honour. It is regularly in circumstances where the allegation cannot be verified, because the only witness to the alleged provocative incident is, conveniently, dead. It could be argued that it is similarly convenient that the provocation defence insists that the jury must consider the evidence most favourable to the accused; that it permits the potential for his invention to be regarded as 'fact'.<sup>19</sup>

He also argues that ordinary people do not respond to relationship breakdowns and insults from their former partner with lethal violence. He points out that there are over 200,000 divorces and relationship breakdowns each year in which insults and hurtful remarks would be exchanged yet "only 50 men kill their intimate partners each year when affronted by insults, separations or confessions".<sup>20</sup> Coss questions why juries nevertheless accept provocation in these types of cases and he suggests that "one could argue that ignorance is the key" and that "experts on intimate partner violence might assist in bringing enlightenment to the criminal courts".<sup>21</sup> Ultimately, however, Coss argues that the defence of provocation should be abolished.<sup>22</sup> Other commentators who have criticised the gender bias of the defence have not called for it to be abolished. For example, Bernadette McSherry has argued that "overall it may be preferable to work towards circumscribing the scope of the defence and providing a workable objective component than to abandon it entirely".<sup>23</sup>

### 3.3 Non-violent sexual advances

The provocation defence has also been criticised on the basis that it has been relied on successfully by men who have killed in response to a non-violent sexual advance by a homosexual person. An example of this type of case is *Green v The Queen*.<sup>24</sup> In that case, Green killed his friend with a pair of scissors after his friend had entered his bed and made sexual advances towards him including trying to grope him. Green was particularly sensitive to matters of sexual abuse because his father had allegedly sexually assaulted his sisters. At the first trial, Green was convicted of murder and sentenced to a minimum term of ten years imprisonment with an additional term of five years.

Green then successfully appealed to the High Court on the basis that the trial judge had erred in directing the jury that his sensitivity to sexual abuse was not relevant to the defence of provocation. A majority of the court considered that this error had resulted in a lost chance for the accused to be acquitted of murder and they ordered a new trial. Two judges dissented on the basis that no jury could have been satisfied that an ordinary person in the position of the

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<sup>19</sup> G Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality', (2006) 18(1) *Current Issues in Criminal Justice* 51 at 52

<sup>20</sup> G Coss, note 19, p53

<sup>21</sup> G Coss, note 19, p68

<sup>22</sup> G Coss, note 19, p71.

<sup>23</sup> See for example B McSherry, 'It's a man's world: claims of provocation and automatism in 'intimate' homicides' (2006) 29(3) *Melbourne University Law Review* 905 at 918

<sup>24</sup> (1997) 191 CLR 334



accused could have been deprived of the power of self-control to the extent of inducing him to form an intent to kill or inflict grievous bodily harm. At the new trial, Green was convicted of manslaughter and sentenced to a minimum of eight years with an additional term of two and a half years.

### 3.4 Arguments for retaining a provocation defence

The VLRC has summarised the arguments for retaining provocation as follows:

- provoked killers are not ‘murderers’;
- juries should decide questions of culpability;
- by allowing the accused to be convicted of manslaughter, provocation provides an important ‘halfway’ defence;
- abolishing provocation would lead to increased sentences and uncertainty;
- abolishing provocation would increase community dissatisfaction with sentencing.<sup>25</sup>

As outlined below, some of these arguments were accepted by the NSW Law Reform Commission in its 1997 report on provocation. However, a number of other jurisdictions have abolished the defence of provocation.

## 4. STATISTICS ON USE OF THE PROVOCATION DEFENCE

### 4.1 Use of the provocation defence in NSW

In 2006, the Judicial Commission of NSW published a report on the use of partial defences to murder in NSW in the period from 1 January 1990 to 21 September 2004.<sup>26</sup> The report found that the defence of provocation was raised in 115 cases and it was successful in 75 of these cases (although note that in ten of these cases the offenders were convicted and sentenced on the basis of both provocation and diminished responsibility).<sup>27</sup> The report provides information about the types of cases where provocation was successful but not about the types of cases where the defence was unsuccessful.<sup>28</sup>

Of the 75 offenders who successfully relied on provocation, two offenders entered a plea of guilty having been indicted for manslaughter only, 30 offenders had a plea to manslaughter accepted by the Crown, 41 offenders were convicted following a jury trial, and two offenders were convicted following a judge-alone trial. The Commission found that both offenders and victims were far more likely to be men: 58 of the 75 offenders who successfully relied on provocation were men, and 67 victims were men. The types of provocative conduct in the 75 cases where provocation was accepted are shown below.

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<sup>25</sup> Victorian Law Reform Commission, note 15, p36

<sup>26</sup> Judicial Commission, [Partial Defences to Murder in NSW 1990-2004](#), June 2006

<sup>27</sup> Judicial Commission, note 26, p36

<sup>28</sup> Judicial Commission, note 26, p36-47

Type of provocative conduct	Number of cases
Violent physical confrontations	28
Intimate relationship confrontations	11
Domestic violence (between partners)	13
Alleged homosexual advance	11
Family violence (not between partners)	8
Non-family sexual assault	3
Words alone	1

Further information about some of these categories is noted below:

- Intimate relationship confrontations:** There were 11 cases where provocation was successfully claimed "in a factual context of infidelity or the breakdown of an intimate relationship". In all cases, the offender was male. In two cases, the victim was the offender's wife<sup>29</sup>; in two cases, the victim was the offender's homosexual partner; and in the other seven cases, the victim was a male who was thought to be having a relationship with the offender's partner.<sup>30</sup>
- Domestic violence (between partners):** There were 13 cases where an offender successfully relied on provocation in the context of a confrontation between domestic partners. In three of these cases, a man killed his de facto wife after she had allegedly hit him during an argument. In all three cases, the male offender had a history of perpetrating violence against the victim. The remaining 10 cases where provocation was successfully raised involved a woman who had killed her husband after a history of physical abuse.
- Alleged homosexual advance:** There were 11 offenders who successfully relied on provocation after an alleged homosexual advance. In five of these cases, the provocative conduct included an alleged sexual assault (either immediately before the killing or some weeks, months or years before) and in a further three cases there was some evidence of prior aggressive contact. In two of the 11 cases the offender relied on evidence of a non-violent homosexual advance. In both cases, the jury accepted that the offender had been provoked.<sup>31</sup>

<sup>29</sup> In one of these cases (*R v Panozzo*, 1990) the offender shot his estranged wife after he found a letter written by her to a new lover; and in the other case (*R v Khan*, 1996), the offender witnessed a sexual act between his wife and a third person.

<sup>30</sup> Two cases in NSW where provocation was unsuccessful in a similar factual context are: *R v Leonard* [1999] NSWSC 510; and *R v Mankotia* [1998] NSWSC 295 [see also the appeals: *R v Mankotia* [2001] NSWCCA 52; and *Mankotia v The Queen* (S61 of 2001, 21/11/01)].

<sup>31</sup> The two cases are *T* (unreported, 14/7/94) and *Dunn* (unreported, 28/10/97, NSWCCA). See also *Green v The Queen* (1997) 191 CLR 334 (which is included in the Commission's list of 11 cases). The Commission noted one case where the jury rejected a provocation defence based on a non-violent homosexual advance: *R v Hodge* [2000] NSWSC 897 For further

The Commission's report also examined sentencing outcomes for offenders who successfully relied on provocation.<sup>32</sup> Key findings included:

- Six out of the 75 offenders did not receive full-time custodial sentences. In three of these cases, the offenders were females who had been convicted of killing their husband or de facto and in two of these cases the killing followed a history of domestic violence by the victim.
- With respect to the 55 male offenders who successfully relied on provocation and received a full-time custodial sentence, the head sentences ranged from 16 months to 15 years, and the non-parole periods ranged from four months to ten years.
- With respect to the 14 female offenders who successfully relied on provocation and received a full-time custodial sentence, the head sentences ranged from three years to ten and a half years and the non-parole periods ranged from one and a half years to eight years.<sup>33</sup>

By way of general comparison with sentences for murder, a study of murder cases in NSW from 1994 to 2001 found that (for all persons) the median head sentence was 18 years and the median non-parole period was 13.5 years.<sup>34</sup>

Kate Fitz-Gibbon has conducted a review of convictions for manslaughter on the basis of provocation in the NSW Supreme Court over the period from January 2005 to December 2010.<sup>35</sup> Fitz-Gibbon identified 15 cases where provocation was successfully argued and she noted:

...of the 15 successful cases of provocation manslaughter in this period, five were accepted where the provoking conduct was a non-violent confrontation, often taking the form of a verbal insult targeted by the eventual victim upon the defendant, in the period immediately prior to the killing. In three of these cases the victim was the current or estranged female intimate partner of the male defendant. Furthermore, in two of the cases...the non-violent confrontation arose from an allegation of infidelity by the defendant upon the victim.<sup>36</sup>

Fitz-Gibbon's study also identified two cases in the period under review where

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data on homicides in response to homosexual advances, see S Tomsen, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales, 1980-2000*, Australian Institute of Criminology Research and Public Policy Series No. 43, 2002.

<sup>32</sup> Judicial Commission, note 26, p69-72

<sup>33</sup> The Commission did not report on sentencing outcomes for the different types of provocation cases. For data on sentencing outcomes in homosexual advance cases, see Judicial Commission, *Sentenced Homicides in New South Wales 1994-2001*, January 2004, p100

<sup>34</sup> Judicial Commission, note 33, p 22

<sup>35</sup> K Fitz-Gibbon, 'Provocation in New South Wales: The need for abolition (2012) 45(2) *Australian and New Zealand Journal of Criminology* 194

<sup>36</sup> K Fitz-Gibbon, note 35, p200. The three cases noted are: *R v Frost* [2008] NSWSC 220; *R v Stevens* [2008] NSWSC 1370; and *R v Hamoui [No 4]* [2005] NSWSC 279. Another case where a man killed his wife during a violent confrontation was *R v Gabriel* [2010] NSWSC 13

female defendants successfully raised provocation and were convicted of the manslaughter of their abusive male partners.<sup>37</sup> In both cases, the Crown accepted the defendant's guilty plea in relation to manslaughter.

## 4.2 Use of provocation in Victoria

In 2003, the Victorian Law Reform Commission published a study of homicide prosecutions in Victoria over a four-year period from 1 July 1997 to 30 June 2001.<sup>38</sup> The study included an examination of the use of defences in homicide cases, and specifically in sexual intimacy homicide cases, although the Commission noted that the information it had collected about defences was “far from complete”.<sup>39</sup> The Commission found that of the sample of 182 people charged with homicide offences, 109 chose to proceed to trial, and at least 27 of these people raised provocation as a defence at their trial: 24 of these offenders were male and 3 were female.<sup>40</sup> The context in which the defence of provocation was raised at trial by males is shown in the Table below.

Type of provocative conduct	Number of cases
Sexual intimacy	12
Spontaneous encounter	4
Family members	4
Conflict resolution	2
Originating in other crime	1
Other	1

The Commission commented on the sexual intimacy cases as follows:

Of the 12 homicides in the context of sexual intimacy, 11 involved men killing women in circumstances of jealousy or control, while the remaining case involved a man killing his sexual rival. It is important to note that of these cases, at least seven involved what Martha Mahoney calls a ‘separation assault’, that is, a homicide that takes place when a woman leaves, or attempts to leave, a relationship. The remaining five cases occurred either in the context of a custody dispute over children, or where the man was trying to ‘assert control over the behaviour of his partner through the use of violence’.<sup>41</sup>

The Commission then observed:

This is to be contrasted with the three cases in which women raised the defence of provocation at trial. Two of these cases were also in the context of sexual

<sup>37</sup> K Fitz-Gibbon, note 35, p205. The two cases were [R v Russell](#) [2006] NSWSC 722 and [R v Joyce Mary Chant](#) [2009] NSWSC 593

<sup>38</sup> Victorian Law Reform Commission, [Defences to Homicide](#), Options Paper, 2003, Ch 2

<sup>39</sup> Victorian Law Reform Commission, note 38, p41

<sup>40</sup> Victorian Law Reform Commission, note 38, p51

<sup>41</sup> Victorian Law Reform Commission, note 38, p52

intimacy. These were both cases in which women alleged they were responding to male violence. The remaining case involved a woman who suffered from a mental impairment killing a fellow resident of her nursing home.<sup>42</sup>

In four of the 12 sexual intimacy cases where males raised the defence, the offender was successful in claiming provocation. In the two cases where female offenders raised provocation in alleged response to male violence, the defence failed.<sup>43</sup> In terms of sentencing, the Commission found that the median sentence imposed for the seven people convicted of manslaughter on the basis of provocation was six years.<sup>44</sup> In contrast, the median sentence for those convicted of murder was 17 years (this did not include 6 people who were convicted of murder and sentenced to life imprisonment).

A 2009 study published by the Victorian Sentencing Council examined sentencing patterns for manslaughter and murder in the period from 1998 to 2006-07.<sup>45</sup> It found that the median imprisonment length for provocation manslaughter was eight years, compared to seven years for other manslaughter cases, and 19 years for murder. The sentence length for provocation manslaughter ranged from four years (with a two year non-parole period), to 15 years (with a 13 year non-parole period). For other manslaughter cases, the range was three years (with a four month non-parole period) to 15 years (with a 12 year non-parole period), and for murder the range was ten years (with a seven year non-parole period), to life imprisonment.

### 4.3 Use of provocation in Queensland

In October 2007, the Queensland Department of Justice and Attorney-General published the findings from an audit of defences relied upon in 80 murder trials conducted between July 2002 and March 2007.<sup>46</sup> The trials were selected "on the basis of the availability of sufficient material to review the case". The audit found that provocation was raised as a defence 25 times but in only two of these cases was provocation the *only* defence left to the jury. Four defendants were found guilty of manslaughter by the jury, and one pleaded guilty to manslaughter. In only one of these cases (*Sebo's case*) was it clear that the manslaughter verdict was due specifically to provocation. However, in another two cases (including one where a man killed his wife), the judge sentenced the offender on the basis that the verdict was due to provocation.

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<sup>42</sup> Victorian Law Reform Commission, note 38, p52

<sup>43</sup> Victorian Law Reform Commission, note 38, p52.

<sup>44</sup> Victorian Law Reform Commission, note 38, p53

<sup>45</sup> F Stewart and A Freiberg, [Provocation in Sentencing](#), Research Report, Sentencing Advisory Council, July 2009, p29 and Appendix 4

<sup>46</sup> Department of Justice and Attorney-General, [Audit on Defences to Homicide: Accident and Provocation](#), Discussion Paper, October 2007. See in particular p39ff.

## 5. RECENT PROVOCATION DEFENCE CASES IN NSW

### 5.1 Overview

There have been two very recent cases in NSW where a person accused of murder has successfully relied on the partial defence of provocation. In *Singh v R*, the accused killed his wife during an argument. At the end of the trial, the jury acquitted him of murder but convicted him of manslaughter on the basis of provocation. On 7 June 2012 in the NSW Supreme Court, the offender was sentenced to eight years imprisonment with a non-parole period of six years.<sup>47</sup> This case is discussed further below. In the second case (*R v Won*), the jury accepted a defence of provocation at the end of the trial of a man who had killed his friend after coming home and finding his friend in bed with his wife.<sup>48</sup> He is due to be sentenced on 3 August 2012.

### 5.2 *Singh v R*

In this case, the offender had married the deceased in September 2008. He was 20 years old and she was 27. Shortly afterwards, his wife moved to Australia on a study visa and a few months later he moved to Australia on a spousal visa. Their relationship began to deteriorate from the time of his arrival in Australia. The couple argued about financial issues and he was also suspicious that his wife was being unfaithful. There was evidence that a few months prior to the killing, the offender had hit his wife out of jealousy.

In late December 2009, the offender questioned his wife about her whereabouts and she allegedly told him that if he continued to question her she would kick him out of the house and the country. The next day the offender withdrew \$1,500 from a joint bank account (apparently motivated by fear that he would have nowhere to live and no money if his wife left him) and this led to a further argument in the evening. According to the offender, during the argument his wife slapped him several times and told him that she had never loved him, that she only loved the man whom she was suspected of having an affair with, and that she would make sure he was kicked out of the country. The offender then became enraged. He picked up a box cutter (Stanley knife) and after strangling his wife, he cut her throat at least eight times.

When deciding on the sentence referred to above, the judge took into account a number of matters. He found that the "objective gravity of the offence was very significant". The judge then considered evidence from a psychiatrist, stating that, at the time of the offence, the offender was suffering from "an adjustment

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<sup>47</sup> [\[2012\] NSWSC 637](#). For media reports on the case, see P Bibby, '[Six years for killing sparks call for law review](#)', *SMH*, 8 June 2012; and D Cornwall, '[Stabbing case questions a provocative defence](#)', *The 7.30 Report*, ABC, 19 July 2012. Other relatively recent cases in NSW where a man has killed his female partner and relied on provocation are: *R v Gabriel* [2010] NSWSC 13, *R v Stevens* [2008] NSWSC 1370 *R v Frost* [2008] NSWSC 220.

<sup>48</sup> L Hall, '[Provocation defence in the dock after husband escapes murder charge](#)', *SMH*, 11 July 2012



disorder with depressed mood". The judge then commented that the offender was "an immature individual who became caught up in a situation which he was unable effectively to handle". Next, the judge referred to the offender having no prior criminal history, and to the fact that he had pleaded guilty to manslaughter. The judge then stated that the offender was unlikely to reoffend, and he noted the offender's expression of remorse. Finally, the judge referred to the victim impact statements and to other sentencing decisions.

## 6. PROVOCATION REFORM PROPOSALS IN NSW

### 6.1 NSW Law Reform Commission report on partial defences

In March 1993, the Attorney General, John Hannaford, asked the NSW Law Reform Commission to review the partial defences of infanticide, provocation and diminished responsibility; and to develop proposals for reform and clarification of the defences. In October 1997, the Commission published its report on the partial defence of provocation, which recommended that the defence be retained but that it be reformulated.<sup>49</sup>

***Retaining the defence:*** The Commission's explanation for recommending retaining the defence of provocation was as follows:

...there are circumstances in which a person's responsibility for an unlawful killing is reduced as a result of a loss of self-control to an extent which should, in any fair system of punishment, be taken into account when dealing with that person. The defence of provocation does not condone that person's actions but recognises that this is a case which does not fall within the worst category of unlawful killing and should be viewed by the law with a degree of compassion. Where a person's mental state is significantly impaired by reason of a loss of self-control, it is appropriate that the person not be treated as a "murderer". The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community, and reflected in a conviction for murder or for manslaughter. The sentencing judge will then impose a sentence which reflects the jury's finding on the level of culpability involved. This ensures public confidence in the administration of criminal justice, including confidence in sentences imposed, and maintains the proper role of both the judge and the jury.<sup>50</sup>

The Commission noted that this recommendation was "supported by half of the submissions which addressed this issue" and it also noted that the recommendation was consistent with "the view adopted in a number of other jurisdictions" that had reviewed the defence of provocation.<sup>51</sup>

<sup>49</sup> NSW Law Reform Commission, [Partial Defences to Murder: Provocation and Infanticide](#), Report 83, October 1997, p22 (Rec 1), p76 (Rec 2)

<sup>50</sup> NSW Law Reform Commission, note 49, p30-31

<sup>51</sup> NSW Law Reform Commission, note 49, p23

An important part of the Commission's recommendation to reformulate the defence was the proposal to replace the "ordinary person" test (the second limb of the provocation defence) with a different test. Under the new test, the defence would be available if the jury formed the view that:

...the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm...as to warrant the reduction from murder to manslaughter.<sup>52</sup>

**No specific exclusion where men kill female partners:** The Commission noted that a number of submissions expressed concern that:

... certain conduct is wrongly regarded by the law as amounting to provocation, which may result in the defence being used inappropriately to reduce legal culpability and sentences. Submissions focused specifically on cases where men kill their female partners out of jealousy or following a woman's confession of infidelity or taunts about the man's sexual inadequacies. It was submitted by some that legislation should expressly exclude this type of conduct from the definition of provocation, so that male offenders would not be able to rely on the defence where they killed women in such circumstances.<sup>53</sup>

However, the Commission concluded that "the imposition of legislative restrictions precluding specific categories of conduct, such as acts of infidelity, taunts, or threats to leave, from amounting to provocation" was not an appropriate solution.<sup>54</sup> It stated:

It would be extremely difficult to identify specific categories of conduct which should be excluded without potentially requiring a long list of other types of conduct which should also be excluded. Moreover, automatic legislative exclusion prevents proper consideration of the merits of individual cases.<sup>55</sup>

The Commission also stated that the risk of spurious claims of provocation in the context of domestic killings had been reduced due to the abolition of unsworn statements in criminal trials.<sup>56</sup> It also noted that there were other evidential provisions which "should permit evidence of prior violent conduct, threats or a history of domestic abuse to be admitted in order to assist the prosecution" in rebutting a claim of provocation.<sup>57</sup> In addition, it stated that under the reformulated defence of provocation, the jury would have the final task of evaluating whether "the accused should be excused for losing self-control so as to warrant reducing the charge from murder to manslaughter".<sup>58</sup>

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<sup>52</sup> NSW Law Reform Commission, note 49, p76

<sup>53</sup> NSW Law Reform Commission, note 49, p66

<sup>54</sup> NSW Law Reform Commission, note 49, p69

<sup>55</sup> NSW Law Reform Commission, note 49, p69-70

<sup>56</sup> NSW Law Reform Commission, note 49, p70

<sup>57</sup> NSW Law Reform Commission, note 49, p70

<sup>58</sup> NSW Law Reform Commission, note 49, p70



**No specific exclusion where men kill after homosexual advances:** The Commission noted that concern had been raised about:

...the possible application of the defence of provocation to provide a partial excuse for homophobic violence against homosexuals in a society in which such violence is said to be increasing. The term “homosexual advance defence” has evolved to refer to cases where an accused claims to have killed the victim either in self-defence or under provocation, in response to a homosexual advance made by the victim. The primary concern is whether, in relation to the defence of provocation, a non-violent homosexual advance...should ever be sufficient to amount to provocation....<sup>59</sup>

The Commission did not discuss this issue in detail because it was the subject of a separate inquiry (namely, an inquiry by a Working Party set up by the Attorney General in 1995 – see below). The Commission expressed the view that “non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation”.<sup>60</sup> However, for the same reasons as those given in relation to domestic killings of women, it did not consider that there should be any specific legislative exception.<sup>61</sup>

**Consideration of how defence applies to battered women who kill:** The Commission noted that:

There has been a significant amount of criticism directed against the current formulation of the defence of provocation in respect of a perceived gender bias in its operation. There is concern that the defence is not readily accessible to women who kill their assailant partners because it is not defined in terms which are appropriate to those women’s experiences of domestic violence.<sup>62</sup>

The Commission considered that its proposed replacement of the ordinary person test (as outlined above) would mean that “all factors which may affect a woman’s power of self-control, including a long history of being abused, [would] be considered by the jury in arriving at their verdict”.<sup>63</sup> However, the Commission recognised that:

One difficulty which some female offenders may continue to face when seeking to raise the defence...under the recommended reformulation is the requirement of a loss of self-control, which remains central to the defence. While some women may kill their aggressors as a result of losing self-control, others may not. Some women may kill in cold blood, but in an attempt at self-preservation...<sup>64</sup>

The Commission concluded that this issue could not be addressed unless the

<sup>59</sup> NSW Law Reform Commission, note 49, p71

<sup>60</sup> NSW Law Reform Commission, note 49, p71

<sup>61</sup> NSW Law Reform Commission, note 49, p71

<sup>62</sup> NSW Law Reform Commission, note 49, p86

<sup>63</sup> NSW Law Reform Commission, note 49, p89

<sup>64</sup> NSW Law Reform Commission, note 49, p89

defence was “changed beyond recognition”. It stated that, “the primary feature of, and rationale for, the defence of provocation is loss of self-control” and, in its view, “the nature of the defence should not be altered to the extent that loss of self-control ceases to be an element”.<sup>65</sup> The Commission then referred to alternative defences open to battered women, namely diminished responsibility and self-defence. In relation to self-defence, it stated:

It has been suggested that the defence of self-defence may often be the most appropriate defence for women who kill following a history of domestic violence, since self-defence recognises that many of these women are acting in self-preservation rather than as a result of loss of self-control or a disturbed mind. Moreover, a successful plea of self-defence results in a complete acquittal, whereas a successful plea of provocation results in a conviction for manslaughter...At present, women may have difficulty in successfully pleading the defence of self-defence. However, a review of the law of self-defence and its ability to meet these women’s experiences lies outside the Commission’s present terms of reference.<sup>66</sup>

## 6.2 Working party report on homosexual advance defence

In July 1995, the Attorney-General, Jeff Shaw, directed that a Working Party be established to review the operation of the defences of provocation and self-defence in the context of homicides in response to homosexual advances (referred to as the “homosexual advance defence” or “HAD”). In September 1998, the Working Party published its final report, which made nine recommendations.<sup>67</sup> One of the report’s recommendations was to enact an amendment to specifically exclude non-violent homosexual advances from forming the basis of a defence of provocation.<sup>68</sup> The Working Party disagreed with the Law Reform Commission’s approach, stating:

Ultimately, the Working Party is of the opinion that the solution suggested by the [Commission] is not appropriate in relation to HAD. Even if the re-formulated test works the way the [Commission] intends it to, and the jury reflects the community’s sympathies and concerns, the problems with HAD will still exist. A jury might apply the standards of a prejudiced community, thus reflecting and perpetuating the idea that homosexual victims deserve the violence they receive.<sup>69</sup>

The Working Party also outlined the arguments for retaining and abolishing the defence of provocation but did not come to a conclusion on this. It stated:

Whether provocation should be completely abolished will remain a controversial question for some time. The Working Party is content to note the arguments for

<sup>65</sup> NSW Law Reform Commission, note 49, p89

<sup>66</sup> NSW Law Reform Commission, note 49, p90

<sup>67</sup> NSW Attorney General’s Department, [Final Report of the ‘Homosexual Advance Defence’ Working Party](#), September 1998

<sup>68</sup> Working Party, note 67, p4 (Rec 2)

<sup>69</sup> Working Party, note 67, p30

and against, but otherwise to confine itself to its specific recommendation to exclude a non-violent homosexual advance.<sup>70</sup>

In relation to self-defence, the Working Party considered that the law was appropriate so long as it retained “the requirement of reasonable grounds for the belief of the accused”.<sup>71</sup> However, it expressed concerns about the operation of the defence in practice, commenting:

...in HAD cases a jury may equate a homosexual advance with a homosexual attack, with no distinction being drawn between an offensive, but innocuous remark or action, and a real sexual assault involving physical force and which calls for the use of self-defence. The Working Party suspects that the former appears to have been sufficient to permit a claim of self defence to succeed in at least one case. That is a matter of profound concern.<sup>72</sup>

In contrast to its approach to provocation, the Working Party did not recommend law reform to address this concern. The Working Party stated:

To the extent that misinformation, ignorance and myth in the community at large allow self-defence to be raised and accepted by the jury in such circumstances, a coordinated and strategic community education campaign can do much to ensure that claims of self defence are critically examined in this context.<sup>73</sup>

The Working Party's other recommendations included:

- A direction to juries that criminal courts are not “courts of morals” and that juries should not hold prejudices on the basis of sexual orientation;
- Monitoring of HAD cases by Justice Agencies, including the DPP and police; and the establishment of an ongoing Monitoring Committee within the Attorney General’s Department with regard to HAD;
- A community education campaign against the use of homophobic violence in response to a non-violent homosexual advance;
- Continuing judicial education with regard to HAD.<sup>74</sup>

### 6.3 Finlay review of the law of manslaughter

In October 2002, the NSW Attorney General, Bob Debus, appointed Mervyn Finlay QC to conduct a review of the law of manslaughter. His report was published in April 2003.<sup>75</sup> It considered the partial defences to murder, including

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<sup>70</sup> Working Party, note 67, p39

<sup>71</sup> Working Party, note 67, p18

<sup>72</sup> Working Party, note 67, p19

<sup>73</sup> Working Party, note 67, p20

<sup>74</sup> Working Party, note 67, p4

<sup>75</sup> M Finlay QC, [Review of the Law of Manslaughter in New South Wales](#), April 2003

recent developments in other jurisdictions, and it suggested that “any further consideration of the abolition or retention of the partial defences...be deferred until the report of the Victorian Law Reform Commission on “*Defences to Homicide*” is published later in the year”.<sup>76</sup>

## 7. PROVOCATION REFORMS IN OTHER STATES

### 7.1 Overview

Over the last 10 years, there have been a number of law reform developments in other Australian jurisdictions relating to the partial defence of provocation. A summary of these developments is shown in the Table below. In South Australia, there have been no significant developments: provocation remains a partial defence in the common law and there continues to be a mandatory sentence of life imprisonment for persons convicted of murder.

Jurisdiction	Year	Summary of provocation reforms
Tasmania	2003	Abolished
ACT	2004	Amended to exclude non-violent sexual advances
Victoria	2005	Abolished
Northern Territory	2006	Amended to exclude non-violent sexual advances
Western Australia	2008	Abolished
Queensland	2011	Amended to reduce the scope of defence being available to those who kill out of sexual possessiveness or jealousy

Before outlining each of these developments in more detail, it is relevant to refer to an earlier consideration of the defence at the national level, namely a 1998 discussion paper by the Model Criminal Code Officers Committee.

### 7.2 Model Criminal Code Committee

On 28 June 1990, the Standing Committee of Attorneys-General (SCAG) placed on its agenda the question of the development of a national model criminal code.<sup>77</sup> In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee came to be known as the Model Criminal Code Officers Committee.

<sup>76</sup> M Finlay, note 75, p57

<sup>77</sup> Standing Committee of Attorneys-General, [Model Criminal Law Officers Committee](#), [online]

In June 1998, the Model Criminal Code Officers Committee published a discussion paper on *Fatal Offences Against the Person*, which recommended that the partial defence of provocation be abolished.<sup>78</sup> The Committee concluded that the defence of provocation suffered from conceptual problems and that it operated in a gender biased fashion, but it stated that:

the real issue in deciding whether the partial defence of provocation should be retained is one of culpability – whether the defendant should be culpable for murder, or for the lesser crime of manslaughter.<sup>79</sup>

In relation to this question, the Committee noted that “some, perhaps even most, [provoked killers] are morally just as culpable as their cold-blooded counterparts”; and some provoked killers are “morally as culpable as the worst of murderers”.<sup>80</sup> The Committee also pointed out that “provocation is only one among a variety of considerations which reduce the culpability of persons who kill intentionally”.<sup>81</sup> The Committee then concluded that it was more appropriate for the differences in culpability to be reflected in the sentencing process than to maintain the partial defence of provocation. In relation to the issue of the gender bias of the defence, the Committee stated:

The need for the defendant to kill while still out of control incorporates a suddenness requirement which is most often reflective of male patterns of aggressive behaviour. This is hardly surprising given the historical foundations of the doctrine which reveal it to be a reaction to the prevalence of certain forms of male aggression (drunken pub brawls and duels). While provocation has served men well, perhaps too well, one has to question the appropriateness of the defence for women, bearing in mind it was never designed for them.<sup>82</sup>

The Committee added that, “any argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense”.<sup>83</sup> The Committee noted that developments in the law had attempted to make it easier for battered women to rely on the defence but it concluded that:

...the relative inaccessibility of the provocation partial defence by women is more deep-rooted than these cosmetic changes to the operation of the doctrine. Relaxing the requirements of the provocation partial defence does not redress the injustice as any discrimination against women will probably stem from [its] very structure.<sup>84</sup>

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<sup>78</sup> Model Criminal Code Officers Committee, [Model Criminal Code – Discussion Paper – Chapter 5 – Fatal Offences Against the Person](#), June 1998, p113.

<sup>79</sup> Model Criminal Code Officers Committee, note 78, p103.

<sup>80</sup> Model Criminal Code Officers Committee, note 78, p105

<sup>81</sup> Model Criminal Code Officers Committee, note 78, p105

<sup>82</sup> Model Criminal Code Officers Committee, note 78, p89

<sup>83</sup> Model Criminal Code Officers Committee, note 78, p91

<sup>84</sup> Model Criminal Code Officers Committee, note 78, p91

The report referred to empirical studies by the Victorian Law Reform Commission and the NSW Judicial Commission, which did not find gender bias in the operation of the defence.<sup>85</sup> It noted, however, that the Victorian study examined a small number of cases and could not make conclusive findings.<sup>86</sup>

### 7.3 Tasmania

In 2003, Tasmania became the first State to abolish the partial defence of provocation.<sup>87</sup> According to the Minister for Justice, Judy Jackson:

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. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder.<sup>88</sup>

The Minister for Justice also referred to several other reasons for abolishing the defence, including that provocation could be adequately considered as a factor during sentencing, and that the defence was gender biased. She stated:

The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and laws have not been insensitive to this issue, it is better to abolish the defence than try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences.<sup>89</sup>

The Minister for Justice did not think that the abolition of the provocation defence would be detrimental to battered women who kill, because their circumstances would be considered in sentencing.

In *Tyne v Tasmania*<sup>90</sup>, the Tasmanian Court of Criminal Appeal considered the approach to sentencing following the abolition of the provocation defence. In that case, the accused pleaded guilty to murdering his wife but claimed that he was provoked and had lost self-control. The alleged provocation by the victim was that she had deliberately harmed her children and attempted to conceal this behaviour (she had suffered from Munchausen by proxy syndrome). The sentencing judge took this into account and sentenced the offender to 16 years imprisonment with a non-parole period of eight years.

On appeal to the Court of Criminal Appeal, it was argued that the sentencing judge erred by failing to make a finding about whether the provocation was sufficient to deprive an ordinary person of the power of self-control; and by failing to give sufficient consideration to sentences imposed in cases where

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<sup>85</sup> Model Criminal Code Officers Committee, note 78, p93-97

<sup>86</sup> Model Criminal Code Officers Committee, note 78, p97

<sup>87</sup> *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas)

<sup>88</sup> J Jackson, *Tasmania Parliamentary Debates*, 20 March 2003, p59

<sup>89</sup> J Jackson, note 88, p60

<sup>90</sup> [\[2005\] TASSC 119](#)

murder had been reduced to manslaughter as a result of provocation. The appeal was dismissed, with the Chief Justice stating:

It is difficult to put the matter more succinctly than did the learned sentencing judge when he said that provocation is no longer a defence to murder and the accused is to be sentenced for murder, not manslaughter. There is no longer any need to enquire into whether the insult would have deprived an ordinary person with the attributes of the accused (whatever that entails in each case) of the power of self-control. There is no longer any reason to impose a sentence for manslaughter instead of murder because of provocation. Provocation is taken into account in the exercise of the sentencing discretion for murder. The degree of provocation is just an aspect of the sentencing discretion.<sup>91</sup>

#### 7.4 Victoria

In 2005, Victoria abolished the defence of provocation.<sup>92</sup> This accorded with a recommendation in an October 2004 report by the Victorian Law Reform Commission.<sup>93</sup> However, further impetus for changing the law was the controversial case of *Ramage*, who was sentenced for manslaughter in December 2004. Coss has described this case as follows:

James Ramage was a wealthy businessman...[His wife] finally left him after years of coping with the intimidation of a manipulative man, and fear arising from initial violence in the marriage. He lured her to the former matrimonial home, and then bashed and strangled her to death. He alleged that she sneered at the renovations he had arranged, and confessed that sex with him repulsed her. By that stage he knew that she had found a new partner. He claimed he simply lost control and killed her...The jury accepted the provocation defence, convicting Ramage of only manslaughter, and he was sentenced to 11 years imprisonment.<sup>94</sup>

The Law Reform Commission's recommendation to abolish provocation was based primarily on its view that, other than self-defence, "factors 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".<sup>95</sup> In support of this view, the Commission stated "it seems illogical to single out one scenario – a loss of self-control caused by provocation – as deserving of a partial defence while leaving all other circumstances as matters to be taken into account at sentencing".<sup>96</sup> Another reason for abolishing the partial defence of was that its moral basis was "inconsistent with contemporary community values

<sup>91</sup> [\[2005\] TASSC 119](#) at para 18

<sup>92</sup> *Crimes (Homicide) Act 2005* (Vic)

<sup>93</sup> Victorian Law Reform Commission, [Defences to Homicide](#), Final Report, October 2004

<sup>94</sup> G Coss, note 19, p54. The sentencing citation is [R v Ramage](#) [2004] VSC 508. Two books have been written on this case: P Cleary, *Getting Away with Murder: The True Story of Julie Ramage's Death*, Allen & Unwin, 2005; and K Kissane, *Silent Death: The Killing of Julie Ramage*, Hodder, 2006.

<sup>95</sup> Victorian Law Reform Commission, note 93, p55

<sup>96</sup> Victorian Law Reform Commission, note 93, p55



on what is excusable behaviour”.<sup>97</sup> The Commission stated:

The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or to seriously injure a person. This is of particular concern when this behaviour is in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person.<sup>98</sup>

The Commission commented on the consequences of abolishing the defence of provocation for battered women who kill their violent partners:

We are confident the recommendations made in this Report in relation to self-defence and the introduction of social framework evidence are likely to result in better outcomes for women than the attempted reform of what is already a conceptually confused and complex defence. Further, with its strong emphasis on a loss of self-control, provocation does not, nor has it ever, truly reflected the reality of women’s experiences and responses to prolonged and serious violence. The retention of provocation and the continued distortion of women’s experiences to fit within the defence; or the distortion of the defence to fit women’s experiences, are in our view neither sustainable nor satisfactory solutions.<sup>99</sup>

The Commission considered the sentencing implications of abolishing the partial defence of provocation. It noted some concerns:

One of the purposes of our recommendations for change to the substantive law is to overcome the gender bias which exists in the law relating to defences to homicide. It would defeat this purpose if abolishing provocation meant that women convicted of murder, in circumstances involving domestic violence, received longer sentences than they would under the present law if they successfully raise provocation. The purpose of reducing gender bias would also be undermined if men who kill their sexual partners were to receive significantly reduced murder sentences on the sole ground they were ‘provoked’ to kill because they suspected their partner was unfaithful or was threatening to leave the relationship.<sup>100</sup>

One of the Commission’s sentencing recommendations was that “in sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options”.<sup>101</sup> In relation to this recommendation, the Commission stated:

Sentencing judges should be prepared to use the full range of options available

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<sup>97</sup> Victorian Law Reform Commission, note 93, p55

<sup>98</sup> Victorian Law Reform Commission, note 93, p55

<sup>99</sup> Victorian Law Reform Commission, note 93, p57-58

<sup>100</sup> Victorian Law Reform Commission, note 93, p270

<sup>101</sup> Victorian Law Reform Commission, note 93, p293 (Rec 50)



when the offender has been subjected to violence by the victim. Where an offender is convicted of murder, the court should consider whether the violence experienced by the offender, combined with other factors, justifies imposing a very short custodial sentence or even suspending it altogether.<sup>102</sup>

Another recommendation on sentencing was that, "when an appropriate case arises, the Court of Appeal should consider indicating the principles which should apply in sentencing an offender who has been subjected to abuse by the deceased and how these should be taken into account".<sup>103</sup> In addition, it was recommended that the Sentencing Advisory Council should "establish a statistical database to monitor sentencing trends in homicide cases."<sup>104</sup>

As discussed further in **Section 11.2**, at the same time as the partial defence of provocation was abolished, reforms were made in relation to self-defence, including creating a new defence of defensive homicide (which is equivalent to manslaughter). Some stakeholders have expressed concern that this defence is replacing provocation when men kill their partners.

## 7.5 Australian Capital Territory

In 2004, the ACT Government enacted an amendment to "address the issue of the availability of the defence of provocation in the case of a non-violent, homosexual advance".<sup>105</sup> The amendment provided that a non-violent sexual advance towards the accused is not sufficient, by itself, to be conduct which 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 the deceased.<sup>106</sup>

## 7.6 Northern Territory

In November 2006, the Northern Territory Government amended the defence of provocation as part of its reform of the criminal code.<sup>107</sup> The new provision was very similar to the way the defence is expressed in NSW. However, the new provision also stated that a non-violent sexual advance is not, by itself, a sufficient basis for the defence of provocation.<sup>108</sup> These reforms followed from a Department of Justice issues paper released earlier in 2006.<sup>109</sup>

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<sup>102</sup> Victorian Law Reform Commission, note 93, p290

<sup>103</sup> Victorian Law Reform Commission, note 93, p293 (Rec 51)

<sup>104</sup> Victorian Law Reform Commission, note 93, p293 (Recs 52-53)

<sup>105</sup> J Stanhope MP, *ACT Parliamentary Debates*, 20 November 2003, p4380

<sup>106</sup> Section 13 *Crimes Act 1900* (ACT), as amended by the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT)

<sup>107</sup> *Criminal Code Reform Amendment (No.2) Act 2006* (NT), which inserted the new section 158 of the *Criminal Code Act* (NT)

<sup>108</sup> See subsection 158(5), *Criminal Code Act* (NT)

<sup>109</sup> Department of Justice, [Criminal Code Reform Issues Paper](#), 28 April 2006. See also the Northern Territory Law Reform Committee's 2000 report on [Self-Defence and Provocation](#).

## 7.7 Western Australia

In 2008, Western Australia abolished the defence of provocation as part of a number of changes to homicide laws. These changes implemented the recommendations of the Western Australian Law Reform Commission in its 2007 report on the law of homicide.<sup>110</sup> After discussing the defence of provocation, the Commission concluded:

The Commission believes that the only justification for retaining provocation is the continued existence of mandatory life imprisonment for murder. However, the Commission has recommended that the mandatory penalty for murder be abolished. After considering how the partial defence of provocation fits within the overall structure for homicide, as recommended in this Report, the Commission has concluded that the partial defence of provocation under s 281 of the Code should be repealed.<sup>111</sup>

The Commission responded to the argument that retaining the partial defence enables community input into the criminal justice system and fosters public confidence in the system (as noted above, this was the view of the NSW Law Reform Commission in its 1997 report). The Commission stated:

...partial defences are not the only way to improve the public's confidence in the criminal justice system. Further, this argument fails to take into account the potential for members of the community to be dissatisfied that a deliberate killing has resulted in a conviction for manslaughter rather than murder.

The argument that it is preferable for a jury—rather than a sentencing judge—to determine issues affecting culpability, does not fully take into account what occurs in practice. The existence of a partial defence does not mean that it is always the jury who decide if the defence applies. In some cases the prosecution is responsible for assessing the culpability of the offender by accepting a plea of guilty to manslaughter. For instance, a study by the Judicial Commission of New South Wales found that 28 per cent of homicide offenders who relied on provocation had a plea of guilty to manslaughter accepted by the prosecution. Therefore, a significant proportion of offenders were sentenced on the basis of provocation without any 'community input' by the jury. Further, in some cases an accused may rely on more than one partial defence and it may not be clear why the jury convicted the offender of manslaughter...

The Commission emphasises that sentencing judges routinely make decisions about an offender's culpability for murder, and about provocation in respect of all other crimes. The Commission can see no reason why provocation as a mitigating factor for murder should be singled out as one issue requiring community input via the jury.<sup>112</sup>

The Commission responded in the following way in relation to concerns about

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<sup>110</sup> Law Reform Commission of Western Australia, [Review of the law of homicide](#), Final Report, September 2007

<sup>111</sup> Law Reform Commission of Western Australia, note 110, p222

<sup>112</sup> Law Reform Commission of Western Australia, note 110, p217

dealing with provocation only as part of the sentencing process:

It has been suggested that, in the absence of provocation, overall sentences for homicide may increase because some offenders who would be currently sentenced for manslaughter will instead be sentenced to a greater penalty for murder. The Commission agrees that if provocation is abolished, in some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder. Thus, it has been argued that abolishing provocation may lead to 'inconsistent dealings with those who kill after losing self control'. However, this is precisely the point. Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to less mitigation than a person who kills his friend after discovering him sexually abusing his child.

It has been argued that the abolition of provocation will not necessarily eliminate gender-bias. Bradfield warns that the sentencing process might 'reiterate the legitimacy of men's violence in response to sexual jealousy and possessiveness'. It is impossible to know the extent, if any, that gender-bias will be repeated in the sentencing outcomes for murder. In Chapter 7 the Commission has recommended the establishment of a body in Western Australia to monitor sentencing practices for homicide. If the partial defence of provocation is abolished, this body should specifically monitor sentencing practices and outcomes for murder when issues concerning provocation are raised.<sup>113</sup>

In response to concerns about the effect of abolishing provocation for women who kill abusive partners, the Commission commented:

...the Commission has made significant recommendations to reform the law of self-defence...and has also recommended that excessive self-defence should be introduced. In light of these recommendations the Commission does not consider that it is necessary to retain provocation solely for the purpose of accommodating the circumstances of victims of domestic violence.<sup>114</sup>

## 7.8 Queensland

**2011 reforms:** The partial defence of provocation in section 304(1) of the *Criminal Code* was amended in 2011, primarily in order to "reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy".<sup>115</sup> The amendments also reversed the onus of proof in relation to the defence. The following provisions were added to section 304(1):

(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.

<sup>113</sup> Law Reform Commission of Western Australia, note 110, p221

<sup>114</sup> Law Reform Commission of Western Australia, note 110, p216

<sup>115</sup> *Criminal Code and Other Legislation Amendment Act 2011* (Qld). The quote is from C Dick, *Queensland Parliamentary Debates*, 24 November 2010, p4251

(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—

- (a) a domestic relationship exists between 2 persons; and
- (b) one person unlawfully kills the other person (the *deceased*); and
- (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—

- (i) to end the relationship; or
- (ii) to change the nature of the relationship; or
- (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

(4) For subsection (3)(a) a domestic relationship between 2 persons may be constituted by an intimate personal relationship as defined under the *Domestic and Family Violence Protection Act 1989*, section 12A(2), even if the persons' lives are not enmeshed as mentioned in section 12A(2)(b) of the Act.

(5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.

These changes implemented recommendations in a 2008 report by the Queensland Law Reform Commission on the excuse of accident and the defence of provocation.<sup>116</sup> This review commenced against the background of public outcry following three homicide trials in 2007. One of these was the case of *R v Sebo*<sup>117</sup>, where the male accused (Sebo), who had committed a violent assault upon his ex-girlfriend which killed her, was convicted of manslaughter on the basis of provocation. The provocation "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".<sup>118</sup> Sebo was sentenced to 10 years imprisonment.

An important point to note about the Commission's inquiry into provocation was that the terms of reference required the Commission to have regard to "the existence of a mandatory life sentence for murder and the Government's intention not to change law in this regard". This weighed heavily in the Commission's recommendation not to abolish the defence. It concluded:

<sup>116</sup> Queensland Law Reform Commission, [A Review of the Excuse of Accident and the Defence of Provocation](#), Report No 64, September 2008

<sup>117</sup> [\[2007\] QCA 426](#)

<sup>118</sup> Queensland Law Reform Commission, note 116, p257

Constrained by the retention of mandatory life imprisonment for murder, and acknowledging that presently the privilege of a provoked killing is difficult to understand in some cases, the Commission considers that preservation of the defence provides at least some avenue for compassionate treatment in deserving cases.<sup>119</sup>

In addition to making recommendations that were implemented in the 2011 changes to the defence, the Commission considered whether non-violent sexual advances should be excluded from the defence other than in circumstances of an extreme or exceptional character. However, ultimately, it decided that it was not satisfied with the description 'non-violent sexual advance' and it was concerned that a non-violent sexual advance from a homosexual might be considered extreme or exceptional.<sup>120</sup> As discussed further below, this issue has recently received further consideration.

The Commission also considered the position of women who kill their partners after a prolonged period of violence and whether the defence should be amended to facilitate claims by such battered women. However, rather than amending the provocation defence the Commission recommended that consideration should be given to the development of a separate defence for battered persons. This is discussed further below in Section 11.4.

The arguments put forward by the Commission in recommending reversing the onus of proof for the provocation defence included:

- The prosecution will very often not be in a position to contest the factual detail of the claim for provocation as the only other potential witness will have been killed by the defendant;
- If the onus of proof is placed on the party who wishes to rely on the defence, it is likely to result in more clearly articulated claims, which will enhance the administration of justice;
- 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 prevent unmeritorious claims being advanced before juries;
- A strong analogy exists with the partial defence of diminished responsibility, where the onus rests on the defendant.<sup>121</sup>

The Commission did not accept that reversing the onus for this defence would be incompatible with the presumption of innocence. It stated that "the defendant is not required to prove that he or she is innocent of murder but instead that, because of the circumstances in which the offence was committed, the offence should be reclassified as manslaughter".<sup>122</sup>

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<sup>119</sup> Queensland Law Reform Commission, note 116, p257. See also p497-500

<sup>120</sup> Queensland Law Reform Commission, note 116, p483

<sup>121</sup> Queensland Law Reform Commission, note 116, p492-493

<sup>122</sup> Queensland Law Reform Commission, note 116, p495

**Special Committee report on non-violent sexual advances:** In November 2011, the Attorney-General, Paul Lucas, formed a special committee chaired by John Jerrard QC to advise on the use of non-violent homosexual advances to establish a defence of provocation. The Committee was formed after two petitions were tabled in Parliament asking for the *Criminal Code* to be amended. The Chair's report in January 2012 noted that "the members of the working group were equally divided for or against an amendment to change the wording of the current section."<sup>123</sup> The Chair concluded that he would support an amendment to the effect that the defence would not apply "other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance towards the defendant or other minor touching".<sup>124</sup> Mr Lucas announced that the Government would adopt this recommendation.<sup>125</sup> However, no change was made prior to the State election and in July 2012, the new Attorney-General, Jarrod Bleijie, said that the Government would not be making any changes to the defence at this stage.<sup>126</sup>

## 8. PROVOCATION REFORMS IN OTHER COUNTRIES

### 8.1 New Zealand

The partial defence of provocation was repealed in December 2009.<sup>127</sup> This accorded with a recommendation of the New Zealand Law Commission in its 2007 report on the partial defence of provocation.<sup>128</sup> The Commission considered that provocation was "irretrievably flawed" and that "some of the flaws are such that the defence does not in fact fulfil its policy purposes".<sup>129</sup> The Commission identified several conceptual flaws with the defence and then commented on two respects in which the defence operates in a counter-productive way. One of these was "the way in which [the defence] tends to operate against both women and gay men, and thereby serves the interests of heterosexual men".<sup>130</sup> For the Commission, however, there was an even more fundamental issue concerning the defence, which it stated as follows:

Section 169 excuses a homicidal loss of self control, in the face of a provocation of such gravity that it would have prompted a person with ordinary self-control to

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<sup>123</sup> JA Jerrard, [Report to the Attorney-General in relation to amendments to section 304 of the Criminal Code](#), January 2012, p8

<sup>124</sup> JA Jerrard, note 123, p9

<sup>125</sup> P Lucas, ['State Government to change "gay panic" defence'](#), *Media Release*, 25 January 2012

<sup>126</sup> P Caruana, ['Qld scraps "gay panic" defence changes'](#), *The Australian*, 23 July 2012

<sup>127</sup> *Crimes (Provocation Repeal) Amendment Act 2009* (NZ)

<sup>128</sup> New Zealand Law Commission, [The Partial Defence of Provocation](#), Report 98, September 2007. The Law Commission's 2001 report, [Some Criminal Defences with particular reference to Battered Defendants](#), Report 73, May 2001 also recommended abolishing the partial defence of provocation but the New Zealand Government asked the Law Commission to further consider some possible consequences of repealing the defence.

<sup>129</sup> New Zealand Law Commission, note 128, p42

<sup>130</sup> New Zealand Law Commission, note 128, p48-49

do likewise. The defence is thus open-ended about the precise emotions that might be driving the defendant; in other words, on its face, provocation is not necessarily confined to an angry loss of self-control, as opposed to one prompted by fear or sympathy. However, anger is the context in which it is commonly understood to operate, and is most frequently used. We would thus argue that the defence puts a premium on anger – and not merely anger, but homicidally violent anger. This, to our minds, is or should be a central issue in considering whether reform is required: out of the range of possible responses to adversity, why is this the sole response that we choose to excuse? Ultimately, issues such as the sexist and heterosexist bias of the provocation defence...strike us as relatively immaterial, when weighed against the larger question of how we, as a society, wish to choose to respond to violence.<sup>131</sup>

The Committee noted a "very widespread consensus across a substantial majority of stakeholders that the present operation of [the defence] was unsatisfactory". The Commission then observed:

Broadly, stakeholders' views as to the appropriate remedy were twofold. Those who considered that it is important to involve juries in the assessment of relative culpability, and similarly important to signal reduced culpability by means of a manslaughter verdict, favoured reform of the partial defence framework. This opinion was not wholly confined to the defence bar; some (a small minority) of Crown Solicitors shared it, as did some in the mental health area.

Others agreed with our view that dealing with the issues on sentence, with the aid of a sentencing guideline...could suffice or indeed be preferable...However, some – particularly the Ministry of Health and some of the women's groups – offered cautious or conditional support for this option, because no draft guideline was available for their review.<sup>132</sup>

In "recognition of a significant body of opinion in favour of an option that permits jury involvement in decisions about relative culpability for homicide" the Commission considered various ways that this might be achieved including:

- a redrafted partial defence of provocation;
- a smorgasbord of partial defences;
- a generic partial defence;
- establishing degrees of murder;
- having a single homicide offence known as culpable homicide.<sup>133</sup>

Ultimately, however, the Commission concluded:

...we do not consider any of the reform options canvassed in this chapter to be viable. We recommend that the partial defence of provocation should be abolished in New Zealand by repealing section 169 of the Crimes Act 1961; the defendants who would otherwise have relied upon that partial defence should be

<sup>131</sup> New Zealand Law Commission, note 128, p50

<sup>132</sup> New Zealand Law Commission, note 128, p67-68

<sup>133</sup> New Zealand Law Commission, note 128, p69-77



convicted of murder; and evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise.<sup>134</sup>

The Commission noted that several concerns had been identified regarding the viability of attempting to deal with provocation issues solely as a mitigating sentencing factor. These included that dealing with provocation on sentence would be less transparent than dealing with it at trial, that there would be a greater risk of sentencing inconsistency, and that defendants who would otherwise have succeeded with provocation would be at risk of harsher sentences.<sup>135</sup> In relation to the last of these concerns, it was noted that section 102 of the *Sentencing Act 2002* created a presumption in favour of life imprisonment for offenders convicted of murder.

In response to this concern, the Commission recommended that the new Sentencing Council should prepare a sentencing guideline that covered the relevance of provocation under section 102, but also the range of other mitigating circumstances that might justify rebuttal of the presumption. In the event, the Sentencing Council was not established. When the Minister of Justice introduced the bill to repeal the partial defence provocation, he commented on this issue as follows:

The threshold to displace the presumption of a sentence of life imprisonment for murder is a high one, likely to be met only in exceptional cases. However, we can all envisage circumstances of extreme provocation in which it might be argued that a sentence of life imprisonment would be manifestly unjust. I expect the appellate courts to develop guidance on how provocation-type factors are to be treated at sentencing, as appropriate cases arise.<sup>136</sup>

## 8.2 United Kingdom

**Law reforms in 2009:** The *Coroners and Justice Act 2009* replaced the partial defence of provocation with a new partial defence known as "loss of control".<sup>137</sup> The loss of control partial defence (which, if successful, also results in a conviction for manslaughter) is outlined in section 54 of the Act:

- (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.

<sup>134</sup> New Zealand Law Commission, note 128, p77

<sup>135</sup> New Zealand Law Commission, note 128, p78-83

<sup>136</sup> S Power, *NZ Parliamentary Debates*, 17 November 2009, [p7755](#)

<sup>137</sup> See sections 54-56 of the Act.



- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

Section 55 refers to two "qualifying triggers" for the purposes of the defence:

- (1) if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person; or
- (2) if D's loss of self-control was attributable to a thing or things done or said (or both) which:
  - (a) constituted circumstances of an extremely grave character, and
  - (b) caused D to have a justifiable sense of being seriously wronged.

However, section 55(6)(c) provides that "in determining whether a loss of self-control had a qualifying trigger "the fact that a thing done or said constituted sexual infidelity is to be disregarded."<sup>138</sup>

These reforms were based on proposals in a 2008 Ministry of Justice consultation paper on the law in relation to murder, manslaughter and infanticide.<sup>139</sup> This consultation paper, in turn, followed a 2006 report by the Law Commission.<sup>140</sup> In the context of the continuing mandatory sentence of life imprisonment for murder, the Commission had recommended retaining, but reformulating, the partial defence of provocation. However, there were some differences between the Commission's proposals and those that were ultimately adopted by the Government, and enacted.

The main difference between them was that the Commission had recommended removing the "loss of self-control" requirement from the defence of provocation. Under the Commission's proposal, the defence could be relied on when the defendant acted in response to "gross provocation...which caused the defendant to have a justifiable sense of being wronged"<sup>141</sup>, or "fear of serious violence towards the defendant or another"; but the defence could not

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<sup>138</sup> See also the other matters to be disregarded in s 55(6)

<sup>139</sup> Ministry of Justice, [Murder, manslaughter, infanticide: proposals for reform of the law](#), July 2008

<sup>140</sup> The Law Commission, [Murder, Manslaughter and Infanticide](#), November 2006. See also the Law Commission's report, [Partial Defences to Murder](#), August 2004 which recommended retaining a reformulated partial defence of provocation.

<sup>141</sup> Law Commission 2006 report, note 140, p78-79, p80-84

be relied upon if the defendant had acted “in considered desire for revenge”.<sup>142</sup> The Commission stated that the “loss of self-control” element:

...has been widely criticised as privileging men’s typical reactions to provocation over women’s typical reactions. Women’s reactions to provocation are less likely to involve a ‘loss of self-control’, as such, and are more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence.<sup>143</sup>

**A recent case on the defence:** A recent decision in the UK Court of Appeal considered the loss of control defence in relation to three separate appeals by persons who had been convicted of murdering their wives.<sup>144</sup> In one of the appeals, the focus was on the sexual infidelity exclusion in subsection 55(6)(c) of the defence. The trial judge had withdrawn the defence from the jury. In making this decision, the trial judge had disregarded the victim’s alleged comments about her infidelity and then formed the conclusion that the remaining evidence (e.g. that the victim had said that the defendant did not have “the balls to commit suicide”) was not sufficient for the jury to conclude that the defence might apply.<sup>145</sup> The Court of Appeal concluded that the judge had erred in withdrawing the defence from the jury.<sup>146</sup> The Court of Appeal interpreted subsection s 55(6) in the following way:

In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it.<sup>147</sup>

Taking this approach, the Court concluded:

We have reflected whether the totality of the matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to the wife’s sexual infidelity, and examined as a cohesive whole, were of sufficient weight to leave to the jury. In our judgment they were.<sup>148</sup>

### 8.3 Ireland

In December 2009, the Law Reform Commission of Ireland published a report

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<sup>142</sup> Law Commission 2006 report, note 140, p79

<sup>143</sup> Law Commission 2006 report, note 140, p81. The Government’s response to this recommendation by the Commission can be seen on p12-13 of the 2008 consultation paper.

<sup>144</sup> [R v Clinton; R v Parker; R v Evans](#) [2012] EWCA Crim 2. For a critique of this decision, see D Baker and L Zhao, ‘Contributory qualifying and non-qualifying triggers in the loss of control defence: a wrong turn on sexual infidelity’ (2012) 76(3) *The Journal of Criminal Law* 254

<sup>145</sup> [2012] EWCA Crim 2 at para 76

<sup>146</sup> [2012] EWCA Crim 2 at para 76

<sup>147</sup> [2012] EWCA Crim 2 at para 39

<sup>148</sup> [2012] EWCA Crim 2 at para 77.

on defences in criminal law.<sup>149</sup> The Commission recommended retaining but reforming the partial defence of provocation. After discussing the arguments for abolishing and retaining the defence, the Commission concluded:

...the Commission accepts that the defence is in an unsatisfactory state but does not agree that abolition is the best course of action. The Commission considers there are compelling reasons for retaining the plea, primarily that the distinction between murder and manslaughter marks an important moral boundary and that this would be greatly compromised by abolition of the plea of provocation.<sup>150</sup>

The Commission proposed reforming the defence in several ways including replacing the subjective-oriented test in Irish law with an objective test (which was more consistent with other common law jurisdictions). Having considered the requirement for a sudden loss of self-control and its application for battered women who kill their abusers, the Commission ultimately concluded that the key elements of the defence should remain but that it should be provided that "there is no rule of law that the defence of provocation is negated if the act causing death did not occur immediately after provocation".<sup>151</sup>

## 9. SELF-DEFENCE AND EXCESSIVE SELF-DEFENCE

### 9.1 Self-defence: a complete defence

In contrast to the partial defence of provocation, self-defence is a complete defence to murder. If the jury accepts the defence, it results in an acquittal. Previously, the defence of self-defence was defined by the common law.<sup>152</sup> In December 2001, the defence was codified in legislation in NSW, with the new section based on provisions developed by the Model Criminal Code Officers Committee.<sup>153</sup> Section 418 of the *Crimes Act 1900* states:

- (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
  - (a) to defend himself or herself or another person, or
  - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

.....  
and the conduct is a reasonable response in the circumstances as he or she perceives them.<sup>154</sup>

<sup>149</sup> Law Reform Commission of Ireland, [Defences in Criminal Law](#), December 2009

<sup>150</sup> Law Reform Commission of Ireland, note 149, p118

<sup>151</sup> Law Reform Commission of Ireland, note 149, p151-52

<sup>152</sup> *Zecevic v DPP* (1987) 162 CLR 645

<sup>153</sup> *Crimes Amendment (Self-Defence) Act 2001* (NSW), which commenced in February 2002

<sup>154</sup> Subsections 418(2)(c) and (2)(d) have been omitted as they do not apply to cases involving the intentional or reckless infliction of death only: see section 420, *Crimes Act 1900*

Section 419 states that, in any criminal proceedings in which self-defence is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

## 9.2 Excessive self-defence: a partial defence

Excessive self-defence is a modified version of self-defence and, like the partial defence of provocation, it only reduces murder to manslaughter. It applies if a person believed that their conduct was necessary to defend themselves but this conduct was not a reasonable response in the circumstances. The history of this partial defence at common law has been outlined as follows:

At common law, excessive self-defence has had a relatively short though controversial history. It was first introduced into Australian law by the High Court in 1958, but was abolished when the Privy Council considered the issue in 1971. The State courts applied the law as determined by the Privy Council until the issue came before the High Court of Australia again in 1978. In *Viro's case*, the High Court overturned the Privy Council's decision, thereby re-establishing the doctrine of excessive self-defence. The High Court's reasoning, however, was lengthy and convoluted, making it difficult for State courts to instruct juries on the issue. The opportunity again arose for the High Court to reconsider the position in 1987 in *Zecevic's case*. That case represents the High Court's formal concession to criticisms of the defence by State courts. By a five to two majority, the High Court abolished the excessive self-defence doctrine...<sup>155</sup>

In December 2001, NSW reintroduced the partial defence of excessive self-defence<sup>156</sup>, it being the Government's view that "a person who honestly believes he is acting in self-defence but who uses more force than is reasonable in the circumstances should not be liable for murder but be liable for the lesser offence of manslaughter".<sup>157</sup> In NSW, the partial defence of excessive self-defence is set out in section 421 of the *Crimes Act 1900*, which states:

- (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.

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<sup>155</sup> Model Criminal Code Officers Committee, note 78, p109

<sup>156</sup> *Crimes Amendment (Self-Defence) Act 2001* (NSW), which commenced in February 2002

<sup>157</sup> Hon Bob Debus MP, *NSW Parliamentary Debates*, 28 November 2001, p19,093

## 10. SELF-DEFENCE AND WOMEN WHO KILL VIOLENT PARTNERS

### 10.1 Problems in relying on self-defence

Longstanding concerns have been held about the difficulties women face in relying on self-defence when they have killed male partners in the context of a prolonged period of domestic violence and for reasons of self-preservation (note that the same concerns also apply to similar killings by persons in other types of intimate partner and family relationships).<sup>158</sup> In 2004, the Victorian Law Reform Commission commented:

The traditional association of self-defence with a one-off spontaneous encounter, such as a pub brawl scenario between two people (usually men) of relatively equal strength has made it difficult for women to successfully argue the defence.<sup>159</sup>

A related argument is that, like the defence of provocation, the defence of self-defence is gender biased because it is more useful in situations in which men commonly kill to defend themselves (i.e. in response to a spontaneous encounter) than in circumstances in which women usually kill to defend themselves (i.e. in response to an ongoing threat of violence).<sup>160</sup>

The legal test for self-defence has evolved and may be broad enough to accommodate situations where women kill their violent male partners. The current provision does not require that the threat be imminent or that the response be proportionate to the threat. However, the application of the defence in this context is still problematic because these continue to be significant factors in determining whether the defence has been made out. The difficulties that women face in relying on self-defence in relation to three key factors have been outlined by the Victorian Law Reform Commission:

- *Whether the threat that the accused faced was immediate* – this may be especially difficult to show in non-confrontational cases where women kill their abusive partner while he is sleeping or has his back turned;
- *Whether the response was proportionate to the threat* – this may also be especially difficult to show in non-confrontational cases. It may also be difficult to show in confrontational cases as women will often use a weapon against an unarmed man. Alternatively, women may be responding to an attack that is not viewed to be 'life threatening';
- *Whether there were other available options* – this may be especially difficult to show in non-confrontational cases where it can be argued that

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<sup>158</sup> See Victorian Law Reform Commission, note 38, p111ff; Victorian Law Reform Commission, note 93, p61ff; Law Reform Commission of Western Australia, note 110, Ch6

<sup>159</sup> Victorian Law Reform Commission, note 93, p61

<sup>160</sup> Victorian Law Reform Commission, note 38, p111ff

the woman should have left the relationship or called the police.<sup>161</sup>

It could be argued that these are always important factors to consider in determining whether the accused acted in self-defence, with the consequence that he or she is not criminally responsible for using lethal force. However, it has also been argued that considerations of imminence and proportionality do not have (and should not be given) the same significance in cases where women kill in response to an ongoing threat of serious violence.<sup>162</sup> In addition, there are concerns that the failure by a jury to properly understand the nature and dynamics of violent relationships can lead the jury to make its assessment of whether a woman's use of lethal force was reasonable in the circumstances, without having a true appreciation of those circumstances.<sup>163</sup>

## 10.2 Battered woman syndrome

Battered woman syndrome "is a psychological theory that has been developed in response to the difficulties that women who kill their abusive partners experience when seeking to rely on the available defences".<sup>164</sup> It has been described in the following terms:

The term 'battered woman syndrome' was first used by American psychologist Dr Lenore Walker. Walker examined a number of cases where women who had been subjected to domestic violence, and argued that these cases involved a 'cycle of violence' which was characterised by three stages: tension building, the acute battering incident and loving contrition. She defined a 'battered woman' as one who had gone through the cycle at least twice.

Walker hypothesised that this recurring cycle of violence promotes a predictable set of responses, including depression and decreased self-esteem. Walker also contended that women involved in a cycle of violence find it difficult to break out of the cycle because of 'learned helplessness': Learned helplessness theory predicts that the ability to perceive your effectiveness in being able to control what happens to you can be damaged by some aversive experiences that occur with trauma. In the case of women who have been subjected to prolonged domestic violence, it is suggested that they come to believe that whatever they do, they cannot change their situation.<sup>165</sup>

From the early 1990s, defence lawyers attempted to call expert evidence (from psychiatrists or psychologists) showing that a woman who killed her abusive partner was suffering from "battered woman syndrome".<sup>166</sup> The reason why they

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<sup>161</sup> This is based on Victorian Law Reform Commission, note 38, p115-123

<sup>162</sup> See Law Reform Commission of Western Australia, note 110, p273-275

<sup>163</sup> See Law Reform Commission of Western Australia, note 110, p275-276. See also Victorian Law Reform Commission, note 38, p115-123. For a relatively recent comment, see A Hopkins and P Easteal, 'Walking in her shoes: Battered women who kill in Victoria, Western Australia and Queensland (2010) 35(3) *Alternative Law Journal* 132

<sup>164</sup> Law Reform Commission of Western Australia, note 110, p285

<sup>165</sup> Victorian Law Reform Commission, note 38, p125

<sup>166</sup> Victorian Law Reform Commission, note 38, p124

sought to introduce expert evidence on domestic violence by reference to a syndrome is that, at the time, expert evidence could only be introduced on a subject if it went beyond the experience of ordinary persons or was not capable of being understood by them. This rule limiting the admission of expert evidence was abolished with changes to the law of evidence in 1995.

In the 1998 case of *Osland v The Queen*, the High Court affirmed that expert evidence on battered wife syndrome was admissible in relation to the question of whether the accused had acted in self-defence.<sup>167</sup> Justice Kirby noted, however, that battered woman syndrome was controversial. He pointed out that critics had said it had failed to meet established criteria for scientific reliability. He also noted that reliance on the syndrome may in fact disadvantage women who seek to rely on self-defence:

...critics argue that the pressure to "medicalise" the response of a victim in a prolonged violent relationship, and to attribute that response to the manifestation of an established psychological or psychiatric disorder, distracts attention from conduct which may constitute a perfectly reasonable response to extreme circumstances. BWS denies the rationality of the victim's response to prolonged abuse and instead presents the victim's conduct as irrational and emotional. This undercuts the very purpose which BWS was meant to serve: to show how a victim's actions in taking lethal self-help against the abuser was reasonable in the extraordinary circumstances which the victim faced.<sup>168</sup>

In 2004, the Victorian Law reform Commission observed that battered women syndrome had come under attack on a number of grounds including that it:

- medicalises women's responses to domestic violence and portrays women as psychologically impaired;
- can distort the legal issues if the dispute centres not upon the justification for the accused's use of defensive force but upon whether she suffered from the syndrome;
- can create a new stereotype of the typical 'battered woman', who is helpless, passive and demoralised;
- may disadvantage those who don't fit the stereotype, including Indigenous women, women from non-English speaking backgrounds and women with criminal histories; and
- lacks scientific support.<sup>169</sup>

The Commission then commented that these problems had prompted:

...researchers both overseas and in Australia to call for an acceptance of expert evidence which places greater emphasis on the social realities of a woman's situation and reflects the current state of knowledge about the nature and

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<sup>167</sup> (1998) 197 CLR 316

<sup>168</sup> (1998) 197 CLR 316 at 374-375

<sup>169</sup> Victorian Law Reform Commission, note 93, p170

dynamics of abusive relationships and their effects. This evidence, commonly referred to as 'social framework evidence', would address the sorts of myths and misconceptions judges and jurors might have about family violence...<sup>170</sup>

### 10.3 Use of self-defence in Australia

There are only limited statistics on the use of self-defence in these types of cases in NSW and Australia. Rebecca Bradfield conducted a study of 65 cases of women who killed their violent spouses in Australia in the period between 1980 and 2000, and she found that self-defence was raised in 21 cases and in nine of these cases the defence was successful.<sup>171</sup> Bradfield noted that her sample was limited as it was selected from cases that were reported.<sup>172</sup>

The Victorian Law Reform Commission's study of homicide cases in Victoria between July 1997 and June 2001 found that two women had raised self-defence in intimate partner homicide cases and both were unsuccessful.<sup>173</sup> In both cases, the female claimed that "she had been sexually assaulted by the deceased, and had responded with fatal violence".<sup>174</sup>

The Western Australian Law Reform Commission examined 25 cases between January 2000 and June 2007 in which women had killed their intimate partners where a history of domestic violence was noted.<sup>175</sup> In 19 of these cases, the woman pleaded guilty to manslaughter (lack of intention to kill or do grievous bodily harm was the basis for most of these pleas).<sup>176</sup> In six cases the woman went to trial for murder and in one case the woman (who killed her violent ex-boyfriend in a struggle) was acquitted on the basis of self-defence.<sup>177</sup> The Commission also noted that it was aware of:

...four Australian cases in which women have been acquitted on the basis of self-defence where they have not relied on battered women's syndrome. These cases demonstrate that it is possible to convey to the jury [the] nature of the threat faced by women in these circumstances, and that their conduct was reasonable, without resort to battered women's syndrome. However, it must be noted that in three out of four of these cases, the killing occurred during a confrontation.<sup>178</sup>

<sup>170</sup> Victorian Law Reform Commission, note 93, p173. The Commission's recommendations in this area are discussed in Section 11.2 below.

<sup>171</sup> Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System*, PhD Thesis, University of Tasmania, 2002); cited in Victorian Law Reform Commission, note 38, p110

<sup>172</sup> Victorian Law Reform Commission, note 38, p109 (footnote 491)

<sup>173</sup> Victorian Law Reform Commission, note 38, p108-109

<sup>174</sup> Victorian Law Reform Commission, note 38, p108

<sup>175</sup> Law Reform Commission of Western Australia, note 110, p271

<sup>176</sup> Law Reform Commission of Western Australia, note 110, p280-283

<sup>177</sup> Law Reform Commission of Western Australia, note 110, p283-284. The case where self-defence was relied on successfully was *Dzuiba* (unreported, Supreme Court of Western Australia, 14 May 2007). For a media article on the case, see ['Perth woman acquitted of murdering former partner'](#), ABC, 15 May 2007

<sup>178</sup> Law Reform Commission of Western Australia, note 110, p287



## 10.4 Reliance on excessive self-defence

The reintroduction in NSW of the partial defence of excessive self-defence may assist women who have killed their abusive partner but cannot satisfy all of the elements of self-defence. However, a concern that has been raised about the availability of this defence in these cases is that:

...it may prevent women from being acquitted on the basis of self-defence, due to the existence of an 'easy' middle option. Many women who kill in response to family violence use a weapon, often against their unarmed partner. A jury, presented with the option of returning a verdict of manslaughter on the basis of excessive self-defence, may therefore simply accept that such a killing was unreasonable and disproportionate, instead of properly considering the reasonableness of her actions in the circumstances.<sup>179</sup>

A Judicial Commission of NSW study on partial defences to murder found that between February 2002 and June 2005, two women who had killed their male partners had successfully relied on the partial defence of excessive self-defence.<sup>180</sup> In both cases, the female was under attack when she killed her male partner. One of these females received a sentence of five years (with a non-parole period of two and a half years), and the other received a sentence of seven and a half years (with a non-parole period of four and a half years).

## 11. SELF-DEFENCE REFORMS IN OTHER STATES

### 11.1 Overview

Since 1987, all other Australian jurisdictions except Queensland have enacted new statutory provisions on the complete defence of self-defence.<sup>181</sup> Like in NSW, in some other jurisdictions (e.g. the ACT and Northern Territory), these reforms were based on a draft provision formulated by the Model Criminal Code Officers Committee. Some jurisdictions have also reintroduced the partial defence of excessive self-defence (South Australia in 1991, Victoria in 2005, and Western Australia in 2008). This section only discusses developments in three States (Victoria, Western Australia, and Queensland), where changes were enacted primarily in response to concerns about the circumstances of those who kill within the context of an abusive relationship. A brief summary of the changes in these three States is presented in the Table below.

<sup>179</sup> Victorian Law Reform Commission, note 93, p94

<sup>180</sup> Judicial Commission of NSW, note 25, p52. The two cases were [R v Scott](#) [2003] NSWSC 627 and [R v Trevenna](#) [2003] NSWSC 463 (and on appeal, [R v Trevenna](#) [2004] NSWCCA 43). It appears that there were no cases in which a female offender had *unsuccessfully* relied on excessive self-defence. The one case of referred to in the report where excessive self-defence had failed (p52, *Katarzynski*) involved a male offender and male victim.

<sup>181</sup> G MacKenzie and E Colvin, [Homicide in abusive relationships: A report on defences](#), July 2009, p27-30

Jurisdiction	Year	Summary of self-defence reforms
Victoria	2005	Codification of self-defence Introduction of "defensive homicide" (equivalent to partial defence of excessive self-defence) Enactment of special provisions that apply when family violence is alleged
Western Australia	2008	Changes to self-defence provisions Reintroduction of partial defence of excessive self-defence
Queensland	2011	Introduction of partial defence of "killing for preservation in an abusive relationship"

## 11.2 Victoria

In 2005, at the same time as abolishing the partial defence of provocation, Victoria codified its law of self-defence, and introduced a new provision on "defensive homicide". These reforms were based on recommendations made in a 2004 report by the Victorian Law Reform Commission (VLRC) on *Defences to Homicide*. However, the provisions that were enacted by the former Victorian Government were somewhat different to the draft Bill proposed by the VLRC.<sup>182</sup>

**General provisions on self-defence & defensive homicide:** Section 9AC of the *Crimes Act 1958* (Vic) provides that a person is not guilty of murder if they believed that the conduct leading to the death of another was "necessary to defend himself or herself or another person from the infliction of death or really serious injury." Section 9AD, the "defensive homicide" provision, provides:

A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.

While this provision is formulated as an offence, in practice it resembles the partial defence of excessive self-defence. In his second reading speech on the bill, the then Victorian Attorney General, explained the two separate tests for the "belief" and "reasonable grounds" components of self-defence established by sections 9AC and 9AD, and the rationale behind them as follows:

Under the first test, the jury would have to consider whether the accused person had the relevant belief. If the prosecution can prove that the accused did not have that belief, the accused will be guilty of murder. If the prosecution cannot prove that, he or she will not be guilty of murder.

<sup>182</sup> Victorian Law Reform Commission, [Defences to Homicide](#), Final Report, October 2004, Appendix 4, in particular proposed sections 322I, 322J and 322P.

However, in such a case, a finding that the accused was not guilty of murder would not be the end of the matter because, under this bill, the second test than arises. The second test is whether the person had reasonable grounds for his or her belief. The test determines whether the accused person is guilty of the new offence of defence homicide or is completely acquitted.

This two-stage approach retains the same elements as the common-law test but, by separating out those two elements, it will ensure that the law of self-defence appropriately measures the culpability of those people who act in the genuine belief that it is necessary to do so to defend themselves or another person. The culpability of such a person is substantially different to that of a person who kills without such a belief. However, if there are no reasonable grounds for his or her belief, the bill reflects the importance that we attach to human life and ensures that such a person is guilty of the very serious offence of defensive homicide.<sup>183</sup>

The VLRC had recommended the reintroduction of excessive self-defence in Victoria. The VLRC noted that this recommendation might be considered inconsistent with its recommendation that the partial defence of provocation should be abolished. However, it explained:

In recommending a partial excuse of excessive self-defence we wish to recognise that the circumstances of those who honestly believe their actions are necessary to defend themselves but overstep the mark are qualitatively different from circumstances giving rise to issues of provocation or diminished capacity.<sup>184</sup>

The VLRC further noted that, if provocation were abolished:

...the reintroduction of excessive self-defence may also give women and others who kill in response to family violence a possible partial defence, should they be unable to successfully argue self-defence. While some women may be able to argue a lack of intention to kill or cause serious injury, in some cases it will be clear that serious injury was intended. The lack of a halfway house for women and others who kill in these circumstances may result in convictions for murder where manslaughter would have been the more appropriate result.<sup>185</sup>

In the VLRC formulation, which was modelled on the NSW provision<sup>186</sup>, excessive self-defence would have been available in circumstances where the force used by a person that led to the death of another person was "not a *reasonable response* in the circumstances as the person perceives them."<sup>187</sup> This may be contrasted with the defensive homicide provision (section 9AD) that was enacted, which applies where a person does not have *reasonable grounds for their belief* that their action was necessary to defend themselves. It is unclear whether this difference is very significant.<sup>188</sup>

<sup>183</sup> R Hulls, *Parliamentary Debates, Victoria*, [LA, 6.10.2005](#), p1350

<sup>184</sup> Victorian Law Reform Commission, note 182, p101

<sup>185</sup> Victorian Law Reform Commission, note 182, p102

<sup>186</sup> Victorian Law Reform Commission, note 182, p104, recommendation 9 and Appendix 4, proposed section 322J. Cf *Crimes Act 1900* (NSW), section 421

<sup>187</sup> Victorian Law Reform Commission, note 182, Rec 9 and Appendix 4, proposed section 322J

<sup>188</sup> For judicial discussion of the difference see [R v Katarzynski](#) [2002] NSWSC 613, at [20], and

**Special provisions that apply when family violence is alleged:** The 2005 amendments to the *Crimes Act 1958* (Vic) also inserted section 9AH, which appears under the heading "family violence". Subsection 9AH(1) provides that in circumstances where family violence is alleged:

...a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary—

- (a) to defend himself or herself or another person; or
- (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person—  
even if—
- (c) he or she is responding to a harm that is not immediate; or
- (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

Section 9AH(3) sets out a non-exhaustive list of the kinds of evidence that might be relevant to making a determination as to whether the person had the requisite belief and whether there were reasonable grounds for the belief in circumstances where family violence is alleged. These include evidence of:

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
- (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
- (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
- (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
- (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
- (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

The Attorney explained the rationale underpinning section 9AH in his second reading speech as follows:

. . . section 9AH affirms the court decisions that have acknowledged that in some cases, particularly those involving family violence, a lack of immediacy will not necessarily mean that the accused did not believe that his or her actions were necessary and based on reasonable grounds.

Section 9AH also highlights the types of relationships and social context

evidence that may be relevant in such cases. In such cases a jury may well ask themselves: why didn't she just leave the relationship or call the police? Fortunately many members of the community have not been placed in such a predicament.

However, that can also mean that when they serve as jurors they can find it hard to fully appreciate the complexity of such situations and the difficulties that a person might actually face.<sup>189</sup>

The VLRC recommended the implementation of a provision similar to section 9AH in order to ensure matters relevant to a determination of whether or not a person acted in self-defence within the context of family violence were able to be taken into account, without necessarily widening the defence itself.<sup>190</sup> Victoria remains the only jurisdiction with a provision such as this.

**Review of defensive homicide:** The way in which defensive homicide has operated in practice in Victoria has attracted criticism. As referred to above, one rationale for its introduction was to assist women and others who kill in response to family violence, but who may not be able to make out the complete defence of self-defence. However, the defence has primarily been relied upon by male offenders, and, in one very controversial case, it was relied upon by a male offender who killed his girlfriend. Only very recently (two cases in 2011) have there been instances in which females have been convicted of the offence of defensive homicide after killing their male partners.<sup>191</sup>

That controversial case noted above was *R v Middendorp* [2010] VSC 202. In September 2008, Middendorp stabbed Jade Bowndes four times in the back. They had been in a relationship that the sentencing judge described as "tempestuous even violent."<sup>192</sup> On a previous occasion they had both been hospitalised, each with cuts to their throats. Two months before the killing, Middendorp was alleged to have assaulted Bowndes. He was on bail in relation to that offence at the time of her death, and one of his bail conditions was that he stay away from the house in which she lived. He did not comply with this and a confrontation took place at the house. Middendorp alleged that Bowndes had come at him with a raised knife and that his actions had been in retaliation to this. The jury accepted that he had acted in self-defence and acquitted him of murder. However, they convicted him of defensive homicide. In May 2010, he was sentenced to 12 years with a non-parole period of eight years.<sup>193</sup>

In response to this case, and also in accordance with a recommendation by the VLRC that excessive self-defence should be reviewed after five years, in August 2010, the Victorian Department of Justice released a discussion paper

<sup>189</sup> R Hulls, *Parliamentary Debates, Victoria*, [LA, 6.10.2005](#), p1350

<sup>190</sup> Victorian Law Reform Commission, note 182, pp74-76, Rec 3

<sup>191</sup> The cases are [R v Black](#) [2011] VSC 152 and [R v Creamer](#) [2011] VSC 196. These cases were noted in K Fitz-Gibbon and S Pickering, 'Homicide law reform in Victoria, Australia' (2012) 52(1) *British Journal of Criminology* 159 at 166.

<sup>192</sup> [R v Middendorp](#) [2010] VSC 202 at [3]

<sup>193</sup> *R v Middendorp*, note 192, at [29]

on the review of defensive homicide.<sup>194</sup> The discussion paper noted that, up until that time, there had been 13 convictions for defensive homicide, and the defendants in all of these cases had been male, while the victim had also been male in all cases but one.<sup>195</sup> After examining 10 cases in which convictions had resulted from a guilty plea, the paper noted that the "most obvious relationship between these cases is that they all involve young men in one-off violent confrontations", and that only one homicide had occurred in circumstances where there had been a prior abusive relationship.<sup>196</sup> There had been convictions resulting from a guilty verdict in three cases.

The discussion paper noted that the *Middendorp* case "highlighted issues in the application of the offence of defensive homicide to situations where a female, who has allegedly been subjected to violence and abuse, is the victim rather than the offender."<sup>197</sup> The discussion paper also noted that some stakeholders had "expressed the view that defensive homicide [had] replaced provocation."<sup>198</sup> However, the paper also observed that *Middendorp* was the only case that "fits within the traditional parameters" of the criticisms directed at provocation before it had been abolished. The other 12 cases had been "more typical of the context in which the laws of self-defence were developed."<sup>199</sup> The paper indicated that it was difficult to ascertain from an analysis of the existing cases whether, if defensive homicide had not existed, there would have been more convictions for murder or more acquittals.<sup>200</sup> A number of questions, including whether the offence should be retained, were posed.

The review of defensive homicide appears to have been delayed following the change of government at the 2010 Victorian election.<sup>201</sup> In June 2012, *The Age* reported that a "spokesman" for the current Attorney General of Victoria had indicated that a review of the defensive homicide laws was nearing completion, and that the government was "concerned about the operation of the law."<sup>202</sup> This followed a report the previous day regarding the use of plea bargaining in defensive homicide cases.<sup>203</sup> This report referred to academic research which had found that those who had pleaded guilty to defensive homicide had had their sentences reduced by an average of two years as a result of their decision

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<sup>194</sup> Victoria, Department of Justice, [Defensive homicide: Review of the defence of defensive homicide](#), Discussion Paper, August 2010

<sup>195</sup> Victoria, Department of Justice, note 194, p33

<sup>196</sup> Victoria, Department of Justice, note 194, 36. In *R v Spark* [2009] VSC 374, the accused had killed his uncle who had sexually abused him during the ages of 8-14, and who threatened to do the same to Spark's children.

<sup>197</sup> Victoria, Department of Justice, note 194, p39.

<sup>198</sup> Victoria, Department of Justice, note 194, p44 and p11

<sup>199</sup> Victoria, Department of Justice, note 194, p44

<sup>200</sup> Victoria, Department of Justice, note 194, p48

<sup>201</sup> A Flynn and K Fitz-Gibbon, 'Bargaining with defensive homicide: examining Victoria's secretive plea bargaining system post-law reform' (2011) 35(3) *Melbourne University Law Review* 905 at 907

<sup>202</sup> A Petrie, "[State to change defensive homicide law](#)" *The Age*, 26 June 2012, pp1-2

<sup>203</sup> A Petrie, "[Murder 'deals' under fire](#)" *The Age*, 25 June 2012, pp1-2



to enter a guilty plea.<sup>204</sup> The academics who conducted the study, Asher Flynn and Kate Fitz-Gibbon, noted that, although pleas of guilty had benefits associated with the avoidance of the cost and ordeal of a trial:

. . . the fact that the accused receives both a plea deal and a sentence discount raises some concern as to whether justice is achieved and whether the seriousness of the offence is adequately recognised, particularly in light of sentences in defensive homicide cases, which have tended to fall well below the maximum penalty set by Parliament.<sup>205</sup>

It should be noted that these criticisms seem to relate more to a perceived lack of transparency in plea-bargaining in Victoria and also to sentencing issues, and how both of these operate in the context of defensive homicide, rather than necessarily to the offence of defensive homicide itself.

### 11.3 Western Australia

In 2008, at the same time as repealing the partial defence of provocation, Western Australia made changes to the provisions on self-defence and also introduced a partial defence of excessive self-defence. These changes largely implemented recommendations made by the Law Reform Commission of Western Australia in its 2007 report on *Defences to Homicide*.<sup>206</sup>

**Self-defence:** Section 248(4) of the *Criminal Code 1913* now provides that a person's act is done in self-defence where:

- (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.

The then Attorney General explained that the test was based on the Model Criminal Code provision and he noted that one important change compared to the existing West Australian provision on self-defence was that:

...the harmful act that the person believes it is necessary to act against in self-defence will not have to be imminent. The Law Reform Commission noted that the concept of imminence is currently a barrier for women, particularly in domestic violence situations, relying on self-defence because women do not necessarily respond to an imminent attack, as to do so may place them in even more danger. The commission also noted that imminence is hard to reconcile with the constant nature of domestic violence.

<sup>204</sup> A Flynn and K Fitz-Gibbon, note 201, p921

<sup>205</sup> A Flynn and K Fitz-Gibbon, note 201, p921

<sup>206</sup> Law Reform Commission of Western Australia, [Review of the law of homicide](#), Final Report, September 2007, p172 (Rec 23)

By providing that the threat need not be imminent, the defence will more readily apply to women who are the victims of domestic violence in the so-called "battered spouse" situation. It will still be necessary for persons to show that there are reasonable grounds for the person's belief that the act of self-defence was necessary and that the force used must be objectively reasonable in the circumstances the person believed to exist. It is not expected that this provision will apply to situations in which it would be reasonable for the person to take other steps, such as going to the police or escaping from the harmful situation.<sup>207</sup>

The West Australian Law Reform Commission had considered whether it was necessary to introduce a separate defence for victims of domestic violence who kill.<sup>208</sup> It pointed out that a 1994 taskforce on gender-bias had recommended that a new defence should be created, and it also noted that the Women's Council and the Women's Law Centre made strong submissions supporting this approach. However, the Commission ultimately concluded that "rather than introduce a separate defence, it is preferable to amend the law so that it better accommodates the experiences of victims of domestic violence who kill".<sup>209</sup>

Also worth noting is the Commission's recommendation that the *Evidence Act 1906 (WA)* be amended to make it clear that expert evidence about domestic violence can be led where relevant to assist in the determination of the reasonableness of a person's belief that it was necessary to use force to defend himself or herself, or whether the use of force was a reasonable response to the circumstances as the person perceived them to be.<sup>210</sup> This recommendation was not implemented as part of the reforms enacted in 2008.

**Excessive self-defence:** The 2008 amendments also reintroduced a partial defence of excessive self-defence in Western Australia. Section 248(3) of the *Criminal Code 1913* now provides that:

(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.

The Law Reform Commission considered whether the reintroduction of this partial defence might be disadvantageous to women who kill in response to domestic violence, in that it might lead to convictions for manslaughter where

<sup>207</sup> J McGinty, *Western Australia Parliamentary Debates*, [LA, 19.03.2008](#), pp1211-1212

<sup>208</sup> Law Reform Commission of Western Australia, note 206, p287-289

<sup>209</sup> Law Reform Commission of Western Australia, note 206, p289

<sup>210</sup> Law Reform Commission of Western Australia, note 206, p293 (Rec 41)



the circumstances were such that the accused should instead be acquitted.<sup>211</sup> The Commission noted that its examination of prosecution files showed that in the majority of cases where women killed in the context of domestic violence, they chose to plead guilty to manslaughter rather than risk a guilty verdict and a murder conviction.<sup>212</sup> The Commission stated:

The Commission believes that one benefit of introducing excessive self-defence is that such women may be more likely to rely on self-defence at trial in the knowledge that there is an appropriate alternative if the complete defence of self-defence fails. Further, excessive self-defence gives the prosecution the opportunity to appropriately assess an accused's claim of self-defence and, where excessive force has been used, accept a plea of guilty to manslaughter on a basis that better reflects the reality of the circumstances.<sup>213</sup>

#### 11.4 Queensland

**A new partial defence:** In Queensland, the complete defence of self-defence has not been reformed but in November 2009 a new partial defence to homicide was enacted.<sup>214</sup> The new subsection 304B(1) of the *Criminal Code 1899* ("killing for preservation in an abusive relationship") provides:

- (1) A person who unlawfully kills another (the *deceased*) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
  - (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
  - (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
  - (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

Subsection 304B(4) expressly provides that "[a] history of acts of serious domestic violence may include acts which appear minor or trivial when viewed in isolation." Subsection 304B(5) also provides that the partial defence:

...may apply even if the act or omission causing the death...was done and made in response to a particular act of domestic violence committed by the deceased that would not, if the history of the of serious domestic violence were disregarded, warrant the response.

The creation of this separate defence had its origins in the Queensland Law

<sup>211</sup> Law Reform Commission of Western Australia, note 206, p179

<sup>212</sup> Law Reform Commission of Western Australia, note 206, p180

<sup>213</sup> Law Reform Commission of Western Australia, note 206, p180

<sup>214</sup> *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2009* (QLD)

Reform Commission's 2008 report on provocation. The Commission's terms of reference did not extend to a review of all defences to homicide so the Commission did not review "the position of a person in a seriously abusive and violent relationship who kills his or her abuser in circumstances in which the defence of provocation cannot apply".<sup>215</sup> Rather than "distort the defence of provocation", the Commission recommended that consideration be given:

...to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.<sup>216</sup>

The Attorney-General subsequently commissioned a report from two academics from Bond University, Geraldine MacKenzie and Eric Colvin, on the development of a separate defence to murder. The terms of reference included having regard to whether the defence should be a complete defence or a partial defence. The report was published in July 2009 and it recommended a partial defence in similar terms to the provision that was enacted.<sup>217</sup> The report noted:

There was a strong preference within the legal community for the introduction of a separate defence or defences for the victims of seriously abusive relationships rather than for the reform of the general law of self-defence. Respondents were generally opposed to the models for a reformed general law of self-defence which have been developed in other Australian jurisdictions. The concern was that widening the net of the general law of self-defence might protect unmeritorious defendants as well as those who deserve a defence.<sup>218</sup>

In light of these views, McKenzie and Colvin did not recommend reforms to the general law of self-defence. They stated that, "while there may be deficiencies in the existing law and lessons to be learned from other jurisdictions, a broader inquiry should be conducted before reform is initiated".<sup>219</sup> In relation to the question whether it would be appropriate to create a separate complete defence for victims of seriously abusive relationships, the report then stated:

On balance...we have concluded that, at this time, there is insufficient support within the legal community for any complete defence outside the conditions of the existing defence of self-defence. We suggest that the options be reconsidered when sufficient time has passed to permit assessment of the impact of the developments in other Australian jurisdictions.<sup>220</sup>

While the Government implemented the report's main recommendation to enact

<sup>215</sup> Queensland Law Reform Commission, [A Review of the Excuse of Accident and the Defence of Provocation](#), Report No 64, September 2008, p11, p491

<sup>216</sup> Queensland Law Reform Commission, note 215, p11 (Rec 21-4)

<sup>217</sup> G MacKenzie and E Colvin, [Victims who kill their abusers: A discussion paper on defences](#), April 2009, p10

<sup>218</sup> G MacKenzie and E Colvin, note 217, p9

<sup>219</sup> G MacKenzie and E Colvin, note 217, p32

<sup>220</sup> G MacKenzie and E Colvin, note 217, p32-33

a partial defence for people who kill in the context of an abusive relationship, it did not introduce some of the provisions that the report had recommended. These included provisions modelled on section 9AH of the Victorian *Criminal Code*, which was discussed above.<sup>221</sup> The report had also recommended that the defence should be available to family members who act in defence of persons who have suffered violence in an abusive relationship.<sup>222</sup>

**Criticisms of the reforms:** Commentators have been critical of the new partial defence which, they say, is very similar to the defence of self-defence but leads to a different result (i.e. a conviction for manslaughter instead of an acquittal).<sup>223</sup> Michelle Edgely and Elena Marchetti have pointed out that the main difference between the partial defence in section 304B and the complete defence in section 271 is that the partial defence does not have a requirement for a triggering assault.<sup>224</sup> Edgely and Marchetti comment:

...in the context of a relationship characterised by domination, isolation, serious physical violence and the terror that necessary accompanies such abuse, the presence or absence of a *particular* triggering assault determines whether the killing is justified or only partly excused. If a woman believes that her abusive partner will kill her (or will inflict grievous bodily harm) and she believes [on reasonable grounds] that the only way to save herself is to kill him during a non-confrontational moment, then why is she not entitled to a full defence?<sup>225</sup>

Edgely and Marchetti further argue that, even in cases where there has been a history of family violence and there is also a triggering assault, the "existence of a separate partial defence might compromise the possibility of a full acquittal".<sup>226</sup> They contend that in such a case it would be "impossible to discharge the evidentiary burden of self-defence without also triggering the availability of section 304B", and this would mean that the jury would have to be instructed on both defences. They suggest that the specific reference to domestic violence in section 304B may confuse juries, who might consider that it was the applicable provision even where the full defence could be made out.

## 12. SELF-DEFENCE REPORTS IN OTHER COUNTRIES

### 12.1 Overview

There have been no legislative reforms to self-defence in other countries such as New Zealand, the United Kingdom, Ireland and Canada. Of these countries,

<sup>221</sup> G MacKenzie and E Colvin, note 217, p48-49; and p58-59

<sup>222</sup> G MacKenzie and E Colvin, note 217, p48-49; and p45

<sup>223</sup> M Edgely and E Marchetti, 'Women who kill their abusers: how Queensland's new abusive domestic relationships defence continues to ignore reality' (2011) 13 *Flinders Law Journal* 125; A Hopkins and P Easteal, 'Walking in her shoes: battered women who kill in Victoria, Western Australia and Queensland' (2010) 35(3) *Alternative Law Journal* 132 at 135-136

<sup>224</sup> M Edgely and E Marchetti, note 223, p139-140

<sup>225</sup> M Edgely and E Marchetti, note 223, p170

<sup>226</sup> M Edgely and E Marchetti, note 223, p141. See also A Hopkins and P Easteal, note 223

only in New Zealand and Ireland has the relevant law reform commission considered the issue of self-defence for women who kill their violent partners. In the UK, the Law Commission's work on the law of homicide focused on the use of partial defences and did not address self-defence (although note that its recommendations on the partial defence of provocation incorporated aspects of the partial defence of excessive self-defence – see Section 8.2 above).

## 12.2 New Zealand

In a 2001 report, the New Zealand Law Commission recommended amending the law of self-defence to “make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but is inevitable”.<sup>227</sup> The report also discussed the importance of “expert evidence on the social context, nature and dynamics of domestic violence”<sup>228</sup>; and it suggested that juries were likely to be assisted by clear directions linking this evidence to the various elements of self-defence.<sup>229</sup> The Commission preferred these reforms to the introduction of a separate defence for battered women who kill their abusers.<sup>230</sup> The report also recommended against establishing a *partial* defence for battered women who kill, because it favoured the use of a sentencing discretion over partial defences.<sup>231</sup> The Ministry of Justice did not adopt the recommendation to amend self-defence, concluding that this “was not required to meet the needs of battered defendants, and might be undesirable in light of the fact that the section is generally regarded as working well”.<sup>232</sup>

## 12.3 Ireland

The Law Reform Commission of Ireland considered the defence of self-defence, including in the context of domestic violence, in a 2009 report on criminal law defences.<sup>233</sup> The Commission recommended that the “imminence rule”, “the necessity rule”, and the “proportionality rule” should remain part of the defence but that, in assessing whether these requirements are made out, the court or jury “may take account of the circumstances as the accused reasonably believed them to be”.<sup>234</sup> The Commission also supported recent case law, which recognised a partial defence of excessive self-defence.<sup>235</sup>

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<sup>227</sup> New Zealand Law Commission, [Some Criminal Defences with particular reference to Battered Defendants](#), Report 73, 2001, p12

<sup>228</sup> New Zealand Law Commission, note 227, p15

<sup>229</sup> New Zealand Law Commission, note 227, p8

<sup>230</sup> New Zealand Law Commission, note 227, p29-30

<sup>231</sup> New Zealand Law Commission, note 227, p30.

<sup>232</sup> New Zealand Law Commission, [The Partial Defence of Provocation](#), Report 98, September 2007, p58. In this 2007 report, the Law Commission commented that it was “content at this stage to concur with the Ministry’s conclusions” on this issue (p59)

<sup>233</sup> Law Reform Commission of Ireland, [Defences in Criminal Law](#), Report 95, December 2009

<sup>234</sup> Law Reform Commission of Ireland, note 233, p53, p58, p73

<sup>235</sup> Law Reform Commission of Ireland, note 233, p75

### 13. NATIONAL REPORT ON LEGAL RESPONSES TO FAMILY VIOLENCE

In October 2010, the Australian Law Reform Commission and the NSW Law Reform Commission jointly published a comprehensive report on family violence.<sup>236</sup> Chapter 14 of the report considered "the extent to which the criminal law should recognise family violence as relevant to a defence to homicide, in circumstances where a victim of family violence kills the family member who was violent towards him or her". After examining defences in Australia including self-defence and provocation, the Commissions stated:

The Commissions have taken a high-level approach to the issues raised in this part, and have focused on the identification of relevant considerations and guiding principles for recognising the dynamics of family violence in homicide defences. The Commissions do not make recommendations about specific forms of defences or individual provisions in state and territory criminal legislation.<sup>237</sup>

The Commissions made recommendations aimed at:

- ensuring that homicide defences promote substantive equality in the treatment of persons who kill in response to family violence and those who kill in response to other forms of violence;
- addressing technical limitations within existing homicide defences to recognise the full range of situational and psychological circumstances associated with family violence; and
- ensuring that relevant homicide defences are applied consistently in individual cases involving persons who kill in response to family violence.<sup>238</sup>

With respect to this last point, the Commissions noted that ensuring that people who kill in the context of an abusive relationship are treated fairly is not simply a matter of undertaking legislative reform:

The Commissions acknowledge that a focus on the doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice. Continuing legal professional and judicial education is essential to ensuring that judges and lawyers practising in criminal law understand the nature and dynamics of family violence, and how evidence of family violence may be relevant to criminal defences.<sup>239</sup>

The Commission made five recommendations including that:

- State and Territory criminal laws should ensure that defences to homicide accommodate the experiences of family violence victims who

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<sup>236</sup> Australian Law Reform Commission and NSW Law Reform Commission, [Family Violence – A National Legal Response](#), Final Report, October 2010

<sup>237</sup> Joint Law Reform Commission report, note 236, p648

<sup>238</sup> Joint Law Reform Commission report, note 236, p648

<sup>239</sup> Joint Law Reform Commission report, note 236, p651

kill, recognising the dynamics and features of family violence;

- State and Territory governments should review their defences to homicide relevant to victims of family violence who kill. These reviews should investigate how the defences are being used, and the impact of rules of evidence and sentencing laws on the operation of the defences;
- The national family violence bench book (recommended in chapter 31 of the report) should include a section that provides guidance on the operation of defences to homicide where a victim of family violence kills the person who was violent towards him or her;
- The Model Criminal Law Officers Committee, or another appropriate body, should investigate strategies to improve the consistency of approaches to recognising the dynamics of family violence in homicide defences in State and Territory criminal laws;
- State and Territory criminal laws should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide (along the lines of the Victorian model).<sup>240</sup>

#### **14. CONCLUSION**

This paper has highlighted concerns that have been expressed about the availability and operation of the defences of provocation and self-defence in the context of intimate partner and sexual advance homicides. A key concern is that the defences are biased in favour of men and against women. It can be seen that jurisdictions in Australia and overseas have taken different approaches to dealing with these concerns. In most cases, the reforms have been based on comprehensive reports by law reform commissions. Some of these bodies have taken the view that provocation is an anachronistic defence which should be abolished and dealt with in sentencing, while others (most notably, the NSW Law Reform Commission) have recommended retaining the defence but making changes to it. In relation to self-defence, the enactment in Victoria of a special provision that applies when family violence is alleged is perhaps the most significant reform for victims of violence who kill their abusers. The Joint Law Reform Commission report on legal responses to family violence recommended that the States review their defences but it also emphasised the importance of continuing family violence education for lawyers and judges.

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<sup>240</sup> Joint Law Reform Commission report, note 236, p653-654